No. 14-1502

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RHONDA NESBITT, individually, and
on behalf of all others similarly situated,
Plaintiff - Appellee,

v.

FCNH, INC.; VIRGINIA MASSAGE THERAPY, INC.; MID-ATLANTIC MASSAGE THERAPY, INC.; STEINER EDUCATION GROUP, INC.; STEINER LEISURE LTD.; SEG CORT LLC, d/b/a "Steiner Education Group,"
Defendants - Appellants.

On Appeal from the United States District Court for the District of Colorado,
Honorable R. Brooke Jackson, Judge, Case No. 1:14-CV-00990-RBJ

BRIEF FOR THE SECRETARY OF LABOR AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLEE

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GLOSSARY

"ADEA" means the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. 621–634.

"AAA" means the American Arbitration Association.

"AAA Commercial Rules" means the Commercial Arbitration Rules and Mediation Procedures of the American Arbitration Association.

"Agreement" means the arbitration agreement signed by Nesbitt as a condition of enrolling in an educational and training program in massage therapy and esthetics run by SEG.

"Appellant," "Defendant," "Defendant-Appellant," or **"SEG"** mean Defendants-Appellants FCNH, Inc., Virginia Massage Therapy, Inc., Steiner Education Group, Inc., Steiner Leisure Ltd., and SEG Cort LLC.

"Appellee," "Plaintiff," "Plaintiff-Appellee," or **"Nesbitt"** mean Plaintiff-Appellee Rhonda Nesbitt.

"EEOC" or **"Commission"** mean the United States Equal Employment Opportunity Commission.

"EPA" means the Equal Pay Act of 1963, 29 U.S.C. 206(d).

"FAA" means the Federal Arbitration Act, as amended, 9 U.S.C. 1–16.

"FLSA" means the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. 201–262.

"NLRA" means the National Labor Relations Act, as amended, 29 U.S.C. 151–169.

"NLRB" means the National Labor Relations Board.

"Secretary" means the Secretary of Labor.

"Title VII" means Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e–2000e-17.

STATEMENT OF THE ISSUE[1]

Whether the district court correctly concluded that an arbitration agreement that requires a claimant to pay her own attorneys' fees even if she prevails is an impermissible waiver of the claimant's substantive rights under the Fair Labor Standards Act.

INTEREST OF AMICI AND AUTHORITY TO FILE

The Secretary of Labor ("Secretary") administers the Fair Labor Standards Act ("FLSA"), see 29 U.S.C. 204, 211(a), 216(c), 217, and has an interest in preserving the ability of employees to enforce their FLSA rights when compelled to arbitrate and ensuring that employees do not lose those substantive FLSA rights in arbitration. See 29 U.S.C. 551 (Department of Labor's obligation to promote the welfare and interest of wage earners in the United States). This case, which concerns the enforceability of an arbitration agreement that the district court found prevented a prevailing claimant from recovering attorneys' fees even if she prevailed, is therefore of interest to the Secretary. Indeed, in prior cases, the Secretary has participated as amicus to argue that provisions of employment

[1] The district court based its decision on two distinct grounds: that the application of the American Arbitration Association Commercial Arbitration Rules and Mediation Procedures would impose prohibitive costs on the claimant, and that the arbitration agreement impermissibly precluded the claimant from recovering statutory attorneys' fees under the Fair Labor Standards Act if she were to prevail. The Secretary of Labor and the Equal Employment Opportunity Commission are participating as *amici curiae* with regard to the second of these two grounds, which constitutes an independent and sufficient ground for affirmance.

contracts constituted impermissible waivers of substantive FLSA rights. See, e.g., Boaz v. FedEx Customer Info. Servs., Inc., 725 F.3d 603 (6th Cir. 2013) (Secretary argued that FLSA statute of limitations could not be shortened by employment contract).

The U.S. Equal Employment Opportunity Commission ("EEOC" or "Commission") is the agency established by Congress to administer, interpret, and enforce the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. 621 et seq., the Equal Pay Act of 1963 ("EPA"), 29 U.S.C. 206(d), Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. 2000e et seq., and other federal anti-discrimination statutes, all of which contain fee-shifting provisions. The Commission has a compelling interest in ensuring that employees do not forfeit their statutory rights under the federal civil rights laws when participating in arbitration proceedings. The interpretation of the attorneys' fees provision in the FLSA is particularly important to the EEOC because the ADEA and the EPA incorporate the identical statutory language.

The Secretary and the EEOC have the authority to file pursuant to Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE CASE

A. Factual Background

1. During a three-year period, Plaintiff-Appellee Rhonda Nesbitt ("Nesbitt") attended a for-profit educational and training program in massage therapy and esthetics run by Defendants-Appellants FCNH, Inc., Virginia Massage Therapy, Inc., Mid-Atlantic Massage Therapy, Inc., Steiner Education Group, Inc., Steiner Leisure Ltd., and SEG Cort LLC (collectively "SEG"). Appellants' Appendix ("Applnt. App.") at 002–4 ¶¶ 5–15. SEG has approximately thirty-one campuses in fourteen states. Id. at 004 ¶ 15. Nesbitt alleges that she and other program participants were required to perform massage services for customers during weekend "clinics." Id. at 006–11 ¶¶ 25–42. Customers paid SEG for these services, but program participants like Nesbitt were not paid. Id. at 006–7 ¶¶ 25–30. According to Nesbitt, the students were required to perform four to five massages per clinic shift and received no instruction, training, or meaningful monitoring by SEG during this time. Id. at 116 ¶¶ 3–4. SEG markets the massages by the students to the general public and advertises its discounted cost compared to similar services provided by other companies. Id. at 008 ¶ 31.

As a condition of enrolling in the SEG program, Nesbitt and other program participants were required to sign an enrollment agreement, which, in turn,

contained an arbitration agreement ("Agreement"). The Agreement states, in relevant part:

> You, the student, and Steiner Education Group ("SEG") agree that any dispute or claim between you and SEG (or any company affiliated with SEG or any of its or SEG's officers, directors, employees or agents) arising out of or relating to (1) this Enrollment Agreement, or the Student's recruitment, enrollment or attendance at SEG, (2) the education provided by SEG, (3) SEG's billing, financial aid, financing options, disbursement of funds or career service assistance, (4) the enforceability, existence, scope or validity of this Arbitration Agreement, or (5) any claim relating in any manner, to any act or omission regarding Student's relationship with SEG or SEG's employees, whether such dispute arises before, during or after Student's attendance at SEG, and whether the dispute is based on contract, statute, tort, or otherwise, shall be resolved through binding arbitration pursuant to this Section (the "Arbitration Agreement"). Arbitration shall be conducted in accordance with the Commercial Rules of the American Arbitration Association applying federal law to the fullest extent possible, and the substantive and procedural provisions of the Federal Arbitration Act (9 U.S.C. §§ 1–16) shall govern this Arbitration Agreement and any and all issues relating to the enforcement of the Arbitration Agreement and the arbitrability of claims between the parties. Judgment upon the award rendered by the Arbitrator may be entered in any court having competent jurisdiction. There shall be no right or authority for any claims within the scope of this Arbitration Agreement to be arbitrated or litigated on a class basis, or for the claims of more than one Student to be arbitrated or litigated jointly or consolidated with any other Student's claims. Each party shall bear the expense of its own counsel, experts, witnesses, and preparation and presentation of proofs.

Applnt. App. at 025 (emphasis added). The Agreement includes an opt-out provision providing that a student may reject the Agreement by sending a signed rejection notice to SEG at an address listed within thirty days after signing the

enrollment agreement. See id. Neither the Agreement nor the enrollment agreement that contains the Agreement contains a severability clause. See id.

2. As noted above, the Agreement requires parties to pursue arbitration under the American Arbitration Association ("AAA") Commercial Rules ("AAA Commercial Rules"). Under the AAA Commercial Rules, the party initiating the arbitration must advance an initial filing fee, and the parties must pay a final fee if the case goes to a hearing. See AAA Commercial Arbitration Rules and Mediation Procedures (Rules Amended and Effective Oct. 1, 2013, Fee Schedule Amended and Effective Nov. 1, 2014) ("AAA Commercial Rules") at 38, available at https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004103&revision=latestreleased (Appellee's Br. at 68).[2] The amount of fees depends on the amount of the claim, with higher fees required where the dollar amount of the claim is greater. See id. at 39 (Appellee's Br. at 69). Under the fee schedule in effect at the time of the district court litigation, the lowest fees – those in proceedings involving claims from $0 to $10,000 – consisted of an initial filing fee of $775 and a final fee of $200, for a total of $975. See AAA Commercial Arbitration Rules and Mediation Procedures (Rules Amended and Effective Oct. 1, 2013, Fee Schedule Amended and Effective June 1, 2010) ("AAA Commercial Rules with 2010 Fee Schedule"), available at

[2] Nesbitt has attached the relevant provisions of the AAA Commercial Rules as an addendum to her brief.

https://www.adr.org/aaa/faces/rules/searchrules/rulesdetail?doc=ADRSTAGE2025278 (click on link "Standard Fee Schedule"). Subsequent to the district court's decision, the AAA revised its fees, and the lowest fees – for claims from $0 to $75,000 – include an initial filing fee of $750 and a final fee of $800, for a total of $1,550. See AAA Commercial Rules at 39 (Appellee's Br. at 69). If the amount of the monetary claim at issue is unknown, parties are required to state a range of claims or be subject to higher fees – $10,200 under the fee schedule in effect at the time of the district court's decision and a total of $14,700 under the current fee schedule. See id.; AAA Commercial Rules with 2010 Fee Schedule (click on link "Standard Fee Schedule"). The parties must also pay other expenses, such as room rental and the arbitrator's travel costs, as well as the arbitrator's compensation. See AAA Commercial Rules at 28–29 (R-53–R-55), 43 (Appellee's Br. at 66–67, 70). All fees and expenses, as well as the arbitrator's compensation, are subject to apportionment between the parties at the arbitrator's discretion at the conclusion of the proceeding. See id. at 27 (R-47(c)) (Appellee's Br. at 65).

3. Nesbitt is currently employed as a massage therapist and earns a monthly average income of $2,200. Applnt. App. at 118 ¶ 14. Her monthly living expenses total $2,035.85, leaving her with $164.15 remaining per month after expenses. See id. ¶¶ 15, 17. She uses this remainder to pay for outstanding medical bills, on which she owes $700, as well as for business licensing and insurance fees that total

$541 annually. See id. ¶¶ 16–17. Nesbitt also has a grown son whom she tries to help with expenses; her son is homeless and has an eleven-year-old daughter. See id. ¶ 17.

B. Procedural History and the District Court's Decision

1. Nesbitt filed a collective and class action Complaint against SEG on April 7, 2014. See Applnt. App. at 001–45. She alleged claims under the FLSA and under the state laws of those states in which SEG operates. Id. at 015–16, 018–23 ¶¶ 53–57, 64–77. Nesbitt's Complaint seeks an unspecified amount of unpaid minimum wages, overtime wages, and liquidated damages. Id. at 023. Her Complaint also alleged that certain provisions of the arbitration agreement were invalid under the FLSA and the National Labor Relations Act ("NLRA"). Id. at 016–17 ¶¶ 58–63.

On May 27, 2014, SEG answered the Complaint and filed a motion to compel arbitration and to stay district court proceedings. See Applnt. App. at 046–84. On July 8, 2014, Nesbitt filed her opposition to SEG's motion. See id. at 085–132. Nesbitt argued that to the extent that the Agreement encompassed her claims, it was unenforceable. She argued that the Agreement was procedurally unconscionable because of the parties' unequal bargaining power, her lack of opportunity to read and become familiar with the Agreement prior to signing, and the positioning of the Agreement in fine print at the end of a lengthy enrollment

agreement; Nesbitt further argued that it was substantively unenforceable because it imposed significant costs on her that she would not have to bear if she pursued her claims in litigation, most notably administrative fees, the arbitrator's compensation, and her own attorneys' fees even if she prevailed, contrary to the FLSA's mandate that a prevailing plaintiff shall recover her reasonable attorneys' fees. See id. at 092–106. Because the Agreement lacked a severability clause, Nesbitt argued, it could not be enforced if these provisions were unenforceable. See id. at 102–04.[3]

Responding to Nesbitt's arguments in its reply brief, SEG contended that the Agreement was not procedurally unconscionable because it contained an opt-out provision, and that it was not substantively unconscionable because it did not actually require the parties to split the arbitrator's compensation or administrative fees and because Nesbitt did not prove that the costs of arbitration would be prohibitive, particularly in light of the AAA Commercial Rules' hardship provision. See Applnt. App. at 134–37; see also AAA Commercial Rules at 28 (R-53) (Appellee's Br. at 66) (providing that "[t]he AAA may, in the event of extreme

[3] Nesbitt also argued that the Agreement interfered with her rights to file a charge before the National Labor Relations Board ("NLRB") and to engage in protected concerted activity via a class or collective action under the NLRA and FLSA. See Applnt. App. at 106–12. Nesbitt later withdrew the latter argument regarding interference with concerted activity. See Pl.'s Notice of Supp. Auths., July 23, 2014 (ECF No. 20). The district court did not reach the former argument regarding interference with Nesbitt's right to file a charge before the NLRB since it denied arbitration on other grounds. See Applnt. App. at 151.

hardship on the part of any party, defer or reduce the administrative fees"). SEG does not appear to have contested Nesbitt's argument that the Agreement would prohibit Nesbitt from recovering attorneys' fees if she prevailed.

2. On November 19, 2014, the district court denied SEG's motion to compel arbitration. Applnt. App. at 140–51. The district court agreed with SEG that the Agreement was not procedurally unconscionable, but agreed with Nesbitt that it was unenforceable. The district court concluded that two specific features of the Agreement and the AAA Commercial Rules prevented Nesbitt from effectively vindicating her statutory rights under the FLSA: the requirement that the parties pay the administrative costs and fees for arbitration and the requirement to bear the costs of her own counsel even if she were to prevail. See id. at 146–51. As to the first requirement, the district court noted that if Nesbitt were to proceed under the AAA Commercial Rules, according to her estimates, she would incur between $2,320.50 and $12,487.50 for the arbitrator's time and filing fees, in addition to expenses for discovery, witnesses, and room rental, and that she could not afford these costs. See id. at 148–49. As to the second requirement, the district court agreed with Nesbitt that the Agreement's mandate that each party bear its own attorneys' fees amounted to a prospective waiver of Nesbitt's statutory right to attorneys' fees under the FLSA, and that eliminating this right could significantly chill individuals and attorneys from bringing FLSA claims. See id. at 149–50.

The court held that these provisions were unenforceable, and that because the Agreement lacked a severability clause the entire Agreement was unenforceable. See id. at 150–51. This appeal followed.

SUMMARY OF THE ARGUMENT

This case involves the threshold issue of whether an individual pursuing claims under the FLSA can be compelled to arbitrate those claims where the agreement to arbitrate prohibits the recovery of attorneys' fees. The FLSA provides that in a successful action"[t]he court . . . shall . . . allow a reasonable attorney's fee to be paid by the defendant[.]" 29 U.S.C. 216(b). The district court correctly concluded that an arbitration agreement may not waive this statutory right to attorneys' fees because it is a substantive right, and such rights may not be waived in arbitration.

The district court's conclusion is consistent with case law that uniformly holds that the right to attorneys' fees under the FLSA and other fee-shifting statutes such as Title VII of the Civil Rights Act of 1964 ("Title VII") and the Age Discrimination in Employment Act of 1967 ("ADEA") cannot be waived in arbitration. It also is in harmony with the specific prohibition against waiving or abridging FLSA rights by contract. Finally, the district court's conclusion comports with the purpose of statutory attorneys' fees under the FLSA, which is to

ensure that individuals can pursue their claims with competent legal representation, especially when the monetary value of such claims may not be very high.

Because SEG's arbitration agreement as interpreted by the district court impermissibly waived Nesbitt's substantive right to attorneys' fees under the FLSA, the district court's conclusion should be affirmed. To the extent that SEG has raised arguments that the arbitration agreement at issue actually permits the recovery of attorneys' fees, these arguments do not appear to have been presented before the district court and therefore may have been waived or forfeited.

ARGUMENT

THE DISTRICT COURT'S DECISION SHOULD BE AFFIRMED BECAUSE THE RIGHT OF A PREVAILING FLSA PLAINTIFF TO ATTORNEYS' FEES IS A SUBSTANTIVE RIGHT THAT CANNOT BE WAIVED IN ARBITRATION

A. Case Law Uniformly Holds that the Right to Attorneys' Fees Under the FLSA and Other Fee-Shifting Statutes Cannot Be Waived in Arbitration.

1. While the Federal Arbitration Act ("FAA") establishes "a liberal federal policy favoring arbitration agreements," Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983), "'[b]y 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.'" Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991) (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)) (alteration in

original); see Sanchez v. Nitro-Lift Techs., L.L.C., 762 F.3d 1139, 1148 (10th Cir. 2014) ("[A]greements which require the arbitration of statutory claims are only enforceable under the FAA so 'long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum[.]'") (second alteration in original) (quoting Gilmer, 500 U.S. at 28); Shankle v. B-G Maint. Mgmt., Inc., 163 F.3d 1230, 1234 (10th Cir. 1999) (concluding that the "supposition" that arbitration is an adequate forum in which to resolve statutory claims "falls apart . . . if the terms of an arbitration agreement actually prevent an individual from effectively vindicating his or her statutory rights").

2. The FLSA mandates that covered employees must be paid at least a minimum wage for all hours worked, and that employees covered by the FLSA's overtime provisions must receive not less than one-and-a-half times their hourly pay for all hours worked in excess of forty during a workweek. See 29 U.S.C. 206(a), 207(a)(1). It provides for a private right of action "by any one or more employees for and in behalf of himself or themselves and other employees similarly situated[,]" and further provides that if such an action is successful "[t]he court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." 29 U.S.C. 216(b) (emphasis added). Thus, the FLSA provides for a mandatory award of attorneys' fees to a prevailing plaintiff.

Attorneys' fees under the FLSA are "substantive rights" that cannot be waived in arbitration. See, e.g., Adkins v. Labor Ready, Inc., 303 F.3d 496, 502 n. 1 (4th Cir. 2002) ("It is undisputed that plaintiffs prevailing under the FLSA are awarded both attorney's fees and the cost of the action, even in arbitration.") (citing Gilmer, 500 U.S. at 27–28) (internal citation omitted); Southerland v. Corporate Transit of Am., No. 13-14462, 2014 WL 4906891, at *9 (E.D. Mich. Sept. 30, 2014) (unpublished) (concluding that provision of arbitration agreement that prohibited award of attorneys' fees to a prevailing plaintiff was unenforceable as to FLSA claims); Shaver v. New England Life Ins. Co., No. 11-1247-JWL, 2011 WL 5827785, at *4 (D. Kan. Nov. 18, 2011) (unpublished) ("[T]he FLSA automatically entitles prevailing plaintiffs to attorneys' fees and litigation costs and these substantive rights apply in arbitration as well."); Delano v. Mastec, Inc., No. 8:10-CV-320-T-27MAP, 2010 WL 4809081, at *5 (M.D. Fla. Nov. 18, 2010) (unpublished) (same); see also Quilloin v. Tenet HealthSys. Philadelphia, Inc., 673 F.3d 221, 230–31 (3d Cir. 2012) (noting, in FLSA case, that "[p]rovisions [in arbitration agreements] requiring parties to be responsible for their own expenses, including attorneys' fees, are generally unconscionable because restrictions on attorneys' fees conflict with federal statutes providing fee-shifting as a remedy") (citing Spinetti v. Serv. Corp. Int'l, 324 F.3d 212, 216 (3d Cir. 2003)).

3. Courts have similarly concluded in the context of other federal fee-shifting statutes that attorneys' fees are substantive rights that cannot be waived in arbitration. See generally Prudential Ins. Co. of Am. v. Carlson, 126 F.2d 607, 611 (10th Cir. 1942) ("Statutes providing for attorneys' fees impose a liability which one may enforce as a matter of right. Such fees are put in controversy in the suit and are a part of the substantive right."). Significantly, courts have reached this conclusion in the context of the ADEA, which explicitly incorporates the FLSA's mandatory fee-shifting provision. See 29 U.S.C. 626(b) (citing 29 U.S.C. 216). For example, the Third Circuit held that a provision requiring each party to pay its own attorneys' fees in arbitration regardless of the outcome was unenforceable as to ADEA and Title VII claims. See Spinetti, 324 F.3d at 216. And the Second Circuit noted that an arbitration panel's refusal to award attorneys' fees to a prevailing ADEA claimant was "[c]ontrary to statutory requirements" and that the panel was, in fact, "obliged" to award such fees. Porzig v. Dresdner, Kleinwort, Benson, N. Am., LLC, 497 F.3d 133, 136 & n. 1, 142 (2d Cir. 2007). These cases regarding the right to attorneys' fees under the ADEA constitute particularly "compelling" and "persuasive" authority as to the nature of the same right under FLSA given the ADEA's incorporation of the language and remedial scheme of 29 U.S.C. 216. Lanza v. Sugarland Run Homeowners Ass'n, 97 F. Supp. 2d 737, 741 (E.D. Va. 2000).

Courts interpreting federal fee-shifting statutes other than the FLSA and ADEA have reached similar conclusions. The Sixth Circuit has noted that "[i]f arbitration is to offer claimants the full scope of remedies available under Title VII, arbitrators in Title VII cases, just like courts . . . must ordinarily grant attorney fees to prevailing claimants." Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 673 n. 15 (6th Cir. 2003).[4] The Seventh Circuit has likewise found that an arbitration agreement that did not provide for award of attorneys' fees to a successful Title VII claimant was unenforceable. See McCaskill v. SCI Mgmt. Corp., 298 F.3d 677, 680 (7th Cir. 2002) (concluding that the party seeking to enforce the provision had conceded that it was unenforceable); id. at 684–85 (Rovner, J., concurring in the judgment) (concluding that the provision was unenforceable because it would "prevent[] [the plaintiff] from effectively vindicating her rights in the arbitral forum by . . . denying her remedies authorized by Title VII"). The Ninth Circuit, in a case under the Petroleum Marketing Practices Act, reversed a district court's decision to compel arbitration on the ground that a provision in the arbitration agreement deprived the plaintiff of statutory rights, including the right to attorneys' fees. See Graham Oil Co. v.

[4] Like the FLSA and ADEA, Title VII provides for the recovery of attorneys' fees by a prevailing plaintiff. See 42 U.S.C. 2000e-5(k).

ARCO Prods. Co., 43 F.3d 1244, 1247–48 (9th Cir. 1994).[5] Numerous district courts have reached similar conclusions. See, e.g., Whitman v. Legal Helpers Debt Resolution, LLC, No. 4:12-cv-00144-RBH, 2012 WL 6210591, at *3 (D.S.C. Dec. 13, 2012) (unpublished) ("Courts that have examined arbitration clauses that limit a plaintiff's statutory right to damages or attorney's fees generally find those clauses unenforceable.") (citing cases); Koridze v. Fannie Mae Corp., 593 F. Supp. 2d 863, 872 (E.D. Va. 2009) (noting, in Title VII case, that "[i]nsofar as [a] plaintiff has the right, should she prevail in litigation, to recover attorneys' fees and costs, she does not forfeit this right by pursuing arbitration"); DeGaetano v. Smith Barney, Inc., 983 F. Supp. 459, 469 (S.D.N.Y. 1997) (concluding that "an arbitration agreement purporting to waive a Title VII plaintiff's right to attorney's fees contravenes public policy" and is therefore unenforceable).

[5] It also is worth noting that the Eleventh Circuit denied a defendant's motion to compel arbitration because the arbitration agreement required the plaintiff to waive her statutory right under Title VII to recover fees and costs if she prevailed. See Perez v. Globe Airport Sec. Servs., Inc., 253 F.3d 1280, 1285–87 (11th Cir. 2001), vacated after stipulation of dismissal, 294 F.3d 1275 (11th Cir. 2002). The Eleventh Circuit vacated this opinion because the parties stipulated to dismissal of the case with prejudice before the court's mandate had issued. See Perez, 294 F.3d at 1276 (citing Flagship Marine Servs., Inc. v. Belcher Towing Co., 23 F.3d 341, 342 (11th Cir. 1994)).

B. The Non-Waivability of the Statutory Right to Attorneys' Fees Under the FLSA is Consistent with the Broad Prohibition Against the Waiver of FLSA Rights by Contract.

This principle that the substantive right to attorneys' fees may not be waived applies with particular force to the FLSA. The FLSA's purposes are "broad" and "remedial." Dole v. Snell, 875 F.2d 802, 804 (10th Cir. 1989). Accordingly, it is settled law that "FLSA rights cannot be abridged by contract or otherwise waived because this would nullify the purposes of the statute and thwart the legislative policies it was designed to effectuate." Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 740 (1981) (internal quotation marks and citations omitted); Wirtz v. Bledsoe, 365 F.2d 277, 278 (10th Cir. 1966) (the purposes of the FLSA may not be frustrated by contract). The Supreme Court, analyzing the legislative policies underlying the FLSA, has concluded:

> The legislative history of the Fair Labor Standards Act shows an intent on the part of Congress to protect certain groups of the population from substandard wages and excessive hours which endangered the national health and well-being and the free flow of goods in interstate commerce. The statute was a recognition of the fact that due to the unequal bargaining power as between employer and employee, certain segments of the population required federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency and as a result the free movement of goods in interstate commerce. To accomplish this purpose standards of minimum wages and maximum hours were provided. . . . No one can doubt but that to allow waiver of statutory wages by agreement would nullify the purposes of the Act. We are of the opinion that the same policy considerations which forbid waiver of basic minimum and overtime wages under the Act also prohibit waiver of the employee's right to liquidated damages.

Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 706–07 (1945) (internal citations omitted and emphases added).

As noted in Brooklyn Savings Bank, a central reason for not allowing the waiver of substantive rights by agreement is because "employers might be able to use superior bargaining power to coerce employees . . . to waive their protections under the Act." Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 302 (1985). Moreover, the prohibition against the waiver of substantive FLSA rights protects employers as well as employees against unfair methods of competition in the national economy. See id. (noting that allowing waiver of the FLSA's protections "would affect many more people than those workers directly at issue in this case and would be likely to exert a general downward pressure on wages in competing businesses"); Brooklyn Sav. Bank, 324 U.S at 710 ("An employer is not to be allowed to gain a competitive advantage by reason of the fact that his employees are more willing to waive claims . . . than are those of his competitor.").

C. Attorneys' Fees Are Critical to the Enforcement of the FLSA.

The right to statutory attorneys' fees by a prevailing plaintiff is part and parcel of the FLSA's enforcement scheme. The FLSA, like many civil rights statutes, relies on a "private attorneys general" mechanism to enforce its policies and objectives. See, e.g., Laffey v. Nw. Airlines, 746 F.2d 4, 11 (D.C. Cir. 1984)

("[The] Fair Labor Standards Act of 1938 and Title VII of the Civil Rights Act of 1964 authorize district courts to award a reasonable attorneys fee to prevailing civil rights litigants. The purpose of such provisions is to encourage private litigants to act as 'private attorneys general' on behalf of enforcement of the civil rights laws."); Trinidad v. Pret a Manger (USA) Ltd., No. 12 CIV. 6094 PAE, 2014 WL 4670870, at *12 (S.D.N.Y. Sept. 19, 2014) (unpublished) ("The FLSA and [the New York Labor Law] are remedial statutes designed to protect employees from unfair labor practices. Plaintiffs' counsel's role as private attorneys general is key to the effective enforcement of these statutes."); Applnt. App. at 150 (citing Daugherty v. Encana Oil & Gas (USA), Inc., No. 10-cv-02272-WJM-KLM, 2011 WL 2791338, at *11 (D. Colo. July 15, 2011) (unpublished); Gourley v. Yellow Transp., LLC, 178 F. Supp. 2d 1196, 1204 (D. Colo. 2001)); see also United Slate, Tile & Composition Roofers, Damp & Waterproof Workers Ass'n, Local 307 v. G & M Roofing & Sheet Metal Co., 732 F.2d 495, 503 (6th Cir. 1984) ("[Section] 216(b) represents a congressional attempt to support the policies of the F.L.S.A. through the intervention of private parties."). Private attorneys represent the overwhelming majority of FLSA plaintiffs; of the 8,204 FLSA lawsuits commenced in the federal courts during the twelve-month period ending June 30, 2014, the Department filed only 191. See Admin. Ofc. of the U.S. Courts, Statistical Tables for the Federal Judiciary, Table C-2 (2014), at 3, available at

http://www.uscourts.gov/uscourts/Statistics/StatisticalTablesForTheFederalJudiciary/2014/june/C02Jun14.pdf. Moreover, many FLSA cases concern low-wage workers, meaning that the amount in controversy for each individual claim is typically not high and plaintiffs often lack the resources to pay attorneys' fees at their full rate.

The mandatory attorneys' fee provision of the FLSA thus functions as an important incentive for private attorneys to take FLSA cases. See Laffey, 746 F.2d at 11 (noting that the goal of such provisions is "to ensure that plaintiffs [are] able to obtain competent legal representation for the prosecution of legitimate claims"). This supports the conclusion that the attorneys' fee provision of the FLSA is not only a substantive right that cannot be waived, but is essential to the ability of aggrieved individuals to pursue their claims under the statute because it provides attorneys with sufficient incentive to represent claimants in FLSA proceedings. The importance of this principle is especially prominent as more employers seek to have disputes with their employees resolved through mandatory arbitration. See Alexander J. S. Colvin, An Empirical Study of Employment Arbitration: Case Outcomes and Processes, 8 J. Empirical Leg. Stud. 1, 2 (2011) (noting that "recent estimates suggest that for perhaps a third or more of nonunion employees, arbitration, and not litigation, is the primary mechanism of access to justice in the employment law realm").

For all of the above reasons, the district court was correct in concluding that parties may not agree to waive a plaintiff's substantive right to FLSA attorneys' fees in arbitration. Its ruling was consistent with case law as well as with the purposes of the FLSA and attorneys' fee provisions generally.

D. The District Court Correctly Concluded that a Provision that Precludes Nesbitt from Recovering Attorneys' Fees if She Prevails in Arbitration Is Unenforceable.

Guided by the above principles, the district court properly concluded that the Agreement was unenforceable to the extent that the provision mandating that "[e]ach party shall bear the expense of its own counsel, experts, witnesses, and preparation and presentation of proofs" results in the Agreement's prohibiting the arbitrator from awarding attorneys' fees to Nesbitt if she prevails. Applnt. App. at 147, 149. Such a prohibition would directly conflict with the FLSA's mandatory award of attorneys' fees to a prevailing plaintiff. Thus, the Agreement as interpreted by the district court is unenforceable because it reflects an impermissible waiver of Nesbitt's substantive right to such fees.

The Secretary and the EEOC recognize that SEG now contends that the Agreement and AAA Commercial Rules actually permit an arbitrator to award attorneys' fees to a prevailing claimant. See Appellants' Br. at 30–38 (citing, inter alia, a provision of the Agreement stating that arbitration will "apply[] federal law to the fullest extent possible," and AAA Commercial Rules at 27 (R-47(d)(ii))

(Appellee's Br. at 65), which states that an arbitrator's award "may include . . . an award of attorneys' fees if all parties have requested an award or it is authorized by law or their arbitration agreement"). While the Secretary and the EEOC take no position on the merits of SEG's new argument, they note that, based on the Department of Labor and the EEOC's review of the record designated for appeal, it appears that SEG did not raise this argument below and, for that reason, this argument may have been either waived or forfeited.[6] See Richison v. Ernest Grp., Inc., 634 F.3d 1123, 1127–28, 1130 (10th Cir. 2011) (noting that "[i]f [a] theory was intentionally relinquished or abandoned in the district court, [this Court] usually deem[s] it waived and refuse[s] to consider it[,]" while arguments that were not raised below as a result of "neglect" are deemed forfeited and subject to "plain error" review, which "[i]n civil cases . . . often proves to be an 'extraordinary, nearly insurmountable burden'" such that reversal will only occur where "the failure to intervene would result in a miscarriage of justice") (quoting Emp'rs Reins. Corp. v. Mid–Continent Cas. Co., 358 F.3d 757, 770 (10th Cir. 2004)); see

[6] SEG's reply brief before the district court appears to have assumed that Nesbitt would be unable to recover her attorneys' fees in arbitration because its response to Nesbitt's argument on this issue offered only rejoinders as to why such inability should not matter. See Applnt. App. at 137 n. 6 (characterizing Nesbitt's argument that the Agreement was unconscionable due to the attorneys' fee provision as "putting the cart before the horse, as there has been no determination that the FLSA . . . should apply in the present context" and asserting that "in any event, by failing to opt-out, Plaintiff agreed to the applicability of the AAA Rules"). Thus, SEG did not appear to dispute before the district court that the Agreement prohibits the recovery of attorneys' fees by a prevailing FLSA plaintiff.

also Emp'rs Reins. Corp., 358 F.3d at 770 (declining to reverse based on appellant's having inadvertently misquoted language of an insurance policy to district court and later bringing the correct language to the attention of the court of appeals).[7] Thus, to the extent that SEG's new argument either may not be considered due to forfeiture or waiver or fails because the district court correctly interpreted the Agreement, the district court's decision denying SEG's motion to compel arbitration should be affirmed on the ground that the FLSA's substantive rights cannot be waived.[8]

[7] Similarly, SEG appears to have offered – for the first time on appeal – "to pay all of the arbitrator's fees and expenses necessary for a full and fair resolution of Plaintiff's statutory claims" if arbitration is compelled. Appellants' Br. at 30. This argument also may have been waived or forfeited because it does not appear to have been presented below.

[8] As noted above, the district court held that the entire Agreement was unenforceable because it concluded that the unenforceable provisions were not severable from the rest of the Agreement. See Applnt. App. at 150–51. SEG does not appear to have contested the severability issue before the district court, nor has it explicitly advanced a severability argument in its opening brief. See generally Appellants' Br. at 21–38.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the district court.

Dated: April 22, 2015

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

Pursuant to Federal Rule of Appellate Procedure 32(a) and Tenth Circuit Rule 32, the undersigned certifies that this brief complies with the applicable type-volume limitation, typeface requirements, and type-style requirements.

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because the brief contains 5,998 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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I hereby certify that a virus check, using McAfee VirusScan Enterprise and AntiSpyware Enterprise 8.8, was performed on the PDF version of this brief and no viruses were found.

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify as follows:

1) All required privacy redactions have been made per 10th Cir. R. 25.5, and

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CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2015, a true and correct copy of the foregoing Brief for the Secretary of Labor and the Equal Employment Opportunity Commission as Amici Curiae in Support of Plaintiff-Appellee was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system, and that service on counsel of record will be accomplished by this system.

I further certify that I have served via electronic mail any counsel in this case not registered to receive service through CM/ECF, pursuant to counsel's written consent.

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