FILED
United States Court of Appeals
Tenth Circuit

April 11, 2022

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DANA FEDOR, and all others similarly situated,

Plaintiff - Appellee,

v.

UNITED HEALTHCARE, INC.; UNITED HEALTHCARE SERVICES, INC.,

Defendants - Appellants.

No. 21-2051
(D.C. No. 1:17-CV-00013-MV-SCY)
(D. N.M.)

ORDER AND JUDGMENT*

Before **PHILLIPS**, **BALDOCK**, and **EID**, Circuit Judges.

Defendants United Healthcare, Inc. and United Healthcare Services, Inc. (collectively UHC), appeal the district court's order denying their motion to compel their former employees, Dana Fedor and the opt-in plaintiffs (collectively plaintiffs), to arbitrate their employment-related claims for unpaid overtime wages under the Fair Labor Standards Act and New Mexico's wage law. The question before us in

* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

this, the parties' second appeal, is whether UHC forfeited the only issue it argues on appeal.[1] Exercising jurisdiction under 9 U.S.C. § 16(a)(1)(C), we hold that the issue was forfeited because it was not raised in the district court and affirm the district court's order denying UHC's motion to compel arbitration.

I.

Plaintiffs, former care coordinators who worked primarily in New Mexico, each "received and signed an arbitration policy when they commenced their employment with UHC. Because the plaintiffs started work in different years . . ., and because UHC periodically updated its arbitration policy . . ., not all of the plaintiffs signed the same . . . policy." *Fedor v. United Healthcare, Inc.*, 976 F.3d 1100, 1103 (10th Cir. 2020). But although "[t]here are [several] versions of the arbitration policy that are relevant to this case[,]" *id.*, the key provisions concerning arbitration are the same in each version.

The 2006, 2011, and 2015 versions of the arbitration policies (earlier policies) all included amendment clauses that "reserved [UHC's] right to amend, modify, or terminate the Policy effective on January 1 of any year after providing at least 30 days' notice of its intent and the substance of any amendment, modification or termination of the Policy." *Id.* (brackets and internal quotation marks omitted). The amendment clauses further provided that "notice may be effected by the posting of

[1] UHC argues that if we do not reach the merits of the only issue it raises on appeal, it is entitled to a summary trial in the district court on remand. We do not address the argument because it presupposes that the only issue it raises on appeal has not been forfeited.

the notice on the UnitedHealth Group intranet website and that all arbitrations shall be conducted in accordance with the Policy in effect on the date the Demand for Arbitration was received." *Id.* at 1103-04 (brackets, ellipses, and internal quotation marks omitted).

On January 1, 2016, while plaintiffs were still employed with UHC, the company issued the most recent version of its arbitration policy by providing notice in the manner specified in the earlier policies—namely, by giving 30 days' notice of the proposed modifications on the company's intranet website. Unlike the earlier policies, the 2016 arbitration policy did not contain an amendment clause. Also, the 2016 policy differed from the earlier policies in that "it contained a delegation clause establishing that an arbitrator—instead of a court—would resolve disputes regarding the policy's interpretation, enforceability, applicability, unconscionability, arbitrability or formation, or whether the Policy or any portion of the Policy is void or voidable." *Id.* at 1104 (internal quotation marks omitted). The 2016 policy further provided that continued employment with UHC was deemed acceptance of the policy.

After suit was filed, UHC moved to compel arbitration pursuant to the 2016 arbitration policy. In opposition to UHC's motion, plaintiffs argued that the earlier policies were void as illusory because "the amendment clause at the end of each policy gave UHC the unilateral ability to amend or terminate the arbitration policy any time before an employee filed an arbitration claim." *Id.*

The district court agreed with plaintiffs that the earlier policies were illusory and therefore unenforceable, but "nonetheless compelled arbitration based on the [delegation clause in the] 2016 policy." *Id.* "In its decision, [however,] the court did not examine whether [plaintiffs] ever agreed to the 2016 policy. Instead, it simply noted that [plaintiffs] challenged only the validity of the contract as a whole, and did not specifically challenge the delegation clause within the 2016 policy." *Id.* (internal quotation marks omitted). Plaintiffs appealed.

This court vacated the district court's judgment and remanded the case to determine "if [plaintiffs] and UHC formed the 2016 arbitration agreement." *Id.* at 1108. We held that "the issue of whether an arbitration agreement was formed between the parties must always be decided by a court, regardless of whether the alleged agreement contained a delegation clause or whether one of the parties specifically challenged [the delegation] clause." *Id.* at 1105.[2]

II.

On remand, the district court ordered the parties to file memoranda of law addressing "whether, despite the unenforceability of the [earlier versions] of [UHC's] arbitration policies[,] [whether plaintiffs] formed the 2016 Arbitration Policy such

[2] In its brief on appeal, UHC urged this court to reverse the district court's determination that the earlier policies were illusory or to consider its other argument that plaintiffs "implicitly promised to arbitrate any employment-related claims that arose between them and UHC by beginning employment with UHC after reading the company's arbitration policy in their offer letters." *Fedor*, 976 F.3d at 1108 n.4. We declined to consider these arguments because UHC did not file a cross-appeal. *See id.* at 1107-08.

that the 2016 . . . Policy is applicable and enforceable as to [plaintiffs]." Aplt. App., Vol. 2 at 399 (internal quotation marks omitted).

As explained by the district court, UHC's theory of formation was based on the terms of the earlier policies.

> [UHC] contend[s] that the 2016 Policy was formed as to Plaintiffs because they received notice thereof *in accordance with the procedure agreed to by Plaintiffs* and subsequently accepted the new terms of the 2016 Policy by continuing their employment. Specifically, [UHC] assert[s] that *each of the contracts signed by Plaintiffs [when they were hired] detailed the procedure by which [UHC] provided actual notice of the revised Policy*. According to [UHC], *by assenting to the [e]arlier [p]olicies*, *Plaintiffs had already agreed to the procedure that [UHC] followed in implementing the 2016 Policy*. Further, [UHC] assert[s] that because Plaintiffs had accepted employment on the condition of arbitration and had already signed an agreement to arbitrate with nearly identical terms, their continued employment after notice of the 2016 Policy constitutes acceptance thereof.
>
> In short, [UHC] contend[s] that *because Plaintiffs agreed to the [e]arlier [p]olicies, and because the terms of those policies outlined both the form of notice that would be made of modifications to the policy and the fact that continued employment would be deemed acceptance of such modifications, Plaintiffs are bound, by their continued employment, to the modifications memorialized in the 2016 Policy. The entirety of [UHC's] argument that the 2016 Policy was formed thus relies solely on the terms of the [e]arlier [p]olicies*, and thus presupposes that Plaintiffs are bound by the terms of those policies. But as this Court has already found, the [e]arlier [p]olicies are neither valid nor enforceable[,] [and] [i]t follows that Plaintiffs cannot be bound by the terms of those [e]arlier [p]olicies. And because they cannot be bound by the terms of those [e]arlier [p]olicies, there is no basis to find that, by continuing employment after receiving notice of the modified 2016 Policy, Plaintiffs agreed to be bound by the terms of the 2016 Policy.

Id. at 582-83 (brackets, citations, and internal quotation marks omitted) (emphasis added).

The district court also declined to reverse its previous determination that the earlier policies were illusory because they lacked valid consideration. In doing so, the court reaffirmed that under New Mexico law, an arbitration agreement that allows an employer to unilaterally amend or terminate the agreement after an employee's claim has accrued fails for lack of consideration because the employer's promise to arbitrate is illusory. *See Flemma v. Halliburton Energy Servs., Inc.*, 303 P.3d 814, 822 (N.M. 2013). The court also rejected UHC's argument "that the illusory nature of the promises in the [e]arlier [p]olicies [was cured] by another form of consideration, namely, the offer of new employment." Aplt. App., Vol. 2 at 586. The court acknowledged that although the New Mexico courts have determined that continued at-will employment, without more, does not constitute consideration, *see Piano v. Premier Distrib. Co.*, 107 P.3d 11, 14 (N.M. Ct. App. 2004), they have not yet decided whether an offer of new at-will employment constitutes consideration at the inception of the employment relationship. Nonetheless, the court reasoned that it

> does not see—and, perhaps more importantly, does not believe that the New Mexico courts would see—a reasoned distinction between a promise of future at-will employment and a promise of continued at-will employment. Accordingly, the Court declines to find that [UHC's] initial offer of employment to Plaintiffs constituted valid consideration for their agreement to submit to arbitration.
>
> Because [UHC's] offer of new employment does not constitute consideration, and because . . . the [e]arlier [p]olicies are not otherwise supported by valid consideration, there is no basis for the Court to reverse its prior determination that the [e]arlier [p]olicies are unenforceable. *And because [UHC's] argument as to the formation of the 2016 Policy depends entirely on the enforceability of those [e]arlier [p]olicies, that argument necessarily must fail.* [UHC] thus ha[s] provided no basis for the Court to find that the 2016 Policy was formed as to Plaintiffs.

Aplt. App., Vol. 2 at 588 (emphasis added).

Last, the district court rejected UHC's argument that if the parties never formed the 2016 policy, the earlier policies were still in effect, and the *delegation clauses* in the earlier policies required the court to delegate the issue of whether the policies were illusory to an arbitrator. The court found that earlier policies "indicate that they are governed by the AAA Rules[,] . . . [and] [i]n turn, Rule 6 of the AAA Rules provides that the arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." *Id.* at 589 (internal quotation marks omitted). However, the court disagreed with UHC that the "reference to the AAA Rules in the [e]arlier [p]olicies . . . means that the issue of the validity of those policies must be delegated to the arbitrator." *Id.*

On this issue, the district court acknowledged that "[t]he parties to an arbitration agreement may agree to have an arbitrator decide not only the merits of a particular dispute but also gateway questions of arbitrability, such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." *Id.* (internal quotation marks omitted). Thus, where "'there is clear and unmistakable evidence'" that "the parties agreed to arbitrate arbitrability,'" a court may not decide the arbitrability issue. *Id.* at 590 (quoting *Fedor*, 976 F.3d at 1106).

But the district court determined the earlier policies did not contain clear and unmistakable evidence that the parties agreed to arbitrate arbitrability. "[T]he

[e]arlier [p]olicies do *not* indicate that they are to be governed by the AAA rules. Rather, each of those [p]olicies provides that the rules and procedures to be used by the parties are *generally based on* the Employment Dispute Resolution Rules of the AAA." *Id.* (brackets and internal quotation marks omitted). "Indeed, each of those [p]olicies also provides that [UHC] has modified the rules and procedures in certain unidentified respects." *Id.* (brackets and internal quotation marks omitted). Thus, "[t]he language of the [e]arlier [p]olicies that the applicable rules and procedures are generally based on the AAA rules does not amount to a delegation clause, as it does not demonstrate by clear and unmistakable evidence that the parties delegated the arbitrability question to an arbitrator." *Id.* (brackets and internal quotation marks omitted).

The district court rejected UHC's further argument "that Plaintiffs should be compelled to arbitrate their claims because they each received an [o]ffer [l]etter that advised them that their agreement to be bound by the terms of the enclosed arbitration policy is a condition of their employment." *Id.* at 591 (brackets and internal quotation marks omitted). The court stated it could not "agree that the [o]ffer [l]etter[s] [are] free-standing arbitration agreement[s]." *Id.* "It appears clear from the language of the letter[s] (which address[] several issues in addition to referencing the enclosed arbitration policy) that [their] purpose is, in part, to alert the recipient[s] that an arbitration policy *is enclosed* and that the *enclosed policy* is a binding contract to which the recipient[s] must agree as a condition of employment." *Id.* at 591-92 (internal quotation marks omitted). "Importantly, the only mention of a

mutual obligation to arbitrate specifically references the obligation set forth in the enclosed polic[ies]. In short, the [o]ffer [l]etter[s] contain[ed] no promise of a mutual obligation to arbitrate separate and apart from [those] set forth in the [e]arlier [p]olicies, which the Court has found to be illusory." *Id.* at 592 (citation omitted).

Last, the district court found that "the offer of at-will employment is not valid consideration for an employee's agreement to submit to arbitration. Thus, to the extent that the [o]ffer [l]etter[s] offer[] employment in exchange for the recipients' promise to arbitrate, [they] lack[] valid consideration, [and] provide[] no basis . . . to compel . . . arbitrat[ion]." *Id.*

The district court denied UHC's motion to compel arbitration. UHC appeals.

III.

UHC does not appeal on *any* of the grounds decided by the court; instead, it maintains that the court overlooked a second theory of formation, namely, that the January 1, 2016, intranet posting was an offer to enter into an agreement to arbitrate and plaintiffs accepted the offer when they continued working for UHC. According to UHC, the offer was made when

> "[r]equiring no effort on the part of Plaintiffs, [UHC] notified Plaintiffs of the 2016 Arbitration Policy by posting it as a "Top Story" on the front page of Frontier, the company's intranet. This meant notice of the new Policy ***automatically loaded*** on all of the Plaintiffs' work computers any time they opened an internet browser window for any reason over a two-week period.

Aplt. Opening Br. at 9. Moreover, UHC insists that plaintiffs were aware of UHC's offer to form a new arbitration agreement because this "was the way [UHC] communicated important information, and Plaintiffs were not only trained to

regularly access Frontier, they did regularly access it, beyond the fact that it was their home page." *Id.*

For their part, plaintiffs argue that UHC has presented an entirely new theory of formation for the first time on appeal. "UHC no longer argues that Plaintiffs had notice of the 2016 arbitration policy because UHC complied with a notification procedure stipulated to by contract." Aplee. Resp. Br. at 1. "Instead, . . . UHC has advanced a new, much more ambitious claim: that UHC's intranet post was sufficient, as a matter of law and irrespective of any prior contracts, to constitute notice of an offer to form a binding agreement." *Id.* at 2. According to plaintiffs, because this theory was never presented to the district court, they

> have not had an opportunity to submit evidence establishing what they thought was undisputed: that they never actually reviewed or even knew of the 2016 arbitration policy. Nor has the district court had the opportunity to consider the new factual and legal questions raised by UHC's *new theory of formation*.

Id. (emphasis added).

We have carefully reviewed UHC's briefs on remand and we agree with plaintiffs that UHC's second theory of formation was not raised in district court and is therefore forfeited.[3]

[3] As one of example of the formation argument consistently pressed by UHC in the district court, it argued that "each Plaintiff agreed to the 2016 Arbitration Policy by continuing employment with [UHC] after receiving *notice* of the update. [UHC] followed the *notice* procedures Plaintiffs agreed to, and it also took extra steps to ensure the 2016 Policy was readily accessible." Aplt. App., Vol. 2 at 406 (emphasis added). This same formation by "notice" argument appears in each of UHC's briefs in the district court.

IV.

"Generally, an appellate court will not consider an issue raised for the first time on appeal." *Tele-Commc'ns, Inc. v. Comm'r*, 104 F.3d 1229, 1232 (10th Cir. 1997). Whether to consider such an issue is within this court's discretion. *See id.* ("It is well-settled that the matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases." (brackets and internal quotation marks omitted)). "[W]e have exercised our discretion to hear issue for the first time on appeal only in the most unusual circumstances." *Lyons v. Jefferson Bank & Tr.*, 994 F.2d 716, 721 (10th Cir. 1993).

We decline to review issues raised for the first time on appeal for several reasons, including the fact that doing so

> would require [this court] to frequently remand for additional evidence gathering and findings; would undermine the need for finality in litigation and conservation of judicial resources; would often have this court hold everything accomplished below for naught; and would often allow a party to raise a new issue on appeal when that party invited the alleged error below.

Id. (brackets, ellipses, citations, and internal quotation marks omitted). In other words, "[p]ropounding new arguments on appeal . . . undermines important judicial values. In order to preserve the integrity of the appellate structure, we should not be considered a 'second-shot' forum, a forum where secondary, back-up theories may be mounted for the first time." *Tele-Comm'cns, Inc.*, 104 F.3d at 1233. Therefore, "an

issue must be presented to, considered and decided by the trial court before it can be raised on appeal." *Id.* (brackets and internal quotation marks omitted).

"[T]here are many ways in which a case may present . . . issues not passed upon below." *Lyons*, 994 F.2d at 722 (internal quotation marks omitted). "One [way] is a bald-faced new issue. Another is a situation where a litigant changes to a new theory on appeal that falls under the same general category as an argument presented [in the district court]. A third is a theory that was discussed in a vague and ambiguous way." *Id.* Moreover, an argument that might "be inferred from [an exhibit or evidence], but was not otherwise discussed, [cannot] be argued on appeal." *Id.* "These are all different aspects of the same principle that issues not passed upon below will not be considered on appeal." *Id.*

Whether we view UHC's argument on appeal as a new issue, a new theory that falls under the same general category as the arguments presented to the district court, or mentioned only in some vague and ambiguous way, the result is the same. Our case law requires litigants to present their specific arguments to the district court to preserve them for appeal, and UHC failed to do so.

To be sure, UHC used the word "formation" in its district court briefs, but it used the word in the context of whether the 2016 policy was formed based on the notice provisions in the earlier policies—not whether the January 1, 2016, notice constituted an offer to form a new arbitration agreement. We also acknowledge that UHC presented evidence of how the notice was posted on the intranet and plaintiffs' access to the notice, but again this evidence was presented in the context of whether

UHC complied with the notice provisions agreed to in the earlier policies. UHC's newly-minted theory falls "under the rule that a party may not [argue] the case on one theory and appeal on another." *Id.* at 723.

V.

"Forfeiture occurs when a party fails to raise a theory, argument, or issue before the district court." *Hayes v. SkyWest Airlines, Inc.*, 12 F.4th 1186, 1201 (10th Cir. 2021). "We will reverse a district court based on a forfeited theory only under our rigorous plain-error standard." *Id.* This standard requires "a party [to] establish the presence of (1) error, (2) that is plain, which (3) affects substantial rights, and which (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* (internal quotation marks omitted). "In civil cases, this burden is extraordinary . . . and nearly insurmountable." *Somerlott v. Cherokee Nation Distribs., Inc.*, 686 F.3d 1144, 1151 (10th Cir. 2012) (brackets and internal quotation marks omitted).

In its reply brief,[4] UHC argues that "[i]n the . . . event that the Court finds that [its] arguments were not sufficiently raised below, [this court] may hear them now . . . [u]nder the plain-error doctrine." Aplt. Reply Br. at 13. According to UHC it meets the rigorous plain-error standard because "the proper resolution [of its

[4] We do not decide whether a party can raise plain error for the first time in a reply brief, because UHC's argument fails the plain-error test. *See Hayes*, 12 F.4th at 1201.

argument] is beyond any doubt or . . . injustice might otherwise result." *Id.* (internal quotation marks omitted). We disagree.

For an error to be plain, it must be clearly erroneous under "current, well-settled law." *United States v. DeChristopher*, 695 F.3d 1082, 1091 (10th Cir. 2012) (internal quotation marks omitted). Here, whether there was an offer and acceptance under New Mexico law is far from settled. Moreover, UHC fails to meet the fourth prong of the plain-error test because the district court's decision does not seriously affect the fairness, integrity, or public reputation of judicial proceedings.

VI.

The district court's order denying UHC's motion to compel arbitration is affirmed and the case is remanded for further proceedings.

Entered for the Court

Allison H. Eid
Circuit Judge