CONCURRING OPINION BY ACOBA, J.

I respectfully concur in the result. First, in my view this case is resolvable on the right of Plaintiff-Appellant Adrian D. Douglass (Appellant) to void the contract, and, second, assuming arguendo the contract is not voidable, the conditional language of the employee handbook issued by the employer renders the arbitration clause ambiguous and, thus, directory and not mandatory. In either event, I would not hinge the outcome of this case on an application of Brown v. KFC Nat'l Mgmt. Co., 82 Hawai'i 226, 231, 921 P.2d 146, 151 (1996), as the majority does, but would limit Brown's application.

I.

As to the first point, Appellant argues that he "was a minor who lacked the legal capacity necessary to make an agreement that could obligate him to arbitrate any of his claims." [OB at 20] I believe he is correct. As a general rule, a contract made by an infant or minor is voidable at the will of the minor, unless the contract is for "necessaries." See Garay v. Overholtzer, 631 A.2d 429, 443 (Md. 1993) (explaining that "[g]enerally, the law regards contractual obligations of minors as voidable, giving the minor child the choice whether to avoid the contract, or to perform it" and that "[i]t is well established . . . that a minor is liable for the value of necessaries furnished to him or her" (internal citations omitted)); Gardner v. Flowers, 529 S.W.2d 708, 709-10 (Tenn.

1975) (stating that "[i]n general, an infant can avoid his contracts" and that "[a]n exception is made if the contract is for 'necessaries'" (internal citations omitted)); Christian v. Waialua Agric. Co., 33 Haw. 34, 81 (1934) (Banks, J. dissenting) (noting that "[i]t is also well settled that, while an insane person or a minor is bound by his contract for necessaries furnished him, the extent of his obligation thereunder is to pay the reasonable value of such necessaries, irrespective of the price which he has agreed to pay"); Field v. Hughes, 20 P.2d 990, 991 (Cal. Dist. Ct. App. 1933) (stating that "[t]he contract of a minor, except for necessaries furnished to him or his family, or for an obligation incurred by direct authority of statute, may be disaffirmed by him").

Some jurisdictions have provided a specific definition of the term "necessaries" to include what is thought of essentially, as the need for human survival. See Zelnick v. Adams, 561 S.E.2d 711, 715-16 (Va. 2002) (opining that "[t]hings supplied which fall into the class of necessaries, include board, clothing, and education" and that "Williston describes necessaries as things generally under the broad headings of food, clothing of a reasonable kind . . . and shelter" (quoting 5 Williston on Contracts § 9:18 at 149 (Richard A. Lord, 4th ed. 1993))); Parkwood OB/GYN, Inc. v. Hess, 650 N.E.2d 533, 534 (Ohio Misc. 2d 1995) (stating that "'[n]ecessaries' are defined as food, medicine, clothing, shelter or personal services usually

considered reasonably essential for the preservation and enjoyment of life").[1]

Other jurisdictions, however, have provided for a more flexible definition of "necessaries," that takes into account the circumstances of the particular case. See Webster St. P'ship, Ltd. v. Sheridan, 368 N.W.2d 439, 442 (Neb. 1985) (noting that "[j]ust what are necessaries . . . has no exact definition[;] [t]he term is flexible and varies according to the facts of each individual case" and that "the question is a mixed one of law and fact, to be determined in each case from the particular facts and circumstances in such case"); Gardner, 529 S.W.2d at 709-10 (positing "[b]ut, what do courts mean by 'necessaries?'[; i]t is likely impossible to frame a definition to cover all cases; flexibility is both desirable and necessary" and that "the overriding requirement is that the infant must be in actual need of the goods or services in question" and opining that "[w]hether such actual need exists depends upon (1) the nature of the goods or services, (2) the need of the infant for such goods or services at the time and (3) whether the infant has sources,

[1] Some courts have narrowed the definition of "necessaries" to exclude products or services that another person, such as a parent or guardian, is obligated to provide for the minor. See Bensinger's Coex'rs v. West, 255 S.W.2d 27, 29 (Ky. Ct. App. 1953) (positing that "[t]o be bound upon a contract for necessaries, an infant must be in actual need of them and obliged to procure them for himself" and that "[t]hey are not necessaries to the infant if he has a parent or guardian who is willing and able to supply them"); Lawrence v. Baxter, 267 N.W. 742, 743 (Mich. 1936) (concluding that a minor's contract to purchase a house and lot was not a contract for a necessary because the minor's father was obligated to provide a home for the minor).

other than his own credit, for supplying the needed goods or services").

The parties agree that the age of majority in Hawai'i is eighteen years of age pursuant to Hawai'i Revised Statutes (HRS) § 577-1 (1993).[2] [OB at 21 and AB at 8] The parties also do not dispute that Appellant was not yet eighteen years of age at the time he received the employee handbook. [OB at 23 and AB at 11] Accordingly, under the well-established law discussed supra, any contract made by Appellant would be voidable at his option, unless it was for a "necessary." Defendant-Appellee Pflueger Hawai'i, Inc. dba Pflueger Acura (Appellee) does not argue that Appellant's employment was a necessary and the record as well fails to show that it was.

II.

Appellee however argues that "[t]he public policies in favor of arbitration and against age discrimination support the enforcement of arbitration agreements against minors who accept the benefits of employment[,]" [AB at 8] and cites to Sheller v. Frank's Nursery & Crafts, Inc., 957 F. Supp. 150 (N.D. Ill. 1997) and Morrow v. Norwegian Cruise Line, Ltd., 262 F. Supp. 2d 474 (M.D. Pa. 2002), for support. First, public policy considerations should not apply inasmuch as Appellee presumably was well aware of Appellant's status as a minor and the law

[2] Hawai'i Revised Statutes (HRS) § 577-1 states that "[a]ll persons residing in the State, who have attained the age of eighteen years, shall be regarded as of legal age and their period of minority to have ceased."

regarding the capacity of minors to contract is well established. See discussion supra. Second, both cases cited by Appellee are distinguishable and unpersuasive.

A.

1.

Sheller involved the application of 9 U.S.C. § 1, the Federal Arbitration Act (the FAA), to the arbitration clause in issue. Sheller, 957 F. Supp. at 152. The FAA has been interpreted as evidencing a strong federal public policy in favor of arbitration. Stout v. J.D. Byrider, 228 F.3d 709, 714 (6th Cir. 2000). Under the FAA, any ambiguities or doubts regarding arbitration are to be resolved in favor of arbitration. Sheller, 957 F. Supp. at 152. In Sheller, the district court stated that the FAA "was applicable to the arbitration agreement at issue" in that case, as the plaintiffs did not fit into the narrow exception for seamen, railroad employees, and workers engaged in foreign or inter-state commerce found in the FAA. 957 F. Supp. at 152.

First, Sheller is incorrect insofar as it states that "whether the Plaintiffs were minors was irrelevant to their signing of the employment application agreeing to arbitrate all claims against the company. Indeed, Defendant required all of its employees, including adults, to sign the same agreement." 957 F. Supp. at 152 (emphasis added). Under this view, an employment contract required to be signed by both minors and

adults would not be voidable by minors, simply because adults were bound by the same contract. The fact that adults were required to sign the same agreement is wholly irrelevant. If the fact that an adult would be held liable prevents application of the doctrine to a minor who signs the same contract, then the infancy doctrine would be nullified. Accordingly, that an employer could hold an adult liable is entirely inapposite to the proposition that a contract is voidable at the minor's behest.

Second, although construing Illinois law, the Sheller court recognized that there was no Illinois case law on point. Sheller, 957 F. Supp. at 153. Unlike Sheller, other courts have held that a minor is not bound by an arbitration clause. See H & S Homes, L.L.C. v. McDonald, 823 So. 2d 627, 630 (Ala. 2001) (holding that "infancy is a valid defense to the enforcement of a properly supported motion to compel arbitration of disputes arising out of a contract"); Wilkie v. Hoke, 609 F. Supp. 241, 243 (W.D.N.C. 1985) (denying defendant's motion to compel arbitration because the minor plaintiff was not bound by the arbitration provision); Dickson v. Hoffman, 305 F. Supp. 1040, 1042 (D.C.Kan. 1969) (recognizing that the public policy of Kansas protects a minor's right to disaffirm an arbitration provision in a contract); cf. Millsaps v. Estes, 50 S.E. 227, 228 (N.C. 1905) (holding that an agreement by an attorney on behalf of a minor to submit to arbitration is voidable by the minor).

Third, Sheller also concludes that a minor should not be allowed to disaffirm a contract and simultaneously keep the "advantage of the contract -- employment." 957 F. Supp. at 154. But Appellant is not seeking any benefits under a contract. Rather, he seeks redress for his injuries arising from alleged sexual harassment from his co-workers. Nor is Appellant suing under the contract. His claims relate to sexual harassment in the workplace, resulting injuries, and negligent supervision pursuant to discrimination statutes.[3] In this regard, Appellant filed a complaint with the Hawai'i Civil Rights Commission (HCRC) and was issued a right to sue letter under HRS § 368-12 (1993), entitled "Notice of right to sue."[4] It would be illogical to imply from the mere fact of his employment that Appellant, a minor, should be precluded from suing for injuries suffered at his job. Indeed, public policy as embodied in HRS § 368-12 sanctions Appellant's right to sue in court.

2.

I note that similar disagreements with Sheller have

[3] In his complaint, Appellant alleged the following counts: I - Hostile, Intimidating And/Or Offensive Working Environment, II - Unsafe Working Environment, III - Sexual Assault and Sexual Harassment, IV - Negligent Training, V - Negligent Supervision of Mr. Ramos and Other Personnel, and VI - Punitive Damages.

[4] HRS § 368-12 states:

> The commission may issue a notice of right to sue upon written request of the complainant. Within ninety days after receipt of a notice of right to sue, the complainant may bring a civil action under this chapter. The commission may intervene in a civil action brought pursuant to this chapter if the case is of general importance.

been espoused by another federal district court in Stroupes v. The Finish Line, Inc., 2005 U.S. Dist. LEXIS 6975 (E.D. Tenn. 2005). Although Stroupes is an unpublished opinion, it is germane to the issues in the instant case and, therefore, merits discussion.[5] In Stroupes, the minor employee and her parents

[5] Because Stroupes is an unpublished opinion and the majority does not address it, I must note the following considerations in citing to it. First, helpful pieces of judicial scholarship and research, even though unpublished, are freely available through internet search engines and other public repositories. Second, although Hawai'i Rules of Appellate Procedure (HRAP) Rule 35(c) seemingly precludes citation to unpublished opinions, it neither directly applies nor expressly proscribes citations to unpublished dispositions from other jurisdictions. See HRAP Rule 35(c) (stating that "[a] memorandum opinion or unpublished dispositional order shall not be cited in any other action or proceeding except when the opinion or unpublished dispositional order establishes the law of the pending case, res judicata or collateral estoppel, or in a criminal action or proceeding involving the same respondent"). The preclusive effect of HRAP Rule 35(c) has been criticized. See Report of AJS Special Committee on Unpublished Judicial Opinions at 4 (recognizing the "problem perceived by the legal community with the continued use of summary disposition orders and, particularly, the inability to cite memorandum opinions despite the fact that those opinions appear to be of substantial length and content and often cite other case law as precedent for the conclusions").

Third, several courts have sanctioned the citation of unpublished dispositions of other jurisdictions under similar circumstances. See McCoy v. State, 80 P.3d 751, 762 (Alaska Ct. App. 2002) (citing Byrd v. Bentley, 850 So.2d 232, 235 (Ala. 2002) (discussing unpublished federal district courts relied on by defendant); Waskel v. Guar. Nat'l Corp., 23 P.3d 1214, 1220 (Colo. App.2000) (citing an unpublished federal circuit court decision for its persuasive value); Staff of Idaho Real Estate Comm'n v. Nordling, 22 P.3d 105, 109 (2001) (approving of citation by defendant of unpublished opinion from another jurisdiction when used "as an example); State v. Gibbs, 769 N.E.2d 594, 598 n. 4 (Ind. App. 2002) (concluding that case from another stated cited by defendant was not persuasive); Campbell v. Markel American Insurance Co., 822 So.2d 617, 625 n. 4 (La. App. 2001) (noting that defendant's citation to two unpublished opinions from other jurisdictions supported defendant's position); Palacios v. Louisiana and Delta R.R., Inc., 775 So.2d 698, 702 (La. App. 2000) (unpublished opinion from other jurisdiction cited as persuasive); State ex rel. Gendrich v. Litscher, 632 N.W.2d 878, 882 n. 6 (Wis. 2001) (citation to unpublished federal circuit court appropriate for its persuasive value); State v. Allen, 539 S.E.2d 87, 103 (W. Va. 1999) (concluding that unpublished opinion cited from another jurisdiction was not persuasive).

Fourth, the clamor over the use of unpublished dispositions within the federal courts led the Advisory Committee on the Federal Rules of Appellate Procedure (Advisory Committee) to propose a new Rule 32.1 to the Federal Rules of Appellate Procedure (FRAP) to replace a rule similar to HRAP Rule 32(c). Memorandum from the Advisory Committee on Appellate Rules, to Judge David F. Levi, Standing Committee on Rules of Practice and Procedure (May 6, 2005, Rev. October 7, 2005) [hereinafter, Advisory Committee Memorandum]. The proposed rule requires the federal courts to permit citation to "federal judicial opinions, orders, judgments, or other written

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brought an action against the minor's employer and one of its managers (the defendants) for sexual harassment under Title VII of the Civil Rights Act of 1964, as well as state law claims for assault and battery and outrageous conduct. The defendants moved to dismiss the claims and to compel arbitration under the Federal Arbitration Act. The district court held that the employment contracts, including arbitration agreements, were voidable due to the minor plaintiff's age, and were voided by the filing of the action.

Similar to the discussion supra, in rejecting Sheller, the district court stated that (1) the plaintiff in that case was "not using her minority as a sword to injure the [d]efendants" and that "the only issue affected by [the plaintiff's] use of the infancy doctrine is the appropriate forum to adjudicate her claims," (2) Sheller's reasoning that a plaintiff's status as "[a] minor[was] irrelevant to [the minor's] signing of the employment application agreeing to arbitrate all claims against

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[5](...continued)
dispositions that have been . . . designated as 'unpublished,' 'non-precedential,' 'not precedent,' or the like[.]" Advisory Committee Memorandum. Recently, United States Supreme Court Chief Justice John Roberts notified Congress that the Court would be adopting the proposed amendments effective January 1, 2007. Letter from Chief Justice John Roberts, Supreme Court of the United States, to the Speaker of the House of Representatives and the President of the Senate (April 12, 2006). The amendments take effect unless the Congress acts to the contrary.

Finally, I believe a narrow view of unpublished work would mute the development of our jurisprudence, particularly in cases of first impression as is this case here. For "[i]t is in the order of case law development that discourse on issues not covered in any existing published opinion should be disseminated and made available for examination, consideration, and citation by those similarly affected or interested." Torres v. Torres, 100 Hawai'i 397, 435, 60 P.3d 798, 836 (2002) (Acoba, J., dissenting).

the company" because the defendant in Sheller "required all of its employees, including adults, to sign the same agreement" would eviscerate the infancy doctrine, and (3) "[a] minor suing an employer for sexual harassment is not suing on the contract." 2005 U.S. Dist. LEXIS 6975, at *11.

B.

Morrow, the second case cited by Appellee, did not involve an employment relationship as in the instant case. That case concerned a minor child who was injured while a passenger on a cruise ship. At issue was the forum selection clause printed on the cruise ship ticket. Morrow relied on three cases, all of which involved forum selection clauses, rather than arbitration clauses. See Igneri v. Carnival Corp., 1996 WL 68536, *3 (E.D.N.Y. 2002) (granting defendant's motion to transfer plaintiff's case from the United States District Court for the Eastern District of New York to the United States District Court for the Southern District of Florida), Harden v. Am. Airlines, 178 F.R.D. 583, 585-86 (M.D. Ala. 1998) (granting Defendant American Hawaii Cruises's motion to dismiss on the ground of improper venue based on a forum selection clause which required that any lawsuit arising out of the cruise "must be brought and litigated, if at all, before a court located in the State of Hawaii, to the exclusion of the courts of any other country or located in any other state of the United States" (emphasis added)); Paster v. Putney Student Travel, Inc., 1999 WL 1074120,

*4 (C.D. Cal. 1999) (concluding that exclusive jurisdiction for the plaintiff's action against the defendant was in the courts of Vermont, rather than the United States District Court for the Central District of California). In those cases, the plaintiffs were arguing about where they could sue, unlike the instant case in which the question is the right to sue.

III.

To justify its position, the majority broadly concludes that (1) the legislature, in enacting amendments to HRS chapter 390, "clearly viewed minors [between sixteen and seventeen years of age] . . . as capable and competent to contract for gainful employment and, therefore, should be bound by the terms of such contracts[,]" majority opinion at 16, or that (2) "inasmuch as the protections of the infancy doctrine have been incorporated into the statutory scheme of Hawaii's child labor law, the general rule that contracts entered into by minors are voidable is not applicable in the employment context[,]" id. at 17. In doing so, the majority raises statutory arguments not cited to or argued by any of the parties in this case. By proceeding in this way, the majority reaches beyond the facts here and consequently calls into question the entire framework of laws pertaining to the rights of minors.

Reviewing the plain language of HRS § 390-2, and legislative history of HRS chapter 390, no legislative intent exists to support the majority. First, HRS § 390-2(a), entitled

"Employment of minors under eighteen years of age," provides that "[n]o minor under eighteen years of age shall be employed or permitted to work in, about, or in connection with any gainful occupation at any time except as otherwise provided in this section." That statute, however, permits a minor between the age of sixteen and eighteen to be employed upon compliance with the requirements for a valid certificate of age issued by the Department of Labor and Industrial Relations (DLIR). Id. HRS § 390-2(b) further provides that a minor between the age of sixteen and eighteen "may be employed during periods when the minor is not legally required to attend school or when the minor is excused by school authorities from attending school; provided that the employer of the minor records and keeps on file the number of a valid certificate of age issued to the minor by the department." Therefore, while the general rule is that minors are not permitted to be employed, employment for 16- or 17-year-old minors may be permitted where the statute allows, that is, when not legally required to attend school, or excused by school authorities.

Second, contrary to the majority's position, the legislative history does not indicate any intention to abrogate the infancy doctrine with respect to minors between sixteen and eighteen years old. In support of its contention, the majority cites to Hse. Stand. Comm. Rep. No. 441, in 1969 House Journal, at 799. In pertinent part, that report states:

> 4. Modify Employment Certificate Requirements
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> A new concept in work permit requirements is proposed. Presently, before a minor can be put to work, his prospective employer must first get an employment certificate for him. The certificate is returned by the employer to the [DLIR] for cancellation when the minor terminates employment. This procedure is repeated if the minor changes employer or is reemployed later by his former employer. Under the proposed revision, a 16- or 17-year-old minor, would be issued an age certificate without regard to occupation or employer. This age certificate (wallet size) would be valid for any legal employment unless invalidated in the best interests of a minor as to specific employment. An employer, upon hiring a 16- or 17-year-old minor, would be required to record and keep on file the number of the certificate of age and insure that the minor is not legally required to be in school. This modification would benefit minors and employers and appreciable savings in man hours and forms would accrue to the State.

(Emphases added.) Hence, as the legislative history to HRS chapter 390 demonstrates, the purpose of the amendments is to require that an "age certificate" be obtained in lieu of a work certificate that would otherwise necessitate frequent updating and renewal with the DLIR. However, nothing in the legislative history indicates that the child labor statutory scheme would otherwise supersede the infancy doctrine.[6]

As the majority observes, the legislature has limited the application of the infancy doctrine, but only in discrete and expressly defined areas. Majority opinion at 11-12. See HRS

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[6] A review of the language in Hse. Stand. Comm. Rep. No. 441, in 1969 House Journal, at 798-99 similarly does not support the majority's proposition that HRS chapter 390 supercedes the common law infancy doctrine. In general, the committee report enumerates the purposes of the amendments to the child labor laws, none of which discuss the infancy doctrine, as follows:

> 1) clearly define applicable terms used in this bill to facilitate its administration; 2) establish additional exemptions from the child labor law; 3) relax certain work hours restrictions; 4) modify employment certificate requirements; and 5) eliminate an apparent "age incompatibility" between the existing law and the compulsory school age attendance law.

§ 577A-2 (1993) (barring later disaffirmance by a minor for contracts involving the receipt of medical care and services); HRS § 577-26 (1993) (prohibiting disaffirmance by a minor with respect to contracts involving alcohol and drug counseling services). Unlike these statutes, HRS chapter 390 is devoid of any like language. Because disaffirmation of an employment contract has not been expressly barred by the legislature, such disaffirmation has not been prohibited by it. See Burns Int'l Sec. Servs., Inc. v. Dep't of Transp., 66 Haw. 607, 611, 671 P.2d 446, 449 (1983) (stating that "statutes in derogation of common law must be strictly construed"); Fonseca v. Pac. Constr. Co., 54 Haw. 578, 585, 513 P.2d 156, 160 (1973) (noting the continuing applicability of the maxim that "statutes abrogating common law rights must be strictly construed); Akai v. Lewis, 37 Haw. 374, 377 (1946) (concluding that an ordinance in derogation of the common law will be strictly construed and positing that "under the rule of strict construction it is not to be presumed that the lawmakers intended to abrogate or modify a rule any further than that which is expressly declared or clearly indicated"). In addition, "[w]here it does not appear there was legislative purpose in superseding the common law, the common law will be followed." Burns, 66 Haw. at 611, 671 P.2d at 449. See also Watson v. Brown, 67 Haw. 252, 686 P.2d 12 (1984) (stating that "[a] statutory remedy is, as a rule, merely cumulative and does not abolish an existing common law remedy unless so declared in

express terms or by necessary implication").

The issue is not whether Appellant is precluded from employment, as the majority would have it but, rather, whether Appellant may disaffirm the terms of his employment contract. By permitting employment for 16- and 17-year-old minors, but not prohibiting disaffirmance of such contracts, as it has in other instances, the legislature in HRS chapter 390 did not abrogate the common law rule that contracts of employment entered into by minors are voidable, rather than void. Hence, HRS chapter 390 does not, as the majority contends, "render[] inapplicable the general rule that contracts entered into by minors are voidable in the employment context." Majority opinion at 18. Such a reading extends application of the child labor laws far beyond legislative expression, and runs afoul of the infancy doctrine.

IV.

More troubling, the majority's approach indicates that a minor may be required to submit to a voidable arbitration clause or give up his right to sue for sexual harassment.[7] Such a proposition would be inimical to the enforcement of civil rights in the employment area. See Haw. Const. Art. I § 5 (stating that the Hawai'i Constitution mandates that an individual will not "be denied the enjoyment of the person's civil rights or be discriminated against"); Stand. Comm. Rep. No.

[7] I note, in part, that such an issue was not extensively discussed in Brown v. KFC Nat'l Mgmt. Co., 82 Hawai'i 226, 23 n.14, 921 P.2d 146, 158 n.14 (1996), and, of course, not with respect to contracting with a minor.

372, in 1989 House Journal, at 984 (the legislature adopted HRS chapter 368 to provide "a forum [in the form of the HCRC]" with the intent to "establish a strong and viable [HCRC] with sufficient . . . enforcement powers to effectuate the State's commitment to preserving the civil rights of all individuals"). Thus I believe that insofar as Brown extends to this case, Brown should be reexamined. See Stroupes, 2005 U.S. Dist. LEXIS 6975 at *13-14 (upholding right to sue under Civil Rights Act of 1964 in light of minor's right to void arbitration agreement despite Federal Arbitration Act).

As mentioned before, originally Appellant filed his complaint with the HCRC. Subsequently, pursuant to HRS § 368-12, Appellant requested that his HCRC complaint be withdrawn in order for him to pursue the matter in court. See HRS § 368-12 (stating that the HCRC "may issue a notice of right to sue upon written request of the complainant" after which, within a ninety day period, "the complainant may bring a civil action under this chapter"). The right to sue in court includes the right to a jury trial, a right at the least afforded by HRS chapter 368 and article I, section 13 of the Hawai'i Constitution.

Although our courts have recognized that the right to a jury trial in civil cases may be waived, Joy A. McElroy, M.D., Inc. v. Maryl Group, Inc., 107 Hawai'i 423, 428-29, 114 P.3d 929, 934-35 (App. 2005), there is no indication in this case that Appellant waived such right. See Lii v. Sida of Hawaii, Inc., 53

Haw. 353, 355, 493 P.2d 1032, 1033 (1972) (stating that the supreme court "will indulge every reasonable presumption against the waiver" of the right to a jury trial); HRS § 635-13 (Supp. 2005) (stating that "[w]hen the right of trial by jury is given by the Constitution or a statute of the United States or this State and the right has not been waived, the case shall be tried with a jury" (emphasis added)). In fact, Appellant demanded a jury trial.[8] [R at 1-14]

Similar circumstances arose in Prudential Ins. Co. of Am. v. Lai, 42 F.3d 1299, 1301 (9th Cir. 1994). In that case the plaintiffs-employees sued their employer and supervisor in state court for state law claims alleging that their supervisor had

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[8] Nothing in the record indicates that Appellee raised the issue of arbitrability of Appellant's claims. Appellee's Answer in the court did not raise an arbitration defense. Appellee's Responsive Pretrial Statement contains no reference to arbitration. Thus, although required to do so under Rule 12 of the Hawai'i Rules of the Circuit Court, Appellant failed to mention the arbitrability of the current dispute until it filed its motion to compel arbitration, after the Appellant's filing of his complaint and pretrial statement, and after significant discovery had already been conducted.

In pertinent part, Rule 12(b) of the Rules of the Circuit Courts of the State of Hawai'i (2006) provides, inter alia, that a pretrial statement and responsive pretrial statement "shall contain the following information":

> (3) All claims for relief and all defenses advanced by the party submitting the pretrial statement and the type of evidence expected to be offered in support of each claim and defense;
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> . . . .
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> (6) A statement that each party, or the party's lead counsel, conferred in person with the opposing party, or with lead counsel of each opposing party, in a good faith effort to limit all disputed issues, including outstanding discovery, and considered the feasibility of settlement and alternative dispute resolution options. . . .
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> (7) A statement identifying any party who objects to alternative dispute resolution and the reasons for objecting. If the parties have agreed to an alternative dispute resolution process, a statement identifying the process.

(Emphases added.)

raped, harassed, and sexually abused them.[9] Upon being hired, plaintiffs had signed "U-4 forms" which contained an arbitration clause. Id. Subsequent to their hiring, the plaintiffs had registered with the National Association of Securities Dealers (NASD), an association that requires that disputes "arising in connection with the business" of its members be submitted to arbitration. Id. The employer filed an action in federal district court seeking to compel arbitration of the plaintiffs' state law claims and to stay court proceedings pursuant to the Federal Arbitration Act. Id. The district court granted the employer's motion. Id.

On appeal, the Ninth Circuit Court of Appeals reversed. It recognized that an arbitration provision does not preclude a plaintiff from seeking remedies in a judicial forum:

> Legislative enactments in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination. In the Civil Rights Act of 1964, Congress indicated that they considered the policy against discrimination to be of the "highest priority." Consistent with this view, Title VII provides for consideration of employment discrimination claims in several forums. And, in general submission of a claim to one forum does not preclude a later submission to another. Moreover, the legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes.

Id. (quoting Alexander v. Gardner, 415 U.S. 36, 47-48 (1974) (emphases added). That court indicated that the public policy

[9] The Ninth Circuit in Prudential Ins. Co. of America v. Lai, 42 F.3d 1299 (9th Cir. 1994) observed that "[p]arallel state anti-discrimination laws are explicitly made part of Title VII's enforcement scheme." Id. at 1303 n.1 (citing Kremer v. Chem. Const. Corp., 456 U.S. 461, 477 (1982)). Accordingly, "the Federal Arbitration Act has the same application to state law claims . . . as it does to Title VII claims." Id.

against sexual discrimination was at least as weighty as the policy favoring arbitration.

> This congressional concern that Title VII disputes be arbitrated only "where appropriate," and only when such a procedure was knowingly accepted, reflects our public policy of protecting victims of sexual discrimination and harassment through the provisions of Title VII and analogous state statutes. See Alexander [v. Gardner-Denver Co., 415 U.S. [36,] 47 [(1974)]. This is a policy that is at least as strong as our public policy in favor of arbitration.

Id. at 1305.

In doing so, the Ninth Circuit observed that "the remedies and procedural protections available in the arbitral forum can differ significantly from those contemplated by the legislature. In the sexual harassment context, these procedural protections may be particularly significant." Id. at 1305. The Lai court noted that "in an area as personal and emotionally charged as sexual harassment and discrimination, the procedural right to a hearing before a jury of one's peers, rather than a panel of the [NASD], may be especially important." Id. at 1305 n.4 (emphasis added).

Lai concluded that the plaintiffs could only be compelled to forego their statutory remedies if they knowingly agreed to submit such disputes to arbitration. Id. The Lai court ruled that the plaintiffs did not knowingly agree to submit to arbitration and were therefore not bound by the agreement in that case. Id. It said:

> We agree with [plaintiffs] that Congress intended there to be at least a knowing agreement to arbitrate employment disputes before an employee may be deemed to have waived the comprehensive statutory rights, remedies and procedural protections prescribed in Title VII and related state statutes. Such congressional intent, which has been noted

> in other judicial decisions, is apparent from the text and legislative history of Title VII.

Id. at 1304. A review of the arbitration clause in this case does not evince any "knowing . . . waive[r by Appellant of] the comprehensive statutory rights, remedies and procedural protections prescribed in . . . related state statutes" id. such as HRS § 378-2.[10] The arbitration clause herein, then, could not have precluded his court action.

V.

As to the second point, the established principle that conditional language must be construed against the employer that used it should control in this case.

A.

A review of the express language of the Handbook indicates that its entire contents are subject to unilateral modification by Appellee. The Handbook's preface states that "[Appellee] maintains the responsibility and the right to make changes at any time and will advise employees when changes occur." (Emphasis added.) [RA at 169] Following that provision, the Handbook advises that "the guidelines and procedures [contained therein] may change . . . from time to time." (Emphasis added.) [RA at 170]. These introductory remarks, then, qualify and condition the provisions in the Handbook that follow.

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[10] HRS § 378-2 prohibits "unlawful discriminatory practice[s] . . . [b]ecause of race, sex, sexual orientation, age, religion, color, ancestry, disability, marital status, or arrest and court record."

Such language is reiterated in the acknowledgment form signed by Appellant, declaring that Appellee "has the right to change this handbook at any time and without advance notice." (Emphasis added.) The acknowledgment form further notifies the employee that its provisions are "presented as a matter of information only and do not constitute an employment contract." To dispel any other construction that may be given it, the Handbook indicates the guidelines "are not conditions of employment." The terms of the Handbook thus lack the bilateral consideration necessary for the formation of a contract, as the majority indicates. Majority opinion at 29-32. Inasmuch as the arbitration provision is a part of the Handbook, that section, then, is non-binding. See Wayland Lum Const., Inc. v. Kaneshige, 90 Hawai'i 417, 422, 978 P.2d 855, 860 (1999) (stating that "an arbitration agreement should be construed as a whole, and its meaning determined from the entire context"); cf. In re Lock Revocable Living Trust, 109 Hawai'i 146, 152, 123 P.3d 1241, 1247 (2005) (ruling that "in construing a trust document to determine the settlor's intent, the instrument must be read as a whole, not in fragments").

B.

Moreover, the seemingly mandatory language of the arbitration agreement, when viewed with the non-binding language of the Handbook, raises an ambiguity as to the effect of the arbitration provision. The arbitration section in this case

provides that "[a]ny and all claims arising out of the employee's employment with [Appellee] and his [or] her termination shall be settled by final binding arbitration[.]" Majority opinion at 3 (emphasis added). The section goes on to state that "[a]ny claim must be presented for arbitration[.]"[11] Id. (emphasis added).

We recently held in Luke v. Gentry Realty, Ltd., 105 Hawai'i 241, 249, 96 P.3d 261, 269 (2004), that, in a case involving a dispute regarding a home sales agreement, an ambiguity existed within that agreement where one provision stated that a buyer may "pursue any remedies available at law or in equity," and the other read that disputes "shall be resolved by arbitration." In Luke, we concluded that "in interpreting contracts, ambiguous terms are construed against the party who drafted the contract[,]" id. (citing Gushiken v. Shell Oil Co., 35 Haw. 402, 416 (1940)), and held that, in light of the ambiguity, the court in that case erred in staying judicial proceedings pending arbitration.

Similarly, here, such an ambiguity must be resolved against the source of the handbook, the employer Appellee. See Amfac, Inc. v. Waikiki Beachcomber Inv. Co., 74 Haw. 85, 110 n.5, 839 P.2d 10, 25 n.5 (1992) (noting that "the fundamental principle that any ambiguities in a contract should be interpreted most strongly against the party who has drafted the

[11] The arbitration agreement provision further states that "[t]he parties agree not to institute any action in any court located in the State of Hawaii or elsewhere against the other arising out of the claims covered by this paragraph."

language is applicable . . . where a contract is open to more than one reasonable construction"); cf. Oahu Transit Serv., Inc. v. Northfield Ins. Co., 107 Hawai'i 231, 235-36, 112 P.3d 717, 721-22 (2005) (holding that ambiguities arising from an insurance policy should be construed in favor of the insured, and explaining that "ambiguity exists and the rule is followed only when the policy taken as a whole, is reasonably subject to differing interpretations" (emphasis added)). In light of the ambiguity the arbitration language must be viewed as directory rather than mandatory.

VI.

The majority recognizes that despite the existence of non-binding language which renders the arbitration clause unenforceable in this case, this court in Brown enforced an arbitration agreement in that case which contained similar language. See majority opinion at 31 (pointing out that, in Brown, this court noted the arbitration provision in that case said "that '[a]ll such materials are presented for informational purposes only and can be changed at any time by KFC, with or without notice[,]'" (quoting Brown, 82 Hawai'i at 229, 921 P.2d at 149), but explaining that "inasmuch as the Brown court severed the arbitration provision from the application and found it enforceable standing on its own, Brown is consistent with our holding today"). This court concluded in Brown that the employee's racial discrimination claim fell within the

arbitration clause of the employment application and granted the employer's motion to compel arbitration.

But plainly, such language conflicts with the compulsory enforcement of an arbitration clause as the majority itself has pointed out. Because of the conflict between Brown and the majority's holding in this case, I believe Brown should not control. The fact that Brown is "remarkably similar" to Patterson v. Tenet Healtcare, Inc., 113 F.3d 832 (8th Cir. 1997), majority opinion at 31, does not make it any less inconsistent with the holding here. The majority's acknowledgement that a seeming discrepancy between this case and Brown results because Brown also contained non-binding language, id. at 31, is precisely why Brown should be confined to its own facts. By limiting Brown, the majority would avoid the situation it posits, that is, of placing the onus on employees to discern what the employer meant in the employer's handbook. Majority opinion at 25-29.

VII.

In sum, in contrast to the rule employed in Luke, the majority relies on various indicia to determine whether the arbitration clause is enforceable or not, such as whether the arbitration agreement section was "buried," the acknowledgment form was drafted in relation to that section, the arbitration agreement was "boxed off," Brown, 82 Hawai'i at 229, 921 P.2d at 149, or words were capitalized or bolded. Majority opinion at

23, 26-27. With all due respect, the enumeration of such indicia lacks a unifying principle.

The want of such a principle places an unwarranted burden on employees of deciphering at their risk such parts of the employer's handbook that later may be found to be legally binding as opposed to those provisions which are not binding, despite the non-binding language typical of such handbooks. The formulation applied by the majority is not practical, realistic, or just; the principle that any ambiguity in a document is to be construed against its source is. Under that principle, the arbitration provision must be construed against Appellee as directory, not mandatory, and, thus, not legally enforceable.