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The “Knowing and Voluntary” Standard: Is the Sixth Circuit’s Test Enough to Level the Playing Field in Mandatory Employment Arbitration?

*Seawright v. American General Financial Services*¹

I. INTRODUCTION

Most courts require that for an individual to waive her Seventh Amendment right to trial by jury, she must knowingly and voluntarily waive that right.² This heightened requirement for waiver exists because the United States Supreme Court has found that “[t]he trial by jury is justly dear to the American people . . . and every encroachment upon it has been watched with great jealousy.”³ Seemingly this standard should apply to mandatory employment arbitration agreements, as shifting the venue from the courts to the arbitral tribunal implicitly means waiving the right to trial by jury. However, because the Federal Arbitration Act (“FAA”) requires that enforcement of arbitration agreements rests on contract standards of consent, most courts apply a less employee-protective test by simply determining whether there were manifestations of mutual assent to the arbitration agreement.⁴ The Sixth Circuit Court of Appeals, to the benefit of employees, does apply a “knowing and voluntary” test, as demonstrated by its decision in *Seawright v. American General Financial Services* (“AGF”), but the definitional factors it examines seem to lack the comprehensiveness of tests outlined by various commentators,⁵ and it does not adequately address the “voluntariness” aspect of the standard.

II. FACTS AND HOLDING

In April 1999, AGF began informing its employees that it would implement an Employee Dispute Resolution (“EDR”) Program effective June 1, 1999.⁶ Em-

1. 507 F.3d 967 (6th Cir. 2007).

2. *See* *Leasing Serv. Corp. v. Crane*, 804 F.2d 828, 832-33 (4th Cir. 1986); *K.M.C. Co. v. Irving Trust*, 757 F.2d 752, 756 (6th Cir. 1985); *Nat’l Equip. Rental, Ltd. v. Hendrix*, 565 F.2d 255, 258 (2d Cir. 1977).

3. *Parsons v. Bedford, Breedlove & Robeson*, 28 U.S. 433, 446 (1830).

4. Christopher J. Kippley & Richard A. Bales, *Extending OWBPA Notice and Consent Protections to Arbitration Agreements Involving Employees and Consumers*, 8 NEV. L.J. 10, 21 (Fall 2007).

5. *See* Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court’s Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1, 57-58 (1997); *see also* Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 1022 (2000).

6. *Seawright v. Am. Gen. Fin. Servs.*, 507 F.3d 967, 970 (6th Cir. 2007). The company informed employees about the EDR program through a publication circulated to all company offices, including

ployees were mailed an informational brochure which stated that the EDR program was the “sole means of resolving employment-related disputes” and that “seeking, accepting, or continuing employment with AGF means that you agree to resolve employment related claims against the company or another employee through this process instead of through the court system.”⁷ Plaintiff Lisa Seawright, an employee of AGF since 1978, attended a group informational meeting explaining the program and signed an attendance sheet indicating that she had attended the informational session and received a copy of the EDR pamphlet.⁸

Two years after the initiation of the EDR program, AGF mailed its employees a letter that reminded them that the program was still in effect and explained how to find additional information on the company’s intranet website.⁹ The brochure that accompanied the letter also reminded the employees that the arbitration agreement was binding and that continued employment meant that the employee agreed to resolve any disputes with the company through arbitration.¹⁰ Approximately six years after the implementation of the EDR Program, AGF fired Seawright.¹¹ She filed suit against AGF for wrongful termination, and AGF responded with a motion to compel arbitration.¹² In Seawright’s answer, she argued that: (1) she did not assent to the EDR Program and that there was no bargained-for exchange; (2) she did not enter into a written agreement as required by the FAA; and (3) in the alternative, the arbitration agreement was void because it was a contract of adhesion or was unconscionable.¹³ The district court denied AGF’s motion to compel arbitration on the ground that there was no valid and enforceable agreement: receiving information and acknowledging the EDR Program did not, by itself, mean that Seawright assented to the agreement; there was no bargained-for exchange; and Seawright was unable to influence the terms of AGF’s policy.¹⁴

On appeal, the Sixth Circuit reversed, holding that Seawright’s knowing continuation of employment after commencement of the arbitration program constituted acceptance of a valid and enforceable contract to arbitrate.¹⁵ The Sixth Circuit reasoned that courts should enforce arbitration agreements as they would any other condition of employment, as long as the arbitration agreement was not obtained through unfair means or was not substantively unfair.¹⁶ Because AGF did not try to hide its mandatory arbitration policy or deceive employees into agreeing to the policy, and because it did not choose an arbitration forum that would discourage employees from submitting disputes or favor the employer in resolving

the office where Seawright was a branch manager, through letters mailed to employees, and through group informational meetings. *Id.*

7. *Id.* at 970-71.

8. *Id.*

9. *Id.* at 971.

10. *Id.*

11. *Id.*

12. *Id.* Seawright alleged that AGF fired her in violation of Tennessee antidiscrimination law and the Family and Medical Leave Act. *Id.* at 970.

13. *Id.* at 971.

14. *Id.*

15. *Id.* at 970.

16. *Id.* at 979.

those disputes,¹⁷ the mandatory arbitration provision should be enforced, according to the Sixth Circuit.¹⁸

III. LEGAL BACKGROUND

A. Supreme Court Precedent on Employment Arbitration

At English common law, and as adopted by American courts, arbitration agreements were revocable by either party at any time prior to the issuance of an arbitral award,¹⁹ thus leading to the claim that common law courts were hostile to arbitration agreements.²⁰ In an effort to reduce judicial opposition to arbitration agreements, Congress enacted the Federal Arbitration Act in 1925 requiring courts to enforce arbitration agreements related to commerce and maritime transactions.²¹ The FAA mandates that the arbitration clause be in writing and provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds that exist at law or in equity for the revocation of any contract."²² Because arbitration agreements are placed on the same footing as any other contract, state contract law applies to those agreements.²³

In the first approximately sixty-five years following the enactment of the FAA, the Supreme Court ruled on a number of cases affecting employment arbitration. The Court found arbitration agreements enforceable in claims arising under the Sherman Antitrust Act of 1890,²⁴ the Securities Exchange Act of 1934,²⁵ the civil provisions of the Racketeer Influenced and Corrupt Organizations Act ("RICO"),²⁶ and the Securities Act of 1933.²⁷ Importantly, the Supreme Court has stated repeatedly that "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."²⁸

In 1991, the Court decided the "watershed employment arbitration case"²⁹ of *Gilmer v. Interstate/Johnson Lane Corp.*, which held that a statutory claim of discrimination could be subjected to mandatory arbitration pursuant to a pre-

17. All arbitrations under AFG's arbitration program are conducted under the rules of the American Arbitration Association ("AAA"). Brief of Defendants-Appellants at 4, *Seawright v. Am. Gen. Fin. Servs.*, No. 0-5091 (6th Cir. Filed Jun. 7, 2007).

18. *Seawright*, 507 F.3d at 979.

19. Richard A. Bales, *Normative Considerations of Employment Arbitration at Gilmer's Quinceanera*, 81 TUL. L. REV. 331, 335 (2006) [hereinafter *Normative Considerations*].

20. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).

21. *Id.* at 24-25.

22. 9 U.S.C. § 2 (2006).

23. See *Seawright*, 507 F.3d at 972 ("Because arbitration agreements are fundamentally contracts, we review the enforceability of an arbitration agreement according to the applicable state law of contract formation.").

24. 15 U.S.C. §§ 1-7 (2006).

25. 15 U.S.C. §§ 78a-nn (2006).

26. 18 U.S.C. § 1961 (2006).

27. 15 U.S.C. §§ 77a-aa (2006); see also *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991).

28. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

29. Richard A. Bales, *Contract Formation Issues in Employment Arbitration*, 44 BRANDEIS L.J. 415, 420 (Winter 2006) [hereinafter *Contract Formation*].

dispute arbitration agreement.³⁰ In *Gilmer*, the plaintiff was required by his employment with Interstate to register as a securities representative with several stock exchanges.³¹ His registration application provided, in part, that Gilmer “agree[d] to arbitrate any dispute, claim or controversy” arising between him and Interstate.³² After Gilmer was terminated from his employment, he filed an age discrimination charge with the Equal Employment Opportunity Commission (“EEOC”), and then filed a complaint in federal court alleging discrimination under the Age Discrimination in Employment Act (“ADEA”).³³ In affirming the Fourth Circuit and compelling arbitration, the Supreme Court reasoned that mere inequality in bargaining power is not enough to hold that employment arbitration agreements are never enforceable, and that such agreements will be enforced absent “the sort of fraud or overwhelming economic power that would provide grounds ‘for the revocation of any contract.’”³⁴

The Supreme Court did not provide much guidance as to when an arbitration agreement would be sufficiently unbalanced to warrant voiding the agreement, so lower courts often inconsistently resolve claims of procedural unfairness and unconscionability.³⁵

B. “Knowing and Voluntary”

Though courts agree that pre-dispute arbitration agreements are usually enforceable, there are differences in the federal circuits as to whether a “knowing and voluntary” standard should be applied to employment arbitration agreements.³⁶ The Sixth Circuit expressly adopted such a standard in *Morrison v. Circuit City Stores, Inc.*, when it listed five factors courts should evaluate in determining whether a plaintiff has knowingly and voluntarily waived her right to pursue employment claims in federal court: (1) plaintiff’s experience, background, and education; (2) the amount of time the plaintiff had to consider whether to sign the waiver, including whether the employee had an opportunity to consult with a lawyer; (3) the clarity of the waiver; (4) consideration for the waiver; and (5) the

30. *Gilmer*, 500 U.S. at 23.

31. *Id.*

32. *Id.*

33. *Id.* at 23-24.

34. *Id.* at 33 (quoting *Mitsubishi Motors Corp.*, 473 U.S. at 627).

35. Bales, *Contract Formation*, *supra* note 29, at 420.

36. *Id.* at 449-50. The standard had its origins in *Prudential Insurance Company of America v. Lai*, 42 F.3d 1299 (9th Cir. 1994). Though the Ninth Circuit did not expressly use the word “voluntary,” it relied on a Supreme Court decision which mentioned the “knowing and voluntary” language in dicta. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 n.15 (1974) (“In determining the effectiveness of any such waiver, a court would have to determine at the outset that the employee’s consent to the settlement was voluntary and knowing.”). Furthermore, the Ninth Circuit is often credited with first applying the “knowing and voluntary” standard. See *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 203 (2d Cir. 1998). The First Circuit has endorsed the standard without necessarily adopting it. See *Bercovitch v. Baldwin Sch., Inc.*, 133 F.3d 141, 143 (1st Cir. 1998). Similarly, the Seventh Circuit discussed the advantage of applying a “knowing and voluntary” standard to a mandatory employment arbitration agreement but decided against applying the standard. See *Gibson v. Neighborhood Health Clinics, Inc.*, 121 F.3d 1126, 1130 (7th Cir. 1997). The Third Circuit has expressly rejected the standard. See *Seus v. John Nuveen & Co.*, 146 F.3d 175, 183-84 (3d Cir. 1998). The Sixth Circuit, on the other hand, has expressly adopted the standard. See *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 668 (6th Cir. 2003).

totality of the circumstances.³⁷ The court determined that Morrison knowingly and voluntarily waived her rights because she not only had a bachelor's degree in engineering and a master's degree in administration, but she was a managerial employee capable of understanding the terms of the agreement.³⁸ Furthermore, the waiver of the right to file suit was clear, and Morrison did not allege that she did not understand the agreement or that it was vague.³⁹ Lastly, because Morrison had three days in which to withdraw her consent to the agreement, and thus withdraw her application, she had time to consult with a lawyer.⁴⁰

C. Notice and Consent

Issues dealing with the "knowing" part of the standard relate to notice and consent, required in contract law because a party cannot normally give consent to a term of the contract without being afforded notice.⁴¹ While the FAA requires the arbitration agreement to be in writing, it does not require signatures of the affected parties.⁴² As a result, it is usually enough that the party moving for arbitration is able to show "that the other party received a written copy of the arbitration agreement."⁴³ Companies seeking to bind employees to dispute resolution programs attempt to notify their employees through a variety of communications including website postings, mail, paycheck envelopes, and informational meetings.⁴⁴ Clearly, the argument for enforcement is the strongest when the employer can show that the employee had actual knowledge that she agreed to the arbitration agreement, ideally through an employee signature.⁴⁵ Absent such an explicit agreement, whether notice is sufficient to create a binding arbitration agreement is often a question for the courts, with answers varying throughout the circuits.

In *Tinder v. Pinkerton Security*, Pinkerton gave notice to employees about the arbitration agreement by inserting an informational brochure into its employees' paycheck envelopes.⁴⁶ When *Tinder* sued for discrimination, she claimed that she could not remember receiving or seeing the arbitration brochure.⁴⁷ The Seventh Circuit held that the distribution of brochures in paycheck envelopes was sufficient notice and compelled arbitration.⁴⁸ In *Hightower v. GMRI, Inc.*, the Fourth Circuit found appropriate notice and enforced the arbitration claim when the employee had attended a meeting announcing the arbitration program and signed a

37. 317 F.3d 646, 668 (quoting *Adams v. Philip Morris, Inc.*, 67 F.3d 580, 583 (6th Cir. 1995)).

38. *Id.* at 668.

39. *Id.* The application for employment provided that Circuit City would not consider any application unless the arbitration agreement, which required arbitration for any legal dispute relating to their employment with the company, was signed. *Id.* at 654.

40. *Id.* at 668.

41. Bales, *Contract Formation*, *supra* note 29, at 435-36.

42. *Id.* at 435; *see also* 9 U.S.C. §§ 2-3 (2006).

43. Bales, *Contract Formation*, *supra* note 29, at 435.

44. *Id.* at 436-42.

45. *Id.* at 435-36.

46. 305 F.3d 728, 731 (7th Cir. 2002).

47. *Id.* at 732.

48. *Id.* at 736.

form that stated, "I have attended a DRP meeting and have received the information in regards to DRP."⁴⁹

On the other hand, courts will refrain from compelling arbitration where the purported notice is insufficient. In *Campbell v. General Dynamics Government Systems Corp.*, the employer sent employees an email with intranet links to its new Dispute Resolution Policy ("DRP").⁵⁰ The text of the email only briefly mentioned arbitration and did not mention that the DRP would be binding on discrimination claims or that employees would be consenting by continued employment.⁵¹ Campbell stated that he had not read the email, and only learned of the DRP after he had been fired.⁵² While General Dynamics could show that Campbell opened the email, it could not show whether he clicked on the link that contained the DRP information, and the First Circuit found that notice was insufficient to create a binding arbitration agreement.⁵³

Though employers must show that employees were properly notified of the binding arbitration agreement, for the arbitration agreement to be valid, the employees must also consent to the agreement. While proving consent with a signed acknowledgement is the most effective method, circumstances exist in which even a signature will not compel arbitration. In *Walker v. Ryan's Family Steak Houses, Inc.*, the company's managers placed an "x" in every place the applicant was told to sign and instructed the applicant to sign without any explanation.⁵⁴ The managers usually did not mention the arbitration agreement, and the applicants did not have the opportunity to take the agreement home to consider or to consult an attorney.⁵⁵ For these and other reasons, the Sixth Circuit held that there was no enforceable arbitration agreement.⁵⁶

Even without a signature consenting to arbitration, courts will often find that consent is established through continued employment, if the arbitration agreement calls for such consent. In *Hardin v. First Cash Financial Services*, Hardin, an assistant manager, sued her employer for sex discrimination.⁵⁷ Even though she "unequivocally refused to consent" to the newly executed dispute resolution program, and in fact stated that her continued employment was not intended to serve as consent, the Tenth Circuit held that by continuing work after the implementation date, Hardin consented to the company's offer to alter the terms of her at-will employment.⁵⁸

Though the "knowing" part of the "knowing and voluntary" standard is addressed by notice and consent, a more problematic issue is the "voluntary" aspect.⁵⁹ A common criticism of employment arbitration is that it is involuntary—both because arbitration clauses are presented to employees as part of a standard

49. 272 F.3d 239, 241-43 (4th Cir. 2001).

50. 407 F.3d 546, 547-48 (1st Cir. 2005).

51. *Id.* at 548.

52. *Id.* at 549.

53. *Id.* at 548-49, 559.

54. 400 F.3d 370, 374 (6th Cir. 2005).

55. *Id.*

56. *Id.* at 388. The Court also decided that consent was lacking because the company misrepresented the terms of arbitration. *Id.* at 384-85.

57. 465 F.3d 470, 472-73 (10th Cir. 2006).

58. *Id.* at 472, 478.

59. Bales, *Contract Formation*, *supra* note 29, at 450.

contract which employees often sign without a full understanding and because the agreement is offered on a take it or leave it, and be fired/not hired, basis.⁶⁰ However, economic pressure does not by itself make the arbitration agreement unenforceable.⁶¹ This is so for a variety of reasons. Arbitration agreements, like other contracts, are usually enforceable despite unequal bargaining power.⁶² Other terms of employment, such as pension plans, severance pay, salary, and noncompetition agreements are enforceable despite economic pressure.⁶³ American employment law is based on the idea that individual employees do not have much bargaining power and must organize into a union to protect their rights.⁶⁴

Whether an arbitration agreement is enforceable is subject to a variety of considerations regarding notice, consent, and voluntariness. Professor Bales recommends that employers who want to ensure that their program is enforceable follow certain guidelines. He suggests that employers provide: (1) clearly drafted arbitration agreements which specify which claims are arbitrable and which claims are not arbitrable; (2) sufficient time for employees to read the agreement and possibly consult a lawyer; (3) consideration in return for the employee's signing the arbitration agreement.⁶⁵ Lastly, he suggests that employers obtain a signature from each employee stating that the employee received and read the arbitration agreement and that she understands and agrees to it.⁶⁶ Though an employee signature is not required by the FAA, the signature will make it easier for the employer to show that the employee received notice and consented to arbitration.⁶⁷

IV. INSTANT DECISION

In *Seawright*, the Sixth Circuit, reversing the district court's denial of the employer's motion to compel arbitration, found that *Seawright's* continued employment after the commencement of the arbitration agreement constituted acceptance of a valid and enforceable contract to arbitrate.⁶⁸

The first issue the Sixth Circuit addressed was whether *Seawright's* continued employment with AGF manifested assent, which is required for the formation of a valid contract.⁶⁹ The court determined that Tennessee contract law recognizes the validity of unilateral contracts in which assent is indicated by action under the contract, such as continued employment.⁷⁰ The Sixth Circuit, in rebutting an argument espoused by the district court—that “merely receiving information and acknowledging the EDR program is not tantamount to assent”—reasoned that the issue is not whether the receipt of an offer constitutes acceptance but whether continuing employment constitutes acceptance.⁷¹

60. Sternlight, *supra* note 5, at 6.

61. Bales, *Normative Considerations*, *supra* note 19, at 375.

62. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991).

63. Bales, *Normative Considerations*, *supra* note 19, at 375.

64. *Id.*

65. Bales, *Contract Formation*, *supra* note 29, at 459.

66. *Id.*

67. *Id.*

68. *Seawright v. Am. Gen. Fin. Servs.*, 507 F.3d 967, 970 (6th Cir. 2007).

69. *Id.* at 972-94.

70. *Id.* at 972.

71. *Id.* at 973.

Next, the court determined that Seawright “knowingly and voluntarily” waived the right to sue in court by applying five factors previously established by the Sixth Circuit: “(1) plaintiff’s experience, background, and education; (2) the amount of time the plaintiff had to consider whether to sign the waiver, including whether the employee had an opportunity to consult with a lawyer; (3) the clarity of the waiver; (4) consideration for the waiver; and (5) totality of the circumstances.”⁷² The court contended that Seawright met the “knowingly and voluntarily” requirement because she was an educated, managerial employee who was capable of understanding the EDR Program, she had two months to consult with an attorney, and the EDR Program clearly stated that employees would be waiving their rights to sue in court by continuing employment.⁷³

Briefly addressing the issue of consideration, the Sixth Circuit refuted the district court’s argument that there was no bargained for exchange because Seawright did not have the ability to affect the terms of AGF’s policy.⁷⁴ The court stated that a mutual promise satisfies the consideration requirement, and because the arbitration process was binding on both Seawright and AGF, this requirement was satisfied.⁷⁵

On the issue of illusory contracts, the court noted that “Tennessee law requires that a contract . . . impose genuine obligations on both parties.”⁷⁶ Though AGF “reserved the right to terminate the EDR program at any time, [it] also agreed to be bound by the terms of the agreement for ninety days after giving reasonable notice of the termination and as to all known disputes arising before the date of termination.”⁷⁷ Thus, the court determined that the reciprocal obligation to arbitrate claims arising in the ninety-day period satisfies the mutuality requirement.⁷⁸

The court also rejected Seawright’s argument that the arbitration agreement is an unenforceable contract of adhesion and a result of unequal bargaining and procedural unconscionability.⁷⁹ The Sixth Circuit repeated Tennessee’s standard for finding a contract of adhesion in the employment context—that plaintiff would be “unable to find suitable employment if she refused to sign [the employer’s] agreement.”⁸⁰ The court found that Seawright could not prove this element because she did not present evidence that she would be unable to find other suitable employment if she did not sign AGF’s arbitration agreement.⁸¹ Furthermore, the court noted that in Tennessee, adhesion contracts are only unenforceable when the terms are “beyond the reasonable expectations of an ordinary person, or oppressive or unconscionable.”⁸² The court dismissed Seawright’s argument that procedural unconscionability resulted from unequal bargaining power because she did not present evidence of any factors bearing on the relative bargaining positions of

72. *Id.* at 974 (quoting *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 668 (6th Cir. 2003)).

73. *Id.* at 974.

74. *Id.*

75. *Id.*

76. *Id.* at 974-75.

77. *Id.* at 975.

78. *Id.*

79. *Id.* at 977.

80. *Id.* at 976.

81. *Id.*

82. *Id.* (quoting *Buraczynski v. Eyring*, 919 S.W.2d 314, 320 (Tenn. 1996)).

the two parties, including intelligence and experience, and because her education and position as branch manager made it “unlikely that she could marshal such evidence.”⁸³ The court further distinguished Seawright from a low-level employee who might be “required to sign an arbitration agreement precisely at the time that he or she is most willing to sign anything to get a job.”⁸⁴

V. COMMENT

In *Seawright*, the defendant company created an almost legally airtight arbitration agreement by complying with nearly all of Professor Bales’ recommendations for employers who want to ensure that their arbitration program is enforceable. First, the agreement was clearly drafted and specified which claims are arbitral—the program’s informational brochure asserted that the EDR Program is the “sole means of resolving employment-related disputes between you and the company or you and another employee, including disputes for legally protected rights such as freedom from discrimination, retaliation, or harassment, unless otherwise prohibited by law.”⁸⁵ The agreement also clearly stated that employees were giving up the right to trial.⁸⁶ Second, the employees, including Seawright, had sufficient time to read the agreement and consult a lawyer, since they were first informed of the program approximately two months before the program took effect.⁸⁷ Third, consideration for the employee’s agreement existed in the form of continuation of employment. While some commentators argue that employment as consideration is illusory because most employees who sign arbitration agreements are “at will” employees and thus can be fired at any time for any nondiscriminatory reason,⁸⁸ a few courts find continued employment to be sufficient consideration.⁸⁹

AGF’s arbitration agreement did not, however, comply with Bales’ final recommendation, that the employer obtain a signature from the employee stating that she received the agreement, understood its terms, and agreed to its terms. Still, AGF had a strong case against Seawright, as the facts do not show any of the typical reasons why arbitration agreements are held unenforceable: AGF, like Seawright, was bound to arbitration, so mutuality of obligation was satisfied; the arbitration agreement was not buried in other paperwork relating to employment and instead was mailed to employees, posted on the company’s intranet website, and discussed with employees at an informational meeting; the employees were not discouraged from reading the agreement and consulting an attorney or rushed through signing any paperwork, as they had approximately two months to consider the agreement; and the agreement did not foist unreasonable arbitration expenses or other unreasonable arbitration terms onto employees.

83. *Id.* at 977.

84. *Id.* (citing *Cooper v. MRM Inv. Co.*, 367 F.3d 493, 504 (6th Cir. 2004)).

85. *Id.* at 971.

86. *Id.* The EDR agreement stated that “[T]he Program must be used instead of a trial if you are not satisfied with the results of the government agency process.” *Id.*

87. *Id.* at 970.

88. Kippley & Bales, *supra* note 4, at 33.

89. *See, e.g.*, *Hardin v. First Cash Fin. Servs.*, 465 F.3d 470, 478 (Okla. 2006).

Most importantly, Plaintiff Seawright had the benefit of the Sixth Circuit's "knowing and voluntary" standard. This standard usually applies to waivers of constitutional rights, including the right to trial by jury, which is implicitly stripped by arbitration agreements, but the Ninth Circuit appears to have adopted the standard and the Sixth Circuit has expressly adopted it for arbitration agreements.⁹⁰ Such a standard serves to the benefit of employees; while most courts apply a less protective test by simply determining whether assent was mutually manifested by objective standards, the "knowing and voluntary" standard examines whether there was actual mutual assent.⁹¹

The five factors for determining whether a waiver was "knowing and voluntary," as applied by the Sixth Circuit to Seawright's case, allow for a court to examine the individual circumstances to determine whether the agreement should be enforced. Seemingly these factors, particularly the "totality of the circumstances" factor, give a court an opening for finding an arbitration agreement unenforceable due to procedural or substantive unconscionability.

However, some of the factors outlined by the Sixth Circuit's "knowing and voluntary" test do not adequately address the realities faced by employees. For example, under the prong related to plaintiff's experience, background, and education, the court placed much reliance on the fact that Seawright was an educated, managerial employee who was capable of understanding AGF's arbitration program.⁹² Yet commentators believe that even college-educated, highly compensated employees have misconceptions about employment law. Pauline Kim found that even these workers could not identify whether a discharge was lawful more than half the time and believes that these employees are "seriously misinformed."⁹³ So, while the Sixth Circuit's reliance on Seawright's education and experience suggests that it might have decided the case differently if the plaintiff was not similarly situated, the courts, perhaps erroneously, agree that educated, managerial employees are capable of deciphering arbitration agreements.

In addition, the Sixth Circuit's reliance on the amount of time Seawright had to consider the arbitration agreement before it took effect likewise is of questionable relevance to whether the agreement was "voluntarily" entered into. The agreement is binding on employees regardless of how much time an employee has to consider the agreement, and an employee is "unlikely to devote resources to try to understand something that he or she cannot change or escape."⁹⁴ Whether an employee has twenty-four hours or two months to consider an arbitration agreement, if she needs to work and does not believe she can reasonably find another job, she will consent to the agreement, making her "voluntariness" doubtful. Unfortunately for Plaintiff Seawright, she did not present any evidence that she would be unable to find suitable employment if she refused to sign the arbitration

90. See Christine M. Reilly, Comment, *Achieving Knowing and Voluntary Consent in Pre-Dispute Mandatory Arbitration Agreements at the Contracting Stage of Employment*, 90 CAL. L. REV. 1203, 1217-19 (2002).

91. See Kippley & Bales, *supra* note 4, at 21.

92. *Seawright*, 507 F.3d at 974.

93. Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an at-will World*, 83 CORNELL L. REV. 105, 144-45 (1997).

94. Reilly, *supra* note 90, at 1235.

agreement.⁹⁵ Even if she could make such a showing, it is unrealistic to believe that an employee, such as Seawright, who worked for AGF for more than twenty years would voluntarily uproot and risk losing a job she enjoyed and co-workers she respected over an arbitration agreement whose terms she may not have fully understood or appreciated. Thus the Sixth Circuit's "knowing and voluntary" test fails to adequately address the realities faced by employees.

Furthermore, the test seems to lack the comprehensiveness of tests outlined by various commentators. Professor Jean R. Sternlight advocates for a four-factor test which examines: (1) the visibility and clarity of the agreement; (2) the relative knowledge and economic power possessed by the parties; (3) the degree of voluntariness of the purported agreement; and (4) the substantive fairness of the purported agreement.⁹⁶ While this test bears resemblance to the Sixth Circuit's test, as it too looks at knowledge of the parties and clarity of the waiver, it seems to place more emphasis on factors which probably weigh in a plaintiff/employee's favor. For example, under Sternlight's test, any time a large corporation conditions employment on an employee signing an arbitration agreement, the economic power factor would weigh in favor of the employee because "few would doubt that an average employee presented by her employer with an employment arbitration agreement on a 'take-it-or-be-fired' basis faces substantial economic pressure to sign the agreement."⁹⁷ The same rationale can be used to show that the third factor, voluntariness, weighs in favor of the employee.

It is worth noting, however, that applying Sternlight's test would likely result in the same outcome for Seawright. Sternlight argues that where all factors do not point in the same direction, as is the case where the arbitration agreement is clear but the party being bound to arbitrate is "ill-informed" and "required to accept the clause in order to obtain a particular service," the court should focus on the substantive fairness of the agreement in determining whether the party waived her rights.⁹⁸ In Seawright's case, she did not argue that the arbitration agreement was substantively unconscionable, and the Sixth Circuit "could not hold" that the agreement was substantively unconscionable.⁹⁹ The court found that the underlying agreement was equitable in binding both employer and employee to arbitration, and that AGF did not select an arbitration forum that discouraged employees from submitting disputes or favored the employer in the resolution of those disputes.¹⁰⁰ So, while Sternlight's test might favor plaintiff/employees in some cases, the case against Seawright was strong enough to withstand a heightened waiver analysis.

Professor Richard Reuben advocates a three-prong test which likewise seems to address factors that are more favorable to plaintiff/employees. His test examines: "(1) the visibility and clarity of the waiver agreement on its face, (2) the general contractual environment in which the waiver was secured, and (3) the

95. *Seawright*, 507 F.3d at 976. Such a showing would have enabled the court to find the contract adhesive. *Id.*

96. Sternlight, *supra* note 5, at 57-58.

97. Bales, *Contract Formation*, *supra* note 29, at 450.

98. Sternlight, *supra* note 5, at 60.

99. *Seawright*, 507 F.3d at 977.

100. *Id.* at 979.

specific facts and circumstances of the actual bargaining over the waiver.”¹⁰¹ Again, like the Sixth Circuit’s test, Reuben’s test considers the clarity of the agreement, and the “general contractual environment,” which seems akin to “totality of the circumstances,” but his third element appears to weigh heavily in favor of the plaintiff/employee, particularly where the only thing of value received by the plaintiff in exchange for the arbitration agreement is continued employment. In most cases where a large corporation conditions employment on signing a waiver, there would appear to be no “actual bargaining” whatsoever. These mandatory arbitration agreements are called “take it or leave it” agreements because an employee must consent to arbitrate or lose his or her job.

However, given the Supreme Court’s interpretation of the FAA as favoring arbitration over litigation,¹⁰² the element of voluntariness, present in both Sternlight and Reuben’s tests, and arguably manifested in the Sixth Circuit’s test through the “totality of the circumstances” prong, cannot be determinative. If the “take it or leave it” nature of an arbitration agreement were enough to invalidate the agreement, an overwhelming number of arbitration programs in the employment arena would be invalidated.

Thus, while a “knowing and voluntary” standard protects employees more than the more common mutual assent requirement and is supported by many scholars as a means of leveling the playing field between employers and employees, the effectiveness of the standard in addressing voluntariness is still questionable and will vary greatly depending on how the standard is defined.¹⁰³ The five factors outlined by the Sixth Circuit do not seem to address practical realities faced by employees and appear to fall short of truly addressing whether the agreement is “voluntary,” particularly if the courts do not place much weight in the “totality of the circumstances” prong. The Sixth Circuit is a step ahead of most other Courts of Appeals in applying a “knowing and voluntary” standard to mandatory arbitration agreements, but the definition of the standard still needs work if employees are to truly operate on a more level playing field with their employers.

VI. CONCLUSION

Based on current law relating to employment arbitration, the Sixth Circuit’s decision in *Seawright v. American General Financial Services* was expected and had a seemingly fair result. Though Seawright never signed the arbitration agreement and instead assented to it through continued employment, the time and opportunity she had to consult with a lawyer, the clarity of the waiver, and her position as a managerial employee all point toward a knowing and voluntary waiver of her right to a jury trial, as required by the Sixth Circuit. While the application of a “knowing and voluntary” standard is advocated by numerous commentators¹⁰⁴ and does provide heightened protection for employees, the defini-

101. Reuben, *supra* note 5, at 1022.

102. Sternlight, *supra* note 5, at 10.

103. See Reilly, *supra* note 90, at 1224. One of the problems with the “knowing and voluntary” requirement is that the term is not well-defined by the courts. *Id.*

104. See Kippley & Bales, *supra* note 4, at 13; see generally, Sternlight, *supra* note 5 (suggesting that a major problem concerning arbitration agreements is that those signing and binding themselves to the agreement fail to do so voluntarily).

tional factors applied by the Sixth Circuit do not really address the voluntariness prong of the standard. As only the Sixth Circuit, and seemingly the Ninth Circuit, apply such a standard to mandatory arbitration agreements, employees will be best served if, when and if other circuits adopt a "knowing and voluntary" standard, they define the standard to expressly include an examination of the relative economic powers of the parties, whether and to what extent there was actual bargaining, and whether the agreement was "take it or leave it"—factors which better indicate the true voluntariness of the agreement.

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