

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

	:	CIVIL ACTION
Joesph Zumpano, Plaintiff	:	
v.	:	
	:	
Omnipoint Communications et al., Defendants	:	
	:	NO. 00-CV-595
	:	
	:	

Memorandum and Order

YOHN, J.

January , 2001

The plaintiff, Joseph Zumpano [“Zumpano”], alleges that his former employers, Omnipoint Communications, Inc., Omnipoint Corporation, and Omnipoint Communications Services, LLC [collectively “Omnipoint”], discriminated against him based on his age and national origin and failed to honor his employment agreement. Zumpano brought this action under the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964, and other applicable federal and state law.

Currently pending before the court is Omnipoint’s motion to dismiss the amended complaint and to compel arbitration. Defs.’ Notice of Mot. to Dismiss the Am. Compl. and to Compel Arbitration (Doc. 16) [“Defs.’ Mot.”]. After considering Omnipoint’s motion, Zumpano’s response in opposition, Pl.’s Resp. to Defs.’ Mot. to Dismiss Pl.’s Am. Compl. and to Compel Arbitration (Doc. 20) [“Pl.’s Resp.”], and various supplementary filings submitted through December 12, 2000, I conclude that Zumpano is obligated to arbitrate his claims.

FACTUAL BACKGROUND

From September 14, 1998 to October 4, 1999, Zumpano was employed as Director of Sales for Omnipoint's Mid-Atlantic region. *See* Pl.'s First Am. Compl. (Doc. 15) ¶¶ 17-18. As Director of Sales, Zumpano earned a base annual salary of approximately \$120,000. *See id.* ¶¶ 16 & 19. In addition to his salary, Zumpano was also compensated with stock options. *See id.* ¶ 20.

Zumpano, who is currently fifty-five years old and is of Italian ancestry, alleges that, during the course of his employment, he was repeatedly subjected to discriminatory and derogatory comments and actions related to his age and Italian ancestry. *See id.* ¶¶ 1 & 14-15. In particular, Zumpano alleges that his immediate supervisor, Matt Dowd ["Dowd"], who is approximately thirty-seven years of age, questioned the ability of Zumpano and other older individuals to work effectively given their age and referred to Zumpano's Italian ancestry in a derogatory manner. *See id.* ¶¶ 26-28. Zumpano also alleges that Thomas J. Shea ["Shea"], Omnipoint's Human Resource Manager, Roger Schlegel, Omnipoint's Sales Manager, and Chuck Johnston ["Johnston"], Omnipoint's Chief Operating Officer, made similar discriminatory and derogatory comments. *See id.* ¶¶ 29-31.

Zumpano alleges that Dowd's bias against older individuals and people of Italian ancestry caused Dowd to reduce Zumpano's compensation level. *See id.* ¶ 32. Furthermore, Zumpano alleges that he was suspended by Dowd and eventually demoted by Dowd and Shea after he complained to Johnston about this reduction in compensation. *See id.* ¶¶ 33-37. Zumpano

alleges that he was ultimately forced to resign because of the hostile work environment created by Dowd. *See id.* ¶ 38.

Zumpano also alleges that Omnipoint violated his employment agreement by refusing to let him exercise 800 stock options that vested on September 14, 1999. *See id.* ¶ 41.

Finally, Zumpano alleges that, since his resignation, he has not been able to obtain comparable employment despite his reasonable efforts to do so. *See id.* ¶ 40.

STANDARD OF REVIEW

Omnipoint has filed the instant motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). However, in addition to their pleadings, both parties have submitted various exhibits and affidavits. If a defendant files a motion for failure to state a claim upon which relief can be granted, and “matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56” Fed. R. Civ. P. 12(b). Accordingly, the Court will treat Omnipoint’s motion as one for summary judgment. Neither Zumpano nor Omnipoint has objected to the court using a summary judgment standard of review. *See* Defs.’ Br. in Supp. of Their Mot. to Dismiss the Compl. and to Compel Arbitration (Doc. 3) (incorporated by Defs.’ Mot.) [“Defs.’ Incorporated Mot.”], at 1 n.1; Pl.’s Br. in Opp’n to Defs.’ Mot. to Dismiss the Compl. and to Compel Arbitration (Doc. 6) (incorporated by Pl.’s Resp.) [“Pl.’s Incorporated Resp.”], at 2.

Either party to a lawsuit may file a motion for summary judgment, and it will be granted “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the

moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). The moving party bears the initial burden of showing that there is no genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Where the movant bears the burden of persuasion at trial, the movant satisfies this initial burden by “identifying [the evidence] which it believes demonstrate[s] the absence of a genuine issue of material fact.” *Id.* at 323. Where the nonmovant bears the burden of persuasion at trial, the moving party may meet its initial burden and shift the burden of production to the nonmoving party “by ‘showing’—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party’s case.” *Id.* at 325. Thus, summary judgment will be entered “against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Id.* at 322.

When a court evaluates a motion for summary judgment, “[t]he evidence of the non-movant is to be believed.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Additionally, “all justifiable inferences are to be drawn in [the non-movant’s] favor.” *Id.* At the same time, “an inference based upon a speculation or conjecture does not create a material factual dispute sufficient to defeat entry of summary judgment.” *Robertson v. Allied Signal, Inc.*, 914 F.2d 360, 382 n.12 (3d Cir. 1990). The nonmovant must show more than “[t]he mere existence of a scintilla of evidence” for elements on which he bears the burden of production. *Anderson*, 477 U.S. at 252. Thus, “[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no ‘genuine issue for trial.’” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citations omitted).

DISCUSSION

Upon acceptance of an offer of employment by Omnipoint, Zumpano signed an employment agreement that contains an arbitration clause. *See* Pl.’s Incorporated Resp., at 3. Omnipoint argues that Zumpano’s complaint should be dismissed because each cause of action alleged by Zumpano arises out of his employment with Omnipoint, and, therefore, is subject to the arbitration clause. *See* Defs.’ Incorporated Mot., at 4. Zumpano claims that the arbitration clause is unenforceable because an oppressive fee structure renders it unconscionable. *See* Pl.’s Incorporated Resp., at 3-8.

A. The Arbitration Clause

As a condition of his employment with Omnipoint, Zumpano signed the “Omnipoint Corporation Salary Employment Agreement” [“Employment Agreement”]. *See* Defs.’ Incorporated Mot., Ex. C. The Employment Agreement contains the following clause:

7. The parties agree that any controversy, claim, or dispute arising out of or relating to this Agreement, or the breach thereof, or arising out of or relating to the employment of the Employee, or the termination thereof, including any claims under federal, state, or local statutes or common law, shall be resolved by arbitration in the state of Bensalem, [sic] PA in accordance with the Employment Dispute Resolution Rules of the American Arbitration Association. The parties agree that any award rendered by the arbitrator shall be final and binding, and that judgment upon the award may be entered in any court having jurisdiction thereof.

Id. at 2.

As stated in the Employment Agreement, any arbitration taking place between the parties will be governed by the Employment Dispute Resolution Rules (“Rules”) of the American Arbitration Association (“AAA”). The AAA Rules state the following regarding the arbitrator’s

expenses and compensation:

34. The Award

....

d. The arbitrator may grant *any remedy or relief* that the arbitrator deems just and equitable, including any remedy or relief that would have been available to the parties had the matter been heard in court. The arbitrator shall, in the award, assess arbitration fees, expenses, and compensation as provided in Sections 38, 39, and 40 *in favor of any party* and, in the event any administrative fees or expenses are due the AAA, in favor of the AAA.

....

38. Administrative Fees

As a not-for-profit organization, the AAA shall prescribe filing and other administrative fees to compensate it for the cost of providing administrative services. The AAA administrative fee schedule in effect at the time the demand for arbitration or submission agreement is received shall be applicable.

The filing fee shall be advanced by the initiating party or parties, subject to final apportionment by the arbitrator in the award.

The AAA may, in the event of extreme hardship on any party, defer or reduce the administrative fees.

39. Expenses

Unless otherwise agreed by the parties, the expenses of witnesses for either side shall be borne by the party producing such witnesses. All expenses of the arbitration, including required travel and other expenses of the arbitrator, AAA representatives, and any witness and the costs relating to any proof produced at the direction of the arbitrator, *shall be borne equally by the parties*, unless they agree otherwise or *unless the arbitrator directs otherwise in the award*.

The arbitrator's compensation *shall be borne equally by the parties* unless they agree otherwise, or *unless the law provides otherwise*.

40. Neutral Arbitrator's Compensation

Arbitrators shall charge a rate consistent with the arbitrator's stated rate of compensation. If there is a disagreement concerning the terms of compensation, an appropriate rate shall be established with the arbitrator by the AAA and confirmed to the parties.

Any arrangement for the compensation of a neutral arbitrator shall be made through the AAA and not directly between the parties and the arbitrator. Payment of the arbitrator's fees and expenses shall be made by the AAA from the fees and moneys collected by the AAA from the parties for this purpose.

Pl.'s Incorporated Resp., Ex. A, at 13-14 (emphasis added).

B. Validity of the Arbitration Clause

The Third Circuit has held that “there is a strong presumption in favor of arbitration.” *Great Western Mortgage Corp. v. Peacock*, 110 F.3d 222, 228 (3d Cir. 1997), *cert. denied*, 522 U.S. 915. Accordingly, when a district court is asked to enforce an arbitration agreement, its scope of inquiry is narrow. *Id.* The threshold questions a district court must answer when it is asked to compel arbitration are: “(1) Did the parties . . . enter into a valid arbitration agreement? (2) Does the dispute between those parties fall within the language of the arbitration agreement?” *John Hancock Mut. Life Ins. Co. v. Olick*, 151 F.3d 132, 137 (3d Cir. 1998) (citing *Schulte v. Prudential Insurance Co. of Am. (In re Prudential Ins. Co. of Am.)*, 133 F.3d 225, 233 (3d Cir. 1998); *PaineWebber Inc. v. Hartmann*, 921 F.2d 507, 511 (3d Cir. 1990)). “In conducting this limited review, the court must apply ordinary contractual principles, with a healthy regard for the strong federal policy in favor of arbitration.” *John Hancock*, 151 F.3d at 137 (citing *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *In re Prudential Ins. Co. of Am.*, 133 F.3d at 228). However, because Zumpano “agrees with [Omnipoint] that, if the Court finds the agreement to arbitrate disputes is a valid and enforceable one, the instant dispute falls within the scope of the arbitration agreement,” Pl.’s Incorporated Resp., at 2 n.2, the only question before this court is whether the parties entered into a valid arbitration agreement.

Under the Federal Arbitration Act, state law governs the formation of contracts. *See Battaglia v. McKendry*, 233 F.3d 720, 724 (3d Cir. 2000) (“[W]hen deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally . . . should apply ordinary state-law principles that govern the formation of contracts.”) (quoting *First Options of*

Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995)); *Blair v. Scott Specialty Gases*, No. Civ. A. 00-3865, 2000 WL 1728503, at *4 (E.D. Pa. Nov. 21, 2000) (“Under the FAA, state law governs the formation of contracts”) (citations omitted); *Smith v. Creative Res.*, No. CIV. A. 97-6749, 1998 WL 808605, at *1 (E.D. Pa. Nov. 23, 1998) (“State law contract principles govern disputes over agreements to arbitrate.”) (citation omitted); *Sues v. John Nuveen & Co., Inc.*, No. CIV. A. 96-5971, 1997 WL 325792 (E.D. Pa. June 2, 1997), at *3 (“A court generally should apply ordinary state-law principles on contract formation [when deciding whether a valid arbitration agreement exists].”) (citation omitted), *aff’d*, 146 F.3d 175 (3d Cir. 1998), *cert. denied*, 525 U.S. 1139 (1999). However, as noted above, in evaluating whether an arbitration agreement constitutes a valid contract, courts must bear in mind the strong federal policy favoring arbitration. *See Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 475-76 (1989).

Under Pennsylvania law, the main inquiry in determining whether two parties have entered into an enforceable contract is “the ‘manifestation of assent of the parties to the terms of the promise and to the consideration for it. . . .’” *Atacs Corp. v. Trans World Communications, Inc.*, 155 F.3d 659, 666 (3d Cir. 1998) (citations omitted). Thus, the Third Circuit has enunciated the following test to determine whether, under Pennsylvania law, an enforceable contract has been formed: “(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.” *Id.* at 666. Omnipoint has submitted a copy of the Employment Agreement containing the clearly stated arbitration clause in question that binds both parties and was signed by Zumpano. *See* Defs.’ Incorporated Mot., Ex. C.

In challenging the validity of the Employment Agreement, Zumpano claims that it is unconscionable. *See* Pl.’s Incorporated Resp., at 3. First, Zumpano asserts that the agreement is unenforceable because it requires him to pay a portion of the arbitrator’s fees and expenses. *See id.* at 4 (citing *Shankle v. B-G Maint. Mgmt. of Colo., Inc.*, 163 F.3d 1230, 1233-34 (10th Cir. 1999); *Paladino v. Avnet Computer Tech., Inc.*, 134 F.3d 1054, 1062 (11th Cir. 1998); *Cole v. Burn Int’l Sec. Serv.*, 105 F.3d 1465, 1482 (D.C. Cir. 1997)). In the alternative, Zumpano claims that the agreement is unenforceable because the imposition of fees and expenses ““would make the plaintiff unable to, or, [sic] would substantially deter plaintiff from seeking to, enforce his or her statutory rights.”” Pl.’s Surreply to Defs.’ Reply Br. Addressing Defs.’ Mot. to Dismiss Pl.’s Compl., and Pl.’s Mot. for Permission to File Same (Doc. 9) (incorporated by Pl.’s Resp.) [“Pl.’s Incorporated Surreply”], at 3 (quoting *Arakawa v. Japan Network Group*, 56 F. Supp. 2d 349, 355 (S.D.N.Y. 1999)).

“Unconscionability is a defensive contractual remedy which serves to relieve a party from an unfair contract or unfair provision of a contract.” *Wagner v. Estate of Rummel*, 391 Pa. Super. 555, 561 (1990), *alloc. denied*, 527 Pa. 588 (Pa. 1991). Under Pennsylvania law, the test for unconscionability is whether one of the parties lacked a “‘meaningful choice’ about whether to accept the provision [or contract] in question” and the challenged provision or contract “‘unreasonably favor[s]’” the other party to the contract.” *See Hornberger v. General Motors Corp.*, 929 F. Supp. 884, 891 (E.D. Pa. 1996) (citations omitted).

1. Per Se Rule

Zumpano asks this court to refuse to compel arbitration because the “United States Courts of Appeals for the D.C., Tenth and Eleventh Circuits have held that if a mandatory arbitration

agreement requires an employee to pay a portion of the arbitrator's fees, then that agreement is unenforceable." Pl.'s Incorporated Resp., at 4. However, the arbitration clause involved in this case and Zumpano's former position of employment clearly distinguish this case from *Shankle*, *Paladino*, and *Cole*. Moreover, these three decisions are not as closely aligned with Third Circuit precedents and are less persuasive than more recent decisions by the Fifth, First, and Seventh Circuits and numerous district courts holding that arbitration agreements which stipulate that an employee may be responsible for a portion of the arbitrator's fees and expenses are enforceable. See *Williams v. Cigna Fin. Advisors, Inc.*, 197 F.3d 752 (5th Cir. 1999), *cert. denied*, 120 S. Ct. 1833 (2000); *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1 (1st Cir. 1999); *Kovelskie v. SBC Capital Markets, Inc.*, 167 F.3d 361 (7th Cir. 1999), *cert. denied*, 528 U.S. 811; *Blair v. Scott Specialty Gases*, No. Civ.A. 00-3865, 2000 WL 1728503 (E.D. Pa. Nov. 21, 2000); *Arakawa v. Japan Network Group*, 56 F. Supp. 2d 349 (S.D.N.Y. 1999).

Although, at times, the Tenth Circuit broadly framed the question before it in *Shankle*, 163 F.3d 1230, 1233 ("Is a mandatory arbitration agreement, which is entered into as a condition of continued employment, and which requires an employee to pay a portion of the arbitrator's fees, unenforceable under the Federal Arbitration Act?"), its holding is narrowly tailored to the facts of the case. First, the agreement in question *required* the employee to pay one-half of the arbitrator's fees. See *id.* at 1232. Second, the court found that Shankle, who was employed as a janitor and, later, a shift manager, "*could not afford such a fee*, and it is unlikely other *similarly situated employees* could either." *Id.* at 1234-35 (emphasis added).

Unlike *Shankle*, the arbitration clause involved in this case does not require Zumpano to

pay half of the arbitrator's fees. Instead, under the AAA Rules, it is uncertain how much Zumpano will be charged:

All expenses of the arbitration, including required travel and other expenses of the arbitrator, AAA representatives, and any witness and the costs relating to any proof produced at the direction of the arbitrator, shall be borne equally by the parties, unless they agree otherwise or *unless the arbitrator directs otherwise in the award.*

The arbitrator's compensation shall be borne equally by the parties unless they agree otherwise, or *unless the law provides otherwise.*

Pl.'s Incorporated Resp., Ex. A, at 14 (emphasis added). Additionally, Zumpano, who earned a base salary of \$120,000, was by no means "similarly situated" to Shankle.

In *Paladino*, the Eleventh Circuit considered an arbitration clause which appeared to encompass statutory claims, but which only authorized the arbitrator to award damages for breach of contract. *Paladino*, 134 F.3d 1054, 1057. The arbitration clause specifically stated that the arbitrator "shall have no authority whatsoever to make an award of other damages." *Id.* As a result, the court found that the arbitration clause "defeat[ed] the statute's remedial purposes because it insulated [the company] from Title VII damages and equitable relief." *Id.* at 1062. In addition, the Eleventh Circuit found that, if Paladino were to arbitrate her claim, she would be required to pay a \$2,000 filing fee and up to half of the arbitration costs. Based on these facts, the Eleventh Circuit found that "*costs of this magnitude* [are a] legitimate basis for a conclusion that the clause does not comport with statutory policy." *Id.* (emphasis added). Later in the opinion, the Eleventh Circuit reiterated the basis for its holding: "a clause *such as this one* that deprives an employee of any hope of meaningful relief, while imposing high costs on the employee, undermines the policies that support Title VII. It is not enforceable." *Id.* (emphasis added).

Because the only aspect of the arbitration clause that is challenged by Zumpano is the allocation of the arbitrator's fees and costs, *Paladino* is inapposite. Whereas the remedies that were available to the employee were explicitly limited by the language of the arbitration clause at issue in *Paladino*, the arbitration clause in this case does not directly limit the relief that is available to Zumpano. Additionally, unlike *Paladino*, only the arbitrator's fees and costs--not administrative fees-- are at issue in this case.

In *Cole*, the issue before the court was whether an employer can "require an employee to arbitrate all disputes and also require the employee to pay all or part of the arbitrators' fees." *Cole*, 105 F.3d 1465, 1468. And the D.C. Circuit held that "[t]he only way that an arbitration agreement of the sort at issue here can be lawful is if the employer assumes responsibility for the payment of the arbitrator's compensation." *Id.* Again, although the court's holding is broad and, it has been argued that it creates a "per se rule," see *Paladino*, 134 F.3d at 1062 (citing *Cole*, 105 F.3d at 1484), the decision appears to be fact-bound. The court found that, at that time, "[t]here [was] no indication in AAA's rules that an arbitrator's fees may be reduced or waived in cases of financial hardship. These fees would be *prohibitively expensive for an employee like Cole*" *Cole*, 105 F.3d at 1484. It is important to note that Cole was employed as a security guard. See *id.* at 1469. Later the court explains the basis for its holding: "In such a circumstance-- *where arbitration has been imposed by the employer and occurs only at the option of the employer--* arbitrator's fees should be borne solely by the employer." *Id.* at 1484-85 (emphasis added).

Unlike *Cole*, the arbitration clause in this case is not asymmetrical; both Zumpano and Omnipoint are required to arbitrate claims arising under the Employment Agreement.

Additionally, as noted above, the AAA Rules now provide that:

All expenses of the arbitration, including required travel and other expenses of the arbitrator, AAA representatives, and any witness and the costs relating to any proof produced at the direction of the arbitrator, shall be borne equally by the parties, *unless they agree otherwise or unless the arbitrator directs otherwise in the award.*

The arbitrator's compensation shall be borne equally by the parties unless they agree otherwise, or *unless the law provides otherwise.*

Pl.'s Incorporated Resp., Ex. A, at 14 (emphasis added). Finally, *Cole* is also inapposite because Zumpano would seem to be substantially more likely to be able to afford to pay the arbitrator's fees associated with filing a claim to arbitrate than Cole was.

The Third Circuit has yet to rule on the issue of whether an arbitration clause that allows a well-compensated employee to be held responsible for a portion of the arbitrator's fees and expenses is enforceable. However, as noted above, the Third Circuit recognizes that "there is a strong presumption in favor of arbitration." *Great Western Mortgage Corp.*, 110 F.3d at 228. Given this "strong presumption," district courts have been instructed to maintain a "healthy regard for the strong federal policy in favor of arbitration" when determining whether an arbitration agreement is enforceable. *John Hancock*, 151 F.3d at 137 (citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *In re Prudential Ins. Co. of Am.*, 133 F.3d at 228). As a result, even if *Shankle*, *Paladino*, and *Cole* were apposite, on this issue, the precedents of the Third Circuit are more closely aligned with the more recent decisions of the Fifth, First, and Seventh Circuits. See *Williams v. Cigna Fin. Advisors, Inc.*, 197 F.3d 752 (5th Cir. 1999), *cert. denied*, 120 S. Ct. 1833 (2000); *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1 (1st Cir. 1999); *Kovelskie v. SBC Capital Markets, Inc.*, 167 F.3d 361 (7th Cir. 1999), *cert. denied*, 528 U.S. 811. See also *Blair v. Scott Specialty Gases*, No. Civ. A. 00-3865, 2000 WL 1728503 (E.D. Pa. Nov. 21, 2000); *Arakawa v. Japan Network Group*, 56 F.

Supp. 2d 349 (S.D.N.Y. 1999).

Additionally, the facts of the *Williams*, *Rosenberg*, and *Kovelskie* cases are more closely aligned with those presented by this case. For example, in *Williams*, the plaintiff was a former securities representative whose salary for a subsequent employer was in “excess of six figures,” *Williams*, 197 F.3d at 765, and the amount of the arbitrator’s fee the employee would be responsible for was uncertain prior to resolution of the claim. *See id.* at 764. Similarly, in *Rosenberg*, the plaintiff was a financial consultant and, under the arbitration clause at issue, employees generally did not bear forum fees because the “arbitrators possess[ed] discretion to award costs and fees when they decide a dispute.” *See Rosenberg*, 170 F.3d at 15. Finally, in *Kovelskie*, the plaintiff was a Director in a securities trading department, and the arbitration clause allowed for the shifting of forum fees. *See Kovelskie*, 167 F.3d at 365-66.

2. Substantially Deter

In the alternative, Zumpano claims that the agreement is unenforceable because the imposition of fees and expenses ““would make the plaintiff unable to, or, [sic] would substantially deter plaintiff from seeking to, enforce his or her statutory rights.”” Pl.’s Incorporated Surreply, at 3 (quoting *Arakawa v. Japan Network Group*, 56 F. Supp. 2d 349, 355 (S.D.N.Y. 1999)). In *Arakawa*, the court held that:

A fee splitting arrangement is only contrary to the remedial and deterrent aims of Title VII if the fees are so great and the plaintiff’s financial situation is such that the imposition of the fees would make the plaintiff unable to, or would substantially deter plaintiff from seeking to, enforce his or her statutory rights.

Arakawa, 56 F. Supp. 2d at 355. Similarly, the Fifth Circuit has also indicated that, when a district court is reviewing an arbitrator’s order for a public policy violation, the appropriate

standard is whether the plaintiff demonstrates that arbitration costs “prevented him from having a full opportunity to vindicate his claims effectively or prevented the arbitration proceedings from affording him an adequate substitute for a federal judicial forum.” *Williams*, 197 F.3d at 764.

Numerous district courts have utilized the standard adopted by *Arakawa* and *Williams* to determine whether an arbitration clause is enforceable or whether an arbitration award should be vacated. *See, e.g., McCaskill v. SCI Mgmt. Corp.*, No. 00 C 1543, 2000 WL 875396, at *4 (N.D. Ill. June 22, 2000) (“[Plaintiff] has not shown the requirement to pay half the arbitration costs ‘prevented [her] from having a full opportunity to vindicate [her] claims effectively or prevented the arbitration proceedings from affording [her] an adequate substitute for a federal judicial forum.’”) (quoting *Williams*, 197 F.3d at 764) (alteration in the original); *Ahing v. Lehman Brothers, Inc.*, No. 94 Civ. 9027(CSH), 2000 WL 460443, at *13 (S.D.N.Y. April 18, 2000) (“I think that if there is a compelling argument that fee-splitting may render arbitration an inadequate forum for the redress of a plaintiff’s Title VII rights, the concern arises, as *Arakawa* and other courts have indicated, from the amount of the fee relative to the plaintiff’s ability to pay.”); *Cline v. H.E. Butt Grocery Co.*, 79 F. Supp. 2d 730, 733 (S.D. Tex. 1999) (“Plaintiff offers no information as to [his] financial status or his ability to pay for the cost of arbitration, but he appears to be a managerial employee making at least \$35,000 per year. The Court cannot simply assume that such a worker is incapable of paying one half of the arbitration fees.”).

Zumpano provides evidence that the hourly rates of potential arbitrators range from approximately \$200. to \$250. per hour¹ and that the typical employment case requires between

¹ Zumpano fails to note that some arbitrators offer a significantly discounted daily rate of \$750. *See* Pl.’s Incorporated Resp., Ex. B.

fifteen to forty hours of arbitrator time. *See* Pl.’s Incorporated Resp., at 5-6 & Ex. B. Given these figures, Zumpano estimates that he “is faced with a prospective bill for his share of the arbitrator’s time ranging between One Thousand Five Hundred Dollars (\$1,500.00) and Five Thousand Dollars (\$5,000.00)” in addition to his share of the arbitrator’s expenses. *See id.* at 6.

Zumpano claims that the following facts raise a genuine issue of material fact as to whether his potential responsibility for the arbitrator’s fees and expenses would substantially deter him from seeking to enforce his statutory rights: 1) he was unemployed for more than seven months after being constructively discharged on October 4, 1999; 2) he received no unemployment compensation during the months he was unemployed; 3) “[he is] in a condition of financial hardship”; and 4) “[t]he *mere possibility* of being forced to pay one-half of an arbitrator’s fee ranging between Five Hundred (\$500.00) and One Thousand Dollars (\$1,000.00) per day, such that [he] could be liable for an amount up to Twenty Thousand Dollars (\$20,000.00) in arbitrator’s fees may leave with [sic] [him] with no alternative but to withdraw [his] claim against OmniPoint [sic] and waive [his] federally-protected rights.” Pl.’s Incorporated Surreply, Aff. of Joseph Zumpano.

However, “[c]ourts have repeatedly held that conclusory self-serving affidavits are insufficient to withstand a motion for summary judgment.” *Blair v. Scott Specialty Gases*, No. Civ. A. 00-3865, 2000 WL 1728503, at *7 (E.D. Pa. Nov. 21, 2000) (citing *Wells v. Shalala*, 228 F.3d 1137, 1144 (10th Cir. 2000); *Taylor v. Monsanto Co.*, 150 F.3d 806, 809 (7th Cir. 1998); *Rose-Maston v. NME Hosp., Inc.*, 133 F.3d 1104, 1109 (8th Cir. 1998)). Plaintiff fails to submit any concrete evidence, such as a bank statement or a statement of assets and liabilities or a statement of income and expenses, either currently or at the time his employment with

Omnipoint ended, to show that he can not afford to pay a portion of the arbitrator's fees and expenses. Instead, to support his contention that he cannot afford to arbitrate his claim, Zumpano relies in large part on the following conclusory statements in his affidavit: 1) "I am in a condition of financial hardship"; and 2) "[t]he *mere possibility* of being forced to pay one-half of an arbitrator's fee ranging between Five Hundred (\$500.00) and One Thousand Dollars (\$1,000.00) per day, such that I could be liable for an amount up to Twenty Thousand Dollars (\$20,000.00) in arbitrator's fees may leave with [sic] me with no alternative but to withdraw my claim against OmniPoint [sic] and waive my federally-protected rights." Pl.'s Incorporated Surreply, Aff. of Joseph Zumpano.

Besides being self-serving and conclusory, the second statement is of little value to the court because, based on facts and estimates Zumpano himself presented in prior pleadings, it is premised on a gross overestimate of the arbitrator's fees and expenses. *See* Pl.'s Incorporated Resp., at 5-6 & Ex. B (estimating that Zumpano "is faced with a prospective bill for his share of the arbitrator's time ranging between One Thousand Five Hundred Dollars (\$1,500.00) and Five Thousand Dollars (\$5,000.00)" based on estimates that the hourly rates of potential arbitrators range from approximately \$200. to \$250. per hour and the typical employment case requires between fifteen to forty hours of arbitrator time).

Additionally, both statements are insufficient to convince the court that there is a genuine issue of material fact because they both describe Zumpano's present financial condition and not his financial condition when the contract was formed or during the intervening time when he was eligible to file for arbitration. As noted above, less than three years ago, Zumpano had sufficient market power to attract an offer of employment at a base salary of \$120,000 per year. Given his

prior income level and the skills that presumably allowed him to earn it, the idea that a maximum expected cost of \$5,000 would be so burdensome as to make Zumpano “unable to, or, would substantially deter [him] from seeking to, enforce his . . . statutory rights” is incredible.

Furthermore, given that Omnipoint has shown that it is willing to consider paying the arbitration fees and costs, *see* Defs.’ Br. in Reply to Pl.’s Opp’n to Defs.’ Mot. to Dismiss the Compl. and to Compel Arbitration (Doc. 7) (incorporated at the request of counsel, Letter from Att’y Cino to Chambers of 9/7/00) [“Defs.’ Incorporated Reply”], at 10-11, the fact that Zumpano has presented no evidence that he ever attempted to negotiate an agreement with Omnipoint regarding payment of the fees and costs weighs against the credibility of his claim.

Given these facts, a rational trier of fact could not find that Zumpano has demonstrated that he has been, and continues to be, substantially deterred from seeking to enforce his statutory rights by the expected cost, as marginal as it may be, of the arbitrator’s fees and costs.

Moreover, because, at this stage in the litigation it is still uncertain how large the arbitrator’s fees and costs will be or whether the plaintiff will even be required to pay any portion of them, this court can not conclude that the agreement to arbitrate is unenforceable as a matter of law. In *Arakawa*, the court articulated the principle underlying the First Circuit’s decision in *Rosenberg* and Seventh Circuit’s decision in *Koveleskie*:

the possibility that a plaintiff may be required to pay arbitration fees is not, by itself, a sufficient reason to invalidate an agreement to arbitrate Title VII claims at the outset of an action because the arbitral panel may not in fact require the plaintiff to pay fees and, if a plaintiff believes that excessive fees have been levied against him or her, judicial review of the imposition of fees is available after arbitration.

Arakawa, 56 F. Supp. 2d at 354 (citing *Rosenberg*, 170 F.3d at 16; *Koveleskie*, 167 F.3d at 366).

This court will, however, maintain jurisdiction over any subsequent petition with respect to the award. *See id.* at 355 (citing *Rosenberg*, 170 F.3d at 16; *Kovelskie*, 167 F.3d at 366).

For the abovementioned reasons, I conclude that Zumpano has failed to demonstrate that the arbitration agreement is invalid and unenforceable as a matter of law. Therefore, Zumpano is obligated to arbitrate his claims.

In conclusion, it should be noted that, even if *Cole* were apposite and persuasive, or if Zumpano had demonstrated that the possibility of being held responsible for a portion of the arbitrator's expenses or compensation has substantially deterred him and continues to substantially deter him from seeking to enforce his statutory rights, the appropriate remedy would not have been for this court to hold the arbitration agreement unenforceable. As noted above, the relevant portion of the arbitration clause states that "[t]he arbitrator's compensation shall be borne equally by the parties unless they agree otherwise, or *unless the law provides otherwise.*" Pl.'s Incorporated Resp., Ex. A, at 14 (emphasis added). In other words, the fee splitting provision is only applicable "unless the law provides otherwise." As a result, if this court had concluded that Zumpano could not be held responsible for any portion of the arbitrator's fees or costs, I would have nullified the offensive aspect of the arbitration clause and held that Omnipoint would be responsible for the arbitrator's fees and costs. *See Quinn v. EMC Corp.*, 109 F. Supp. 2d 681, 685-86 (S.D. Tex. 2000) ("Even if the Court were convinced that Plaintiff cannot afford to pay for the arbitration proceeding, the better solution would be to nullify the fee provisions of the arbitration agreement and have [the Defendant] shoulder the expense. Plaintiff's proposed solution— abrogation of the entire arbitration agreement— is unnecessarily radical."); *Cf. Smith v. Creative Res.*, No. CIV. A. 97-6749, 1998 WL 808605, at *3 (E.D. Pa.

Nov. 23, 1998) (“When an arbitration agreement between an employee and her employer does not specify who must pay the costs of arbitration, the employer must pay.”) (citing *Cole*, 105 F.3d at 1485). However, the arbitration clause would still have been enforceable. *Cf. Blair v. Scott Specialty Gases*, No. Civ. A. 00-3865, 2000 WL 1728503, at *7 n.2 (E.D. Pa. Nov. 21, 2000). Therefore, I still would have concluded that Zumpano had failed to demonstrate that the arbitration agreement was invalid and unenforceable as a matter of law.

CONCLUSION

I will grant Omnipoint’s motion to dismiss (treated as a motion for summary judgment) and direct the parties to submit their dispute to arbitration as provided in the Employment Agreement.

Because Zumpano does not dispute Omnipoint’s contention that all of the causes of action in his amended complaint fall within the scope of the arbitration clause, no issue remains before the court. *See* Pl.’s Incorporated Resp., at 2 n.2; Defs.’ Incorporated Mot., at 9. Therefore, I will dismiss the amended complaint without prejudice. *See Seus v. John Nuveen & Co., Inc.*, 146 F.3d 175, 179 (3d Cir. 1998); *Dancu v. Coopers & Lybrand*, 778 F. Supp. 832, 835 (E.D. Pa. 1991) (“Retaining jurisdiction would serve no purpose [because all] claims will be determined in arbitration. Without a live controversy before the court, the appropriate procedure is dismissal of the action without prejudice.”) (citations omitted), *aff’d*, 972 F.2d 1330 (3d Cir. 1992).

An appropriate order follows.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

Joesph Zumpano, Plaintiff	:	CIVIL ACTION
	:	
v.	:	
	:	
Omnipoint Communications et al., Defendants	:	NO. 00-CV-595
	:	
	:	

ORDER

AND NOW, this day of January, 20001, upon consideration of Omnipoint's motion to dismiss the amended complaint (treated as a motion for summary judgment), Zumpano's response in opposition, and various supplementary filings, IT IS HEREBY ORDERED that:

- (1) Omnipoint's motion to dismiss (treated as a motion for summary judgment) is GRANTED,
- (2) Omnipoint's motion to compel arbitration is GRANTED, and
- (3) the action is dismissed without prejudice.

William H. Yohn, Jr., J.