IN THE SUPREME COURT OF TEXAS

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NO. 01-0774
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J. M. DAVIDSON, INC.

v.

CHELSEY J. WEBSTER

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ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS
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Argued on December 11, 2002

JUSTICE JEFFERSON delivered the opinion of the Court, joined by CHIEF JUSTICE PHILLIPS, JUSTICE HECHT, JUSTICE OWEN, JUSTICE WAINWRIGHT, and JUSTICE BRISTER.

JUSTICE SCHNEIDER filed a dissenting opinion, joined by JUSTICE O'NEILL.

JUSTICE SMITH filed a dissenting opinion.

This is an interlocutory appeal of a trial court's order denying an employer's motion to compel arbitration under the company's alternative dispute resolution policy. We recently held that arbitration agreements between an employer and an at-will employee are enforceable when there is an agreement that is valid under traditional contract principles. *In re Halliburton Co.*, 80 S.W.3d 566, 573 (Tex. 2002). Here, we consider whether an arbitration agreement between an employer and an employee is enforceable if the employer reserves the unilateral right to modify or terminate personnel policies without notice. The trial court denied the employer's motion to compel arbitration, and the court of appeals affirmed. 49 S.W.3d 507.

We conclude that the arbitration agreement is ambiguous because it is not possible to determine from the document itself whether the unilateral termination right applies to the parties' agreement to arbitrate, or only to "personnel policies" concerning the at-will employment relationship. Accordingly, we reverse the court of appeals' judgment and remand to the trial court for further proceedings consistent with this opinion.

I
Background

J. M. Davidson, Inc. hired Chelsey Webster as a mechanic in December 1997. Soon after, Davidson asked Webster to sign a one-page document as a condition of his at-will employment. Webster signed the document, which provided:

> J.M. Davidson, Inc.
> **ALTERNATIVE DISPUTE RESOLUTION POLICY**
> EMPLOYMENT APPLICATION LANGUAGE
>
> I, the applicant whose signature is affixed hereto, and the above listed Company, (hereinafter referred to as the "Company"), for itself and all of its officers, directors, agents and employees, all of which mutually agree and contract that any and all claims, disputes or controversies, whether based on the Construction[sic], Statutes, Code(s), Ordinances, Rules, Orders Regulations, and/or common law of he [sic] United States and/or of any State, and/or all subdivisions, of either, and/or asserted on the basis of contract, quasi-contract, personal injury, tort, offenses, quasi-offenses or otherwise, or arising out of, or in any way relating to this application for employment, or any other application for employment that I may have previously submitted, or may submit in the future, or the Company's decision to hire or not to hire me; including the arbitrability of any claim, dispute or controversy shall be exclusively and finally settled by binding arbitration administered by, Conducted [sic] under the Arbitration Rules of, and before the Arbitrator(s) of an Arbitration Tribunal of the National Association for Dispute Resolution, Inc., pursuant to the provisions of the Federal Arbitration Act and/or any applicable Alternative Dispute Resolutions Act, whichever shall have the broadest effect, all claims of any rights to the contrary, including any right to trail [sic] by jury, being hereby expressly waived. The Arbitration Tribunal shall be the sole and existence [sic] of its jurisdiction over all parties and issues. Judgment upon any award may be entered in any Court – State

or Federal – having jurisdiction.

I hereby certify that all of the information and statements made or furnished on this application are true and correct and I hereby grant the "Company" permission to verify such information and statements. I understand that any false statement or omission on this application may be considered as sufficient cause for rejection of this application, or for dismissal, if such false statement or omission is discovered subsequent to my employment. I further understand that the "Company" may perform a pre-employment investigation to determine my suitability for employment and I authorize the "Company" to have access to any and all records concerning my education or employment background. I hereby authorize any person or Entity having such information to release same to the "Company". I understand that the pre-employment investigation may include contacting my previous employers, and I hereby authorize such previous employers to release any and all information relating to my employment to the "Company". I understand that if I am extended an offer of employment, I will have to pass a physical examination as a condition of such employment. If employed, I agree to abide by and comply with all of the rules, policies and procedures of the "Company." I understand that if I am employed by the "Company", such employment will be "at-will" and that the "Company" may terminate my employment at any time and for any reason. I understand and agree that, in the event of my separation from any employment with the "Company", any and all information concerning my employment history may be furnished to any other employer with whom I seek employment and I hereby release and hold harmless the "Company", its affiliates, parents, subsidiaries, and successors, and its and their officers, directors, trustees, employees and agents from and against any and all claims and liability for furnishing such information. No supervisor or person other than the President of the "Company", can change or otherwise modify any employment agreement. The "Company" reserves the right to unilaterally abolish or modify any personnel policy without prior notice. I understand that this application will be considered valid and current for a period of not more than thirty (30) days.

In November 1998, Webster was injured at work and subsequently filed a workers' compensation claim. Although his condition improved temporarily, his doctor eventually placed him on "no work" status. Shortly thereafter, Webster's employment with Davidson ceased. The parties dispute whether Webster quit or was terminated.

Webster sued Davidson for wrongful termination under section 451 of the Texas Labor Code, alleging he was terminated in retaliation for filing a workers' compensation claim. *See* TEX. LAB. CODE §

451.001. Davidson denied Webster's allegations and filed a motion to compel binding arbitration under the company's alternative dispute resolution policy. Webster responded that the arbitration agreement was unenforceable because it was illusory, unconscionable, and lacked mutuality. Following a hearing, the trial court denied Davidson's motion without explanation.

Davidson then filed an interlocutory appeal seeking to compel arbitration under the Texas Arbitration Act, and a mandamus action to compel arbitration pursuant to the Federal Arbitration Act. The court of appeals denied the petition for writ of mandamus, held that the arbitration agreement was illusory, and affirmed the trial court's order denying Davidson's motion to compel arbitration. 49 S.W.3d 507, 514. One justice dissented, concluding that the arbitration agreement was enforceable because both parties mutually agreed to arbitrate workplace injury disputes. *Id*. at 519. The dissent observed that the reservation language — concerning the company's unilateral right to modify or terminate personnel policies without notice — did not render Davidson's promise illusory, because it was "separable" from the promise to arbitrate. *Id*. at 518.

Davidson asks us to reverse the court of appeals' judgment and order the trial court to stay the trial pending binding arbitration pursuant to the Texas Arbitration Act.[1] *See* TEX. CIV. PRAC. & REM. CODE § 171.098.

II
Standard of Review

A party attempting to compel arbitration must first establish that the dispute in question falls within

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[1] Davidson has not filed a petition for writ of mandamus with this Court under the Federal Arbitration Act, *see Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 272-73 (Tex. 1992), and does not dispute that the Texas Arbitration Act controls.

the scope of a valid arbitration agreement. *In re Oakwood Mobile Homes, Inc*., 987 S.W.2d 571, 573 (Tex. 1999). If the other party resists arbitration, the trial court must determine whether a valid agreement to arbitrate exists. *Id.*; TEX. CIV. PRAC. & REM. CODE § 171.021. The trial court's determination of the arbitration agreement's validity is a legal question subject to de novo review. *In re Kellogg Brown & Root*, 80 S.W.3d 611, 615 (Tex. App.—Houston [1st Dist.] 2002, orig. proceeding). If the trial court finds a valid agreement, the burden shifts to the party opposing arbitration to raise an affirmative defense to enforcing arbitration. *Oakwood*, 987 S.W.2d at 573.

III
Analysis

Although we have repeatedly expressed a strong presumption favoring arbitration, the presumption arises only after the party seeking to compel arbitration proves that a valid arbitration agreement exists. *See, e.g., Prudential Secs., Inc. v. Marshall*, 909 S.W.2d 896, 898 (Tex. 1995); *High Valley Homes, Inc. v. Fudge*, 2003 WL 1882261, at *3 (Tex. App.–Austin April 17, 2003, no pet.) (memorandum opinion); *see also Fleetwood Enters., Inc. v. Gaskamp*, 280 F.3d 1069, 1073 (5th Cir. 2002) (federal policy favoring arbitration does not apply to the determination of whether there is a valid agreement to arbitrate; instead, ordinary contract principles are applied). Arbitration agreements are interpreted under traditional contract principles. *Jenkens & Gilchrist v. Riggs*, 87 S.W.3d 198, 201 (Tex. App.–Dallas 2002, no pet.); *Pepe Int'l Dev. Co. v. Pub Brewing Co.*, 915 S.W.2d 925, 930 (Tex. App.–Houston [1st Dist.] 1996, no writ); *see also First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (holding that, when deciding whether the parties agreed to arbitrate, "courts generally . . . should apply ordinary state-law principles that govern the formation of contracts"). Thus, an employer attempting to

enforce an arbitration agreement must show the agreement meets all requisite contract elements. At-will employment does not preclude formation of other contracts between employer and employee, so long as neither party relies on continued employment as consideration for the contract. *See Light v. Centel Cellular Co.*, 883 S.W.2d 642, 645 (Tex. 1994) (because at-will employer always retains the option to discontinue employment at any time, the promise of continued employment is illusory and insufficient consideration for employee's promise not to compete). Here, the parties dispute whether the reciprocal promises to arbitrate are sufficient consideration to support enforcing the arbitration agreement.

We recently considered whether an arbitration agreement between an employer and at-will employee was supported by sufficient consideration. *See In re Halliburton Co.*, 80 S.W.3d at 566. We note, however, that the court of appeals' decision and both parties' submissions to this Court occurred before we decided *Halliburton*. In *Halliburton*, the employer notified employees of a new alternative dispute resolution program that required both the employer and the employees to submit all employment-related disputes to binding arbitration. *Id.* at 568. The terms included the employer's right to modify or discontinue the program, but also required the employer to give its employees notice of changes and stated that any amendments would apply only prospectively. *Id*. at 569-70.

We upheld the arbitration agreement between Halliburton and its employee. *Id*. at 570. We concluded that the employee's at-will employment status did not render the agreement illusory because Halliburton did not rely on continued employment as consideration for the agreement. Instead, mutual promises to submit all employment disputes to arbitration constituted sufficient consideration, because both parties were bound to the promises to arbitrate. *Id.* at 569.

Halliburton's right to modify or terminate the policy did not allow the employer to avoid its promise

to arbitrate because it was limited by express contract provisions. *Id*. at 569-70. First, the policy stated that any changes only applied prospectively to unknown claims. *Id*. And second, if Halliburton terminated the policy, such termination required notice and applied to both Halliburton's and the employees' rights. *Id*. Therefore, Halliburton could not avoid its promise to arbitrate by amending or terminating the dispute resolution program. *Id*. Because the express terms of the policy provided that both the employee and Halliburton were bound to their promises to arbitrate, we held the agreement was not illusory. *Id*. at 570. Here, we are asked to decide whether the terms of the agreement between Davidson and Webster are distinguishable from *Halliburton*.

Davidson argues that its dispute resolution policy is enforceable because, like *Halliburton*, the agreement includes reciprocal promises to waive the right to litigation and submit all employment disputes to binding arbitration. *See In re Alamo Lumber Co.*, 23 S.W.3d 577, 579-80 (Tex. App.–San Antonio 2000, pet. denied) ("Since the parties surrendered their rights to trial by jury, these mutual promises supply valid consideration."). Thus, Davidson contends there is sufficient consideration to support the arbitration agreement. On the other hand, Webster argues that the arbitration agreement is illusory because the express terms of the agreement provide that Davidson was not bound by its terms.

It is clear that Davidson and Webster "mutually agree[d] and contract[ed]" to submit disputes to arbitration. At the end of the one-page document containing their agreement, however, is the following statement: "The Company reserves the right to unilaterally abolish or modify any personnel policy without prior notice." Our resolution of this case depends on the relationship between those two provisions.

In construing this agreement, we first determine whether it is possible to enforce the contract as written, without resort to parol evidence. Deciding whether a contract is ambiguous is a question of law

for the court. *Coker v. Coker*, 650 S.W.2d 391, 394 (Tex. 1983). In construing a written contract, the primary concern of the court is to ascertain the true intentions of the parties as expressed in the instrument. *R&P Enters. v. LaGuarta, Gavrel & Kirk, Inc.*, 596 S.W.2d 517, 518 (Tex. 1980); *City of Pinehurst v. Spooner Addition Water Co.*, 432 S.W.2d 515, 518 (Tex. 1968). To achieve this objective, we must examine and consider the entire writing in an effort to harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless. *Universal C.I.T. Credit Corp. v. Daniel*, 243 S.W.2d 154, 158 (Tex. 1951). No single provision taken alone will be given controlling effect; rather, all the provisions must be considered with reference to the whole instrument. *Myers v. Gulf Coast Minerals Mgmt. Corp.*, 361 S.W.2d 193, 196 (Tex. 1962); *Citizens Nat'l Bank v. Tex. & P. Ry. Co.*, 150 S.W.2d 1003, 1006 (Tex. 1941). A contract is unambiguous if it can be given a definite or certain legal meaning. *Columbia Gas Transmission Corp. v. New Ulm Gas, Ltd.*, 940 S.W.2d 587, 589 (Tex. 1996). On the other hand, if the contract is subject to two or more reasonable interpretations after applying the pertinent rules of construction, the contract is ambiguous, creating a fact issue on the parties' intent. *Id*.

In this case, we cannot give the arbitration agreement a definite or certain legal meaning because it is unclear whether Davidson's unrestricted right to "unilaterally abolish or modify any *personnel policies*" gives it the right to terminate the *arbitration agreement* without notice. (Emphasis added.) Stated more succinctly, is the arbitration agreement a "personnel policy"?

We cannot answer this question by reading the agreement's terms. The agreement is titled "Alternative Dispute Resolution Policy" on one line, and "Employment Application Language" on the next. The document addresses several issues that refer specifically to the employment application process but have no bearing on alternative dispute resolution. For example, Webster agreed to submit to a background

check and physical examination. He promised to abide by company policies and acknowledged that his employment was at-will. The "personnel policy" language is not in the first paragraph, which contains the promise to arbitrate, but appears only in the second paragraph, which discusses these other, unrelated employment issues.

In their attempt to construe the agreement, the court of appeals' justices could not agree on the scope of Davidson's right to terminate the agreement. Although silent on ambiguity, the majority held that the "personnel policy" language permitted Davidson to terminate the arbitration agreement at any time. 49 S.W.3d at 514 ("Although Davidson agreed to submit 'any and all claims, disputes or controversies' arising between it and appellee to arbitration, it explicitly retained the absolute right to modify or terminate the policy at any time."). Conversely, the dissent held that Davidson's unilateral right to terminate or modify personnel policies did not affect the parties' separate agreement to arbitrate; in fact, the dissent noted that "[i]n the event the employer exercised that right [to modify or terminate] *the employee retained the right to force arbitration on the issue*." *Id.* at 518 (emphasis added). If the dissent had interpreted the "personnel policy" language as applying to the arbitration agreement itself, Webster would not have the right to seek arbitration on the issue following termination of the arbitration agreement.

The proper interpretation of this language is critical.[2] In *Halliburton*, we rejected the argument

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[2] We note that most courts that have considered this issue have held that, if a party retains the unilateral, unrestricted right to terminate the arbitration agreement, it is illusory. *Dumais v. Am. Golf Corp.*, 299 F.3d 1216, 1219 (10th Cir. 2002) ("We join other circuits in holding that an arbitration agreement allowing one party the unfettered right to alter the arbitration agreement's existence or its scope is illusory."); *Floss v. Ryan's Family Steak Houses, Inc.*, 211 F.3d 306, 315-16 (6th Cir. 2000) (arbitration agreement was "fatally indefinite" and illusory because employer "reserved the right to alter applicable rules and procedures without any obligation to notify, much less receive consent from," other parties) (citing 1 SAMUEL WILLISTON, CONTRACTS § 43, at 140 (3d ed. 1957)); *Hooters of Am., Inc.*

that the arbitration agreement at issue was illusory because, among other things, it required ten days notice of any modification or termination and stated that any such amendment would apply prospectively only. 80 S.W.3d at 569-70. Thus, we held that "Halliburton cannot avoid its promise to arbitrate by amending the provision or terminating it altogether." *Id*. at 570. The termination provision in this case does not contain similar limitations. Accordingly, we hold that the agreement is ambiguous and must be remanded to the trial court to determine what the parties intended by the clause "The 'Company' reserves the right to unilaterally abolish or modify any personnel policy without prior notice."

We add a brief response to the dissents. The proper interpretation of this document has split both

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v. *Phillips*, 173 F.3d 933, 939 (4th Cir. 1999) (arbitration agreement unenforceable in part because Hooters, but not employee, could cancel agreement with 30 days notice, and Hooters reserved the right to modify the rules "without notice"; [n]othing in the rules even prohibits Hooters from changing the rules in the middle of an arbitration proceeding."); *Gibson v*. *Neighborhood Health Clinics*, 121 F.3d 1126, 1133 (7th Cir. 1997) (Cudahy, J., concurring) (promise to arbitrate was illusory in part because employer retained the right to change or revoke the agreement "at any time and without notice"); *Snow v*. *BE&K Constr*. *Co.*, 126 F. Supp. 2d 5, 14-15 (D. Maine 2001) (citations omitted)(arbitration agreement illusory because employer "reserve[d] the right to modify or discontinue [the arbitration] program at any time"; "Defendant, who crafted the language of the booklet, was trying to 'have its cake and eat it too.' Defendant wished to bind its employees to the terms of the booklet, while carving out an escape route that would enable the company to avoid the terms of the booklet if it later realized the booklet's terms no longer served its interests."); *Trumbull v*. *Century Mktg*. *Corp.*, 12 F. Supp. 2d 683, 686 (N.D. Ohio 1998)(no binding arbitration agreement because "the plaintiff would be bound by all the terms of the handbook while defendant could simply revoke any term (including the arbitration clause) whenever it desired. Without mutuality of obligation, a contract cannot be enforced."); *Simpson v*. *Grimes*, 849 So.2d 740, 748 (La. Ct. App. 2003) (arbitration agreement lacked mutuality, making it "unconscionable and unenforceable": "By retaining the right to modify at will any and all provisions of the agreement in question, Argent allows itself an escape hatch from its promise to be similarly bound to arbitrate all disputes arising between the parties. Argent's ability to modify the specific terms of the agreement at will is not shared by the potential customer signing the agreement."); *In re C&H News Co.*, No. 13-02-529-CV, 2003 Tex. App. LEXIS 393 , *11-*12 (Tex. App.–Corpus Christi January 16, 2003, orig. proceeding) (employer's right to change, modify, delete, or amend the arbitration agreement "with or without prior notification to employees" made the arbitration agreement illusory).

the court of appeals and this Court. Justice Smith contends the agreement is unambiguous and clearly compels Webster to arbitrate. Justice Schneider says the agreement is unambiguous but clearly illusory. We will not reiterate our thoughts on ambiguity, but believe it helpful to respond to some of the dissents' concerns. Both dissents assert that the title of the document must be considered insofar as it references arbitration, but they omit from consideration that portion of the title, and contents of the document, that pertain to personnel policies. Justice Smith determines that the document is "primarily devoted to setting forth an arbitration policy," even though arbitration is discussed in only the first paragraph, which comprises less than fifty percent of the text (and, as Justice Schneider points out, only two of fifteen sentences). __ S.W.3d at __. The document is set out in full in this opinion, and we need not belabor the point. Suffice it to say that – as evidenced by the multiple disagreements about its meaning among this Court's justices – the agreement is subject to more than one reasonable interpretation. Under our precedent, the document is ambiguous. *Columbia*, 940 S.W.2d at 589.

Rather than follow this precedent, however, Justice Smith would enforce a deeply flawed agreement that he admits is "far from a model of precise drafting." __ S.W.3d at __. Indeed, the one-page document is rife with grammatical errors, misspellings, and omitted words. Webster waived his right to "trail by jury," even for claims "based on the Construction of . . . he United States." He also agreed that "[t]he Arbitration Tribunal shall be the sole and existence of its jurisdiction over all parties and issues," whatever that means. While we generally favor arbitration agreements, we should not reflexively endorse an agreement so lacking in precision that a court must first edit the document for comprehension, and then rewrite it to ensure its enforceability.

Justice Schneider implies that, because the parties do not contend the agreement is ambiguous, we

may not hold that it is. This is contrary to Texas law. *See Sage St. Assoc. v. Northdale Constr. Co.*, 863 S.W.2d 438, 444-45 (Tex. 1993) (holding jury question was presented by ambiguity in construction agreement; a court may conclude that a contract is ambiguous even in the absence of such a pleading by either party); *Coker*, 650 S.W.2d at 393 (concluding agreement was ambiguous even though both parties asserted property settlement agreement was unambiguous and moved for summary judgment); *Acadian Geophysical Servs., Inc. v. Cameron*, 119 S.W.3d 290, 302 (Tex. App.–Waco 2003, no pet. h.); *W.W. Laubach Trust/The Georgetown Corp. v. The Georgetown Corp./W.W. Laubach Trust*, 80 S.W.3d 149, 155 (Tex. App.–Austin 2002, pet. denied); *Arredondo v. City of Dallas*, 79 S.W.3d 657, 667 (Tex. App.–Dallas 2002, pet. denied); *Z.A.O., Inc. v. Yarbrough Drive Ctr. Joint Venture*, 50 S.W.3d 531, 540 (Tex.App.–El Paso 2001, no pet.); *N. Cent. Oil Corp. v. Louisiana Land & Exploration Co.*, 22 S.W.3d 572, 576 (Tex. App.–Houston [1st Dist.] 2000, pet. denied); *Curbo v. State*, 998 S.W.2d 337, 343 (Tex. App.–Austin 1999, no pet.).

Finally, Justice Schneider states that he is reluctant to send this matter back to the trial court "because [he] cannot imagine what such a hearing would look like." __ S.W. 3d at __. It is not necessary to speculate on the character of that proceeding: the trial court will conduct an evidentiary hearing to determine the parties' intent. *See Anglin*, 842 S.W.2d at 269 (noting that, "if the material facts necessary to determine [a motion to compel arbitration] are controverted, by an opposing affidavit or otherwise admissible evidence, the trial court must conduct an evidentiary hearing to determine the disputed material facts"); *see also Armijo v. Prudential Ins. Co.*, 72 F.3d 793, 801 (10th Cir. 1995) (Jenkins, J., concurring) (if arbitration agreement is ambiguous "the issue then becomes a factual question, to be decided from external evidence of the parties' intent, unless only one conclusion can be drawn from the undisputed

evidence"); *Montgomery County Cmty. Coll. Dist. v. Donnell, Inc.*, 752 N.E.2d 342, 345 (Ohio Ct. App. 2001) (holding that "an ambiguity in the [arbitration] agreement . . . must be resolved by an evidentiary hearing").

Because we cannot discern whether Davidson's unilateral right to terminate "personnel policies" applies to the agreement to arbitrate, we conclude that the arbitration agreement is ambiguous. We reverse the court of appeals' judgment and remand this case to the trial court for further proceedings consistent with this opinion. TEX. R. APP. P. 60.2(d).

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Wallace B. Jefferson
Justice

OPINION DELIVERED: December 31, 2003