**Adler v. Fred Lind Manor**

***Supreme Court of Washington (En Banc.)***

***153 Wash.2d 331; 103 P.3d 773 (2004)***

Bridge, J.

Like its companion case, Zuver v. Airtouch Communications, Inc., 153 Wash.2d 293, 103 P.3d 753 (2004), this case requires us to consider the enforceability of a predispute employment arbitration agreement in the context of employment discrimination litigation. Here, after employee Gerald Adler sued his employer Fred Lind Manor, the trial court granted Fred Lind Manor’s motion to compel arbitration under the arbitration agreement. Adler asserts that the arbitration agreement is unenforceable because it violates his right to a jury trial, because the Washington Law Against Discrimination (WLAD), chapter 49.60 RCW, entitles him to a judicial forum, and because the arbitration agreement is both procedurally and substantively unconscionable. He also claims that Fred Lind Manor waived its right to arbitration and/or should be equitably estopped from demanding arbitration. We agree with Adler that the agreement’s attorney fees and 180-day limitations provisions unreasonably favor Fred Lind Manor and are thus substantively unconscionable. We further conclude that factual disputes preclude resolution of Adler’s claims of procedural unconscionability, the substantive conscionability of the fee-splitting provision, and whether his right to a jury trial was violated. We therefore remand these claims to the trial court for further proceedings consistent with this opinion.

**I.** Statement of Facts

Gerald Adler immigrated to the United States from Poland in 1990. On June 4, 1992, Fred Lind Manor, a business that provides housing and services to senior citizens, hired Adler for a maintenance personnel position. Two months later, Fred Lind Manor promoted Adler to maintenance and housekeeper supervisor.

In 1995, Paradigm Senior Living assumed management of Fred Lind Manor and required all current employees to sign an arbitration agreement as a condition of their continued employment. The arbitration agreement provided:

**Arbitration Agreement**

I hereby agree that any dispute related to my employment relationship shall be resolved exclusively through binding arbitration in Seattle, Washington under the American Arbitration Association’s Commercial Arbitration Rules, except as other wise [sic] provided here.

I agree to the following terms of arbitration as part of this agreement to arbitration. The aggrieved party must deliver to the other party a written notice of his/her/its intention to seek arbitration no later than 180 days after the event that first gives rise to the dispute. Otherwise his/her/its rights shall be irrevocably waived. The dispute shall be decided by one arbitrator selected by mutual agreement of the parties, or absent agreement, in accordance with the Rules. The arbitrator’s fee and other expenses of the arbitration process shall be shared equally. The parties shall bear their own respective costs and attorneys fees. Washington law, to the extent permitted, shall govern all substantive aspects of the dispute and all procedural issues not covered by the Rules.

Adler signed the agreement as did general manager, Christine Serold.

Adler received another promotion to maintenance and housekeeper director in May 1998. Then on January 16, 2001, general manager Mark Mullen ordered him to move a commercial dryer, and while moving the dryer, Adler hurt his hip and back. On January 17, 2001, Adler visited his doctor who diagnosed him with hip osteoarthritis and advised him to perform “light duty.” Id. at 5. On that same day, Adler filed his first claim with the Department of Labor and Industries (DLI).[[1]](#footnote-1)1 He sustained additional injuries on June 1, 2001, and January 14, 2002, and filed claims with DLI for these injuries.[[2]](#footnote-2)2 On June 11, 2002, Mullen fired Adler for “‘inability to operate all aspects of [the] maintenance department.’” Fred Lind Manor replaced Adler with a younger employee.

On October 2, 2002, Adler filed a complaint with the Equal Employment Opportunity Commission (EEOC) alleging that Fred Lind Manor and Mullen violated the Americans with Disabilities Act of 1990, 42 U.S.C. §12101, the Age Discrimination in Employment Act of 1967, 29 U.S.C. §623, and Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. §2000e. In December 2002, Fred Lind Manor responded asserting that it had discharged Adler because of poor attendance, failure to meet productivity standards, Adler’s sexual harassment of another employee, unauthorized use of Fred Lind Manor’s facilities, and failure to respect residents’ rights. Fred Lind Manor did not mention the existence of the arbitration agreement.

On January 9, 2003, the parties attended EEOC mediation. Neither party made reference to the arbitration agreement. Approximately four months after mediation, the EEOC dismissed Adler’s complaint stating that “the EEOC is unable to conclude that the information obtained establishes violations of the statutes.” …

On May 20, 2003, Adler filed a complaint in superior court alleging that Fred Lind Manor violated the WLAD by discriminating against him for his disability, age, and national origin; discharged him for pursuing worker’s benefits in violation of Title 51 RCW; committed the tort of wrongful discharge in violation of public policy; committed the tort of intentional infliction of emotional distress; and created a hostile work environment. Fred Lind Manor filed its answer on August 1, 2003, claiming for the first time that Adler must submit his claims to arbitration. Fourteen days later, Fred Lind Manor moved to compel arbitration and stay proceedings. During a telephone conversation with Adler’s attorney, Fred Lind Manor indicated that at arbitration, it planned to seek dismissal of Adler’s claims pursuant to the 180-day statute of limitations provision of the arbitration agreement.

In response to Fred Lind Manor’s motion to compel arbitration, Adler claimed he did not understand that the 1995 agreement required him to arbitrate his future claims nor was he given a copy of the agreement.[[3]](#footnote-3)3 He requested that the court declare the agreement void as unconscionable or, alternatively, find that Fred Lind Manor had waived arbitration. Without holding a hearing, the trial court granted Fred Lind Manor’s motion to compel arbitration and stay proceedings.

…We granted review.

**II** Analysis

…Section 2 of the FAA provides that written arbitration agreements “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of *any* contract.” 9 U.S.C. §2 (emphasis added). The United States Supreme Court has stated that “[s]ection 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.”[[4]](#footnote-4)4 Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983).…

Although federal and state courts presume arbitrability, “generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening §2.” Doctor’s Assocs., Inc., v. Casarotto, 517 U.S. 681, 687, 116 S. Ct. 1652, 134 L. Ed. 2d 902 (1996).…

We engage in de novo review of a trial court’s decision to grant a motion to compel or deny arbitration.…The party opposing arbitration bears the burden of showing that the agreement is not enforceable. See Green Tree Fin. Corp. v. Randolph, 531 U.S. 79, 92, 121 S. Ct. 513, 148 L. Ed. 2d 373 (2000).

WLAD requirements

Relying on cases holding that an exclusive remedies provision in a collective bargaining agreement does not prevent employees from initiating civil suits in court for violations of the WLAD, Adler argues that the WLAD requires a judicial forum for discrimination claims of employees.…The United States Supreme Court…has held that in instances where a valid individual employee-employer arbitration agreement exists, the FAA requires that employees arbitrate federal and state law discrimination claims. See Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 27-28, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991) (holding that the FAA requires arbitration of age discrimination claims when a valid arbitration agreement exists).…Moreover, the FAA clearly preempts any state law to the contrary.…Thus, we reject Adler’s claim that the WLAD entitles him to a judicial forum.

unconscionability

It is black letter law of contracts that the parties to a contract shall be bound by its terms.…Adler argues that he should be exempt from the terms of the agreement here because it is both procedurally and substantively unconscionable. “The existence of an unconscionable bargain is a question of law for the courts.” Nelson v. McGoldrick, 127 Wash.2d 124, 131, 896 P.2d 1258 (1995).…In Washington, we have recognized two categories of unconscionability, substantive and procedural. Id. (citing Schroeder v. Fageol Motors, Inc., 86 Wash.2d 256, 260, 544 P.2d 20 (1975)). “Substantive unconscionability involves those cases where a clause or term in the contract is alleged to be one-sided or overly harsh.…” *Schroeder*, 86 Wash.2d at 260. “‘Shocking to the conscience’, ‘monstrously harsh’, and ‘exceedingly calloused’ are terms sometimes used to define substantive unconscionability.” *Nelson*, 127 Wash.2d at 131.…Procedural unconscionability is “the lack of a meaningful choice, considering all the circumstances surrounding the transaction including “‘[t]he manner in which the contract was entered,” whether each party had “a reasonable opportunity to understand the terms of the contract,” and whether “the important terms [were] hidden in a maze of fine print.” ‘“ Id. at 131 (alterations in original) (quoting *Schroeder*, 86 Wash.2d at 260 (quoting Williams v. Walker-Thomas Furniture Co., 121 U.S. App. D.C. 315, 350 F.2d 445, 449 (D.C. Cir. 1965))). We have cautioned that “these three factors [should] not be applied mechanically without regard to whether in truth a meaningful choice existed.” Id.

We have not explicitly addressed whether a party challenging a contract must show both substantive and procedural unconscionability. However, our decisions in *Nelson*, 127 Wash.2d at 131, and *Schroeder*, 86 Wash.2d at 260, analyze procedural and substantive unconscionability separately without suggesting that courts must find both to render a contract void.…

Fred Lind Manor and amicus, Association of Washington Business (AWB), urge us to require proof of both substantive and procedural unconscionability to render a contract void as unconscionable. The AWB asserts that a majority of courts adopt this approach since,

[i]f, despite grossly unequal bargaining power between the parties or other evidence of lack of meaningful choice, the terms of the contract are nonetheless fair, the weaker party has suffered no injury. Likewise, courts should not interfere with the terms of a contract, however “harsh” or one-sided, where the parties were of equal bargaining power or where there was no unfairness in the manner in which the contract was executed.

Amicus Curiae Br. of AWB at 11. *See also* 8 Samuel Williston, a Treatise on the Law of Contracts §18:10, at 67 (Richard A. Lord, 4th ed. 1998) (“[S]urprise or an inability to bargain with understanding as to the terms of an agreement (procedural unfairness) must culminate in the drafting party’s exacting harsh or unreasonable terms from the other party (substantive unfairness) before the concept of unconscionability becomes applicable in the view of perhaps most jurisdictions.”).

In Maxwell v. Fidelity Financial Services, Inc., 184 Ariz. 82, 90, 907 P.2d 51 (1995), the Arizona Supreme Court considered an almost identical argument. There the court held that “a claim of unconscionability can be established with a showing of substantive unconscionability alone, especially in cases involving either price-cost disparity or limitation of remedies.” Id. The court, however, reserved the question whether procedural unconscionability alone could render a contract void as unconscionable. Id.

We agree with the Arizona Supreme Court. In some instances, individual contractual provisions may be so one-sided and harsh as to render them substantively unconscionable despite the fact that the circumstances surrounding the parties’ agreement to the contract do not support a finding of procedural unconscionability. See 2 Restatement (Second) of Contracts §208 cmt. e (1981) (“Particular terms may be unconscionable whether or not the contract as a whole is unconscionable.”). Accordingly, we now hold that substantive unconscionability alone can support a finding of unconscionability. However, since Adler has yet to prove a valid claim of procedural unconscionability, we decline to consider whether it alone will support a claim of unconscionability.

procedural unconscionability

…

First, Adler asserts that the arbitration agreement is an adhesion contract, which he argues, supports his claim of unconscionability. We have established the following factors to determine whether an adhesion contract exists: “(1) whether the contract is a standard form printed contract, (2) whether it was ‘prepared by one party and submitted to the other on a “take it or leave it” basis’, and (3) whether there was ‘no true equality of bargaining power’ between the parties.” Yakima County (W. Valley) Fire Prot. Dist. No. 12 v. City of Yakima, 122 Wash.2d 371, 393, 858 P.2d 245 (1993).…[T]he fact that an agreement is an adhesion contract does not necessarily render it procedurally unconscionable.…

Fred Lind Manor and Adler’s agreement is an adhesion contract. Paradigm provided a standard form printed arbitration agreement to all of Fred Lind Manor’s employees.…Fred Lind Manor’s representative, Serold, informed employees that they must sign the agreement as a condition of their continued employment, i.e., on a “take it or leave it basis.” Id. Presumably, employees were not free to negotiate the terms of the agreement with Fred Lind Manor. Thus, there was “‘no true equality of bargaining power.’” *Yakima County Fire Prot. Dist.*, 122 Wash.2d at 393.…Nonetheless, the fact that Fred Lind Manor and Adler’s arbitration agreement is an adhesion contract does not end our inquiry. Id.

Adler further asserts that the agreement is procedurally unconscionable because his unequal bargaining power precluded him from negotiating terms of the agreement.…However, we have held that while unequal bargaining power may exist between parties, the mere existence of unequal bargaining power will not, standing alone, justify a finding of procedural unconscionability.…Rather, the key inquiry for finding procedural unconscionability is whether Adler lacked meaningful choice. *Schroeder*, 86 Wash.2d at 260.

Adler contends he lacked meaningful choice because the manner in which he entered the contract shows that he was forced to sign the agreement under threat that Fred Lind Manor would fire him, and that his financial circumstances, namely his new daughter and new house, placed pressure on him to sign the agreement. He further avers that he “had no idea what an arbitration was or what it meant.” Fred Lind Manor, however, disputes Adler’s version of the facts asserting that it had no knowledge of Adler’s financial circumstances; that it never threatened to fire him if he refused to sign the agreement; that Serold explained that “arbitration was an alternative to going into a lawsuit in court,” and that Adler “‘did not indicate any reservations or reluctance in signing the document, and prior to signing, he read it, seemed to understand it, and absolutely signed it of his own free will.’” …

Adler also contends that he did not have a reasonable opportunity to understand the arbitration agreement since his limited English impaired his ability to fully comprehend its provisions. On the other hand, Fred Lind Manor claims that Serold explained the terms of the agreement and that Adler appeared to understand its terms. Perhaps most importantly, Adler admits that he pondered the arbitration agreement for a week and presumably, had ample opportunity to contact counsel and inquire about the meaning of its terms. We conclude therefore that the evidence here weighs against Adler’s claim that he did not have a reasonable opportunity to understand the terms of the agreement.

Further, the important terms were not hidden in a “maze of fine print.” First, this short half page agreement is clearly labeled **“Arbitration Agreement”** in boldface type and normal font. The first sentence explicitly states, “I hereby agree that any dispute related to my employment relationship shall be resolved exclusively through binding arbitration.” Thus, this circumstance of Adler and Fred Lind Manor’s transaction does not support Adler’s claim of procedural unconscionability.

Nevertheless, we have cautioned that these factors should “not be applied mechanically without regard to whether in truth a meaningful choice existed.” *Nelson*, 127 Wash.2d at 131. Although Fred Lind Manor appears to have provided Adler with a reasonable opportunity to understand the terms of the agreement, and the important terms were not hidden, Adler and Fred Lind Manor offer remarkably different versions of the facts pertaining to the manner in which the contract was entered into.…Consequently, we cannot make a determination of procedural unconscionability without further factual findings.

When disputes exist as to the circumstances surrounding an agreement, we remand to the trial court to make additional findings.…If Fred Lind Manor’s representative threatened to fire him for refusing to sign the agreement despite the fact that Adler raised concerns with its terms or indicated a lack of understanding, the manner of the transaction would lend support to Adler’s claim of procedural unconscionability.[[5]](#footnote-5)9 …However, if, as Fred Lind Manor contends, Serold explained the document and/or offered to answer Adler’s concerns or questions, such facts will not lend support to Adler’s claim of procedural unconscionability. … Accordingly, we remand Adler’s case to the trial court for further proceedings consistent with this opinion.

substantive unconscionability

Adler contends that the agreement’s unilateral application renders it substantively unconscionable. He further argues that the arbitration agreement’s fee-splitting, attorney fees, and limitations provisions are substantively unconscionable. Fred Lind Manor disputes Adler’s claims countering that he improperly relies on California and Ninth Circuit law.

unilateral application

Relying on Ingle [v. Circuit City Stores, Inc., 328 F.3d 1165, 1171, 1174 (9th Cir. 2003), cert. denied, 540 U.S. 1160, 124 S. Ct. 1169, 157 L. Ed. 2d 1204 (2004)], Adler argues that the arbitration agreement is substantively unconscionable because it applies only to disputes brought by employees, not to disputes brought by Fred Lind Manor against its employees. Fred Lind Manor, however, claims that the agreement is bilateral since it also requires Fred Lind Manor to arbitrate any of its disputes brought against its employees.

To interpret the meaning of a contract’s terms, Washington courts employ the context rule.…The context rule requires that we determine the intent of the parties by viewing the contract as a whole, which includes the subject matter and intent of the contract, examination of the circumstances surrounding its formation, subsequent acts and conduct of the parties, the reasonableness of the respective interpretations advanced by the parties, and statements made by the parties during preliminary negotiations, trade usage, and/or course of dealing.…

The text of the agreement here, as well as the parties’ statements and conduct, support Fred Lind Manor’s claim that the agreement also requires it to arbitrate its disputes against employees. First, at the time the arbitration agreements were executed, then-manager Serold informed employees that the arbitration agreement reflected management’s policy that all employment disputes, “whether by employer or an employee,” be subject to binding arbitration instead of a lawsuit in court. Serold also indisputably acted in her role as Fred Lind Manor’s representative when she signed Adler’s and other employees’ agreements on Fred Lind Manor’s behalf. Id. Most importantly, the agreement provides, “[t]he *aggrieved party* must deliver to the other party a written notice of *his/her/its* intention to seek arbitration…Otherwise *his/her/its rights* shall be irrevocably waived.” …(emphasis added). This provision does not single out individual employees’ disputes against Fred Lind Manor. Rather, it refers generically to the “aggrieved party,” and, by use of the words “his/her/its,” clearly contemplates suits brought by Fred Lind Manor against its employees.…Thus, we reject Adler’s argument that this arbitration agreement applies unilaterally.

fee-splitting provision

Next, Adler argues that the agreement’s fee-splitting provision is substantively unconscionable because the cost of arbitration would effectively bar him from bringing his claims.[[6]](#footnote-6)11 …

As noted in *Zuver,* the United States Supreme Court has acknowledged that arbitration fees may prohibit employees from bringing their discrimination claims but held that “where…a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs.” *Green Tree Fin. Corp*., 531 U.S. at 92. In *Zuver* we further held that in order for a party opposing arbitration to meet his burden of showing the likelihood of incurring excessive costs, the Court of Appeals decision in Mendez [v. Palm Harbor Homes, Inc., 45 P.3d 594 (2002)] sets forth the proper approach. There the court held that by producing an affidavit describing his personal finances as well as fee information obtained from the American Arbitration Association’s Seattle office, the party opposing arbitration, Mendez, had provided sufficient evidence to prove that the fee-splitting provision in his arbitration agreement was substantively unconscionable. Id. at 467-68. Unlike Mendez, Adler has failed to provide any specific information about the arbitration fees he will be required to share and why such fees would effectively prohibit him from bringing his claims. Consequently, he has not met his burden here to show that the agreement’s fee-splitting provision is substantively unconscionable.

Although Adler has failed to meet his burden, we hesitate to reach a final decision about the substantive conscionability of the agreement’s fee-splitting provision. In similar circumstances, the Third Circuit Court of Appeals has remanded the case to the trial court and permitted limited discovery on the issue of whether such fees would effectively prohibit arbitration.…Alexander v. Anthony Int’l, L.P., 341 F.3d 256, 268 (3d Cir. 2003). Like the Third Circuit, we believe that Adler should have the opportunity to prove that the costs of arbitration would prohibit him from vindicating his claims. Therefore, on remand the trial court should provide the parties with the opportunity to engage in limited discovery regarding the costs of arbitration. On remand, “[o]nce prohibitive costs are established, the opposing party [Fred Lind Manor] must present contrary offsetting evidence to enforce arbitration.” …Such evidence may include an offer to pay all or part of the arbitration fees and costs.…

attorney fees provision

The arbitration agreement provides that “[t]he parties shall bear their own respective costs and attorneys fees.” …Adler contends that this provision is substantively unconscionable because it is one-sided and overly harsh requiring him to waive the right to recover his attorney fees and costs under RCW 49.60.030(2).[[7]](#footnote-7)12 Fred Lind Manor, on the other hand, asserts that this provision,

provides only that the employer need not pay plaintiff’s fees and costs leading up to and during the hearing; it does not hamper a prevailing claimant’s right to attorney fees under the WLAD after ultimately prevailing. Both the Agreement and the rules provide that Washington law, including the WLAD, governs.

Resp’ts’ Br. at 39.

We do not find Fred Lind Manor’s interpretation of this provision persuasive. It is a well-known principle of contract interpretation that “specific terms and exact terms are given greater weight than general language.” 2 Restatement (Second) of Contracts §203(c) (1981). While the agreement generally provides that “Washington law, to the extent permitted, shall govern all substantive aspects of the dispute and all procedural issues not covered by the Rules,” the agreement’s attorney fees provision specifically and unambiguously states that the “parties *shall* bear their own respective costs and attorneys fees.” …(emphasis added). Moreover, any ambiguity between these arguably conflicting provisions is resolved against the drafter, Fred Lind Manor.…Consequently, this provision effectively undermines a plaintiff’s rights to attorney fees under RCW 49.60.030(2) and “helps…the party with a substantially stronger bargaining position and more resources, to the disadvantage of an employee needing to obtain legal assistance.” *Alexander*, 341 F.3d at 267. See also Brooks v. Travelers Ins. Co., 297 F.3d 167, 171 (2d Cir. 2002) (noting that an arbitration agreement which restricts recovery of attorney fees would prevent plaintiffs from vindicating their statutory rights under Title VII). Thus, we hold that the attorney fees provision of the agreement is substantively unconscionable.

limitation on actions

Adler also argues the arbitration agreement’s 180-day statute of limitations is substantively unconscionable because it provides for a substantially shorter limitations period than he is entitled to under the WLAD. Chapter 49.60 RCW, however, does not expressly provide for a particular statute of limitations for employment discrimination claims. Instead, courts have applied the general three-year statute of limitations in RCW 4.16.080(2) to WLAD claims reasoning that violations of chapter 49.60 RCW amount to an invasion of a person’s legal rights.

…

…Washington courts have established that a contract’s limitations provision will “prevail over general statutes of limitations unless prohibited by statute or public policy, or unless they are unreasonable.” Ashburn [v. Safeco Ins. Co. of Am., 713 P.2d 742, rev. denied, 105 Wash.2d 1016 (1986).…No statute explicitly prohibits Fred Lind Manor and Adler from adopting a shorter limitation provision for WLAD claims in their contract.

Numerous courts have considered whether limitations provisions in arbitration agreements and/or adhesion contracts are substantively unconscionable. Some have held that six-month limitations provisions for Title VII claims are reasonable, but that shorter limitations periods, i.e., 30 days, are substantively unconscionable. Soltani v. W.&S. Life Ins. Co., 258 F.3d 1038, 1044 (9th Cir. 2001) (upholding a six-month limitations provision in an employment contract); Taylor v. W.&S. Life Ins. Co., 966 F.2d 1188, 1206 (7th Cir. 1992) (upholding a six-month limitation period). Cf. *Alexander,* 341 F.3d at 267 (holding that a 30-day limitations provision is substantively unconscionable); Plaskett v. Bechtel Int’l, Inc., 243 F. Supp. 2d 334, 341 (D.V.I. 2003) (holding that a 30-day limitations provision is substantively unconscionable). The Ninth Circuit has held that even one-year limitations provisions are substantively unconscionable because they deprive plaintiffs the benefit of the continuing violation and tolling doctrines under federal and state discrimination laws. *Ingle*, 328 F.3d at 1175; Circuit City Stores, Inc. v. Adams, 279 F.3d 889, 894-95 (9th Cir.), cert. denied, 535 U.S. 1112, 153 L. Ed. 2d 160, 122 S. Ct. 2329 (2002).

We agree with the Ninth Circuit. By limiting the period of time in which its employees may bring discrimination claims, Fred Lind Manor obtains unfair advantages. First, in order to timely pursue his claim against Fred Lind Manor at arbitration, an employee may be forced to forgo the opportunity to file his complaint and have that complaint investigated and mediated by the EEOC or Washington Human Rights Commission (WHRC)…Moreover, because the agreement demands that an employee “deliver to the other party a written notice of his/her/its intention to seek arbitration no later than 180 days *after the event that first gives rise to the dispute,*” that employee could be barred from seeking those damages for a hostile work environment arising out of discriminatory behavior which occurred outside the limitations period.…(emphasis added). The agreement’s language requiring written notice within 180 days of “the event that *first* gives rise to the dispute,” could be interpreted to insulate the employer from potential liability for violative behavior occurring outside the limitations period by establishing a liability cut-off if notice of the *first* violative behavior is not given within 180 days. Therefore, we hold that the 180-day limitations provision in the agreement unreasonably favors Fred Lind Manor and thus is substantively unconscionable.

severance of the substantively unconscionable provisions

Fred Lind Manor urges us to sever any provisions we find to be substantively unconscionable arguing that the essential term of the parties’ bargain, i.e., arbitration, should be retained. Adler, however, contends that because the substantively unconscionable provisions pervade the entire agreement, we should refuse to sever those provisions and declare the entire agreement void. See *Ingle,* 328 F.3d at 1180 (holding that the employer’s “insidious pattern” of seeking to tip the scales in its favor during employment disputes justified a decision to declare the entire agreement unenforceable). The Restatement (Second) of Contracts §208 (1981) provides that:

If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, *or may enforce the remainder of the contract without the unconscionable term,* or may so limit the application of any unconscionable term as to avoid any unconscionable result.

(Emphasis added.) For contracts concerning leases, sales, real property, and retail installments, our legislature has adopted the *Restatement* position directing that in cases where these contracts are found to contain an unconscionable provision, courts may “enforce the remainder of the…contract without the unconscionable clause.” …

The *Restatement* position concerning severance of unconscionable provisions should also apply in cases where courts are confronted with substantively unconscionable provisions in employment arbitration agreements. Accord Helstrom v. N. Slope Borough, 797 P.2d 1192, 1200 (Alaska 1990);…Application of this rule facilitates the accomplishment of important federal and state public policies favoring arbitration of disputes.…

Nonetheless, we acknowledge that in instances where an employer engages in an “insidious pattern” of seeking to tip the scales in its favor in employment disputes by inserting numerous unconscionable provisions in an arbitration agreement, courts may decline to sever the unconscionable provisions. *Ingle*, 328 F.3d at 1180. In this case, however, Adler and Fred Lind Manor’s arbitration agreement contains just two substantively unconscionable provisions. The primary thrust of their agreement is the agreement to arbitrate. Consequently, we can sever the unconscionable attorney fees and limitations provisions without disturbing the primary intent of the parties to arbitrate their disputes.[[8]](#footnote-8)15 …

jury trial rights

Adler argues that compelling him to arbitrate his disputes violates his jury trial rights under article I, section 21 of the Washington Constitution because he did not “knowing[ly], voluntar[ily], and intelligent[ly]” waive his right to a jury trial.…

[A]s discussed supra, disputes still remain about the manner in which Adler entered into the arbitration agreement with Fred Lind Manor. Consequently, we decline to hold here that Adler knowingly and voluntarily entered into the arbitration agreement with Fred Lind Manor. On remand, if the trial court concludes that Fred Lind Manor’s representative threatened to fire him if he refused to sign the agreement despite the fact he raised concerns with its terms or indicated a lack of understanding, then the evidence here would not support Fred Lind Manor’s claim that Adler knowingly and voluntarily agreed to arbitration, and thus implicitly waived his right to a jury trial. However, if as Fred Lind Manor contends, its representative explained the document and offered to answer Adler’s concerns or questions, Adler’s claim fails.

waiver

Adler also argues that Fred Lind Manor waived its right to compel arbitration by waiting until August 2003 before invoking the arbitration agreement.…

Fred Lind Manor has not acted in a manner here which suggests waiver.…Fred Lind Manor raised its defense of arbitration in its initial answer to Adler’s complaint and promptly moved to compel arbitration after serving its answer. Thus, we conclude that Fred Lind Manor neither commenced litigation nor ignored arbitration.

…

**III** Conclusion

We reject Adler’s claims that the WLAD entitles him to a judicial forum, that Fred Lind Manor has waived its right to arbitrate this dispute, and/or that Fred Lind Manor should be equitably estopped from asserting arbitration. However, we conclude that the attorney fees and limitations provisions of the arbitration agreement are substantively unconscionable but sever these provisions from the agreement thus preserving the parties’ intent to arbitrate their disputes. We remand to the trial court for determination, consistent with this opinion, of Adler’s claims of procedural unconscionability, including whether Adler implicitly waived his right to a jury trial and the substantive conscionability of the fee-splitting provision.

Alexander, C.J., and Johnson, Sanders, Ireland, Chambers, Owens, and Fairhurst, JJ., concur.

Madsen, J. (concurring opinion) [Omitted. –EDS.]

1. 1 Adler claims that he made a request to Mullen that Fred Lind Manor provide him with light duty pursuant to his doctor’s orders, but Mullen failed to accommodate his hip injury. [↑](#footnote-ref-1)
2. 2 Adler also asserts that on other occasions, Mullen criticized Adler’s claims to DLI, made fun of his accent, criticized him for hiring “foreigners,” and ridiculed him for his Polish origin. [↑](#footnote-ref-2)
3. 3 Fred Lind Manor disputes Adler’s claim that he never received a copy of the arbitration agreement. It notes that within one month of his termination, Adler requested a copy of his personnel file, which contained the arbitration agreement, and that he was permitted to inspect, examine, and copy his file. Fred Lind Manor contends Adler’s action is verified by handwritten numbers he placed on the pages of his file while examining it.… [↑](#footnote-ref-3)
4. 4 Washington State also has a strong public policy favoring arbitration of disputes. See Int’l Ass’n of Fire Fighters, Local 46 v. City of Everett, 146 Wash.2d 29, 51, 42 P.3d 1265 (2002).… [↑](#footnote-ref-4)
5. 9 If the trial court finds that Adler has proved his claim of procedural unconscionability, in accordance with the facts of this particular case such a finding will necessarily lead to a finding that Adler’s waiver of his right to a jury was not “knowing, voluntary, and intelligent.” If such a finding is ultimately made, the arbitration agreement would be void. [↑](#footnote-ref-5)
6. 11 The fee-splitting provision states, “[t]he arbitrator’s fee and other expenses of the arbitration process shall be shared equally.” … [↑](#footnote-ref-6)
7. 12 RCW 49.60.030(2) provides that prevailing plaintiffs shall “recover the actual damages sustained by the person, or both, together with the cost of suit including reasonable attorneys’ fees.” [↑](#footnote-ref-7)
8. 15 On remand, in the event the trial court finds the fee-splitting provision to be substantively unconscionable, it may likewise sever that provision and still compel arbitration. [↑](#footnote-ref-8)