

(Def.'s Motion to Stay Judicial Proceedings Pending Arbitration or, in the Alternative, for Summary Judgment¹ [hereinafter Def.'s Mot.] Ex. B.)

The Agreement provided that LVEC would employ Kiesel for one year; thereafter, the Agreement would automatically renew unless terminated by one of the parties. (Compl. Ex. A. ¶ 1.) The Agreement also provided that Kiesel would work six half days a week, split between LVEC's main office in Allentown and its office in Trexlertown, with the option for Kiesel to decrease his working hours if he so chose. (*Id.*) As part of the Agreement, LVEC promised that Kiesel would be paid a salary equal to 40% of his gross collections. (*Id.* at ¶ 2.) The Agreement also included an arbitration provision, which provided:

Any controversy or disagreement between the parties to this Agreement shall be determined by an arbitration in the County of Lehigh in accordance with the rules of the American Arbitration Association, and judgment on any award or determination so made be entered in any court having jurisdiction.

(*Id.* at ¶ 7.) Further, the Agreement included a covenant not to compete, which provided that “[i]n the event of termination of this Agreement, Kiesel agrees that, for a period of two (2) years, he will not directly nor indirectly solicit, refer, and or/accept [*sic*] as patients any patients served by LVEC at any time prior to termination of the Agreement.” (*Id.* at ¶ 11.) Both parties reserved the right to terminate the Agreement, but were required to provide ninety days’ notice to the other side. (*Id.* at ¶ 9.)

Kiesel initially found his employment conditions to be satisfactory. However, over time, LVEC increased Kiesel’s non-billable clinic time, revoked his long-term responsibility of fitting contact lenses, and repeatedly asked him when he was going to retire. (Compl. ¶ 14.) Then, in

¹ The Motion for Summary Judgment was denied by order dated January 10, 2006.

April 2003, LVEC closed its Trexlertown office (where Kiesel worked some of his shifts) and informed Kiesel that it planned to reduce his working hours. (Compl. ¶ 14; Def.'s Mot. 3.) Kiesel objected to this change, and retained a lawyer to challenge it. (Compl. ¶ 15.) In response, LVEC notified Kiesel that it planned to terminate his employment in ninety days. (Compl. ¶ 18.) Kiesel's last day of employment with LVEC was September 8, 2003. (Compl. ¶ 16.)

After Kiesel ceased working for LVEC, he obtained employment with a competing ophthalmologist who shared a building with LVEC. (Def.'s Mot. 3.) Kiesel began to treat patients that he had formerly treated for LVEC at this new office. (*Id.*) LVEC then filed a Demand for Arbitration, asserting that Kiesel's conduct breached the Agreement's covenant not to compete. (Singley Aff. ¶ 6.)

Arbitration hearings were conducted on May 10, 11, and 27, 2004, before an American Arbitration Association arbitrator. (*Id.* at ¶ 8.) LVEC claimed that Kiesel breached the covenant not to compete. (Def.'s Mot. Ex. C. at 10.) Kiesel answered that he was entitled to disregard the covenant because LVEC had breached the Agreement in several ways, including: (1) by reducing the number of technicians available to him; (2) by assigning him an increased amount of unpaid clinic time; and (3) by changing his regularly-scheduled workweek and reducing the amount of time he was scheduled to work. (*Id.* at 9-10.) Kiesel also asserted a counterclaim that LVEC owed him \$14,596.62 in back wages. (*Id.* at 10.)

On September 28, 2005, the arbitrator issued a detailed decision. (Def.'s Mot. Ex. C.) He concluded that Kiesel did violate the covenant not to compete in derogation of LVEC's rights. (*Id.* at 20-21.) He also determined that LVEC did not breach the Agreement by reducing the amount of technical support supplied to Kiesel or by increasing the number of clinics that he

had to attend. (*Id.* at 14-16.) However, the arbitrator ruled that LVEC's actions in changing Kiesel's schedule and reducing Kiesel's working hours constituted material breaches of the Agreement. (*Id.* at 17-20.) Further, he concluded that LVEC owed Kiesel back wages, although this did not amount to a breach of the Agreement. (*Id.* at 16-17.) Nevertheless, the arbitrator determined that even the material breaches did not extinguish LVEC's rights under the covenant not to compete. (*Id.* at 21-22.) He limited Kiesel's remedy to a credit for the additional salary he would have earned had LVEC's breach not occurred. (*Id.* at 22.)

The parties were initially unable to determine the precise amount of damages that Kiesel owed to LVEC pursuant to the arbitration award. (Def.'s Mot. Ex. D. at 1.) Both parties appeared before the Court of Common Pleas in Lehigh County, and that court remanded the case for supplemental arbitration on that issue. (*Id.*) Then, on March 30, 2005, the arbitrator fixed damages at \$218,054.00. (*Id.* at 5.)

On September 7, 2005, Kiesel filed a complaint in this court, alleging that LVEC harassed and intimidated him by asking him when he was going to retire, reduced his revenue-producing hours, took away his long-term responsibilities, increased his non-revenue-producing hours, and terminated him, all in violation of the ADEA and the PHRA. LVEC then filed a Motion to Stay Judicial Proceedings Pending Arbitration or, in the Alternative, for Summary Judgment.

II. Standard of Review

The Federal Arbitration Act "provides two parallel devices for enforcing an arbitration agreement: a stay of litigation in any case raising a dispute referable to arbitration, 9 U.S.C. § 3, and an affirmative order to engage in arbitration, § 4." *Moses H. Cone Mem'l Hosp. v. Mercury*

Const. Corp., 460 U.S. 1, 23 (1983). While these devices are similar, they are not identical. For example, a § 3 motion to stay court proceedings, unlike a § 4 motion to compel arbitration, provides no right to a jury trial to resolve disputed factual issues. *J & R Sportswear & Co. v. Bobbie Brooks, Inc.*, 611 F.2d 29, 30 (3d Cir. 1979). In this case, LVEC seeks to stay proceedings pursuant to § 3.

The Third Circuit has explained that, for purposes of § 4 motions, “[o]nly when there is no genuine issue of fact concerning the formation of the agreement should the court decide as a matter of law that the parties did or did not enter into such an agreement.” *Par-Knit Mills, Inc. v. Stockbridge Fabrics Co., Ltd.*, 636 F.2d 51, 54 (3d Cir. 1980); *see also Great W. Mortgage Corp. v. Peacock*, 110 F.3d 222, 231 n. 36 (3d Cir. 1997) (applying standard). The *Par-Knit Mills* court identified this “as the standard used by district courts in resolving summary judgment motions pursuant to Fed. R. Civ. P. 56(c).” *Par-Knit Mills, Inc.*, 636 F.2d at 54 n.9. Courts have used a similar standard in determining whether to conduct an evidentiary hearing on a § 3 motion. *See Commerce Park at DFW Freeport v. Mardian Constr. Co.*, 729 F.2d 334, 340 (5th Cir. 1984) (ruling that without a showing that “disputed factual questions going to the legal issue of arbitrability existed,” a court could grant a stay without an evidentiary hearing); *Barker v. Trans Union LLC.*, No. 03-C-3837, 2004 WL 783357, at *3 (N.D. Ill. Jan. 24, 2004); *China Res. Prods. (U.S.A.) Ltd. v. Fayda Int’l, Inc.*, 747 F. Supp. 1101, 1105 (D. Del. 1990). Accordingly, in evaluating whether to grant LVEC’s motion to stay proceedings without conducting an evidentiary hearing, the court will “give to the opposing party [Kiesel] the benefit of all

reasonable doubts and inferences that may arise.”² *Par-Knit Mills, Inc.*, 636 F.2d at 54.

III. Discussion

LVEC argues that pursuant to the arbitration clause of the Agreement – which provides that “[a]ny controversy or disagreement between the parties to this Agreement shall be determined by an arbitration” – Kiesel is required to arbitrate his age discrimination claims. Kiesel, on the other hand, contends that the arbitration clause is either invalid or does not cover his statutory claims. Because I conclude that pursuant to the arbitration clause Kiesel’s claims must be prosecuted in the arbitral forum, I will grant LVEC’s motion and stay this proceeding until arbitration has been conducted.

The threshold question of whether a dispute is arbitrable is a matter properly decided by this court. *See AT&T Techs., Inc. v. Commc’ns Workers of Am.*, 475 U.S. 643, 649 (1986). Due to the “federal policy in favor of arbitration,” however, courts need only engage in a “limited review” to ensure that a dispute is arbitrable. *John Hancock Mut. Life Ins. Co. v. Olick*, 151 F.3d 132, 137 (3d Cir. 1998) (quotations omitted).

The Federal Arbitration Act (“FAA”),³ which applies to the current contract, *see Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109 (2001) (holding that FAA covers all employment

² While this standard may limit the court’s ability to resolve “any doubts concerning the scope of arbitrable issues . . . in favor of arbitration,” *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983), the court notes that under either standard it would reach the same result.

³ The FAA applies to “any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal.” 9 U.S.C. § 2.

contracts except those of transportation workers), authorizes a federal court to stay proceedings “upon any issue referable to arbitration under an agreement in writing for such arbitration . . . until such arbitration has been had.” 9 U.S.C. § 3.

“[A] court asked to stay proceedings pending arbitration must determine whether there is a valid agreement to arbitrate and, if so, whether the specific dispute falls within the substantive scope of that agreement.” *Medtronic AVE, Inc. v. Advanced Cardiovascular Sys., Inc.*, 247 F.3d 44, 54-55 (3d Cir. 2001). “Questions concerning the interpretation and construction of arbitration agreements are determined by reference to federal substantive law.” *Harris v. Green Tree Financial Corp.*, 183 F.3d 173, 179 (3d Cir. 1999). However, in interpreting arbitration agreements, courts may also look to state law for “generally applicable contract defenses.” *Id.*

Kiesel argues both that the arbitration clause is invalid or unenforceable and that his statutory claims do not fall within the scope of the clause. As discussed below, the court finds both arguments to be without merit.

A. The Validity of the Arbitration Clause

The first point of inquiry is whether the arbitration agreement contained in plaintiff's employment contract is valid and enforceable. The FAA provides that arbitration agreements are enforceable “save upon such grounds as exist at law or equity for the revocation of any contract.” 9 U.S.C. § 2. The Third Circuit has interpreted this provision to mean that agreements to arbitrate are “enforceable to the same extent as other contracts.”⁴ *Harris*, 183 F.3d at 178. Thus,

⁴ The Third Circuit has explained that in evaluating whether a contract is valid under Pennsylvania law, the court must “look to: (1) whether both parties manifested an intention to be bound by the agreement; (2) whether the terms of the agreement are sufficiently definite to be enforced; and (3) whether there was consideration.” *Blair v. Scott Specialty Gases*, 283 F.3d 595, 603 (3d Cir. 2002) (quoting *ATACS Corp. v. Trans World Commc'ns, Inc.*, 155 F.3d 659,

“[a]n agreement to arbitrate may be unenforceable based on a generally applicable contractual defense, such as unconscionability.” *Alexander v. Anthony Int’l., L.P.*, 341 F.3d 256, 264 (3d Cir. 2003).

Kiesel first argues that the arbitration clause is invalid for a lack of consideration. “Consideration confers a benefit upon the promisor or causes a detriment to the promisee and must be an act, forbearance or return promise bargained for and given in exchange for the original promise.” *Blair v. Scott Specialty Gases*, 283 F.3d 595, 603 (3d Cir. 2002) (quoting *Channel Home Ctrs. v. Grossman*, 795 F.2d 291, 299 (3d Cir. 1986)). A contract that lacks adequate consideration is unenforceable. *Id.* Kiesel’s argument fails because “[w]hen both parties have agreed to be bound by arbitration, adequate consideration exists and the arbitration agreement should be enforced.” *Id.* Here, the parties mutually agreed to arbitrate “[a]ny controversy or disagreement,” and thus, consideration exists.

Kiesel also argues that it would be unconscionable to enforce the arbitration agreement. “Unconscionability is a ‘defensive contractual remedy which serves to relieve a party from an unfair contract or from an unfair portion of a contract.’” *Harris*, 183 F.3d at 181 (quoting *Germantown Mfg. Co. v. Rawlinson*, 491 A.2d 138, 145 (Pa. Super. Ct. 1985)). The party challenging a contract provision “generally bears the burden of proving unconscionability.” *Id.* Courts recognize two categories of unconscionability: (1) procedural unconscionability and (2) substantive unconscionability. *Id.* “Procedural unconscionability pertains to the process by which an agreement is reached and the form of an agreement.” *Id.* “This element is generally satisfied if the agreement constitutes a contract of adhesion.” *Alexander*, 341 F.3d at 265. “An

666 (3d Cir. 1998)).

adhesion contract is defined as a ‘standard form contract prepared by one party, to be signed by the party in a weaker position, [usually] a consumer, who has little choice about the terms.’” *Lytle v. CitiFinancial Servs., Inc.*, 810 A.2d 643, 658 (Pa. Super. Ct. 2002) (quoting *Huegel v. Mifflin Constr. Co.*, 796 A.2d 350, 357 (Pa. Super. Ct. 2002); see also *Alexander*, 341 F.3d at 265 (“A contract of adhesion is one which is prepared by the party with excessive bargaining power who presents it to the other party for signature on a take-it-or-leave-it basis.”). The second category of unconscionability, substantive unconscionability, “refers to contractual terms that are unreasonably or grossly favorable to one side and to which the disfavored party does not assent.” *Harris*, 183 F.3d at 181. Substantive unconscionability may exist, for example, in cases where the arbitration clause includes an unreasonably short limitations period for bringing a claim or substantially limits the types of relief available to one party. See *Alexander*, 341 F.3d at 266-68. Thus, “[u]nconscionability requires a two-fold determination: that the contractual terms are unreasonably favorable to the drafter and that there is no meaningful choice on the part of the other party regarding acceptance of the provisions.” *Bensalem Twp. v. Int’l Surplus Lines Ins. Co.*, 38 F.3d 1303, 1312 (3d Cir. 1994) (quoting *Worldwide Underwriters Ins. Co. v. Brady*, 973 F.2d 192, 196 (3d Cir. 1992)).

In this case, Kiesel presents no evidence that the arbitration clause is procedurally unconscionable. He has not argued that LVEC was in a stronger position during negotiations than he was or that the negotiations were somehow unfair, and the fact that Kiesel was not only accepting employment but also selling his shares of LVEC stock to LVEC would seem to indicate that the playing field was level. Kiesel also has not argued that he was coerced or defrauded into agreeing to the arbitration clause in his contract. See *Great W. Mortg. Corp. v.*

Peacock, 110 F.3d 222, 229-30 (3d Cir. 1997). He appears to argue that the arbitration clause is procedurally unconscionable because it is unclear. However, the clause clearly and unambiguously requires arbitration of “[a]ny controversy or disagreement.” Kiesel’s attempt to create ambiguity is contrary to the plain meaning of the clause, and therefore will be rejected. See generally *Burstein v. Prudential Prop. & Cas. Ins. Co.*, 809 A.2d 204, 206 (Pa. 2002) (stating “[g]enerally, courts must give plain meaning to a clear and unambiguous contract provision unless to do so would be contrary to a clearly expressed public policy”).

Kiesel has also presented no evidence that the arbitration agreement is substantively unconscionable. In this case, the requirement to arbitrate applies equally to both parties and Kiesel’s access to relief is in no way limited. He appears to believe that it would be substantively unconscionable to require him to arbitrate a statutory claim; however, the Supreme Court has consistently upheld arbitration agreements that apply to statutory claims, including claims arising under the ADEA.⁵ See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991) (stating that “a claim under the Age Discrimination in Employment Act of 1967 . . . can be subjected to compulsory arbitration pursuant to an arbitration agreement”). Kiesel’s argument on this point appears to be based on a “‘suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants,’ and as such, [is] ‘far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes.’” *Id.* at 30 (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477,

⁵ While the Older Workers Benefit Protection Act of 1990 provides that an “individual may not waive any right or claim under [the ADEA] unless the waiver is knowing and voluntary,” 29 U.S.C. § 626(f)(1), this applies only to substantive rights under the ADEA and not to the waiver of a judicial forum, *Seus v. John Nuveen & Co., Inc.*, 146 F.3d 175, 181-82 (3d Cir. 1998).

481 (1989). Thus, the court rejects Kiesel’s unconscionability defense and finds that the Agreement’s arbitration clause is valid and enforceable.

B. The Scope of the Arbitration Clause

Before a court may stay proceedings, it must also ensure that “the specific dispute falls within the substantive scope of [the arbitration] agreement.” *Medtronic AVE, Inc.*, 247 F.3d at 55. “To determine whether a claim falls within the scope of an arbitration agreement, the focus is on the factual underpinnings of the claim rather than the legal theory alleged in the complaint.” *Id.* (internal quotation marks omitted).

The “factual underpinnings” of Kiesel’s claims focus on LVEC’s behavior toward Kiesel during his employment and in terminating that employment. Thus, the court must consider whether these claims fall within the scope of the arbitration agreement.

It is clear that the arbitration agreement does cover the instant dispute. The arbitration agreement – which states that “[a]ny controversy or disagreement between the parties to this Agreement shall be determined by an arbitration” (emphasis added) – is broad, contains no exceptions, and does not limit arbitrable issues to contractual causes of action. In *Gilmer*, the Supreme Court enforced an arbitration agreement with similar⁶ language – the clause in *Gilmer* provided that the parties “agree[d] to arbitrate any dispute, claim or controversy” – and held that

⁶ The court also rejects Kiesel’s argument that the arbitration clause in *Gilmer* is materially different than the arbitration clause in this case because the former included the word “claim.” Kiesel has presented no case law or meaningful discussion explaining why “claim” is significant. Further, the argument conflicts with the Supreme Court’s statement in *Wright* that the arbitration clause at issue in that case – which provided for arbitration of “[m]atters under dispute” – was “equivalently broad” to the arbitration clause at issue in *Gilmer*. 525 U.S. at 80. See also *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110, 1114-15 (3d Cir. 1993) (clause providing for arbitration of “all controversies which may arise between us” covers ERISA claims).

by agreeing to that clause a plaintiff had waived his right to bring his ADEA claim in a judicial forum. *Gilmer*, 500 U.S. at 23. The Court's decision in *Gilmer* confirms that an arbitration agreement can apply to statutory claims without explicitly stating so. Indeed, the Supreme Court has noted that the burden actually runs the other way: "[n]othing, in the meantime, prevents a party from excluding statutory claims from the scope of an agreement to arbitrate." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). Thus, the court will follow *Gilmer* and rule that Kiesel's claims fall within the scope of the arbitration clause.

Kiesel argues that *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70 (1998), stands for the proposition that an "explicit incorporation of statutory anti-discrimination claims" is necessary for an arbitration provision to apply to statutory claims. *Wright*, however, is distinguishable from this case.

In *Wright*, the Supreme Court was faced with the question of "whether a general arbitration clause in a collective-bargaining agreement (CBA) requires an employee to use the arbitration procedure for an alleged violation of the Americans with Disabilities Act of 1990." *Id.* at 72. The arbitration clause provided for arbitration of "matters under dispute." *Id.* In ruling on this issue, the Court first concluded that the presumption of arbitrability that the Court had previously found in § 301 of the Labor Management Relations Act (LMRA) was inapplicable, because that presumption only applies to cases involving the interpretation of a CBA, while *Wright* presented a statutory claim. *Id.* at 77-78. Next, the Court ruled that "a union-negotiated waiver of employees' statutory right to a judicial forum for claims of employment discrimination" must be "clear and unmistakable." *Id.* at 80-81. The Court held that the arbitration clause did not contain "a clear and unmistakable waiver of the covered employees'

rights to a judicial forum for federal claims of employment discrimination,” and accordingly, ruled that the employees had not waived their right to bring their claims in federal court. *Id.* at 82.

Despite Kiesel’s contentions, *Wright* is inapposite. First, *Wright*’s conclusion that there is no presumption of arbitrability for statutory claims is based on the LMRA, not the FAA. The Court expressly “decline[d] to consider the applicability of the FAA” and its presumption of arbitrability. *Id.* at 78 n.1. The Court in *Wright* also did not purport to abrogate its statement in *Mitsubishi*, 473 U.S. at 627, a case applying the FAA, that “the Act itself provides no basis for disfavoring agreements to arbitrate statutory claims by skewing the otherwise hospitable inquiry into arbitrability.” Second, the clear and unmistakable standard is applicable to “a union’s waiver of the rights of represented employees,” not “an individual’s waiver of his own rights.” *Id.* at 80. Here, Kiesel waived his own rights, which renders inapplicable *Wright*’s heightened standard. Accordingly, the court concludes that Kiesel’s age discrimination claims fall within the scope of a valid arbitration agreement, and therefore must be resolved in arbitration.

For the foregoing reasons, there is no genuine factual question that precludes the court from concluding that it is required to stay the instant proceedings pursuant to 9 U.S.C. § 3.

An appropriate order follows.

