

SJC10712

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

DAR 18758

SJC NO. DAR

Appeals Court No. 2010-P-0437

JOULÉ, INC., JOULÉ TECHNICAL
STAFFING, INC., JOHN G. WELLMAN,
and KARI BURKE,

Plaintiff-Appellant.

v.

RANDI SIMMONS,

Defendant-Appellee

And

MASSACHUSETTS COMMISSION AGAINST
DISCRIMINATION
Defendant Intervener-Appellée

On Appeal from the Suffolk Superior Court

COMMONWEALTH OF MASSACHUSETTS'
APPLICATION FOR DIRECT APPELLATE REVIEW

MASSACHUSETTS COMMISSION AGAINST
DISCRIMINATION
By its Attorney

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COMMONWEALTH OF MASSACHUSETTS'
APPLICATION FOR DIRECT APPELLATE REVIEW

I. Request For Direct Appellate Review

Pursuant to G.L. c. 211A, § 10(A) and Mass. R.
App. P. 11 the Appellee Massachusetts Commission
Against Discrimination ("Commission") seeks direct
appellate review of issues raised and preserved before

the superior court in the matter of *Joulié, Inc., et al v. Randi Simmons, et al*, Appeals' Court Number 2010-P-0437.

II. Statement Of Prior Proceedings

Randi Simmons filed a discrimination claim with the Massachusetts Commission Against Discrimination ("Commission" or "MCAD") on August 25, 2009, asserting claims of gender (pregnancy) discrimination and retaliation by her former employer Joulé Inc., and employees thereof (collectively, Joulé). Exhibit A, Complaint To Enforce An Arbitration Agreement and Exhibits attached therewith. The Commission is investigating Ms. Simmons' complaint in accordance with G.L. c. 151B, § 5.

Joulé filed an answer (position statement) with the Commission on November 6, 2009.¹ On November 19, 2009, without notice or service to the Commission, Joulé filed a civil action in superior court seeking to compel Ms. Simmons to initiate arbitration, and bar her from participating in Commission proceedings as a "party" or "litigant". Appendix A, Certified Court

¹ Joulé's complaint to enforce arbitration also asserts that Simmons' breached her employment contract by filing a complaint with the Commission. Exhibit A, Complaint To Enforce An Arbitration Agreement.

Docket ("Docket"); Exhibit A. The Commission filed a Motion to Intervene, which the Court allowed. Docket. On January 7, 2010, the superior court denied Joulé's Motion, and stayed all proceedings pending resolution of Ms. Simmons' complaint by the Commission. *Id.* Docket; Appendix B, Decision.

Joulé filed a notice of appeal and docketed the case with the Appeals Court. The Commission and Simmons now seek direct appellate review.

III. Short Statement Of Facts

Plaintiff Joulé Technical Staffing, Inc. ("Joulé") is a New Jersey corporation doing business in the Commonwealth of Massachusetts. John G. Wellman, Jr., is the president and chief operating officer of Joulé. Exhibit A. Plaintiffs Kristin Motta Zwickau and Kari Burke are employees of Joulé's Boston, Massachusetts office. Ms. Zwickau is the director of Joulé's Boston, office.² Ms. Burke is the Boston office manager.

In February 2008, Joulé hired Randi Simmons ("Simmons") as a selling branch manager for Rhode Island and southeastern Massachusetts. As selling

² Addendum, Exhibit to Plaintiffs' Memorandum in support of plaintiffs' Complaint, Affidavit of Kristin Motta Zwickau.

manager, Ms. Simmons was responsible for overseeing Joulé's sales effort and territory management for certain industries.³

On Simmons' first day of employment, without prior discussion or notice, Kristin Zwickau presented her with a mandatory employment agreement containing confidentiality, non-compete and arbitration provisions ("Agreement").⁴ Zwickau told Simmons that she would have to sign the Agreement if she wanted to work at Joulé, and told her to review it and return it "promptly".⁵ Zwickau kept after Simmons until she returned the Agreement signed on April 4, 2008.⁶

The arbitration clause requires Joulé employees to arbitrate disputes, including discrimination claims, relating to their employment and/or termination of their employment in lieu of a jury trial. Exhibit B, Agreement at pages 2 and 3, clause 5(a)-(b). More specifically, the Agreement requires Joulé employees to "give up their right to go to court

³ Taken from, Exhibit to Plaintiffs' Memorandum in support of plaintiffs' Complaint, Affidavit of Kristin Motta Zwickau.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

and to a trial by jury". *Id.* at ¶ 5(b). The agreement contains no language waiving the right to file a complaint with an administrative agency or participate in an administrative enforcement action. Exhibit B.

IV. Statement Of The Issues Of Law Raised

The issues raised by Joulé's appeal include: (1) what, if any, impact a private agreement has on the Commonwealth's enforcement of the laws against discrimination; (2) the enforceability of mandatory pre-dispute arbitration clauses that waive, purport to waive, or otherwise impair: (a) the right of an aggrieved person to file a complaint of discrimination with the Massachusetts Commission Against discrimination under G.L. c. 151B, § 5; (b) an aggrieved party's right to participate in a Commission investigation and enforcement action as set forth in G.L. c. 151B, § 5 and the Code of Massachusetts Regulations; and whether an arbitration clause that by its terms waives only the right to go to court or to a jury trial, is a clear and unmistakable waiver of the administrative enforcement process.

As a natural consequence of the issues raised above, this case implicates the application to the MCAD of mandatory pre-dispute

arbitration clauses between private parties that waive, purport to waive, or otherwise impairs the Commission's statutory authority to interpret G.L. c. 151B in the first instance, bring an enforcement action, and remedy acts of unlawful discrimination in accordance with G.L. c. 151B, § 5.

V. Argument⁷

a. The section five provision of Chapter 151B is an enforcement action.

When the Commonwealth's Legislature established the Massachusetts Commission Against Discrimination's predecessor agency, the Fair Employment Practices Commission, in 1946, it created an enforcement scheme for the ferreting out and eradication of discrimination. Crucial to this enforcement scheme is the filing of a complaint by a person claiming to be the victim of unlawful discrimination. St. 1946, c. 368, §§ 4, 5 and 9.⁸

⁷ In light of the page limit, the arguments below identify only the major issues and arguments. Appellants reserve the right to supplement these arguments and issues should this Court grant direct review.

⁸ See *Beacon Hill Civic Ass'n*, 422 Mass. at 322-32 (discussing the difference between the public enforcement action under Section 5 and the private

The purpose of the Commission investigation into an aggrieved party's complaint is to determine whether the allegations of the complaint give rise to a probable cause or lack of probable cause determination. While the Commission employs a variety of techniques to investigate cases, each Investigating Commissioner determines whether to issue predetermination "discovery" Orders allowing the complainant and respondent to conduct "discovery" on a case-by-case basis. *Standing Order of the Commissioners Regarding Pre-Determination Case Process* (February 20, 2007).⁹ See also, 804 C.M.R. 1.13(7). In doing so, the parties are assisting the Commission in its investigative responsibilities.

right of action under Section 9). The Legislature did not create a private right of action until 1974, when it amended § 9 of G.L. c. 151B to allow complainants to file a civil action in Superior Court. St. 1974, c. 478. The aggrieved party's private right of action accrues ninety days after a complaint has been filed at the Commission, earlier with Commission approval. G.L. c. 151B, § 9. The right to proceed through the Commission under Section 5, or remove a case, and pursue a private action at the expiration of ninety days lies with the aggrieved party, and the Commission's jurisdiction remains exclusive while the case is pending before it. *Id.* Accordingly, the enforcement process under Section 5 is in no sense of the words "private litigation."

⁹<http://www.mass.gov/mcad/documents/stanord022007.pdf> (As of November 24, 2009).

If the Commission determines that there is probable cause to believe that a violation of the law has occurred, the Commission will appoint Commission Counsel or an agent of the Commission to prosecute the claim at the Commission. At the Commission's discretion, it will allow private counsel retained by an aggrieved party to present the case on the Commission's behalf. 804 C.M.R. 1.09. Therefore, while an aggrieved party may file a complaint with the Commission, testify at hearing and intervene as a party to an administrative prosecution (at the discretion of the Commission), it is the MCAD, and not the complainant, that prosecutes the discrimination claim at the Commission. G.L. c. 151B, § 5; 804 C.M.R. 1.01 et seq.

The primary purpose of an administrative proceeding before the MCAD is to vindicate the public's interest in eradicating discrimination by "detering, and punishing, instances of discrimination" *Stonehill College*, 441 Mass. at 563. *C.F. Everett v. 357 Corp.*, 453 Mass. 585, 601 (2009). The Commission's mandate comports with government's fundamental role in regulating public health and safety, keeping the peace, and providing for the

general welfare. The Massachusetts Legislature in fact exercised its police power when it passed G.L. c. 151B and committed to the Commission the mandate to eliminate discrimination.¹⁰ Private third-party agreements cannot impair the exercise of this "police power".¹¹

b. An arbitration provision that bars an aggrieved party from filing a complaint under G.L. c. 151B or that in any way purports to limit Section 5 investigation and enforcement proceedings contravenes Massachusetts public policy.

Both the Federal Arbitration Act and its Massachusetts equivalent, G.L. c. 251, 55 1 et seq., require courts to treat arbitration agreements as all other contracts are treated and, therefore, the state regulates contracts, including arbitration clauses, under general contract law principles. Under basic principles of common law contract, a clause that violates the express provisions or general policy of a

¹¹ The term "police power" made its first appearance in the U.S. Supreme Court in *Brown v. Maryland*, 25 U.S. (12 Wheat 419, 443 (1827)). The concept, however, is much older. See 4 Blackstone's Commentaries 162 (St. George Tucker ed., Rothman Reprints, Inc. 1969) (1803) ("The due regulation and domestic order of the kingdom, whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighbourhood, and good manners; and to be decent, industrious, and inoffensive in their respective stations.").

particular statute is contrary to public policy, and, accordingly, is unenforceable. See *Feeney v. Dell Inc.*, 454 Mass. 192, 209 (2009), *Beacon Hill Civic Ass'n v. Ristorante Toscano, Inc.*, 422 Mass. 318, 321 (1996); *Wheeler v. Russell*, 17 Mass. 258, 1821 WL 1489 (1821). See also *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 704 (1945).

The rights of an aggrieved party to file a discrimination claim with the Commission and to participate in Commission proceedings as authorized by G.L. c. 151B, § 5, are unassailable statutory rights, which cannot be diminished through mandatory pre-dispute arbitration clause. G.L. c. 151B, § 5. See also, *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 293-294 (2002). The same is true, of the Commission's right to enforce the statutory scheme by which it attempts to eradicate discrimination under c. 151B. Any arbitration clause that purports to preclude or limit an aggrieved party's participation in a Section 5 proceeding inherently interferes with the Commission's authority to investigate and eradicate discrimination in the public interest

and is therefore unlawful.¹² See *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 293-294 (2002).

The Legislature enacted Chapter 151B to assure equality of employment opportunities by eliminating those practices and barriers that discriminate. While cooperation and voluntary compliance are the preferred methods for achieving this goal, the Legislature also recognized that investigation and punishing violations is necessary where cooperation failed. See G.L. c. 151B, § 5. To this end, the Legislature created the Massachusetts Commission Against Discrimination and established a comprehensive administrative procedure whereby the Commission would investigate claims of discrimination, and for those it credited, it would have an opportunity to settle disputes through conference, conciliation, and persuasion before resorting to the Commission's enforcement mechanism - public hearing and remedies. *Id.*¹³

¹² The public policy in this case is "well defined and dominant." *Massachusetts Bay Transp. Authority v. Boston Carmen's Union, Local 589, Amalgamated Transit Union*, 454 Mass. 19, 26 (2009). See also *Stonehill College*, 441 Mass. at 563; *Warfield v. Beth Israel Deaconess Medical Center, Inc.*, 454 Mass. at 399 n. 13 (1981).

¹³ The Commission may order injunctive relief, training, reinstatement, individual compensatory

Ultimately, it is "[t]he Commission's task [] to work for the public good of eliminating and preventing discrimination and to educate the citizens of the Commonwealth with regard to their rights and duties under the Commonwealth's anti-discrimination statutes. It is the Commission's responsibility to enforce Massachusetts' anti-discrimination laws, in order to protect, preserve, and enhance the civil rights of its citizens." *In re Mohawk Greenfield Motel Corp.*, 239 B.R. at 9. Thus, while private individuals have a significant and perhaps critical role in the Commission's enforcement process under c. 151B, § 5,¹⁴ once a probable cause determination issues, the Commission controls the prosecution of claims, and prosecutes offenders in its own name. G.L. c. 151B, § 5; 804 C.M.R. 1.09(5) ("The case in support of the complaint shall be presented before the Commission by one of its attorneys or agents, or, at the discretion of the Commission, by an attorney retained by the complainant) (Emphasis added); 804 C.M.R. 1.20 ("When remedies, and civil penalties paid to the Commonwealth - and each that play an important role in the enforcement of G.L. c. 151B, and deters future violations. G.L. c. 151B, § 5.

¹⁴ The Commission relies on individual filings as the primary means of ferreting out such unlawful conduct.

the Investigating Commissioner believes that the public interest requires a certification of issues to public hearing, she or he shall issue a complaint in the name of the Commission, pursuant to M.G.L. c. 151B, § 5"; "Any complainant may file a request for intervention under 804 C.M.R. 1.20(3)(a)".¹⁵ This authority cannot be abridged by private agreement. See *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 293-294 (2002).

Both the Federal Arbitration Act and its Massachusetts equivalent, G.L. c. 251, 55 1 et seq., require courts to treat arbitration agreements as all other contracts are treated and, therefore, the state regulates contracts, including arbitration clauses, under general contract law principles. Not only is the Commission not a party to these private agreements, but basic principles of common law contract require invalidation of a clause that violates the express provisions or general policy of a particular statute, as contrary to public policy. See *Feeney v. Dell*

¹⁵ For example, while the Commission administrative scheme includes a neutral adjudicatory process, the Commission prosecution of the complaint after probable cause is not "neutral". Compare, *Preston v. Ferrer*, 552 U.S. 346, 128 S.Ct. 978 (2008) (administrative body acted only as a neutral arbitrator).

Inc., 454 Mass. 192, 209 (2009), *Beacon Hill Civic Ass'n v. Ristorante Toscano, Inc.*, 422 Mass. 318, 321 (1996); *Wheeler v. Russell*, 17 Mass. 258, 1821 WL 1489 (1821). See also *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 704 (1945). Limitation or restriction on the Commission's enforcement authority directly, or indirectly through limitations imposed through mandatory pre-dispute arbitration agreements on an aggrieved party's right to file a complaint with the Commission or participate fully in a Commission enforcement action, constitutes such violation.

VI. Statement of Reasons Why Direct Appellate Review Is Appropriate

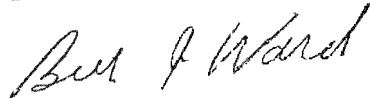
The issues raised in this appeal present novel questions of law, that are of substantial importance to public interest as the impact both the rights of the individual under G.L. c. 151B, § 5, and the statutory enforcement authority of the Massachusetts Commission Against Discrimination . The impact of private mandatory pre-dispute arbitration agreements on the authority of the Massachusetts Commission Against Discrimination and on the right of an aggrieved party to file a complaint with the Commission and fully participate in a Commission

enforcement action under G.L. c. 151B is one of first
impression.

Wherefore, the Massachusetts Commission
Against Discrimination and Randi Simmons ask this
Court to grant their petition for direct
appellate review.

Respectfully Submitted,

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION
By its Attorney



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EXHIBIT A

_____)
JOULÉ, INC., JOULÉ TECHNICAL)
STAFFING, INC., JOHN G. WELLMAN,)
KRISTIN MOTTA ZWICKAU,)
and KARI BURKE,)
Plaintiffs,)
v.) Civil Action No.
RANDI SIMMONS,)
Defendant.)
_____)

COMPLAINT
TO ENFORCE AN ARBITRATION AGREEMENT

Introduction

1. In February 2008, Plaintiff Joulé, Inc. (hereafter this Complaint refers to Joulé, Inc. and its subsidiary Joulé Technial Staffing, Inc. collectively as "Joulé") hired Defendant Randi Simmons ("Simmons") as selling senior branch manager for Joulé's offices in Boston and Rhode Island.
2. In April 2008, Simmons signed an agreement captioned "Employment Agreement With Confidentiality, Non-Competition, And Arbitration Provisions" (hereafter the "Arbitration Agreement").
3. A true copy of the Arbitration Agreement is attached as Tab A to the Affidavit of Plaintiffs' Counsel Authenticating Documents, which is attached hereto as Exhibit One.

4. The Arbitration Agreement provides in part: "I hereby understand and agree that disputes between me and Joulé, its employees and/or its clients relating to my employment and or/termination of my employment (which includes without limitation, claims of discrimination, harassment, hostile work environment, retaliation, or other wrongful termination claims) will be resolved through binding arbitration at the American Arbitration Association ('AAA') or the Judicial Arbitration and Mediation Service ('JAMS')."

5. In July 2009, Joulé terminated Simmons' employment.

6. On or about September 9, 2009, Simmons filed a charge of employment discrimination against Joulé, Inc. and the other Plaintiffs in this case at the Massachusetts Commission Against Discrimination ("MCAD").

7. Simmons has not initiated an arbitration proceeding against Joulé, Inc. or the other Plaintiffs in this case with AAA or JAMS.

8. Simmons has, through counsel, informed Plaintiffs that she does not consider the Arbitration Agreement binding on her and that she intends to litigate her case at the MCAD without regard to the Arbitration Agreement.

9. Plaintiffs file this case to enforce the Arbitration Agreement.

The Parties

10. Plaintiff Joulé, Inc. is a corporation organized under the laws of New Jersey. Its offices are located at at 1245 Route 1 South, Edison, New Jersey, 08837. Joulé, Inc. is a parent company and provides corporate support to its subsidiaries, which operate in the staffing industry in several states. Joulé, Inc.'s subsidiaries annually supply thousands of hourly employees to companies in several states and, additionally, provide companies in

several states payroll, invoicing, financial operations and reporting, employee relations, benefits administration, and technology systems support. Joulé, Inc.'s subsidiaries do business in and maintain offices in several states, including New Jersey, Pennsylvania, Alabama, Illinois, and Massachusetts.

11. Plaintiff Joulé Technical Staffing, Inc. is a corporation organized under the laws of New Jersey and with its principal place of business at 1245 Route 1 South, Edison, New Jersey, 08837. Joulé Technical Staffing, Inc. is a subsidiary of Joulé, Inc. Joulé Technical Staffing, Inc. provides temporary professionals to companies in several states, including New Jersey, Pennsylvania, and Massachusetts. Joulé Technical Staffing, Inc. does business in Massachusetts as CM Access. Joulé Technical Staffing, Inc. has an office in Massachusetts at One Thompson Square, Suite 302, Boston, Massachusetts 02129.

12. Plaintiff John G. Wellman is president of Joulé, Inc. and Joulé Technical Staffing, Inc.

13. Plaintiff Kristin Motta Zwickau is director of Joulé's Boston office.

14. Plaintiff Kari Burke is office manager at Joulé's Boston office.

15. Defendant Randi Simmons, upon information and belief, resides at 120 Cliff Road in Milton, Massachusetts.

Joulé Hires Simmons;
Simmons Signs Arbitration Agreement;
Approximately 18 Months Later, Joulé Terminates Simmons' Employment

16. In February 2008, Joulé, through its Boston office, hired Simmons as selling branch manager. As selling branch manager, Simmons was responsible for overseeing

Joule's sales effort and territory management for certain industries in Rhode Island and southeastern Massachusetts.

17. On Simmons' first day of employment at Joulé, Ms. Zwickau delivered to Simmons the Arbitration Agreement.

18. Ms. Zwickau asked Simmons to review the Arbitration Agreement, sign it, and return the signed Arbitration Agreement to Joulé promptly.

19. Ms. Zwickau informed Simmons that Simmons' signing the Arbitration Agreement was a condition of her employment at Joulé.

20. During February and March 2008, Joulé asked Simmons several times to sign and return the Arbitration Agreement.

21. On April 7, 2008, Simmons signed the Arbitration Agreement.

22. The introductory paragraph to the Arbitration Agreement provides in part: "My covenants, promises and agreements set forth in [this] Agreement are a material inducement to Joulé to employ or retain me."

23. Paragraph 5 (a) of the Arbitration Agreement provides:

I hereby understand and agree that disputes between me and Joulé, its employees and/or its clients relating to my employment and/or termination of my employment (which includes without limitation, claims of discrimination, harassment, hostile work environment, retaliation, or other wrongful termination claims) will be resolved by binding arbitration, through either the American Arbitration Association ("AAA") or the Judicial Arbitration and Mediation Service ("JAMS"), and by the relevant Joulé Employment Dispute Rules and Procedures in effect at the time of filing the arbitration claim. I understand that my agreement to arbitrate such disputes includes without limitation any disputes or claims arising under common law or various statutes, including without limitation, termination of my employment by Joulé,

discrimination claims, whether under federal, state, or local law, regulation or ordinance, claims under any public policy, contract or tort, or under common law, claims involving practices or procedures of Joulé or and of Joulé's clients. My agreement to arbitrate does not however, apply to any claims for Worker's Compensation and Unemployment Benefits or any claims involving theft, fraud or other actions against me, which might give rise to criminal penalties, or any type of action where the sole or primary remedy is declaratory and/or injunctive relief against me.

24. Paragraph 5 (b) of the Arbitration Agreement provides:

I understand and acknowledge that my agreement to submit all applicable disputes as described above to binding arbitration means that with respect to all such claims I am knowingly, and voluntarily waiving my right to a trial by jury and that I am doing so free of any duress or coercion. I further understand that Joulé will pay all costs of arbitration, except for my own attorney fees, expenses, and any fees associated with filing the initial complaint or claim. I understand that I am not required to hire a lawyer in the event of a dispute resulting in arbitration. While I am giving up my right to appear in court and to a trial by jury with respect to the types of claims set forth above, I understand that an arbitrator can award to me all damages and other compensation, including attorneys' fees to which I would otherwise be entitled by specific common law or statutes.

25. Paragraph 5 (c) of the Arbitration Agreement provides:

I understand that the dispute resolution provisions of this Agreement and any resulting arbitration will be governed by the Federal Arbitration Act and the laws of the state in which I am employed by Joulé.

26. Paragraph 5 (d) of the Arbitration Agreement provides:

I acknowledge that I have read and fully understand this Agreement. I consider the commitments I have made in this Agreement to be reasonable ones, required for Joulé's protection, and are fair to me. Accordingly, I understand that if I violate any of said commitments, Joulé will take

an action against me to the fullest extent of the law. I further acknowledge that I have the right to consult an attorney prior to signing this Agreement, but that I will not be offered employment until I sign and return this Agreement.

27. Ms. Zwickau witnessed Simmons sign the Arbitration Agreement.

28. Ms. Burke witnessed Simmons sign the Arbitration Agreement. Ms. Burke signed the Arbitration Agreement as a witness to Simmons' signing the Arbitration Agreement.

29. On July 30, 2009, Joulé terminated Simmons' employment.

Simmons Files MCAD Case Against Plaintiffs;
Simmons Refuses To Initiate Arbitration Proceeding Under The Terms of The
Arbitration Agreement

30. On or about August 25, 2009, Simmons, through attorneys, filed a charge of employment discrimination against Joulé, Inc. and the other Plaintiffs in this case at the MCAD. The MCAD assigned the case an MCAD docket number, 09BEM02347, and the case was assigned an Equal Employment Opportunity Commission docket number, 16C-2009-02354. A true copy of the MCAD complaint is attached as Tab B to the Affidavit of Plaintiffs' Counsel Authenticating Documents, which is attached hereto as Exhibit One.

31. Simmons has not initiated an arbitration proceeding at AAA or JAMS against Plaintiffs.

32. Simmons has, through counsel, informed Plaintiffs that she refuses to resolve her claims against them in arbitration. See E-mail Correspondence From Defendant's Counsel, November 2, 2009, attached as Tab C to the Affidavit of Plaintiffs' Counsel Authenticating Documents, which is attached hereto as Exhibit One.

33. Simmons has, through counsel, informed Plaintiffs that she believes the Arbitration Agreement is not binding on her and does not prevent her from acting as a litigant in the MCAD case. See *ibid*.

Count One: Massachusetts Arbitration Act (M.G.L. c. 251, §§ 1 et seq.)

34. Simmons is party to a written agreement to submit any controversy concerning her employment with Joulé to arbitration.

35. The Arbitration Agreement is valid and binding.

36. Simmons must submit any claim against Plaintiffs, which is based on the facts alleged in her MCAD complaint, to arbitration under the terms of the Arbitration Agreement.

37. Simmons, because she is a party to the Arbitration Agreement, may not act as a litigant or party in any administrative action against Plaintiffs, which is based on the facts alleged in her MCAD complaint.

Count Two: Federal Arbitration Act (9 U.S.C. §§ 1 et seq.)

38. The Arbitration Agreement is a written contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction.

39. Simmons has failed, neglected, and refused to submit claims against the Plaintiffs, which are within the scope of the Arbitration Agreement, to arbitration.

40. Plaintiffs are aggrieved by Simmons' failure, neglect, and refusal.

Count Three: Breach of Contract

41. Simmons signed the Arbitration Agreement.

42. Joule continued to employ Simmons in consideration for Simmons' signing the Arbitration Agreement.

43. Simmons has breached the Arbitration Agreement.

44. Simmons has damaged Plaintiffs by her breach of the Arbitration Agreement.

Count Four: Declaratory Relief (M.G.L. c. 231A, §§ 1 et seq.)

45. An actual controversy has arisen between Plaintiffs and Simmons concerning the Arbitration Agreement.

46. Plaintiffs ask the Court to declare that: a.) the Arbitration Agreement is valid and binding on Simmons; b.) Simmons must submit any claim against Plaintiffs, which is based on the facts alleged in her MCAD complaint, to arbitration under the terms of the Arbitration Agreement; c.) Simmons, because she is a party to the Arbitration Agreement, may not act as a litigant or party in any administrative action against Plaintiffs, which is based on the facts alleged in her MCAD complaint; and d.) declare the other rights and obligations of the parties under the Arbitration Agreement.

WHEREFORE, Plaintiffs respectfully ask this Court to:

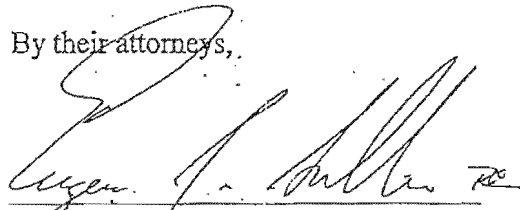
- a.) declare that the Arbitration Agreement is valid and binding on Simmons;
- b.) order Simmons to pursue any dispute against Plaintiffs related to her employment, including any claims based on the alleged facts which underlie her complaint to the MCAD, through arbitration in the manner described in the Arbitration Agreement;
- c.) declare that Simmons may not act as a litigant in the MCAD/EEOC case captioned MCAD docket number, 09BEM02347, EEOC/HUD docket number, 16C-2009-02354;

d.) grant Plaintiffs such other relief as the Court finds appropriate and just.

Respectfully submitted,

JOULÉ, INC., JOULÉ TECHNICAL
STAFFING, INC., JOHN G. WELLMAN,
KRISTIN MOTTA ZWICKAU, and KARI
BURKE,

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Dated: 19 Nov 09

Certificate of Service

Undersigned certifies that on this date he caused a true copy of this document to be served on counsel for the plaintiff, Barbara A. Robb, Shilepsky O'Connell Hartley Casey Michon Yelen Robb LLP, One Financial Center, 15th Floor, Boston, MA 02111-2898, by first class mail, postage prepaid *hand*.

Dated: 19 Nov 09

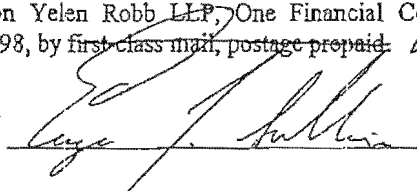


EXHIBIT B



Copy given

EMPLOYMENT AGREEMENT WITH CONFIDENTIALITY, NON-COMPETITION,
AND ARBITRATION PROVISIONS

Name: Randi Simmons Date: 4/7/2008

In consideration of my employment by Joulé Inc., its subsidiaries and/or affiliates (collectively "Joulé"), and in recognition that:

- A) My covenants, promises and agreements set forth in the Agreement are a material inducement to Joulé to employ or retain me; and
- B) The protection afforded to Joulé by these covenants, promises and agreements is necessary to protect Joulé's property rights in its proprietary and confidential information, data and material; and to protect it from unfair competition which I recognize would result to Joulé if the same were divulged to and/or used for the benefit of others, or if these covenants, promises and/or agreements were/are violated.

I HEREBY COVENANT, PROMISE AND AGREE AS FOLLOWS:

1. **Duty of Confidentiality:** I will not, during the period of my employment by Joulé, or at any time thereafter, divulge to any party, or utilize other than for Joulé's benefit, the names of any customers or assigned personnel of Joulé, or any trade secrets of Joulé, which may be imparted by me, or which I may otherwise acquire, during employment with Joulé. During my employment with Joulé, I will not disclose trade secret information or data, except as such disclosure may be required in connection with my work as a Joulé employee. I acknowledge that such trade secrets include without limitation the following:
 - a. All literature, information, data and records (INCLUDING THE COMPUTER ON-LINE DATA BASE) concerning the customers of Joulé and/or concerning Joulé's customer lists, business, products, services, techniques, methods, systems, prices, price books, plans, policies and orders (including employment orders).
 - b. All literature, records, information and data (INCLUDING THE COMPUTER ON-LINE DATA BASE) concerning Joulé's employees, whether said employees be field or administrative personnel, and whether they be temporary or regular employees.
 - c. All literature, records, information and data (INCLUDING THE COMPUTER ON-LINE DATA BASE) relating to the requirements of Joulé's customers, agreements and/or arrangements between Joulé and its customers (both past and present), as well as pricing, pay rate, and marketing techniques developed and/or utilized by Joulé, whether done so generally, or with regard to specific customers.
2. **Restrictive Covenant, Non-Competition:** During the term of my employment with Joulé and for a period immediately after termination of said employment and for a period of time equal to the number of months my employment shall have continued (but not less than six nor more than 18 months after termination), and within a 50 mile radius of any Joulé office where I was located, or interacted with in the course of my duties, or had management responsibilities, I will not directly or indirectly accept employment with or render service on behalf of a competitor of Joulé (including myself or any entity in which I have ownership



interest), or any third party in any capacity where the circumstances are such that the confidential information or trade secrets of *Joulé* acquired by me during my employment with *Joulé* would be useful to my new employer, or would be disclosed to or used by such a competitor or third party to the detriment of *Joulé*. I further agree during the period of termination of my employment (referred to above in this paragraph), to advise *Joulé* of the name and address of my prospective employers at least 5 days prior to subsequent employment.

3. **Non-Solicitation of Joulé Customers or Employees:** Upon my employment with *Joulé* ending (no matter how it ended), and thereafter, I will not directly or indirectly:

- a. call upon, solicit, divert, or take away, or attempt to do so, any of the customers, business patrons of *Joulé*, upon whom I called, or solicited or serviced, or became acquainted with while employed with *Joulé*;
- b. hire on behalf of myself, or on behalf of any other party, any person who was a *Joulé* employee of any category during the term of my employment by *Joulé*, or attempt to do so.

4. **Employment at Will:** I acknowledge that my employment with *Joulé* is and always will be that of an employee at-will. This means that *Joulé* has not promised me and I have no guaranty of employment for any length of time. Accordingly, *Joulé* may terminate my employment at-will, at any time without prior notice to me and without any reason or cause. Also, I am free to resign at any time without any reason or cause. I also acknowledge that no representative of *Joulé*, regardless of how high his/hier position within *Joulé* might be, has the authority to make any verbal assurances, promises or guarantees regarding wages, benefits, regarding my continued employment with *Joulé*, regarding terms and conditions of my *Joulé* employment, or regarding deleting or changing any provisions of this Agreement.

5. **Arbitration of Employee Claims:**

- a. I hereby understand and agree that disputes between me and *Joulé*, its employees and/or its clients relating to my employment and/or termination of my employment (which includes without limitation, claims of discrimination, harassment, hostile work environment, retaliation, or other wrongful termination claims) will be resolved by binding arbitration through either the American Arbitration Association ("AAA") or the Judicial Arbitration and Mediation Service ("JAMS"), and by the relevant *Joulé* Employment Dispute Rules and Procedures in effect at the time of filing the arbitration claim. I understand that my agreement to arbitrate such disputes includes without limitation any disputes or claims arising under the common law or various statutes, including without limitation, termination of my employment by *Joulé*, discrimination claims, whether under federal, state or local law, regulation or ordinance, claims under any public policy, contract or tort, or under common law, claims involving any practices or procedures of *Joulé* or any of *Joulé*'s clients. My agreement to arbitrate does not however, apply to any claims for Worker's Compensation or Unemployment Insurance Benefits or any claims involving theft, fraud or other actions against me, which might give rise to criminal penalties, or any type of action where the sole or primary remedy is declaratory and/or injunctive relief against me.



- b. I understand and acknowledge that my agreement to submit all applicable disputes as described above to binding arbitration means that with respect to all such claims I am knowingly, and voluntarily waiving my right to a trial by jury and that I am doing so free of any duress or coercion. I further understand that *Joulé* will pay all costs of arbitration, except for my own attorney fees, expenses, and any fees associated with filing the initial complaint or claim. I understand that I am not required to hire a lawyer in the event of a dispute resulting in arbitration. While I am giving up my right to appear in court and to a trial by jury with respect to the types of claims set forth above, I understand that an arbitrator can award to me all damages and other compensation, including attorneys' fees to which I would otherwise be entitled by specific common law or statutes.
 - c. I understand that the dispute resolution provisions of this Agreement and any resulting arbitration will be governed by the Federal Arbitration Act and the laws of the state in which I am employed by *Joulé*.
 - d. I acknowledge that I have read and fully understand this Agreement. I consider the commitments I have made in this Agreement to be reasonable ones, required for *Joulé's* protection, and are fair to me. Accordingly, I understand that if I violate any of said commitments, *Joulé* will take action against me to the fullest extent of the law. I further acknowledge that I have the right to consult an attorney prior to signing this Agreement, but that I will not be offered employment until I sign and return this Agreement.
6. **Severability:** If any provision of this Agreement is determined to be invalid, such invalidity shall not impair the validity of any other provision of this Agreement. This Agreement supersedes any and all prior agreements between *Joulé* and the undersigned concerning the same subject matter and, along with the documents entitled *Joulé* Arbitration Procedures and Dispute Resolution Process that are relevant, shall constitute the entire Agreement between myself and *Joulé* regarding duty of confidentiality, non-competition and resolution of all disputes or claims falling within one or more categories of claims set forth in paragraph 5 above. The provisions in this Agreement may only be amended, waived, changed or modified by a writing signed by an authorized representative of *Joulé* and me.

Employee's Signature _____

Printed Employee's Name _____

Randi J. Simmons

In consideration of above named Employee's execution and delivery of this agreement, *Joulé* does hereby agree to hire/retain Employee on the basis, and subject to the provisions, set forth above.

Joulé Inc.

Witnessed By: _____

APPENDIX

APPENDIX A

Case Summary
Civil Docket

SUCV2009-04929
Joule, Inc et al v Simmons

| | |
|-------------------------------|--|
| File Date 11/19/2009 | Status Needs review for answers (acneansw) |
| Status Date 03/01/2010 | Session A - Civil A, 3 Pemberton Sq, Boston |
| Origin 1 - Complaint | Case Type D99 - Misc equitable remedy |
| Track F - Fast track | Lead Case |
| Jury Trial No. | |

DEADLINES

| | Service | Answer | Rule12/19/20 | Rule 15 | Discovery | Rule 56 | Final PTC | Judgment |
|------------------|------------|------------|--------------|------------|------------|------------|------------|------------|
| Served By | | | 03/19/2010 | 03/19/2010 | 09/15/2010 | 10/15/2010 | | |
| Filed By | 02/17/2010 | 03/19/2010 | 04/18/2010 | 04/18/2010 | | 11/14/2010 | | 09/10/2011 |
| Heard By | | | 05/18/2010 | 05/18/2010 | | | 03/14/2011 | |

PARTIES

| | |
|---|---|
| <p>Plaintiff Joule, Inc Active 11/19/2009</p> | <p>Private Counsel 554843 Herbert L Holtz Holtz & Reed LLP 1 Bowdoin Square Boston, MA 02114 Phone: 617-720-0501 Fax: 617-375-5700 Active 11/19/2009 Notify</p> <p>Private Counsel 656497 Eugene J Sullivan, III Holtz & Reed LLP One Bowdoin Sq. Boston, MA 02114 Phone: 617-720-0501 Fax: Active 11/19/2009 Notify</p> <p>Private Counsel 672611 Kate J Levy Holtz & Reed LLP One Bowdoin Square Boston, MA 02114 Phone: 617-720-0501 Active 11/19/2009 Notify</p> |
| <p>Plaintiff Joule Technical Staffing, Inc Active 11/19/2009</p> | <p>Private Counsel 554843 Herbert L Holtz Holtz & Reed LLP 1 Bowdoin Square Boston, MA 02114 Phone: 617-720-0501 Fax: 617-375-5700 Active 11/19/2009 Notify</p> |

SUCV2009-04929
Joule, Inc et al v Simmons

| | |
|---|--|
| <p>Plaintiff John G Wellman Active 11/19/2009</p> | <p>*** See Attorney Information Above ***</p> |
| <p>Plaintiff Kristin Motta Zwickau Active 11/19/2009</p> | <p>*** See Attorney Information Above ***</p> |
| <p>Plaintiff Kari Burke Active 11/19/2009</p> | <p>*** See Attorney Information Above ***</p> |
| <p>Defendant Randi Simmons Served: 11/19/2009 Answered: 12/10/2009 Answered 12/29/2009</p> | <p>Private Counsel 639976 Barbara A Robb Shilepsky O'Connell Casey Hartley Michon Yelen LLP 1 Financial Center 15th Floor Boston, MA 02111 Phone: 617-723-8000 Active 12/11/2009 Notify</p> <p>Private Counsel 555766 Lawrence J Casey Shilepsky O'Connell Casey Hartley Michon Yelen LLP One Financial Center 15th Floor Boston, MA 02111-2898 Phone: 617-723-8000 Fax: 617-447-2800 Active 12/11/2009 Notify</p> <p>Private Counsel 672696 Andrew P Hanson Shilepsky O'Connell Casey Hartley Michon Yelen LLP 1 Financial Center 15th Floor Boston, MA 02111 Phone: 617-723-8000 Active 12/21/2009 Notify</p> |

SUCV2009-04929
Joule, Inc et al v Simmons

| | |
|---|--|
| Defendant/intervenor MCAD Active 12/23/2009 | |
|---|--|

ENTRIES

| Date | Paper | Text |
|------------|-------|--|
| 11/19/2009 | 1.0 | Complaint filed |
| 11/19/2009 | | Origin 1, Type D99, Track F. |
| 11/19/2009 | 2.0 | Civil action cover sheet filed (N/A) |
| 11/19/2009 | 3.0 | Plaintiff Joule, Inc's MOTION for Short Order of Notice |
| 11/19/2009 | 4.0 | Plaintiff Joule, Inc's MOTION to enforce an Arbitration Agreement under federal Arbitration Act & Massachusetts Arbitration Act |
| 11/19/2009 | | Summons and order of notice issued; returnable, Wednesday in Ctrm. 304,A session on December 9, 2009 at 2:00pm to show cause Moton to enforce Arbitration Agreement (Connolly,J) Summons & order of notice issued See P#1 |
| 11/19/2009 | 5.0 | Plaintiff Joule, Inc's MOTION for appointment of Quick Serv as special process server Allowed (Hogan,J) |
| 11/27/2009 | 6.0 | Commonwealth of Massachusetts Commission against Discrimination's MOTION to Intervene as defendant (w/o/opposition) & request for an opposition to the plffs' motion to compel arbitration. |
| 11/30/2009 | 7.0 | Assented to motion for enlargement of time to file opposition to plffs motion to compel Arbitration and to continue the hearing on plffs motion to compel Arbitration & Allowed (Connelly,J) Notice sent 11/27/09 (entered 11/25/09) |
| 12/04/2009 | | Motion (P#8) Denied without prejudice under rule 9A (McIntyre,J) Notice sent 12/3/09 (entered 12/2/09) |
| 12/10/2009 | 8.0 | ANSWER: Randi Simmons(Defendant) |
| 12/18/2009 | 9.0 | Opposition to Plaintiffs' motion to enforce and arbitration agreement under Federal Arbitration Act and Massachusetts Arbitration Act filed by Randi Simmons |
| 12/23/2009 | 10.0 | The Massachusetts Commission against Discrimination's emergency MOTION to intervene and request to file an opposition to the plffs' motion to compel arbitration, filed on 12/4/09 & ALLOWED in full on 12/18/09. (Thomas Connolly, Justice) notices mailed 12/22/09 |
| 12/29/2009 | 11.0 | Affidavit of compliance by Eugene J Sullivan, III with proof of service of complaint re: Randi Simmons (Summons & order of Notice accepted by Barbara Robb dated 11/19/09 |
| 01/08/2010 | | Motion (P#4) DENIED All proceedings in this case are stayed pending the resolution of the proceedings before the MCAD (Paul E. Troy, Justice) Notices mailed 1/7/2010 (entered 1/7/10) |
| 01/25/2010 | 12.0 | Plaintiff Joule, Inc, Joule Technical Staffing, Inc, John G Wellman, Kristin Motta Zwickau, Kari Burke's notice of appeal |

Commonwealth of Massachusetts
SUFFOLK SUPERIOR COURT
Case Summary
Civil Docket

SUCV2009-04929
Joule, Inc et al v Simmons

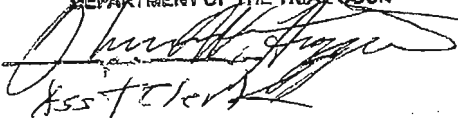
| Date | Paper | Text |
|------------|-------|---|
| 01/25/2010 | | Notice to Justice Thomas Connolly of the filing of Notice of Appeal |
| 01/25/2010 | | Notice of service of the filing of Notice of Appeal to: Herbert L. Holtz, Esquire, Eugene J. Sullivan, III, Esquire, Kate J. Levy, Esquire, Holtz & Reed LLP; Barbara A. Robb, Esquire, Lawrence J. Casey, Esquire, Andrew P. Hanson, Esquire, Shilepsky, O'Connell, Casey, Hartley, Michon & Yelen LLP |
| 02/11/2010 | 13.0 | Plaintiff's Attorney Eugene J. Sullivan, III Letter received that the transcripts are not being ordered for the appellate record |
| 03/01/2010 | | Case status changed to 'Needs review for answers' at service deadline review |
| 03/04/2010 | | Notice of assembly of reocrd on Appeal |

EVENTS

| Date | Session | Event | Result |
|------------|---------------------------------|--|---------------------------------|
| 12/09/2009 | Civil A, 3 Pemberton Sq, Boston | Motion/Hearing: arbitrator's awrd Motion to Enforce Arbitrator's Award | Event not held-req of Defendant |
| 01/05/2010 | Civil A, 3 Pemberton Sq, Boston | Motion/Hearing: arbitrator's awrd Motion to Enforce Arbitrator's Award. Case is stayed. See order on #4 | Event held as scheduled |

HEREBY ATTEST AND CERTIFY ON
3-18-10 THAT THE
FOREGOING DOCUMENT IS A FULL,
TRUE AND CORRECT COPY OF THE
ORIGINAL ON FILE IN MY OFFICE,
AND IN MY LEGAL CUSTODY.

MICHAEL JOSEPH DONOVAN
CLERK, MAGISTRATE
SUFFOLK SUPERIOR CIVIL COURT
DEPARTMENT OF THE TRIAL COURT



APPENDIX B

Nonny

MCAD.
 This need not be a proceeding before the MCAD.
 are stayed
 pending
 in this case
 All proceedings in Michael v. [unclear] are stayed pending the resolution of this case.

COMMONWEALTH OF MASSACHUSETTS
 SUPERIOR COURT DEPARTMENT
 OF THE TRIAL COURT

SUFFOLK, ss

JOULÉ, INC., JOULÉ TECHNICAL
 STAFFING, INC., JOHN G. WELLMAN,
 KRISTIN MOTTA ZWICKAU,
 and KARI BURKE,

Plaintiffs,

v.

RANDI SIMMONS,

Defendant.

Civil Action No. 09-49

11/7/10 - After hearing and consideration, written demand for its response, the Motion submitted in the MCAD Opposition. The Arbitration Agreement, to the extent enforceable, does not preclude Simmons from having a party to this MCAD. See Stankovic v. MCAD, 441 Mass. 549, 563 (2004). The court should not find that Wheeler v. Little is applicable. 451 Mass. 390, 396 (2009) is controlling.

PLAINTIFFS' MOTION TO ENFORCE AN ARBITRATION AGREEMENT
 UNDER FEDERAL ARBITRATION ACT AND MASSACHUSETTS
 ARBITRATION ACT

OFFICE SENT
 11.07.10
 J.H.R.
 J.L.H.
 J.S.H.
 J.L.
 O.C.H.M.Y.
 B.A.R.
 L.J.C.
 A.P.H.

Defendant Randi Simmons is a former employee of Plaintiff Joulé, Inc. After Ms. Simmons began her employment at Joulé, Inc., she signed an arbitration agreement. The agreement provides in part: "I hereby understand and agree that disputes between me and Joulé [and] its employees ... relating to my employment and or/termination of my employment [] which includes without limitation, claims of discrimination ... will be resolved through binding arbitration."

In September 2009, Simmons filed a charge of employment discrimination against Joulé, Inc. and the other Plaintiffs in this case at the Massachusetts Commission Against Discrimination ("MCAD"). Simmons has not initiated an arbitration proceeding against Joulé, Inc. or the other Plaintiffs and she has, through counsel, informed Plaintiffs

(LAT)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Application for Direct Appellate Review and supporting Appendix were served on Herbert L. Holtz, counsel for Appellants, at Holtz & Reed, LLP, One Bowdoin Square, Boston, MA 02114, and Barbara A. Robb, Shilepsky O'Connell Hartley Casey Michon Yelen Robb LLP, One Financial Center, 15th Floor Boston, MA 02111-2688 by first class mail on this first day of April 2010.

Bency J. Ward