STATE OF MICHIGAN

COURT OF APPEALS

MICHELE G. LORENZ
f/k/a MICHELE G. GOBLE,

Plaintiff-Appellant,

v

BULL HN INFORMATION SYSTEMS, INC., f/k/a HONEYWELL BULL, INC., f/k/a HONEYWELL INFORMATION SYSTEMS, INC., and JACK J. GINSBERG,

Defendant-Appellees.

UNPUBLISHED

No. 177502
LC No. 94-076871-CZ

Before: MacKenzie, P.J., and Saad and C. F. Youngblood*, JJ.

YOUNGBLOOD, J. (dissenting.)

I respectfully dissent from the majority's opinion. The trial court held that the Federal Arbitration Act (FAA), 9 USC §§ 1-5, applied to defendant's sales compensation plan.

The FAA does not apply because the agreement relied on here was not a contract within any legal definition of that term. The document relied on by the defendants is titled "1993 Sales Compensation Plan" and, according to defendant, a new plan was provided each year. It was not signed by the parties. The contents of the document are in keeping with its title; i.e., it contains information on the commission rate, bonus plan, sales expectations, and how these items are calculated. Its terms are not binding on the defendant and can be changed at any time. Under *Heurtebise v Reliable Business Computers*, ___ Mich ___; ___ NW2d ___ (Docket No. 102019, decided 7/16/96), it cannot be considered a binding contract between the parties and the arbitration clause is therefore not binding.

Even if this "Plan" could be considered a contract, the FAA would still not apply because this is contrary to the express terms of the FAA, 9 USC § 1, which precludes application of the act to employment contracts. *Gilmer v Interstate/Johnson Lane Corp*, 500 US 20; 111 S Ct 1647; 114 L Ed 2d 26 (1991) is consistent with this interpretation. In *Gilmer* the Court held that the agreement to

arbitrate was *not* part of an employment contract but rather it was a part of an agreement on licensing with the New York Stock Exchange which the plaintiff had signed. In *Heurtebise, supra,*, the Supreme Court noted:

> However, the FAA expressly excludes from coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 USC 1. Referencing this clause, *Gilmer* expressly did not decide what the result would be if the arbitration clause had been contained in an employment contract. Slip op, p 10.

Likewise, in *Willis v Dean Witter Reynolds, Inc*, 948 F2d 305 (6th Cir, 1991), the identical New York Stock Exchange licensing agreement was involved. The court in *Willis* expressly held that all employment contracts subject to regulation under Title VII and similar acts of Congress fall within the exclusion of "contract of employment" under the FAA. *Heurtebise, supra*, slip op, p 13.

Michigan has a policy of enforcing arbitration agreements; however, an arbitration provision in unenforceable if it is not a binding contract. *Heurtebise, supra.* In *Heurtebise*, the Supreme Court held that an arbitration provision in an employee handbook was not enforceable because the handbook did not bind the company. Like the handbook in *Heurtebise*, the 1993 Sales Compensation Plan here is not binding on the defendant because the opening paragraph specifically states "The Company reserves the eight to change or terminate this Plan, in total or in part, at any time and at the sole option of the Company." Thus, the arbitration provision is not enforceable.

Massachusetts' arbitration statute is in complete agreement with the Supreme Court's holding in *Heurtebise*. A provision to arbitrate in the future is not binding unless it exists in a binding contract. MA St. Chapter 251, § 1 states:

> A written agreement to submit any <u>existing</u> controversy to arbitration or <u>a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties</u> shall be valid. . . .

Here, there is no binding contract between the parties and the arbitration agreement is not binding.

Finally, Massachusetts law does not apply to plaintiff's gender discrimination claims under the Elliott-Larsen Civil Rights Act (ELCRA), MCL 37.2101, *et seq*.; MSA 3.548(101) *et seq.* Michigan law declares the right of all employees in this state to be free from discrimination in their workplace. This right to be free from discrimination is a recognized and declared civil right. MCL 37.2102(1); MSA 3.548(102). Plaintiff is a Michigan citizen and resident working in this state and has the right to avail herself of the laws of this state and to be free from discrimination.

Circuit court has exclusive jurisdiction over all ELCRA claims. MCL 37.2801; *Baxter v Gates Rubber Co*, 171 Mich App 588; 431 NW2d 81 (1988). There is no claim that Massachusetts has a state law similar to Michigan's ELCRA. Massachusetts has no interest in enforcing Michigan's

ELCRA. Justice Griffin wrote in *Betty v Brooks & Perkins*, 446 Mich 270, 282; 521 NW2d 518 (1994) that the ELCRA confers "nonnegotiable state rights" which cannot be bargained away and that such rights cannot be waived. *Heurtebise*, *supra*, slip op, p 9. Plaintiff's ELCRA claims can only be brought in Michigan in a circuit court of proper jurisdiction.

I would hold that under Michigan and Massachusetts law and the FAA the "1993 Sales Compensation Plan" is not a contract and the arbitration clause is not enforceable.

/s/ Carole F. Youngblood