Westlaw. For a fully searchable and synchronized transcript and oral argument video, go to the TX-ORALARG database on Westlaw.com.

This is an unofficial transcript derived from video/audio recordings

Supreme Court of Texas.
In re HALLIBURTON COMPANY and Brown & Root Energy Services, Relators.
No. 00-1206.

May 30, 2002.

Appearances:
W. Carl Jordan, Vinson & Elkins, Houston, TX, for Relators.
Barbara J. Gardner, Barbara Gardner & Associates, Houston, TX, for Respondent.

Before:

Thomas R. Phillips, Chief Justice, Priscilla R. Owen, Harriet O'Neill, Wallace B. Jefferson, Xavier Rodriguez, Nathan L. Hecht, Deborah Hankinson, James A. Baker, Craig Enoch, Justices.

CONTENTS

ORAL ARGUMENT OF W. CARL JORDAN ON BEHALF OF THE PETITIONERS
ORAL ARGUMENT OF BARBARA J. GARDNER ON BEHALF OF THE RESPONDENT
REBUTTAL ARGUMENT OF W. CARL JORDAN ON BEHALF OF THE PETITIONERS

JUSTICE: The Court is ready for the argument from relators in In re Halliburton.
SPEAKER: May it please the Court, Mr. Carl Jordan will present argument for relator. The relators reserve ten minutes for rebuttal.

ORAL ARGUMENT OF W. CARL JORDAN ON BEHALF OF THE PETITIONERS

MR. JORDAN: Good morning, your Honors. May it please the Court. I would like to address the issues of [inaudible] binding arbitration agreement was created under the principles enunciated by this Court in Hathaway decisions. And as part of that discussion whether there was a valid consideration on both sides underlying that ruling.
The general rule enunciated by this Court in Hathaway was that when an at-will employer announces a changed term or condition of employments, the employee must accept or quit, and that if the employee continues to report to work, here, she is deemed, as a matter of law, to have accepted the contract.
JUSTICE: Tell us your [inaudible].
MR. JORDAN: Your Honor, it needs to be clear and unequivocal according to what this Court said in Hathaway. Hathaway rules are general -- generally applicable rule of contract formation.
JUSTICE: Did you have to prove actual knowledge and understanding or ample -- an adequate opportunity to understand or where does the cut off come? If we have a situation where somebody did not know and appreciate that there had been a change of condition --

© 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.
NOT FOR COMMERCIAL RE-USE

MR. JORDAN: Chief Justice --

JUSTICE: -- what do we look at in a mandamus nonfactual revolution setting.

MR. JORDAN: Chief Justice Phillips, what we submit, it is the latter of the two propositions you first particulate that the opportunity must be proven. And for that proposition, we refer the Court to the Burlington Northern v. Akpan decision of the Fort Worth Court of Appeals which is a case really on all fours with this case where the Court of Appeals said, on page 51 of its opinion, that in the law, what fairly puts a person on [inaudible] is sufficient notice. And then it went on to say that where the plaintiff or where the employee had received a clearly written material regarding -- through the mail, regarding the arbitration, the employer's arbitration program but had failed to read them that he, nevertheless, was charged with notice. And it said the party providing unequivocal notice of changes in employment terms cannot force the other party to assimilate and understand the information in the notification.

JUSTICE: Have we got any type of fraud? Should we have any type of inconspicuousness requirements in that notice or how do we judge it?

MR. JORDAN: Chief Justice --

JUSTICE: -- made sense but it, clearly, wouldn't do.

MR. JORDAN: We would submit that she cannot have it, that the State of Texas cannot impose conspicuous requirements that would go beyond what is required to create a contract between private parties under normal circumstances. That is the holding of the United States Supreme Court under the Federal Arbitration Act in the Doctor's Associates case, the Southland case, and the Perry v. Thomas cases all cited in our brief.

JUSTICE: Well, [inaudible] that the FAA doesn't apply?

MR. JORDAN: If -- I'm sorry Justice --

JUSTICE: If the FAA doesn't apply to the case, would your answer be the same or different?

MR. JORDAN: If the FAA did not apply, my answer would not necessarily be the same. but there's no dispute [inaudible] that the FAA applies the other side -- Mr. Myers has conceded that.

With regard to the kind of notice that was provided, the facts, the material facts in this case are undisputed. Brown & Root adopted a dispute resolution program which included a mandatory arbitration component. It mailed materials to all of its employees beginning in May of 1993, on four separate occasions, before Mr. Myers' claim which [inaudible] this lawsuit arose.

He claims that in 1998 he was demoted from general foreman to first-line foreman because of his age. That's his underlying claim --

JUSTICE: Does it make any difference in how we apply Hathaway if we're dealing with a discrimination claim that has been subject of legislation by the State of Texas?

MR. JORDAN: No, Justice Hankinson, it does not. Again, the U.S. Supreme Court addresses that. Most recently in the Circuit City case decision which is just a few months old and cited in our reply brief. There, the Court in response to amicus brief that were filed by over 20 state attorney generals raising the issue you just raised said that we've addressed this issue [inaudible] and favors the Thomas decision and the fact that an employment discrimination statute that may be -- if that is a state statute, may provide the right to a jury trial, does not override the instruction of the Federal Arbitration Act.

Now, bear in mind also that in both Gilmer and in Circuit City, the U.S. Supreme Court applied or enforced mandatory arbitration

© 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.
NOT FOR COMMERCIAL RE-USE

agreements in employment discrimination cases that were brought under federal employment discrimination statute.

So, the rule applies equally for the statute -- statutory claim is federal or state.

JUSTICE: Well, but from looking at it from the perspective of state laws since you're asking us to apply Hathaway which is a decision of this Court and part of the common law of the State of Texas, its effort to apply contract principles in the at-will-no-employment context, my question, then, becomes under the state common law. Should there be more required with respect to an acceptance on the part of the employee given what is at stake under state law?

MR. JORDAN: Again, my answer is that there cannot be more required to [inaudible] section 2 of the Federal Arbitration Act says that arbitration agreements that comport with generally applicable principles of contract formation under state law must be enforced. And that is the limited role that state law plays in cases where arbitration agreements are subject to the FAA.

Contract formation rules and in common law defenses to contract formation that are all generally applicable. Special rules cannot be [inaudible] under the Supreme Court cases --

JUSTICE: That's the only -- in the state law [inaudible] then let's talk about the contract formation. What consideration did you give here other than agreeing to go to an arbitration process that you wanted in the first place?

MR. JORDAN: Well, there are several aspects of consideration. Let me first point out, if I can, that the -- that the courts are generally consistent on the principle that the mutuality of the agreement arbitrate is valid legal consideration for both parties. And there are cases cited, I think, in our brief from, at least, two of the different circuits --

JUSTICE: Let me ask you about that. Under the terms of this particular program that you offered -- that your client offered the employees, Brown & Root, at any point in time, could change the terms, could withdraw it, could unilaterally act to remove whatever consideration was there? Doesn't that, in some way, affect whether or not there really was consideration and, actually, a binding contract between the parties?

MR. JORDAN: Justice Hankinson, I would take exception to this statement that they could unilaterally removed the consideration. They can amend and even terminate on a going-forward basis the plan but they cannot amend or terminate on a retroactive basis in any claim that has a reason or that has it knowledge -- the company has knowledge of by the very terms of the plan, cannot be affected by any amendment or termination. That duty to arbitrate on the part of Brown & Root will always be there once it has notice of a potential dispute and it cannot do anything under the terms of the plan or the contractual obligations to avoid that duty.

JUSTICE: The employees are going to have to prove notice of the plan to Brown & Root in order to then have any benefits that the plan would provide to them.

JUSTICE: Notice of dispute.

JUSTICE: I'm sorry, notice of dispute.

MR. JORDAN: Once Brown & Root has knowledge --

JUSTICE: I understand but --

MR. JORDAN: -- whether it comes from the employer or any other source.

JUSTICE: I understand but the employee would then have to prove

© 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.
NOT FOR COMMERCIAL RE-USE

that knowledge in order to prove that the plan was still in effect as to them if they wanted to. They would have to have -- in other words, --

MR. JORDAN: They would have to prove knowledge --

JUSTICE: -- they would have to prove the knowledge or notice on the part of Brown & Root of the potential claim in order to be able to have the benefit of the plan.

MR. JORDAN: If Brown & Root were to terminate the plan, yes. And also, --

JUSTICE: Can I --

MR. JORDAN: -- the 10-day advance notice requirement for a planned termination as well. So, they have to --

JUSTICE: There are also --

MR. JORDAN: -- all the requirements.

JUSTICE: -- does that same provision apply with respect to amendments to the plan?

MR. JORDAN: The 10 days does not -- the prospect [inaudible] limitation does and we have, by the way, cited cases in our briefs for the proposition that that limiting the right to amend or terminate the prospect of situations is valid legal consideration. That they have a legal detriment that [inaudible] and, therefore, it is valid consideration.

JUSTICE: But I don't understand the terms of what the terms of the plan are with respect to amendment of plan. What kind of limitations are there on Brown & Root for limiting or amending the plan?

MR. JORDAN: On a going-forward basis with regards to claims that have not come forward, there is none. They can change it just like they can decide to no longer provide medical benefits to their employees on a going-forward basis or to reduce all their employees' compensation to minimum wage on a going-forward basis. It is no different from any other term or condition of employment in that respect.

JUSTICE: But does the same rule apply that if a claim has a reason, then they're -- and they have notice or knowledge of the claim that they are then unable to amend the plan with respect to that claim.

MR. JORDAN: That is correct. It could not lose them. Brown & Root could not lose them.

JUSTICE: There are past exhibits that could have been put in this plan [inaudible] to an arbitration service that charged $10,000 a day. Is that correct?

MR. JORDAN: Chief Justice Phillips, certainly, that is correct. A plan could be written in an unconscionable way. We believe this plan was crafted to be a model of the process, and I think the record evidence shows that.

JUSTICE: If the record were to be developed as [inaudible] at a trial to show that these types of age-discrimination claims, generally, could be represented in the Courts on a contingency v.[inaudible]. You got past -- certainly, you got past the forward hurdle or something that you could generally find and obtain and that, you generally cannot find an attorney for the amount of money that [inaudible] --

MR. JORDAN: I'm sorry -- for the amount of money --

JUSTICE: For the amount -- for the $2,500 maximum that you would provide for attorneys' fees. Generally, people would not do an arbitration case, would that --

MR. JORDAN: Does not --

JUSTICE: Could that be a material factor on unconscionability?

MR. JORDAN: Not a factor in this instance because remember, the $2,500 legal aid benefit is consideration, we believe. But it does not

© 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.
NOT FOR COMMERCIAL RE-USE

limit the employee in any way in terms of finding a lawyer, entering into any fee contract he would enter into if the matter were a lawsuit rather than arbitration and, indeed, as it's in clear in the record, this arbitration plan has a fee-shifting provision that runs only to the benefit of claimants to employee embodied in it and shifts the fees in the discretion of the arbitrator if the employee prevails even if there's -- even if the claim that's being brought doesn't contain the statutory fee-shifting provision.

JUSTICE: Your plan's been there for 8 years now.

MR. JORDAN: Since 1993, June of 1993.

JUSTICE: So, would it be relevant to look at that history of the 8 years of operation. How many times fees have [inaudible], how many times employees had been able to secure an attorney? How many initial notices have gone all the way through the four-step process? I mean, at some point, could that history be looked at to determine unconscionability?

MR. JORDAN: I do not believe that that would be an appropriate analysis. I believe that unconscionability would have to be judged on the face of the programs. Now, there are fact issues about unfair application of the program that departed from its face. That would be an issue. There has been no issue of that sort raised in this case. There's nothing in the record that indicate that that's happened.

JUSTICE: Any other questions? Thank you, Counsel. The Court is ready to hear argument from respondent.

SPEAKER: May it please the Court. Ms. Barbara Gardner will present argument for the respondent.

ORAL ARGUMENT OF BARBARA J. GARDNER ON BEHALF OF THE RESPONDENT

MS. GARDNER: Mr. Chief Justice, may it please the Court. I'm Barbara Gardner and I represent J. D. Myers who is a welder with a high school diploma who welded for Brown & Root for over 30 years.

JUSTICE: Mr. Gardner, how would your situation be different if the employer had terminated your client here and then offered to rehire him under these terms. How would your argument change?

MS. GARDNER: My argument would not change because the terms of the plan, as they are, are unconscionable.

JUSTICE: And is that a question for us to decide from the face of the plan or is that a fact question for the jury?

MS. GARDNER: It is a fact question as to whether or not there was a binding contract, i.e. an arbitration contract. But as far as the makings of this plan is a question of law -- in fact, we are offering that to the Court to decipher that particular question on notice, on nature of the changes, on imposition of the certainty.

JUSTICE: So, you're asking us to decide this unconscionability issues as a matter of law.

MS. GARDNER: That can be decided. I'm not asking in my particular delivery today that you decide all the unconscionability factors.

JUSTICE: But as to the contract principles, if the company had fired your client at which they could have done under an at-will agreement and then offered to hire him back under these terms, what would be the contract issues involved that would be different from the situation we have here? I mean, I don't understand why that wouldn't be a valid contract in that instance and how do you distinguish that from

© 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.
NOT FOR COMMERCIAL RE-USE

what happened.

MS. GARDNER: Yes, your Honor. In neither instance would it be a valid contract because Brown & Roots' promise to arbitrate is illusory. They can amend it, they can withdraw it, and change it at any time. So, no matter when the employee works there sooner or later, it's still an illusory promise.

JUSTICE: But how do you counter the argument, though, that there is a mutuality in the arbitration of provisions? So, once Brown & Root has agreed to arbitrate, if there is a period of six months and your client has a claim during those six months and, thereafter, Brown & Root alters or modifies or terminates the plan, they have, nevertheless, agreed to arbitrate within that six-month period. How do you get around that?

MS. GARDNER: Now, in that scenario, it could be a contract, it could be a unilateral contract but as the contract --

JUSTICE: Well, that's not unilateral at that point, that is a mutual agreement.

MS. GARDNER: Yes, a mutual set of promises. At the time those promises were given, Brown & Roots' promise is illusory, no contract. Brown & Root can amend that promise the day these brochures went out in the mail. Brown & Root can amend or change at any time before and the plan on page 5 says "Actual Notice." That's capitalized. Actual notice and this [inaudible] has to do with the rules of arbitration. So, actual notice would be notice of arbitration.

JUSTICE: Well, how do you distinguish that from the medical plan or an employee-benefit plan? Do these plans allow the employer to unilaterally amend?

MS. GARDNER: -- your Honor --

JUSTICE: -- you call all those illusory contracts?

MS. GARDNER: No, your Honor. The difference here is that this is a waiver of constitutional rights in this instance. This is not a matter of --

JUSTICE: What's the constitutional right?

MS. GARDNER: The waiver that we're talking about is whether or not the employee has enough information to make a decision knowingly, intelligently, and voluntarily and with sufficient awareness of the facts to know the legal circumstances and --

JUSTICE: I didn't hear the constitutional right [inaudible].

MS. GARDNER: Yes, your Honor. The constitutional right is not given by the plan or taken away by the plan. The constitutional right is what the employee is asked to give up.

JUSTICE: And what is that right?

MS. GARDNER: A right to a jury trial --

JUSTICE: But ain't that true of every arbitration? I mean, you could claim a constitutional due process deprivation in any arbitration [inaudible] --

MS. GARDNER: Not exactly, your Honor. That would be if some actions were taken. We're talking about free dispute. We're talking about the time when the employee is trying to make a decision whether or not to do what they say and if the employee does not understand what they said, he gives up his right to a jury trial and the due process without knowing so. And --

JUSTICE: But arbitration [inaudible]

MS. GARDNER: Yes, your Honor, and there have been arbitration agreements for centuries in the maritime setting and in a commercial setting, that is a good thing, that -- it works. But you should --

JUSTICE: But they are waiving the right there, why wouldn't you

© 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.
NOT FOR COMMERCIAL RE-USE

have the question in every case such as that you've waived your right in all those cases?

MS. GARDNER: Yes, your Honor. The reason is, in the commercial setting. Those parties are on equal bargaining terms. Usually, they are advocates on the equal terms, financially and otherwise, same with the maritime. If you have a shift down there in the floor and it's [inaudible], they wanna get that done now.

JUSTICE: I haven't been on equal terms of estoppel for years --

MS. GARDNER: Thank you. Good point. And, in fact, that illustrates my point in the employment setting. The employer has much more power, much more [inaudible] to go hire attorneys. These employees such as Mr. Myers who have a high school diploma, they are not on equal footing. And I say, in that instance, especially in discrimination, that should not be arbitrated unless this employee has full awareness of the legal consequences.

JUSTICE: What about in union, the union situation? Are there arbitration agreements there?

MS. GARDNER: Yes, there are. And thank you for that question because that allows me to discuss the case of Wright -- the Supreme Court case of Wright decided by Justice Scalia. In a collective bargaining situation, the union can bargain to give away these constitutional rights on behalf of the members. But Supreme Court says only if that waiver is clear and unmistakable. And that same standard has been adapted -- or adopted other cases, I believe, the Harris case out of this Circuit recently. So, even in a union setting, to waive this constitutional right, it must be done in a clear and unmistakable --

JUSTICE: Let's talk --

JUSTICE: -- happen here. What would it take to have a valid waiver?

MS. GARDNER: It would take the kind of language that an everyday worker can understand.

JUSTICE: -- other than the Ninth Circuit that's adopted this view [inaudible]

MS. GARDNER: Which view? Is that the collective bargaining agreement --

JUSTICE: No, no. The collective bargaining agreement is somewhat different because that's somebody else waiving it for you. No. I'm talking about -- is there any court that has said that, "We're not going to enforce an arbitration agreement [inaudible] unless it's clear and unmistakable so that much like our waiver -- shifting of burden [inaudible]. You got to read and nobody in the world could misunderstand it.

MS. GARDNER: Right.

JUSTICE: What's the authority that that is below in Texas or in the amended state's general?

MS. GARDNER: An analogous case in Texas is Fort Worth IFD v. Southwestern Bell. Those who were bargaining probably on the same level but the waiver of constitutional rights there -- it was a tax issue with the state court, the waiver of constitutional rights, even in that instance with those parties, had to be intelligently, voluntarily, and knowingly made.

JUSTICE: But we're operating under a statute here. We're really not making up the law ourselves in the first instance. We're operating under the FAA and -- and then not -- not just that the state court has left to its discretion.

MS. GARDNER: The FAA comes in only when we have a contract. That's

© 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.
NOT FOR COMMERCIAL RE-USE

a question of arbitrability --
JUSTICE: So, contract formation is ours and that --
MS. GARDNER: Correct.
JUSTICE: -- and --
MS. GARDNER: Contract Law --
JUSTICE: What -- in the arbitration context, what jurisdictions have imposed this high burden on the person that wants arbitration to show that the agreement is valid?
MS. GARDNER: There is no specific case on waiver of constitutional rights in the arbitration setting. However, there is an employment case out of the Fourteenth Court of Appeals, a Houston case of Dilly v. Sisters of Charity. That was an employment case where the plaintiff, an employee, had negotiated an agreement with the employer. The plaintiff was a doctor and he negotiated this contract for himself. Within that contract, he agreed to give up notice of any termination or any cause of termination. Of course, later when [inaudible] he claimed he did not have his due process rights. The Court denied that particular case. But in that employment case, the Houston Court said, "Nevertheless, that arbitration -- that any sort of waiver of constitutional rights has to be knowingly, voluntarily, and intelligently done." So, I think that is a case as close to our facts.
And we have a recent case, Davidson v. Webster out of the Corpus Christi Court of May 2001. That case is very analogous to our case. It had to do with arbitration. It had to do with facts just almost identical to this one. And what is also identical to this case, and then the case turned on fact that the plan, the arbitration plan, can be amended or changed or terminated at any time. And the Davidson case says, "That's no consideration. There is no valid promise. There is no contract."
JUSTICE: How do you deal with Mr. Jordan's statement that it's not illusory because if the employee initiates the process, makes the claim, then the -- Halliburton is bound to go through arbitration. How does that make this illusory?
MS. GARDNER: It's illusory at the time the contract supposedly is formed because as written on page 5, an amendment can be made only when the employer has, and it's capitalized, actual notice. All these rules -- and these are the rules of the gang written by Brown & Root, single-spaced, small type, very legal [inaudible].
Now, is an employee able to read this? I suggest that some attorneys have trouble reading it. But is an employee able to discern that he must file an arbitration demand and prove that he has actual notice before there can be an amendment. I would say that's a very onerous, almost impossible, burden for a worker with 30 years of welding to understand. I would say that at the time that this was negotiated, and this was supposedly come in into a binding situation, it was never a contract. So, even that actual notice, your Honor, that rule on page 5, it can be amended.
JUSTICE: Now, it seems to me your argument could apply to the Civil Justice System.
MS. GARDNER: Not exactly --
JUSTICE: -- Civil Justice System that violates constitutional right because plaintiffs wouldn't ordinarily know what they have to file for lawsuit and get a citation issued and have it served within -- and answer within 20 days or Monday next after 20 days. It seems to me you're not arguing about notice involuntary waiver. You're talking about the processes just so complicated, it's somehow unconstitutional.
MS. GARDNER: I can see your point on the Civil Justice System and,

© 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.
NOT FOR COMMERCIAL RE-USE

yes, it's fairly complex. The difference here is, this material is drafted and it arrives in the mail. And by the employer getting up and going to work the next morning, like he's done for 30 years, it becomes binding. The Civil Justice System is not anything approaching that. This is not fair. And in the Hathaway case, talking about the notice, Hathaway set up, I think, a two-pronged test for notice.

JUSTICE: Going back to Justice O'Neill's question, what would be the difference if he came to Brown & Root looking for a job and then he handed in these plans and -- we'll hire you if you're agreeable to abide by these plans?

MS. GARDNER: That could be different. And the difference there would be similar to a [inaudible] HED, in re HED. The employee comes to the workplace and applies for a job. And the employer then hands this program and they explain to the --

JUSTICE: [inaudible] they say, here's the plan. This is part of our terms, conditions of employment, either accept it or not. If he accepts it, what's the difference?

MS. GARDNER: Well, the difference is, if the employee asks, "What is this? What does that mean to me?"

JUSTICE: So, if he doesn't ask and there's no oral discourse, it's void that -- if he does ask, then it's valid?

MS. GARDNER: No. I think in that instance, it could be valid because it is the beginning of the arbitration plan. It is the plan itself. In our instance, the brochure was mailed with the rules with it and it just arrived in the mail. That's all.

JUSTICE: But it arrived four times. And there were transmittal letters and they said, "This is a legal document. You need to read this. This is important. It applies to you." Isn't there any responsibility incumbent upon the employee to ask a question?

MS. GARDNER: Yes. That is a responsibility and employees get materials like that all the time. It's just more company papers. Sometimes, in the practical application, but, yes, they have a responsibility to read it --

JUSTICE: -- agreements or banking agreements that we get in the mail [inaudible] frequently changing the terms and conditions. A court should have [inaudible]. What's the difference?

MS. GARDNER: The difference is, that is not based on, exclusively, Common Law of Contract Law. We're in Texas. We're looking to the Hathaway case. We're looking to the Texas Common Law principles of contract.

JUSTICE: Well, isn't that a contract between the bank and the -- and myself in that instance as to how my checking account's gonna be run?

MS. GARDNER: Right. And the difference there is, you and I have a lot more education than J.D. Myers did. I think it's on a case by case basis.

JUSTICE: So, J.D. can sue his bank [inaudible]?

MS. GARDNER: Not necessarily. But the situation -- I think, each one has to be looked at individually. In Hathaway, there must be notice. Notice of what? So, in Hathaway, it was notice of loss of income. In our case, it's notice of loss of constitutional rights. And so, the amount -- the detail, what is being explained to this person must be greater than would be explained to an attorney. I think it matters --

JUSTICE: So this is a subjective test in terms of deciding whether or not the employee has sufficient notice. We're going to look at it subjectively what the employee says -- "I understood, I didn't

© 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.
NOT FOR COMMERCIAL RE-USE

understand," as opposed to any kind of objective test.

MS. GARDNER: Your Honor, that would be a question of fact and that, too, is answered in Hathaway.

JUSTICE: I understand, but is the test objective or subjective?

MS. GARDNER: It is both. I think in a contract, if there's a contract formed, there must be objective consideration -- were there any reasonable person --

JUSTICE: No, I'm talking about his knowledge -- the knowledge and understanding component.

MS. GARDNER: [inaudible]

JUSTICE: Does that have -- is that an objective test or is it a subjective test?

MS. GARDNER: For the person, for Mr. Myers, it's subjective. For the contract to be formed just [inaudible] when we say a contract, it would have to be both. There would have to be an objective finding that there was consideration and there would have to be a subjective counter on his part to say I did or didn't understand.

JUSTICE: Let me ask. What is your view of the legal definition of unequal bargaining power? What does that mean?

MS. GARDNER: My view of that and that is discussed, I believe, in the Light case.

JUSTICE: Does it -- is it just in your assessment that one party is more educated and has more control over the form than the other or is it that one party has no option whatsoever? In other words, in this case, the -- Mr. Myers could have remained with the company or could have decided I'm not going to continue my employment under these terms and find other employment. Is that enough just because an option was given to him? Take it or leave it, does that mean it's unequal bargaining power? What does it mean [inaudible]?

MS. GARDNER: No, your Honor. That factor by itself does not mean unconscionability. That's a contract of adhesion and that's been held by itself, only it's not unconscionable. But the fact where you have an employer with in house counsel, they have written these rules, they can change these rules and then they have and employee here that's been working here 30 years and welding everyday.

That is a different situation. You have education, you have resources, you have the [inaudible], you have the management.

JUSTICE: So, is it that arbitration agreements that are in the terms of this agreement simply don't apply depending on the educational level of the employee -- if they haven't -- for example, haven't receive the high school diploma, then you can't have arbitration?

MS. GARDNER: No, I think it would have to be taken on case by case basis because it's a question of fact.

JUSTICE: And if it's taken on a case by case basis, then all these arbitration agreements especially for the major employers are gonna go away, aren't they?

MS. GARDNER: No, your Honor. I don't believe they'll go away. I think it will be, in each instance, whether or not would fit for that person. Did he understand it? And if he files suit in state court or federal court, the question will be, "Hey, was there a binding promise to arbitrate?"

JUSTICE: And how does the employer decide whether or not the employee understands plain language -- I mean, many people don't -- many people -- the lay people don't even know what arbitration means.

MS. GARDNER: Sure.

JUSTICE: How does an employer suppose to assess whether or not the employee understands that?

© 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.
NOT FOR COMMERCIAL RE-USE

MS. GARDNER: That's true. That's a very good point. I think, personally, that in the front of these books, the first thing that should come in is all caps, You cannot sue your employer ever for any reason, for a bad reason, no matter how bad it is. You cannot sue your employer if you accept this plan.

And number two, if this comes in the mail and you get up and go to work, you're bound. They need to know that. That's not -- this is explained here on the last page in smaller print and then in the rules booklet in the middle on page 8, same line, same small space. But for these people, they are gonna look at these and they do look at this but for this to be understandable so that to make a decision that's knowing, intelligent --

JUSTICE: May I ask you a question. There was a period of seven years before the situation [inaudible] where your client sued. From that June 1993 to then, did he ever communicate to anybody at Brown & Root that even though he was aware of these mailings, he had no understanding and didn't know what it means -- what it meant?

MS. GARDNER: No, your Honor. Factually, he did not. However, back to the reasoning here, the 1993 is the point when the contract is made or not made. It was not made. In fact, there has never been any actual notice from Brown & Root that they would like to arbitrate until they promised -- they performed a promise. There's no contract. They promised to arbitrate. They have never sent an arbitration demand. In footnote 5 of the --

JUSTICE: Have you demanded and they declined? Why would you institute a lawsuit or arbitration proceeding which yourself [inaudible] to demand arbitration --

MS. GARDNER: That's the point and they won't. That's the whole point of these.

JUSTICE: So, why would they? You're the one that wants -- you have a claim against them and it's incumbent on you to make the claim, "I've got a claim, let's arbitrate."

MS. GARDNER: I was attempting to answer that particular question but you led into, I think, into a little bit of a different question. The way notice is given is unmistakable, that's clear. And that wasn't done here. So, the fact that there is --

JUSTICE: Well, didn't he sue first?

MS. GARDNER: Yes, he sued first.

JUSTICE: And then they said, "Well, but there's an arbitration clause that we want to impose."

MS. GARDNER: Yes. And he said, "No, there's not."

JUSTICE: [inaudible]

MS. GARDNER: They have never --

JUSTICE: But, at least, they made a demand under what they thought was a valid dispute resolution program in the context of the lawsuit.

MS. GARDNER: They would have to be the one to perform the promise, promise to arbitrate. That's illusory. He is not bound until there is some contract. That's illusory.

JUSTICE: Oh, I understand your legal theory. But I thought you will answer Justice Owen and say "Well, they never asked to arbitrate." And my question was, your client sued first and then they said, "But we have the arbitration and we asked for it." Your answer is, "Well, we don't think there's a contract so you don't get it."

MS. GARDNER: That's right.

JUSTICE: Is that right?

MS. GARDNER: [inaudible] Brown and Root is saying, "You're bound but I'm not."

© 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.
NOT FOR COMMERCIAL RE-USE

JUSTICE: Well, you're client initially was saying, "He didn't understand." Now, in light of this legal proceeding, I'm sure you're client understands what arbitration means. He continues to work at Brown & Root. Is the recourse here for him to terminate, not agree to this plan, and then seek constructive discharge?

MS. GARDNER: No, your Honor. His position and, I believe, since I represent him is that he should not be forced to arbitrate. He didn't promise anything. He never promised. There was never an agreement to arbitrate. And in an arbitration, contract law decides. It is completely [inaudible]

JUSTICE: Well, that's different in your other argument. There are cases and I think you've referred to them -- that the way these are set up -- if the employee makes no response and continues working, then the law says, [inaudible] that program. Do you agree with those cases?

MS. GARDNER: The Alamo case, the Burlington case, no, I don not. I think they are incorrect. In fact, the Burlington case did not give the full burden of proof for the employer. They just said how to prove the modification.

Hathaway says, the employer has to prove knowledge and they have to prove that this employee understood what the nature of the change is and also the certainty of the imposition. The employer didn't do that. The employer has never done that because here, the nature of the change is, remember I said early on, is the constitutional right that's being lost. That's never explained.

Second, the certainty of the imposition, it's everything but certain, they can amend, they can take this away. It is not certain. So, I believe under the Hathaway case, the burden is to do much more. Burlington says only if they asked [inaudible]. It would be easy to send this in the mail [inaudible] but that's not the burden of proof.

Also in Alamo, I disagree with that case because it stated just perfunctorily that mutual promises [inaudible] consideration. Not when the mutual promise, the promise to arbitrate is illusory. That case did not address that with the bilateral contract. Then the Alamo case went on to take full and straight on disagreement with Tenet Healthcare v. Cooper. Tenet Healthcare, 1995 case out of the Houston Fourteenth Court of Appeal, said that it is illusory. It followed the Light v. Centel reasoning that the promise, illusory promise is not consideration and choosing between Alamo and Tenet Healthcare, I choose Tenet Healthcare.

JUSTICE: Well, in Tenet Healthcare, the handbook says this isn't binding. Here, it clearly said this is binding. So, those are very difficult cases analogize.

MS. GARDNER: The analogy is that the Fourteenth Court said, "We're not deciding that on the statement." We're deciding it on the contract law. They said the controlling issue is whether a contract is formed.

JUSTICE: But, again, the handbook said over and over, this is not a contract. It's a different scenario entirely.

MS. GARDNER: I think it would be depending on where the [inaudible]. If it's in the middle, on page 8 in single [inaudible] language, no. It's on the very front that says you cannot sue your employer if you take this plan. Yes. So, it depends on where it is and the wording in the Tenet Healthcare case was some different than ours. So, that's some distinction. But, I think, for all cases the standard to apply is whether an employee can make a decision knowingly, intelligently. Knowing the full consequences the --

JUSTICE: And you would have a jury trial on that issue before you ever reach the arbitration question.

MS. GARDNER: That can be decided by the Court in a hearing. I

© 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.
NOT FOR COMMERCIAL RE-USE

believe this whole matter of deciding whether or not a contract to arbitrate exists is the preliminary fact finding.

JUSTICE: Well, if it's a fact finding there, you'd be entitled to a jury trial on every single instance before you got to the arbitration.

MS. GARDNER: As I understand arbitration law and the United States Supreme Court had explained that the trial judge has the authority to have a hearing. And if either side request a hearing on motion to compel arbitration, the trial judge then use evidence and here she decides if there's a contract. If there's a contract to arbitrate, then everybody gonna need and arbitrate. But that is early in the case and that is the trial judge not the jury.

JUSTICE: And do you think that's in the FAA? [inaudible]

MS. GARDNER: The FAA does not trump this Court's authority. I think this Court, attempt to follow the FAA in arbitration setting because the Federal Arbitration Act applies in state court just as the Texas Arbitration Act does. So they're both applied in state courts. So, I believe, it would be incumbent on this Court to follow those precepts under the FAA. But the case law has said if one person files a motion to compel arbitration, the first order of the day is for the trial judge to determine if there's a contract. And, I believe, the United States [inaudible] first options --

JUSTICE: Well, if that's true then there's no right to a jury trial in the essential threshold questions of whether there's a contract based on the authorities you've just relied on. That's the question of law.

MS. GARDNER: Your Honor, my reading of the case is that's a procedural matter. There has to be a hearing. And arbitration said, that's different from maybe negotiating a real estate --

JUSTICE: Well, under what you've just said, what would be tried to a jury that you said your client was?

MS. GARDNER: Once it's determined that there is no contract to arbitrate, then we're going to the merits of the case. What is tried to the jury in this case would be whether or not Mr. Myers is demoted because he's over 50 and because --

JUSTICE: [inaudible].

MS. GARDNER: The merits of the actual discrimination case. Age --

JUSTICE: But on the other hand it seemed then that the trial court performs that preliminary function that says what I believe it's just a valid contract to arbitrate.

MS. GARDNER: At that point, either both party or parties have the opportunity and the right to appeal because, let's say that --

JUSTICE: Yes, but what you can't do if you're the aggrieved party and say this is wrong because it made me waived my right to a jury trial because you've already conceded that if it's a legal issue, that the Court decides.

MS. GARDNER: Let me go back through the steps. Maybe I wasn't clear.

JUSTICE: Well, you were very clear that it's the preliminary decision made by the trial court without being [inaudible] of the jury on whether it's a contract or not. If you lose that issue after you argued that there's a constitutional deprivation of the jury trial on a legal question.

MS. GARDNER: I think the question of unconscionability is always a fact question depending on many circumstances. That can be tried before the jury.

JUSTICE: Well, is it -- the question is this contract

© 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.
NOT FOR COMMERCIAL RE-USE

unconscionable under our law? Now, is there a back question on unconscionability?

MS. GARDNER: I must say and I hold to the same answer and I beg your patience that the initial question before anything else is, is there a valid contract?

JUSTICE: Yeah.

MS. GARDNER: And then the question of arbitration --

JUSTICE: But my point is the question of whether there's a valid contract in your view is here would encompass the issue of unconscionability. The next step is if it's that preliminary label situation where the trial judge decides that issue, is there a contract, a valid contract. No jury intervention. So, how can you claim deprivation of a constitutional right under your own theory of the case?

MS. GARDNER: Almost, if I may go back. Let's determine that -- the judge determined there was a contract to arbitrate. Then the next step is, was that contract that was formed unconscionable? Those are different questions. The very first question is, is there a contract to arbitrate? Yes or no? At that point, either party loses, either party can appeal because that is a timing mechanism that must be done there.

Let's say that there is no appeal and they go on into the case and a fact issue will be unconscionability. And that will be --

JUSTICE: So, we're going to have two trials on one contract?

MS. GARDNER: No, sir, not two trials. We'll have a hearing and the trial.

JUSTICE: Okay.

MS. GARDNER: The hearing before the trial judge is much like hearings -- for example that we see when we're sitting in a courtroom waiting and there's a hearing on whether or not this [inaudible] attorney has explained to these children what their rights are. That there will be an evidentiary hearing and the answer is yes or no, is there contract to arbitrate. That point, they can -- either one can appeal. If they don't then they go on into the case and one of the issues can be unconscionability and that's how it's resolved.

JUSTICE: Anything else?

JUSTICE: Thank you, Counsel.

MS. GARDNER: Thank you.

JUSTICE: Mr. Jordan, we're obviously concerned about the parameters of unconscionability here and what an employer could unilaterally impose upon or take away from the employee. And that's a tricky issue so how do we go about doing that. But let me ask you this, what if Halliburton or Brown & Root [inaudible] and then the program unilaterally to say that any personal injury claims would be covered by this arbitration agreement? What would your position on unconscionability be in that instance?

REBUTTAL ARGUMENT OF W. CARL JORDAN ON BEHALF OF THE PETITIONERS

MR. JORDAN: Justice O'Neill assuming that was subject to a Federal Arbitration Act, I think there could be no unconscionable -- the issue [inaudible]

JUSTICE: Regarding personal injury?

MR. JORDAN: Yes ma'am, I believe so. I think one of the [inaudible] cases that's reported and cited in one or both of our

© 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.
NOT FOR COMMERCIAL RE-USE

briefs actually involved personal injury claims. The unconscionability issue it seems to me goes in -- in the at-will context has little to do with procedural unfairness, everything to do with substantive unfairness.

In this instance, for example, this program provides a right to the claim -- to an independent hearing before -- on the merits before a neutral arbitrator to discover [inaudible] civil procedure. And on and on in terms of reserving same rights that employee would have in the court, the program guarantees to the employee every substantive right under law including all [inaudible] that are available in a court on his or her claims. And in my mind --

JUSTICE: Except twelve people instead of one?

MR. JORDAN: I beg your pardon.

JUSTICE: Except twelve people instead of one --

MR. JORDAN: Yes.

JUSTICE: -- the right to a jury trial --

MR. JORDAN: Yes, Justice Baker that's exactly right. In the U.S. Supreme -- in the United States Supreme Court recently in Circuit City addressing that same issue rejected out of hand the argued from the employee's side that arbitration proceedings inherently favor the employer in some way. And it said that the benefit of arbitration proceedings are in or equally to employees in employment discrimination cases and that there are, perhaps, uniquely suitable to employment discrimination cases because so often these cases involve lesser sums of money and is more difficult to prosecute into an expensive litigation process.

On the issue of the heightened standard and whether that's been applied anywhere [inaudible] Ninth Circuit, I believe, the answer to that is, no. There is a case I've cited in our supplemental letter to the authorities. It is the Haskins v. Prudential, Sixth Circuit case from last year 2000 noting that the Ninth Circuit's heightened standard for enforceability of these agreements has been rejected by nearly every court.

To consider it, I would also submit to you that the Ninth Circuit's approach to this which was recently -- one aspect of their approach, of course, was overturned in Circuit City but their approach, generally, to these arbitration agreements strikes me as being clearly inconsistent on what the U.S. Supreme Court has said in Gilmer and Circuit City about the benefits of these programs and the fact that they have to be judged based on the same principles of state contract law that all other private agreements are judged on.

JUSTICE: Mr. Jordan, Mr. Myers didn't have the same bargaining power that, probably, you have, is that correct?

MR. JORDAN: That's correct, Justice Jefferson.

JUSTICE: What does unequal bargaining power mean as a legal term?

MR. JORDAN: I do not know the precise legal definition of that term. I think I can respond to your question by saying that in at-will employment situation -- well, first of all, I think, as a matter of general law of unconscionability, you have to have both procedural unfairness, if you will, or one- sidedness, if you will, and then substantively unfair terms.

On the procedural one-sidedness, I think my colleague Ms. Gardner has conceded that the case to say that's enough by itself. In addition to that, here we have an at-will employment situation and I think Justice O'Neill asked Ms. Gardner right off the bat, couldn't the company have terminated Mr. Myers and all the other employees and then rehired them subject to a new contract at the time of the arbitration

© 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.
NOT FOR COMMERCIAL RE-USE

provision and the answer of that, of course, is, yes.

Hathaway allows employers -- allows at-will employers to operate more efficiently than that. That's a good thing.

JUSTICE: And could they, in fact, did send a letter to Mr. Myers saying sign this agreement or you will be fired?

MR. JORDAN: They could have done that but they decided that was not the preferable thing to do.

JUSTICE: But under your construct, they could do that because an at-will employee, you can do that.

MR. JORDAN: I believe they could, Justice O'Neill. What they did instead and I do take issue with the other side's statement that this was not clear and unequivocal notice. They sent him a letter from the Chief Executive Officer of the company that said, enclosed are materials. It's a new program, it applies to you, will govern your employment. Read these materials. It says, please read these materials in capital letters.

JUSTICE: Mr. Jordan, does the record reflect any additional knowledge that the employee may have had regarding the program? For example, watching the company videotape knowing that ombudsmen were present in the company, anything of that nature.

MR. JORDAN: The record does not reflect that, Justice Rodriguez, you know --

JUSTICE: Why?

MR. JORDAN: [inaudible]

JUSTICE: If that was [inaudible] notice, how come in 1996 you decided to get some signatures and apparently didn't get his --

MR. JORDAN: Well, there's a dispute about then, we chose not to rely on that, obviously, because [inaudible] answer another question that was asked. There is a provision in the FAA that says that if there is a bonafide factual dispute about whether the contract was formed in respect to all the principles or whether it's enforceable under the State Law of Principles that are defenses' enforceability of contracts, then you do have a separate trial on that issue. But that trial was held independent of any proceeding merits.

There is no dispute in this record. I can speculate, Chief Justice Phillips, about why they sought the signature in 1996 but it would be speculations. It's not in the record. We don't think the signature is necessary as the record does reflect this program was implemented for all the tens and thousands of employees that Brown & Root had in various states in which it does business by a clear and unequivocal announcement.

And this record is replete. Some of it's summarized in our briefs especially the reply brief. We plead to the claim and clearly stated representations of what this program was about that it was a no dispute resolution procedure with the ombuds office and the people there who do assist in employee disputes.

If those disputes could not be resolved, however, that the ultimate means of resolution was filing a binding arbitration in materials telling employees that if they file a lawsuit, the company's gonna ask to have it dismissed. The materials tell employees that they've waived their right to a judicial forum.

By the way, the U.S. Supreme Court has said in the Gilmer and Circuit City cases [inaudible] to another point that the other side [inaudible] that the right to a jury trial under a statute including [inaudible] statutes is not substantive right.

That these agreements merely shift forum. That was discussed in full paragraph in Gilmer but most of that paragraph is [inaudible].

© 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.
NOT FOR COMMERCIAL RE-USE

Universal Maritime was cited by Ms. Gardner properly for the proposition that if a union or representative rather than the individual himself has waived the statutory right to jury trial, then if that can be done at all, it must be done in a clear and [inaudible] way.

What the Court in Universal Maritime [inaudible] U.S. Supreme Court also said, however, that Gilmer involved an individual's waiver of his own rights rather than a union's waiver of the rights of its members and hence, and I'm quoting, and "hence, declared an unmistakable standard was not applicable to the individual waiver [inaudible]."

The argument that this is a small type of legal [inaudible], the formal plan statement and the rules, the copy of which are in the record is a document that, as we point out in our reply brief, very similar to the rules and procedure that govern the litigation.

That is not the document that the company really intended -- the lay people [inaudible]. This is the resolution [inaudible] the copy of which is in the record but it wasn't sent out to [inaudible] all of these employees and it's written by Mr. Myers own admission in the brief in language that can be understood by a lay person. Mr. Myers, by the way, has a high school education and had [inaudible] level within the company.

JUSTICE: Any other questions? Thank you, Counsel.

MR. JORDAN: Thank you, your Honor.

JUSTICE: That concludes the argument in the first trial. We'll take a brief recess.

2002 WL 34445774 (Tex.)

© 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.
NOT FOR COMMERCIAL RE-USE