

AMERICAN ARBITRATION ASSOCIATION
Employment and Class Action Arbitration Tribunal

In the Matter of the Arbitration between:

Re: 11 160 00655 08

Laryssa Jock, Christy MeierDiercks, Kelly Contreras, Maria House, Denise Maddox, Lisa McConnell, Gloria Pagan, Judy Reed, Linda Rhodes, Nina Shahmirzadi, Leighla Murphy, Dawn Souto-Coons, and Maria Wolf, individually and on behalf of all others similarly situated and Sterling Jewelers, Inc.	Claimants Respondent
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CLAUSE CONSTRUCTION AWARD OF ARBITRATOR

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreement entered into between the above-named parties, and having been duly sworn, and having duly heard the proofs and allegations of the Parties, do hereby, AWARD, as follows:

Claimants are current and former employees of Sterling Jewelers Inc. ("Sterling") alleging a company-wide pattern of practice of gender discrimination in pay and promotion decisions that violate Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Sec. 2000(e) et seq., and the Equal Pay Act, 29 U.S.C. Sec. 206. Pursuant to Rule 3 of the Supplementary Rules for Class Arbitration, Claimants seek a clause construction award finding that the Claimants' Class Complaint should be accepted and that they should be permitted, pursuant to Rules 4 and 5 of the Supplementary Rules, to apply for certification of their claims as they would under Title VII and the Equal Pay

Act in a civil action. Sterling seeks a clause construction award that class claims are prohibited by the applicable arbitration agreements.

In 1998, Sterling introduced an employment dispute resolution program known as "RESOLVE." Since the introduction of the RESOLVE Program, new employees have been required to sign the Resolve Program Alternative Dispute Resolution Arbitration Agreement as a condition of their employment. This Agreement is the subject of the clause construction determination requested by the parties. Persons employed by Sterling at the time the program was implemented were not required to sign the Agreement, but were nonetheless bound by its terms as a condition of their continued employment. Each version of the Agreement requires Sterling employees to consent to its terms as a condition of hire or continued employment.

RESOLVE is a three-step program. The first step requires the employee to complete a written complaint, along with references to supporting evidence the employee may possess. Thereafter, Sterling makes a determination on the merits of the complaint. If the employee is dissatisfied with Sterling's determination, he or she may proceed to the second step in which the claim is referred to mediation or a panel of employees. Sterling is responsible for choosing whether the claim goes to mediation or the panel, and if mediation is chosen, Sterling alone selects the mediator. In the event the complaint is not resolved at this stage, the employee may proceed to the third step by requesting arbitration, which the RESOLVE Arbitration Agreement provides be conducted "in accordance with the National Rules for the Resolution of Employment Disputes of the American Arbitration Association ("AAA") as amended by the Sterling RESOLVE Program." "In the event of a conflict between the RESOLVE Program Arbitration Rules

and the AAA Employment Dispute Resolution Rules, RESOLVE Program Arbitration Rules will control.”

Each of the RESOLVE Program Arbitration Agreements provides that the claims asserted by the employee are governed by the law of the jurisdiction in which they arose; that “[e]ach eligible arbitrator must be licensed to practice law in the applicable state of dispute”; and that arbitrations must be conducted at a location “near where [the] Employee worked for Sterling,” absent undue hardship as determined by the arbitrator.

All versions of the Agreement contain language that is identical or substantially similar to the following:

I hereby agree to utilize the Sterling RESOLVE Program to pursue any dispute, claim, or controversy (“claim”) against Sterling * * * regarding any alleged unlawful act regarding my employment or termination of my employment which could have otherwise been brought before an appropriate government or administrative agency or in a appropriate court, including, but not limited to, claims under * * * Title VII of the Civil Rights Act of 1964; The Civil Rights Act of 1991; * * * the Fair Labor Standard[s] Act; * * *. I understand that by signing this Agreement I am waiving my right to obtain legal or equitable relief (e.g. monetary, injunctive or reinstatement) through any government agency or court, and I am also waiving my right to commence any court action. I may, however, seek and be awarded equal remedy through the RESOLVE Program.

* * * The Arbitrator shall have the power to award any types of legal or equitable relief that would be available in a court of competent jurisdiction including, but not limited to, the costs of arbitration, attorney fees and punitive damages for causes of action when such damages are available under law.

Although the RESOLVE Program Arbitration Agreement has apparently been modified in some respects since the inception of the program, no version of the Agreement expressly prohibits the pursuit of class claims; indeed, there is no mention of class claims in any version of the Agreement.

All versions of the RESOLVE Arbitration Agreements provide that the “agreement shall be governed by and interpreted in accordance with the laws of Ohio.”

The question of whether an arbitration agreement prohibits the pursuit of class claims, or “what kind of arbitration proceeding the parties agreed to,” is one of contract interpretation to be determined by the arbitrator. *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003); *Stolt-Nielsen SA v. Animal Feeds Int'l Corp.*, 548 F.3d 85 (2d Cir. 2008).

Although numerous courts and arbitrators have struggled with the question of whether class claims are permitted or prohibited by an agreement that does not expressly address the issue, the question has apparently not been addressed in any reported decision by an Ohio court.

Under Ohio law, contracts are to be interpreted so as to carry out the intent of the parties, as that intent is evidenced by the contractual language. *Skivolocki v. East Ohio Gas Co.*, 38 Ohio St. 2d 244, 247 (1974). “The law will not insert by construction for the benefit of one of the parties an exception or condition which the parties either by design or neglect have omitted from their own contract.” *Montgomery v. Bd. of Educ. of Liberty Township, Union Cty.*, 102 Ohio St. 189, 193 (1921).

Applying these principles, I find that the RESOLVE Arbitration Agreements do not prohibit class claims.

Sterling argues that RESOLVE’s unique contractual provisions for local venues, the application of local laws, and the selection of locally-licensed arbitrators establish that the parties never intended class arbitration of employee claims. Sterling further argues that ignoring the terms of RESOLVE that are inconsistent with class arbitration would “rewrite” the parties’ Agreement.

I note at the outset that the very concept of intent is problematic in the context of a contract of adhesion. Because this contract was drafted by Sterling and was not the product of negotiation, it was incumbent on Sterling to ensure that all material terms, especially those adverse to the employee, were clearly expressed. Notably, Sterling acknowledges in its reply brief that it has deliberately not revised the RESOLVE Arbitration Agreement to include an express prohibition, despite numerous arbitral decisions that class claims are permitted in the absence of an express prohibition. Under these circumstances, construing the Agreement to contain a waiver of a significant procedural right would impermissibly insert a term for the benefit of one of the parties that it has chosen to omit from its own contract. *Montgomery*, 102 Ohio St. at 193; *cf. Mastrobouno v. Shearson Lehman Hutton, Inc.*, 514 US 53, 64 (1995).

I further find that agreeing to a step process for individual claims does not manifest an intent to waive the right to participate in a collective action, where, as here, the Agreement expressly gives the Arbitrator the “power to award any types of legal or equitable relief that would be available in a court of competent jurisdiction.”¹

CONCLUSION

The RESOLVE Arbitration Agreements cannot be construed to prohibit class arbitration.

¹ Arbitrators faced with agreements containing similar provisions have found them insufficient to reflect any mutual intent to preclude arbitration of class claims. *See* cases cited at pages 5-6 of Claimant’s Clause Construction Response Brief.

Pursuant to Rule 3 of the Supplementary Rules for Class Arbitration, the Arbitrator retains jurisdiction, but these proceedings shall be stayed for 30 days to permit any Party the opportunity to move a court of competent jurisdiction to confirm or to vacate this Clause Construction Award. If all Parties inform the AAA in writing during the period of this stay that they do not intend to seek judicial review of this Clause Construction Award, or once the requisite time period expires without any party having informed the AAA that they have done so, this matter shall proceed, and the Parties are directed to promptly schedule a telephone conference with the Arbitrator. If any Party informs the AAA within the time period provided that it has sought judicial review, further proceedings may be stayed until the AAA is informed of the ruling of the Court.

SO ORDERED.

6/1/09
Date

Kathleen A. Roberts
Kathleen A. Roberts

I, Kathleen A. Roberts, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Clause Construction Award of Arbitrator.

6/1/09
Date

Kathleen A. Roberts
Kathleen A. Roberts