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DANIEL J. LADEAIROUS,	:	SUPERIOR COURT OF NEW JERSEY
	:	LAW DIVISION MIDDLESEX COUNTY
Plaintiff,	:	DOCKET NO. 3891-16
	:	
v.	:	CIVIL ACTION
	:	
TOYOTA MOTOR SALES U.S.A. INC., d/b/a LEXUS; PENSKE AUTOMOTIVE GROUP, INC.; SOMERSET MOTORS, INC.; SCOTT GIARRAFFA; RON JOFFE; and BRENDA BERMUDEZ-CABRERA	:	OPINION
	:	
Defendants.	:	

Decided November 14, 2016

Matthew A. Luber, R. Armen McOmber, and Christian V. McOmber (McOMBER & McOMBER, P.C.), appearing on behalf of Plaintiff.

John C. Petrella and Jordan S. F. Hollander (GENOVA BURNS LLC), appearing on behalf of Defendant Penske Automotive Group.

WOLFSON, J.S.C.

I. INTRODUCTION

This matter comes before me on Defendant Penske Automotive Group, Inc.'s ("Penske") Motion to Dismiss Plaintiff Daniel J. Ladeairous' Complaint, which alleges claims brought pursuant to

the New Jersey Law Against Discrimination ("LAD") and the Conscientious Employee Protection Act ("CEPA").[1]

The principal issue presented requires me to decide, for the first time, whether an "agreement to arbitrate" that is included in an employer's handbook is enforceable, when that handbook contains the following disclaimers:

> **Introductory Statement**
>
> No employee handbook can anticipate every circumstance or question about policy. As Penske Automotive Group, Inc. continues to grow, the need may arise and Penske Automotive Group, Inc. reserves the right to revise, supplement, or rescind any policies or portion of the handbook from time to time as it deems appropriate, at its sole and absolute discretion. . . . .
>
> **Section One – Employment**
>
> **1.01 Nature of Employment – Employment at Will**
>
> . . . Policies set forth in this handbook are intended to promote and maintain a pleasurable work environment and continue Penske Automotive Group, Inc.'s tradition of positive employee relations. They are not intended to create a contract, nor are they to be construed to constitute contractual obligations of any kind or a contract of employment between Penske Automotive Group, Inc., its dealerships and any of its employees.

[1] Pursuant to R. 4:6-2(e), the Court converts Defendant's Motion to Dismiss into a Motion for Summary Judgment, because the Motion relies on documents outside of the pleadings. See R. 4:6-2(e) ("If, on a motion to dismiss . . . matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided by R. 4:46, and all parties shall be given reasonable opportunity to present all material pertinent to such a motion.").

> The provisions of this handbook have been developed at the discretion of management and, except for its policy of employment-at-will, may be amended or cancelled at any time, at Penske Automotive Group, Inc.'s sole discretion. . . . .
>
> (emphasis added).

For the reasons set forth below, I conclude that it is not.

II. FACTS

The following facts giving rise to this action and contained in Plaintiff's complaint are, for the purposes of this motion, accepted as true, along with all favorable inferences as may be drawn therefrom.[2]

Plaintiff, formerly employed by Defendant as a portfolio manager, alleges that he was subjected to discrimination, harassment, and retaliation during the course of his employment, based on the conduct of his direct superior, Scott Giarraffa. Those allegations included his being repeatedly berated with homophobic slurs, physically threatened, as well as being present during the making, and within earshot of, anti-Semitic and racist comments directed at other employees and customers. Plaintiff also alleges that while he repeatedly reported these

[2] See Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995) ("[W]hether there exists a 'genuine issue' of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.").

instances of misconduct to upper management, they were neither investigated nor remediated, and the offending supervisor was not disciplined or terminated.

At the inception of Plaintiff's employment with Defendant, Plaintiff attended an orientation session, where he was provided with: (1) a corporate handbook (the "Handbook") nearly 100 pages in length; and (2) a stand-alone form that acknowledged Defendant's arbitration policy (the "Arbitration Agreement"). The orientation was conducted by Defendant's Human Resources Department, and included nearly ninety minutes of videos to familiarize potential employees with company's policies and procedures. Subsequently, Plaintiff and two other individuals were brought into a small conference room, where Defendant's representatives presented them with paperwork to fill out and read, which included the Handbook and Arbitration Agreement.

While Plaintiff concedes that the documents were "briefly" explained to him, he alleges that: (1) he had no prior experience interpreting or negotiating employment contracts; (2) no one from Defendant reviewed the documents with him or explained that he was giving up his right to trial by signing the Arbitration Agreement; (3) he felt pressure to sign the documents immediately; (4) he believed that his signature was a prerequisite to employment; (5) Defendant did not provide Plaintiff with enough time to fully review the Handbook's

contents; (6) he had no opportunity to consult with counsel before signing the Arbitration Agreement; and (7) despite signing the Handbook and stand-alone Arbitration Agreement, he was not aware that an Arbitration Agreement actually existed and was included in the documents.

The Arbitration Agreement in question incorporates, page 33, Section 1.06, of the Handbook, by reference. That section of the Handbook explains what arbitration is, how it differs from a traditional lawsuit, the scope of the Arbitration Agreement, and how Plaintiff could opt-out of arbitration, if he so desired. Specifically, Section 1.06 of the Handbook provides as follows:

> **1.06 Dispute Resolution**
>
> It is the policy of PAG and its subsidiaries (the "Company") that any and all disputes between the Company and its employees that may arise out of or in any way be related to employment with the Company will be exclusively resolved through binding arbitration pursuant to the Federal Arbitration Act rather than through the court system. This policy extends to all kinds, whether based on tort, contract, statute (including, but not limited to, any claims of discrimination, harassment, and/or retaliation, equitable law, or otherwise).
>
> The only exceptions to the requirement of binding arbitration shall be for claims arising under the National Labor Relations Act which are brought before the National Labor Relations Board, claims for unemployment compensation benefits, claims for medical and disability benefits under the state workers' compensation law or as may otherwise be required by state or federal law. However, nothing herein shall prevent an Employee from filing and pursuing proceedings before the United States Equal Employment Opportunity Commission, or similar state or local agency

(although pursuit of a claim following the exhaustion of such administrative remedies would be subject to the provisions of this Agreement).

* * *

What Kind of Claims Are Covered By This Arbitration Policy?

Our policy covers all legal claims which could otherwise be brought by one party against the other in a state or federal court, including claims relating to hiring decisions, promotions, and termination. Included within the scope of this Agreement are disputes based on tort, contract, statute (including, but not limited to, any claims of discrimination, harassment and/or retaliation, whether they be based on Title VII of the Civil Rights Act of 1964, as amended, the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Family and Medical Leave Act, or any other state or federal law or regulation), equitable law, or otherwise. . . . .

Do I Have To Agree To Arbitrate Claims?

The Company strongly believes that the mutual obligation to arbitrate any and all disputes is in the best interests of both employees and the Company. The Company also recognizes that not all employees will agree with this philosophy, and, accordingly employees will be offered one opportunity to opt out of this policy . . . . Employees must carefully review this option, because once the opportunity to opt out has passed, an employee who has not opted out will be required to arbitrate any and all disputes pursuant to this policy, unless otherwise agreed to in writing by the Company.

The Handbook also makes clear that its contents do not create a "contractual relationship" between the employer and its employees, and cautions employees that any policies in the Handbook can be amended by Defendant, in its sole discretion. Consequently, Plaintiff contends that the Arbitration Agreement should be deemed unenforceable and that he be permitted to

pursue his claims and grievances in the forum of his choice - the Superior Court.

III. DISCUSSION

A. Legal Standard

The controlling authority in this case is N.J.S.A. 2A:24-1 to 11, New Jersey's corollary to the Federal Arbitration Act (FAA), 9 U.S.C. § 1 et seq., wherein "[t]he New Jersey legislature codified its endorsement of arbitration agreements." Martindale v. Sandvik, Inc., 173 N.J. 76, 84 (2002). That statute provides:

> A provision in a written contract to settle by arbitration a controversy that may arise therefrom, or a refusal to perform the whole or a part thereof or a written agreement to submit, pursuant to section 2A:24-2 of this title, any existing controversy to arbitration, whether the controversy arise out of contract or otherwise, shall be valid, enforceable and irrevocable, except upon such grounds as exist at law or in equity for the revocation of a contract.

N.J.S.A. 2A:24-1.

New Jersey courts recognize a strong presumption in favor of arbitration. See, e.g., Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A., 168 N.J. 124, 131 (2001) ("[O]ur jurisprudence has recognized arbitration as a favored method for resolving disputes."); Martindale, supra, 173 N.J. at 84 ("New Jersey courts also have favored arbitration as a means of resolving disputes.").

However, the judicial presumption in favor of arbitration is not without limits. To that end, arbitration "is, at its heart, a creature of contract," Kimm v. Blisset, LLC, 388 N.J. Super. 14, 25 (App. Div. 2006), and "state contract-law principles generally govern a determination whether a valid agreement to arbitrate exists." Hojnowski v. Vans Skate Park, 187 N.J. 323, 342 (2006). Moreover, "an arbitration clause may be invalidated 'upon such grounds as exist at law or in equity for the revocation of any contract.'" Martindale, supra, 173 N.J. at 85 (quoting 9 U.S.C. § 2).

In assessing the Arbitration Agreement at issue in this case, I must determine as a threshold matter: (1) whether Plaintiff's claims fall within the scope of the purported agreement to arbitrate; and (2) whether a valid agreement to arbitrate exists. If those two elements are satisfied, the Court will compel arbitration.

1. Are Plaintiff's LAD and CEPA Claims Covered Within the Scope of the Arbitration Agreement?

Are Plaintiff's LAD and CEPA claims arbitrable, and if so, are they are covered within the scope of the Arbitration Agreement? I believe that the answer both of those questions is yes.

In his complaint, Plaintiff asserts several causes of action against Defendant including claims of: (1) unlawful

harassment; (2) discrimination; (3) retaliation due to his gender expression, sexual orientation, religion, race, national origin, and/or disability in violation of the LAD; and (4) unlawful retaliation in violation of CEPA.

Generally speaking, "an employee may be bound by an agreement to waive his or her right to pursue a statutory claim in a judicial forum in favor of arbitration." Martindale, supra, 173 N.J. at 92. "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." Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 628 (1985). Thus, courts have consistently found that the adjudication of LAD claims may properly be the subject of arbitration agreements. See, e.g., Martindale, supra, 173 N.J. at 93 ("There is no indication in the text or legislative history of . . . the LAD that restrict[s] the use of an arbitral forum to pursue those claims. Indeed, in respect of the LAD, a judicial remedy was never perceived to be essential to vindicate such claims."); see also Young v. Prudential Ins. Co. of Am., Inc., 297 N.J. Super. 605, 616 (App. Div. 1997) ("[T]here is no evidence in the text or legislative history of CEPA or LAD that members of the classes protected by those statutes cannot waive the right to jury trial by agreeing to arbitrate disputes with their employers.").

Accordingly, if done properly – i.e., knowingly and voluntarily - Plaintiff's statutory claims may, by agreement, be adjudicated via binding arbitration rather than through resort to the courts.

Nonetheless, the critical issue in determining whether Plaintiff's claims are covered under the Arbitration Agreement is whether the Arbitration Agreement clearly and unambiguously provides that Plaintiff waives his statutory right to pursue potential discrimination claims in court. See, e.g., Garfinkel, supra, 168 N.J. at 127. In Garfinkel, supra, the employee signed an arbitration agreement which contained a provision that "any controversy or claim arising out of, or relating to, this Agreement or the breach thereof, shall be settled by arbitration." Id. (internal quotation marks omitted). The Court rejected that arbitration clause as unenforceable, because the language was ambiguous and therefore insufficient to "constitute an enforceable waiver of plaintiff's statutory rights under the LAD." Id. The Court reasoned:

> Defendants urge a contrary conclusion, arguing that the language of [the arbitration clause] is sufficient by its plain terms to encompass plaintiff's LAD claim. We disagree. Although we might interpret the paragraph to cover any dispute involving a term or condition of employment, the clause is silent in respect of plaintiff's statutory remedies. To enforce a waiver-of-rights provision in this setting, the Court requires some concrete manifestation of the employee's intent as reflected in the text of the agreement itself. "In interpreting a contract, '[i]t is not the real intent but the intent expressed or

apparent in the writing that controls.'" Quigley, supra, 330 N.J. Super. at 266.

* * *

To reiterate, the policies that support the LAD and the rights it confers on aggrieved employees are essential to eradicating discrimination in the workplace. *The Court will not assume that employees intend to waive those rights unless their agreements so provide in unambiguous terms. That said, we do not suggest that a party need refer specifically to the LAD or list every imaginable statute by name to effectuate a knowing and voluntary waiver of rights. To pass muster, however, a waiver-of-rights provision should at least provide that the employee agrees to arbitrate all statutory claims arising out of the employment relationship or its termination. It should also reflect the employee's general understanding of the type of claims included in the waiver, e.g., workplace discrimination claims*. Along those lines, the court in Alamo aptly observed:

> The better course would be the use of language reflecting that the employee, in fact, knows that other options such as federal and state administrative remedies and judicial remedies exist; that the employee also knows by signing the contract, those remedies are forever precluded; and that, regardless of the nature of the employee's complaint, he or she knows that it can only be resolved by arbitration.
>
> [Alamo, supra, 306 N.J. Super. at 394, 703 A.2d 961.]

Garfinkel, supra, 168 N.J. at 134-35 (italics in original).

By contrast, in Martindale, supra, the Court found that an employee was bound by an arbitration agreement because the language used was both clear and unambiguous, and was sufficiently broad to encompass the employee's discrimination claims, including a NJ LAD claim. See Martindale, supra, 173 N.J. at 81. The arbitration agreement in that case provided:

> AS A CONDITION OF MY EMPLOYMENT, I AGREE TO WAIVE MY RIGHT TO A JURY TRIAL IN ANY ACTION OR PROCEEDING RELATED TO MY EMPLOYMENT . . . .
>
> I AGREE THAT ALL DISPUTES RELATING TO MY EMPLOYMENT . . . OR TERMINATION TEHREEOF SHALL BE DECIDED BY AN ARBITRATOR.

Id.

In this case, the Arbitration Agreement seems clear and unambiguous with respect to its scope, and provides sufficient detail to cover Plaintiff's workplace discrimination and CEPA claims:

> Our policy covers all legal claims which could otherwise be brought by one party against the other in a state or federal court, including claims relating to hiring decisions, promotions, and termination. Included within the scope of this Agreement are disputes based on tort, contract, statute (including, but not limited to, any claims of discrimination, harassment and/or retaliation, whether they be based on Title VII of the Civil Rights Act of 1964, as amended, the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Family and Medical Leave Act, or any other state or federal law or regulation), equitable law, or otherwise. (emphasis added)

Thus, the Arbitration Agreement, as written, explicitly provides that all statutory claims arising out of Plaintiff's employment, including discrimination claims, would be subject to arbitration, thereby satisfying the requirements of Garfinkel and Martindale.

2. Is the Agreement to Arbitrate Valid?

My conclusion that the Arbitration Agreement, as written, is sufficiently detailed to encompass Plaintiff's claims, does

not, however, end the inquiry. I must still determine whether the Arbitration Agreement is valid and enforceable.

In general, "[a]n agreement to arbitrate, like any other contract, 'must be the product of mutual assent, as determined under customary principles of contract law.'" Atalese v. U.S. Legal Services Grp., L.P., 219 N.J. 430, 442 (2014) (citation omitted). In that regard, the parties must understand "the terms to which they have agreed"; i.e., there must be a meeting of the minds. Id.

"By its very nature, an agreement to arbitrate involves a waiver of a party's right to have her claims and defenses litigated in court." NAACP of Camden Cty. E. v. Foulke Mgmt. Corp., 421 N.J. Super. 404, 425 (App. Div. 2011). "An effective waiver requires a party to have full knowledge of his legal rights and intent to surrender those rights." Knorr v. Smeal, 178 N.J. 169, 177 (2003). And, because a member of the general public, absent some "explanatory comment," may not understand the implications of waiving his or her right to trial, see Atalese, supra, 219 N.J. at 442, "courts take particular care in assuring the knowing assent of both parties to arbitrate, and a clear mutual understanding of the ramifications of that assent." NAACP of Camden Cty. E., supra, 421 N.J. Super. at 425.

Thus, any contractual waiver-of-rights provision, including an agreement to arbitrate, "must reflect that an employee has

agreed clearly and unambiguously to arbitrate the disputed claim." Leodori v. Cigna Corp., 175 N.J. 293, 302 (2003) (emphasis added); see also Garfinkel, supra, 168 N.J. at 135 ("The Court will not assume that employees intend to waive those rights unless their agreements so provide in unambiguous terms."); Red Bank Reg'l Educ. Ass'n v. Red Bank Reg'l High Sch. Bd. of Educ., 78 N.J. 122, 140 (1978) (holding that a party's waiver of statutory rights "must be clearly and unmistakably established, and contractual language alleged to constitute a waiver will not be read expansively.") However, "[n]o particular form of words is necessary to accomplish a clear and unambiguous waiver of rights." Atalese, supra, 219 N.J. at 444. The test is that of a reasonable consumer; i.e., "[a]rbitration clauses . . . will pass muster when phrased in plain language that is understandable to the reasonable consumer." Id.; see also N.J.S.A. 56:12-2 ("A consumer contract entered into . . . shall be written in a simple, clear, understandable and easily readable way.").

The recent case of Morgan v. Raymours Furniture Co., Inc., 443 N.J. Super. 338 (App. Div. 2016), is particularly instructive on the need to establish an unambiguous intention to arbitrate. In Morgan, supra, the Appellate Division was asked to determine the enforceability of an arbitration agreement that

was contained wholly within the employer's handbook, and which provided:

> Nothing in this Handbook or any other Company practice or communication or document, including benefit plan descriptions, creates a promise of continued employment, [an] employment contract, term or obligation of any kind on the part of the Company.
>
> * * *
>
> [T]he rules, regulations, procedures and benefits contained therein are not promissory or contractual in nature and are subject to change by the company.

Id. at 342 (emphasis added).

While the employer in that case sought to bind the employee to his purported agreement to arbitrate, the handbook itself specifically debunked the idea that the handbook created a "contract" or an obligation of any kind on the employer. Accordingly, the Appellate Division concluded that the arbitration agreement was unenforceable, reasoning:

> Here, the employer would seek both the benefit of its disclaimer in most instances, while insisting that the handbook was contractual when it suits its purposes — a proposition to be rejected if for no other reason than it runs counter to the ancient English proverb: 'wolde ye bothe eate your cake, and have your cake?' John Heywood, Dialogue of Proverbs (1546), as well as its corollary, which may have originated with Aesop, 'sauce for the goose is sauce for the gander.' Of course, our decisions are not governed by clichés, but these in particular can be found at the root of the court's equity jurisdiction.
>
> * * *
>
> In this setting, it is simply inequitable for an employer to assert that, during its dealings with its employee, its written rules and regulations were not contractual and then

> argue, through reference to the same materials, that the employee contracted away a particular right
>
> * * *
>
> In any event, our Supreme Court has made clear that an employee in this circumstance must 'clearly and unambiguously' agree to a waiver of the right to sue. Atalese, supra, 219 N.J. at 443. By inserting such a waiver provision in a company handbook, which, at the time, the employer insisted was not 'promissory or contractual,' an employer cannot expect — and a court, in good conscience, will not conclude — that the employee clearly and unambiguously agreed to waive the valued right to sue. And, by the same token, in obtaining the employee's signature on a rider, which stated only that the employee 'received' and 'underst[ood]' the contents of the company handbook or rules and regulations, the employer cannot fairly contend the employee 'agreed' to a waiver of the right to sue that might be found within those materials. Leodori v. CIGNA Corp., 175 N.J. 293, 307, 814 A.2d 1098, cert. denied, 540 U.S. 938 . . . . These principles preclude enforcement of the arbitration provision and waiver of the right to sue contained within Raymours' company handbook and related documents.

Id. at 342-43.

In this case, Plaintiff likewise urges that his agreement to arbitrate is unenforceable due to the Handbook's following disclaimer:

> Policies set forth in this handbook . . . are not intended to create a contract, nor are they to be construed to constituted contractual obligations of any kind or a contract of employment between Penske Automotive Group, Inc., its dealerships and any of its employees. . . . [A]nd, except for its policy of employment-at-will, may be amended or cancelled at any time, at Penske Automotive Group, Inc.'s sole discretion.

Defendant seeks to distinguish Morgan, supra, because: (1) unlike the employees there, here, Plaintiff signed a "stand-

alone" Arbitration Agreement; (2) that Agreement's reference to Section 1.06 of the Handbook can be parsed out and considered separately and independently from the disclaimer; and (3) Plaintiff's execution of the stand-alone Arbitration Agreement cured any ambiguity in its arbitration policy. I disagree.

Here, the plain language of the Handbook unequivocally evinces a clear intent to preclude the existence of a contractual relationship with respect to any of the Handbook's stated policies. Defendant cannot, in law or equity, seek to bind Plaintiff to the Arbitration Agreement, but insulate itself from any other provision it chooses not to follow. Ironically, but for this disclaimer allowing the company to modify or amend any of its employment policies in its sole discretion, the specific provisions of Section 1.06 of the Handbook are the provisions necessary for the Court to uphold the Arbitration Agreement as enforceable in the first place; i.e., provisions explaining: (1) what arbitration is; (2) how it differs from a traditional lawsuit; (3) the scope of the Arbitration Agreement; and (4) how Plaintiff could opt-out, if he so desired.

While Defendant urges that Section 1.06 should be viewed independently from the rest of the Handbook, consumers would neither likely understand - or even take note of - such a subtle distinction, nor appreciate the one-sidedness of the arrangement. This is especially so, given that: (1) the

Handbook and the Arbitration Agreement were both drafted by Defendant; (2) Plaintiff signed the Handbook and Arbitration Agreement during his employment orientation; (3) he did so without the assistance or advice of counsel; (4) he did so without being given a thorough or unbiased explanation of the documents by Defendant's representatives; and (5) he did so without being afforded an adequate opportunity to read and digest these extensive documents.

Moreover, Defendant's reliance on the Supreme Court's decision in Leodori, supra, is likewise, unavailing. There, the Court was similarly tasked with determining the enforceability of a waiver-of-rights provision in the defendant-employer's handbook, which contained the following provisions pertaining to arbitration:

> This handbook contains only two terms of your employment. They are very important. The first is that your employment is not for any fixed period of time. Just as you can terminate your employment, at any time for any reason, the Company can terminate your employment at any time for any reason. The second is that by accepting employment and being eligible to receive increases in compensation and benefits, you agree that you will not go to court or a government agency for a hearing to decide an employment-related claim. Instead, you will resolve all employment related legal disputes (except worker[s'] compensation and unemployment compensation) by going to a neutral third party arbitrator. *Regardless of what anyone may have told you or you may have read before you were hired or after, these two terms of your employment are the full and complete agreement between you and the Company concerning these terms and cannot be changed except by a written agreement between you and your employer signed by the President of the Company.*

> This handbook does not alter the "at will" status of your employment. Just as you may terminate your employment at any time for any reason, your employment may be terminated at any time for any reason. Except for the **arbitration policy mentioned in this handbook**, which **is a term and condition of your continued employment**, the policies and practices set forth herein are for your information and guidance. Things change and there is no guarantee that the policies and practices contained herein will not change in the future. The company reserves the right to alter, amend, and make exceptions to this handbook at any time in its sole discretion, with or without prior notice.

Id. at 298 (emphasis in original).

The employer there also distributed an "acknowledgment form" as an accompaniment to its handbook, which did not specifically refer to arbitration, but did reference the employee handbook:

> This is to acknowledge that I have received my copy of the July 1998 employee handbook, You and CIGNA. I understand that by accepting employment and being eligible to receive increases in compensation and benefits, I am agreeing to the following two important terms of my employment described in You and CIGNA: (1) my employment can be terminated by me or my employer at any time for any reason--therefore, my employment is at the will of either party, and (2) I will use the Company's internal and external employment dispute resolution processes to resolve legal claims against the Company--therefore rather than go to court or to a government agency for a hearing to decide my legal claim, I will submit my employment related legal claims except workers' compensation and unemployment compensation to final and binding neutral third party arbitration. *I understand further that these two terms of my employment replace and supersede any prior agreement concerning these terms and cannot be changed except in writing signed by me and the president of the Company.*

Id. (italics in original).

While the employee in Leodori did sign the acknowledgment form, he did not sign the employee handbook. Under these circumstances, the Supreme Court held that the arbitration agreement was unenforceable because: (1) there was no clear expression or manifestation of the employee's intent to waive his right to trial, see id. at 307-08; and (2) the form's waiver-of-rights provision did not specifically reference the arbitration provision in the handbook. See id. at 308 ("The problem in this case is that the acknowledgment form signed by plaintiff contains no statement that he had agreed to the arbitration provision. . . . [W]ithout some affirmative indication of plaintiff's assent, that provision cannot operate to deny plaintiff his rights under CEPA to which he otherwise is entitled.").

Nonetheless, the court noted that, in general, "an employer and its employee may agree to arbitrate their disputes by referring . . . to an arbitration policy contained in a separate writing, provided that the policy itself clearly reflects the employee's knowing and voluntary waiver of rights." Id. Indeed, the Court offered the following guidance:

> The acknowledgment form need not recite that policy verbatim so long as the form refers specifically to arbitration in a manner indicating an employee's assent, and the policy is described more fully in an accompanying handbook or in another document known to the employee.

Id. at 307.

In this case, because its "acknowledgment form" specifically "referenced" the Handbook's arbitration policy, Defendant urges that its Arbitration Agreement should be enforceable under Leodori, supra. That position is rejected. In Leodori, supra, both the acknowledgement form and the handbook expressly provided that the company's policy on arbitration could not be changed, "except in writing signed by me and the president of the Company." Id. at 298. By way of contrast, the Handbook in this case rejects the notion that any contractual obligations were created, specifically reserving to Defendant the unilateral right to amend or cancel any of the policies contained within the Handbook at any time, in its sole discretion.[3]

Thus, the deficiency in Defendant's case is not related to its use of two separate documents, but rather, is due to the inclusion of the disclaimer in the employee Handbook. Compare Morgan, supra, 443 N.J. Super. at 343 (employee cannot unambiguously consent to a waiver-of-rights provision where the employer reserves the right to declare the agreement non-

[3] Specifically, Defendant's arbitration policy provides that "except for its policy of employment-at-will," any provision or policy may be amended in the Defendant's "sole discretion."

binding, or amend the agreement, at the employer's sole discretion).

While arbitration agreements are certainly permissible in an employment context, where an employer: (1) expressly states in the agreement that no contractual obligations exist between it and the employee; and (2) reserves the right to amend or change any of its policies or obligations in its sole discretion, that agreement will not be enforceable.[4]

IV. CONCLUSION

In sum, while Plaintiff's LAD and CEPA claims are both permissibly arbitrable and fairly within the scope of the Arbitration Agreement, the inclusion of disclaimer language in the Handbook, indicating that: (1) the policies therein were not binding; (2) Defendant could amend any such policies in its sole discretion; and (3) Defendant's failure to state that its

[4] My conclusion that the arbitration agreement in this case is ambiguous, and thus unenforceable, is not altered by the fact that Plaintiff was afforded an opportunity to "opt out" of arbitration. While an opt out provision may be probative of the employee's assent to be bound by the terms of that agreement, the guiding principle is still the same. Unless the arbitration agreement is sufficiently clear and unambiguous to allow the Court to conclude that the employee knowingly and voluntarily waived his or her right to trial, it will not be enforceable. A contrary result would permit an employer to enforce an arbitration agreement that was invalid as a matter of law against an employee, based merely on that assent. Consequently, Plaintiff's failure to opt out is not fatal to his position, nor does it cure the ambiguities or otherwise alter the result in this case.

arbitration policy was not subject to those disclaimers, renders the Arbitration Agreement ambiguous, and thus, unenforceable. Accordingly, Defendant Penske's Motion to Dismiss is DENIED.

Plaintiff shall submit an appropriate form of order, incorporating this opinion by reference, under the Five-Day Rule.

No costs.