Court of Appeals No. 78356-4-I

97429-2

SUPREME COURT OF THE STATE OF WASHINGTON

STEVEN BURNETT, Respondent,

v.

PAGLIACCI PIZZA, INC., Petitioner.

PETITION FOR REVIEW

DORSEY & WHITNEY LLP
Michael W. Droke, WSBA #25972
Email: droke.michael@dorsey.com
Todd S. Fairchild, WSBA #17654
Email: fairchild.todd@dorsey.com
Jasmine Hui, WSBA #49964
Email: hui.jasmine@dorsey.com
701 Fifth Avenue, Suite 6100
Seattle, WA 98104-7043
Telephone: (206) 903-8800

Attorneys for Petitioner Pagliacci Pizza, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

A. IDENTITY OF PETITIONER

Petitioner Pagliacci Pizza, Inc. ("Employer") asks this court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

In *Burnett v. Pagliacci Pizza, Inc.*, 2019 Wn. App. LEXIS 1522, 2019 WL 2498721 (No. 78356-4-I, published June 17, 2019), the Court of Appeals refused to enforce a mandatory arbitration policy contained in an employee handbook. This Court has ruled that employee handbooks can be used to create binding "contracts" between an employer and its employees, but the Court of Appeals held that this principle does not apply to mandatory arbitration policies. The Court also dangerously expanded the doctrine of substantive unconscionability by striking down an arbitration agreement based upon a pre-filing mediation requirement that did not have any impact on the filing of an arbitration in this matter.

If allowed to stand, the decision of the Court of Appeals would create a different legal standard for creating binding arbitration agreements than for other terms of employment that are commonly agreed upon through employee handbooks. The employee, Mr. Burnett, was given the handbook containing the mandatory arbitration policy on his first day of work. He was instructed to read the handbook at home, and he was employed for two years

after receiving the handbook. Throughout that time, he received and accepted the various benefits and protections described in the handbook.

Yet the Court refused to enforce the mandatory arbitration policy. The Court held that: (1) the mandatory arbitration policy was procedurally unconscionable because the employee did not read the handbook before his first day of work, and (2) the mandatory arbitration policy was substantively unconscionable because the employer's internal dispute resolution process could *hypothetically* be used to delay filing an arbitration.

The new, higher legal standard applied by the Court of Appeals conflicts with published decisions of this Court. If the Court of Appeals decision remains as precedent binding upon the lower courts, it will negate arbitration policies contained in employee handbooks throughout the State of Washington. The decision also creates a new basis for challenging contracts generally. Under the Court of Appeals decision, the *hypothetical* possibility that a contract clause could have an unfair outcome now renders an entire arbitration agreement unconscionable.

Petitioner asks the court to review the parts of the opinion captioned Enforceability of Arbitration Agreement, Procedural Unconscionability, Substantive Unconscionability and Severance. Petitioner does not seek review the part captioned Existence of Arbitration Agreement. A copy of the decision is in the Appendix at pages A-1 through A-28.

C. ISSUES PRESENTED FOR REVIEW

1. Does providing an at-will employee with an employee handbook, and requiring him to read it at home and to comply with its terms, deny the employee a meaningful choice and thereby render a mandatory arbitration policy contained in the handbook procedurally unconscionable?

2. Does requiring an employee to engage in a non-binding dispute resolution process before commencing arbitration so shock the conscience as to render a mandatory arbitration policy substantively unconscionable?

3. Can an entire agreement be struck down as substantively unconscionable based upon a clause that could hypothetically lead to unfair outcome which did not occur?

4. If it is substantively unconscionable to require an employee to engage in a non-binding dispute resolution process before commencing an arbitration, should the strong public policy encouraging arbitration require severance of that provision from an arbitration agreement?

D. STATEMENT OF THE CASE

1. Introduction

The case concerns whether Washington State employers can enforce mandatory arbitration policies contained in employee handbooks. Employers throughout the State have adopted mandatory arbitration

policies. Very often they are contained in employee handbooks that apply to all employees. Because Washington State has a strong policy favoring arbitration, and because employers commonly impose mandatory arbitration policies through handbooks, this Petition involves an issue of substantial public interest that should be decided by the Supreme Court.

This case also involves enforcement of employee handbooks generally. The new and stricter requirements imposed by the Court of Appeals threaten the myriad protections for employees and employers that are contained in handbooks. For example, invalidating the "Mandatory Arbitration Policy"—because the employee did not read the handbook before his first day of work—necessarily invalidates the "Unlawful Harassment Policy" located right below it. This absurd result affects all employees working in Washington State.

Although this Court has issued several decisions regarding the enforceability of terms and conditions contained in employee handbooks, it has not considered those issues in the context of a mandatory arbitration policy. In the absence of Supreme Court precedent addressing mandatory arbitration policies, the Court of Appeals ruled that a mandatory arbitration policy cannot be imposed through an employee handbook. The Court of Appeals held:

> *Gaglidari* [*v. Denny's Rests.*, 117 Wn.2d 426, 815 P.2d 1362 (1991)] does not, as [Employer] contends, stand for the proposition that an employee handbook can create an arbitration agreement enforceable by the employer against its employee. Furthermore, [Employer] cites no Washington authority holding that an employer can foist an arbitration agreement on an employee simply by including an arbitration clause in an employee handbook that is provided to the employee. Therefore, we are not persuaded by [Employer]'s argument that the [employee handbook] created an arbitration agreement merely because [Employee] received a copy of it and continued his employment thereafter.

Ct. App. Op. at 15.

This ruling will create serious problems for Washington State employers. This Court has held that a handbook can create a binding contract between an employer and an at-will employee where the employee receives reasonable notice of the handbook and continues working for the employer. If that rule does not apply to mandatory arbitration policies, then employers will either need to negotiate separate arbitration agreements with all employees or litigate employment disputes in court.

There is no principled basis for distinguishing between arbitration clauses (which are supported by strong public policy) and other provisions in employee handbooks. Left standing, the decision would create uncertainty regarding the enforceability of any handbook provision not specifically addressed by this Court. This petition involves an issue of substantial public interest because employers need certainty and uniformity regarding handbooks and the arbitration of employee disputes.

The Court of Appeals also refused to enforce the mandatory arbitration policy because it required existing employees to participate in a non-binding dispute resolution process before filing a claim in arbitration. That process required an employee to discuss a claim with his or her supervisor, and possibly a second "responsible person," before commencing arbitration. The Court found that policy to be substantively unconscionable based on speculation that the employer could drag out the discussions and significantly shorten the three-year statute of limitations applicable to an employee's claim. That hypothetical set of facts did not occur.

It is common for arbitration agreements to require some sort of non-binding mediation as a pre-condition to filing a claim in arbitration. If such provisions were *per se* unconscionable because one party or another could hypothetically drag out the mediation process and create an unfair outcome, it would create an entirely new basis for attacking contractual provisions generally. Under that logic, the mere possibility that a clause in a contract could create an unfair outcome would allow a party to challenge the entire agreement as unconscionable. Such a rule would create doubt and unpredictability with regard to the drafting and enforceability of contracts.

The Court of Appeals decision is in conflict with numerous decisions of this Court and of the Court of Appeals, and it undermines the strong public policy in favor of arbitration. *See Verbeek Props., LLC v.*

GreenCo Envt'l., Inc., 159 Wn. App. 82, 86-87, 246 P.3d 205, 207 (2010) ("Courts must indulge every presumption in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.")

2. Procedural Posture

On October 3, 2017, Employee filed suit in the Superior Court of the State of Washington for King County. Employer filed a motion to compel arbitration of Employee's claims based on the Mandatory Arbitration Policy. The Superior Court denied Employer's motion, stating: "The Court finds there is no agreement to arbitrate." CP 227. Employer moved for reconsideration (CP 228-320) which was denied. CP 321-22. Employer appealed, and the Superior Court stayed the trial court proceedings pending appellate review. The appeal was decided by the Published Opinion dated June 17, 2019. This petition followed.

3. Employee Began and Continued His Employment For Two Years After Receiving Notice of the Handbook Containing the Mandatory Arbitration Policy.

Petitioner Pagliacci Pizza, Inc. ("Employer") is a pizzeria chain that employs hundreds of employees at dozens of locations in the greater Seattle area. CP 21. Employer employed Steven Burnett ("Employee") as a delivery driver from October 2015 to July 2017. CP 58; CP 3 at ¶ 3.1.

On his first day of work, Employee signed an "Employee Relationship Agreement" (CP 58) and was given Pagliacci's employee handbook, the Little Book of Answers (the "Handbook"). CP 60-73. The Handbook contains a Mandatory Arbitration Policy covering the types of claims alleged here. CP 71. By signing the Employee Relationship Agreement, Employee expressly agreed that he would "learn and comply with the rules and policies outlined in" the Handbook. CP 58.

After Employee ceased working for Employer, he filed a putative class action lawsuit alleging 'wage and hour' claims under various municipal ordinances and state laws and regulations. CP 1-20. He alleges that Employer failed to provide all required compensation, rest and meal breaks to himself and other pizza delivery drivers. *Id.*

The Handbook that Employee received on his first day of work states on page one that Employee was required to comply with the policies contained therein:

> **OBLIGATION**
>
> By working here, you agree to comply with the contents of this book and with the written plans and policies that are referenced in it.

CP 62. One of the policies that Employee was required to comply with is the Mandatory Arbitration Policy contained in the Handbook:

MANDATORY ARBITRATION POLICY

> The company has a mandatory arbitration policy with which you must comply for the binding resolution of disputes without lawsuits. If you believe you have been a victim of illegal harassment or discrimination or that you have not been paid for all hours worked or at less than the rate of pay required by law or that the termination of your employment was wrongful, you submit the dispute to resolution in accordance with the F.A.I.R. Policy and if those procedures are not successful in resolving the dispute, you then submit the dispute to binding arbitration before a neutral arbitrator pursuant to the Washington Arbitration Act.

CP 71 (emphasis added).

Employee admits that during his initial orientation he "was given a copy of the [Handbook] and told to read it at home." CP 142 at ¶ 8. It is undisputed that he continued working for almost two years after receiving a copy of the Handbook on his first day and being instructed to read it.

The Handbook also contains a policy (the "F.A.I.R. Policy") aimed at resolving disputes without the need for arbitration. CP 70. The policy requires an existing employee to report a concern to his or her supervisor before filing an arbitration. *Id.* If the supervisor does not resolve the matter to the employee's satisfaction, then the employee can request a face-to-face "conciliation" with another responsible person, who may be the owner of the company. *Id.* The conciliation process is expressly "non-binding." *Id.*

Employee was no longer employed by Employer when he filed suit, and therefore he did not have a supervisor or use the F.A.I.R. Policy.

Critically, Employer has never argued that Employee waived his right to an arbitration because the F.A.I.R. process was not used.

The Court of Appeals found that "an agreement to arbitrate exists here but that the agreement is unconscionable and unenforceable." Ct. App. Op. at 5. Specifically, the Court found that: (1) the agreement to arbitrate is procedurally unconscionable because Employee "did not have a reasonable opportunity to review the arbitration policy" before he signed the Employee Relationship Agreement; (2) the agreement to arbitrate is substantively unconscionable because Employee was required to engage in an internal dispute resolution process before filing an arbitration; and (3) the F.A.I.R. Policy could not be severed from the agreement.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. The Petition Involves an Issue of Substantial Public Interest that Should Be Determined by the Supreme Court Because It Concerns the Enforceability of Benefits and Protections Found in Hundreds of Thousands of Employee Handbooks in Washington State.

This Court has held that employers can use employee handbooks to create binding contracts, but the Court has not addressed this principle in the context of a mandatory arbitration policy. Mandatory arbitration policies are imposed by thousands of employers throughout the State of Washington. The Court of Appeals has recognized the policy reasons

favoring use of employee handbooks to establish, and modify, terms and conditions of employment:

> [I]n the modern economic climate, the operating policies of a business enterprise must be adaptable and responsive to change. An employer that could not change its policies without renegotiating with each employee could find itself obligated in a variety of different ways to any number of different employees. The resulting confusion and uncertainty would not be conducive to harmonious labor-management relations.

Govier v. N. Sound Bank, 91 Wn. App. 493, 500-01, 957 P.2d 811, 816 (1998) (emphasis added) (citations and internal punctuation omitted).

Washington State employers need to know what language and procedures are required to create enforceable arbitration policies. The public policy favoring arbitration is thwarted if a mandatory arbitration policy is unenforceable because the employee did not read the policy before commencing his employment or based upon speculation that an employer might engage in misconduct to delay the filing of an arbitration.

2. The Decision Directly Conflicts with Published Decisions of the Supreme Court Regarding Enforceability of Contracts Formed with Employee Handbooks, Severely Undermining Protections in Washington State.

This Court held that an employee is contractually bound by terms found in an employee handbook where the employee has reasonable notice of the handbook. *Gaglidari v. Denny's Rests.*, 117 Wn.2d 426, 815 P.2d 1362 (1991). In *Gaglidari*, the employee was notified of one employee

handbook when her employment began. Many years later, the employer notified her of a second handbook which "contained the provision that fighting on company premises was grounds for immediate dismissal." *Id.* at 429, 815 P.2d at 1364. The employee was contractually bound by the 'no fighting' provision, even though it was unilaterally imposed by the employer years after the employee began working for the employer. *Id.* at 433-34, 815 P.2d at 1366-67.

This Court described the issue it was deciding as follows: "Whether the employee handbooks, distributed to plaintiff, for which she signed an acknowledgment agreeing to abide by their rules and policies and which contained termination procedures, created a contract between defendant and plaintiff." *Id.* at 432, 815 P.2d at 1365. This Court held that the employee, Ms. Gaglidari, was contractually bound by those rules and policies. *Id.* at 435, 815 P.2d at 1367. The Court made it clear that when an employer provides notice to an employee of terms of employment contained in a handbook, the handbook becomes a contract binding upon the employer and employee. *Id.* at 433-34, 815 P.2d at 1366-67.

The Court of Appeals found that the issue in *Gaglidari* was "solely" whether the *employer* had agreed to follow certain procedures before terminating the employee. Ct. App. Op. at 15. The Court of Appeals held:

> In short, the *Gaglidari* court considered whether a contract was formed between Denny's and Gaglidari solely to determine what, if any, procedures an employer had agreed to follow before terminating an employee and whether the employer had complied with those procedures. *Gaglidari*, 117 Wn.2d at 431.
>
> *Gaglidari* does not, as Pagliacci contends, stand for the proposition that an employee handbook can create an arbitration agreement enforceable by the employer against its employee. Furthermore, Pagliacci cites no Washington authority holding that an employer can foist an arbitration agreement on an employee simply by including an arbitration clause in an employee handbook that is provided to the employee. Therefore, we are not persuaded by Pagliacci's argument that the Little Book created an arbitration agreement merely because Burnett received a copy of it and continued his employment thereafter.

Id.

That decision conflicts with decisions of this Court and of the Court of Appeals holding that an employer can unilaterally impose new conditions of employment by giving reasonable notice of an employee handbook or changes to the handbook. *Gaglidari* shows that an employer can impose new terms of employment on existing, at-will employees simply by amending a handbook and giving employees notice that the conditions of their employment have changed.

3. The Decision Conflicts with Published Court of Appeals Decisions Regarding Enforceability of Contracts Formed With Employee Handbooks.

The Court of Appeals decision conflicts with *Govier v. N. Sound Bank*, 91 Wn. App. 493, 957 P.2d 811 (1998). Two years after Deborah Govier began working for North Sound Bank, "the bank presented her with

a new employment agreement that substantially changed the terms of her previous employment." *Id.* at 494, 957 P.2d at 813. The Court of Appeals rejected Govier's argument that the Bank was required to give her advance notice of the changes before they became effective. *Id.* at 502, 957 P.2d at 816. The Court reached the same conclusion in *Tjart v. Smith Barney, Inc.*, 107 Wn. App. 885, 28 P.3d 823 (2001). The Court held that the plaintiff-employee was bound by an arbitration clause contained in a form "application" that she was "told to sign" after her employment began. *Tjart,* 107 Wn. App. at 896-97, 28 P.3d at 829.

Here, Employee worked as a delivery driver for almost two years after receiving a copy of the Handbook. Like the plaintiff in *Tjart*, he "had a reasonable opportunity to understand that [he] was agreeing to arbitrate [his] future claims." *Id.* at 898-99; 28 P.3d at 830. He also had a "meaningful choice" whether to continue his at-will employment with Employer or to "choose employment elsewhere." *Romney v. Franciscan Med. Grp.*, 186 Wn. App. 728, 740, 349 P.3d 32, 38 (2015).

The Court of Appeals applied the legal principle described in *Gaglidari* in the context of a terminable-at-will pricing agreement between an insurance company and a company that repairs automobile windshields. *Cascade Auto Glass, Inc. v. Progressive Cas. Ins. Co.*, 135 Wn. App. 760, 145 P.3d 1253 (2006). The Court held that because the agreement was

terminable-at-will, the insurance company could unilaterally reduce the prices it would pay for repair work, and the repair company accepted the new terms by performing work after receiving notice of the change. The Court of Appeals held:

> The same rule applies in at-will employment agreements, where an employer may unilaterally change policies and procedures set forth in an employee handbook so long as the employee receives reasonable notice of the change. In such cases, a new contract is formed when the employer communicates the new terms (offer), the employee works after receiving notice (acceptance), and the employee continues in employment although free to terminate (consideration).

Cascade Auto Glass. 135 Wn. App. at 768-69, 145 P.3d at 1257, *citing Govier,* 91 Wn. App. at 498 and *Gaglidari,* 117 Wn.2d at 433-34.

The Court of Appeals' decision in this case conflicts with *Govier*, *Tjart*, *Romney* and *Cascade Auto Glass*. Employee was an at-will employee who could terminate his employment at any time. CP 58. This Court should find that Employee accepted the terms of the Handbook, including the Mandatory Arbitration Policy, by continuing to work for Employer after he received actual notice of the Handbook.

4. The Decision Is in Conflict with Published Supreme Court Decisions Regarding Substantive Unconscionability.

The decision of the Court of Appeals conflicts with this Court's decisions in *Adler v. Fred Lind Manor,* 153 Wn.2d 331, 103 P.3d 773 (2004), *Zuver v. Airtouch Comm'ns, Inc.,* 153 Wn.2d 293, 103 P.3d 753

(2004), *Hill v. Garda CL Northwest, Inc.*, 179 Wn.2d 47, 308 P.3d 635 (2013) and *Gandee v. LDL Freedom Enters., Inc.*, 176 Wn.2d 598, 293 P.3d 1197 (2013). In those four cases, this Court found arbitration provisions to be unconscionable because they significantly limited the employee's *substantive* rights and remedies and unfairly shifted costs to the plaintiffs.

The Court of Appeals speculated that the F.A.I.R. Policy could hypothetically be abused by Employer to effectively shorten the three-year statute of limitations applicable to Employee's claims.[1] That internal dispute resolution process is not the type of provision that this Court has found to be substantively unconscionable. In *Zuver*, this Court found that the arbitration clause unfairly barred the employee from seeking punitive or exemplary damages, while permitting the employer to collect such damages. *Zuver*, 153 Wn.2d at 318-319, 103 P.3d at 767 (footnote omitted). In *Hill*, this Court found an arbitration clause to be substantively unconscionable because it reduced the statute of limitations three years to 14 days, imposed a limit on the employees' ability to recover back pay, and imposed arbitration cost-sharing requirements that effectively eliminated the employees' ability to litigate their claims. *Hill*, 179 Wn.2d at 55-58, 308 P.3d at 638-40.

[1] *See Sorey v. Barton Oldsmobile*, 82 Wn. App. 800, 801, 919 P.2d 1276, 1276 (1996) (violation of a wage and hour statute is an invasion of a personal right subject to the three-year statute of limitations set forth in Wash. Rev. Code § 4.16.080(2)).

In *Adler*, the arbitration agreement contained a "fee-splitting" provision that would "effectively prohibit [Adler] from bringing his claims." *Adler*, 153 Wn.2d at 352-353, 103 P.3d at 785. The agreement in *Gandee* required the arbitration to take place in California, which made commencing an arbitration prohibitively expensive for the plaintiff. *Gandee*, 176 Wn.2d at 604-605; 293 P.3d at 1200. The agreement also contained a fee-shifting provision that "effectively chill[ed] Gandee's ability to bring suit … ." *Id.* at 606, 293 P.3d at 1201.

Unlike those agreements, the Handbook does not purport to limit Employee's substantive rights or remedies. The Mandatory Arbitration Policy does not shorten the statute of limitations, reduce the amount or type of damages that Employee can recover, or shift costs to Employee. The decision conflicts with this Court's rulings by failing to identify any provision that is "shocking to the conscience," "monstrously harsh" or "exceedingly calloused." *Adler*, 153 Wn.2d at 344-45, 103 P.3d at 781.

Also important is the fact that the Court of Appeals found the F.A.I.R. Policy to be substantively unconscionable based on a hypothetical set of facts that never occurred. Virtually any contract provision could be invalidated if courts were prepared to speculate that one provision or another might be abused by an unscrupulous party acting in bad faith. This Court should reject that kind of analysis. *See Zaborowski v. MHN Gov't*

Servs., 936 F. Supp. 2d 1145, 1156 (N.D. Cal. 2013) (rejecting hypothetical argument as a basis for finding unconscionability); *Wallace v. Red Bull Distrib. Co.*, 958 F. Supp. 2d 811, 825-26 (N.D. Ohio 2013) (same).

5. The Decision Is in Conflict with Published Decisions of the Court of Appeals Regarding Construction of Contracts by Imposing a Requirement on Former Employees That Is Not Supported by the Agreement Itself.

The Court of Appeals found that the F.A.I.R. Policy applied to a former employee and rendered the Mandatory Arbitration Policy unconscionable. That ruling conflicts with the well-established principle that "when a court examines a contract, it must read it as the average person would read it; it should be given a practical and reasonable rather than a literal interpretation, and not a strained or forced construction leading to absurd results." *Forest Mktg. Enters. v. Dep't of Natural Res.*, 125 Wn. App. 126, 132, 104 P.3d 40, 43 (2005) (citations and quotation marks omitted).

The F.A.I.R. policy requires existing employees to first report a dispute to their supervisor. CP 70. If that does not lead to a resolution, the next step is to engage in "non-binding Conciliation" with "a responsible person at Pagliacci Pizza (who may be the owner) … ." *Id.* The only reasonable interpretation of the F.A.I.R. Policy is that it is intended to apply to current employees, who still have a supervisor, not to former employees.

6. The Court of Appeals Decision Is in Conflict with Published Decisions of the Supreme Court Regarding Severance of Unconscionable Contract Terms.

This Court has held that substantively unconscionable provisions should be severed unless doing so would "significantly alter both the tone of the arbitration clause and the nature of the arbitration contemplated by the clause." *Gandee*, 176 Wn.2d at 607; 293 P.3d at 1202. In that case, this Court found that severing the unconscionable provisions would essentially "rewrite" the arbitration agreement. *Id.* at 607, 293 P.3d 1201-02. By contrast, this Court found in *Zuver* that it could "easily" excise the unconscionable provisions "but enforce the remainder." *Zuver*, 153 Wn.2d at 320, 103 P.3d at 768-69.

The F.A.I.R. Policy concerns events that occur before an arbitration, not the arbitration itself. (CP 70, 71). Severing the policy would not alter "the tone of the arbitration clause [or] the nature of the arbitration contemplated by the clause." *Id.* at 607, 293 P.3d at 1202.

F. CONCLUSION

This Court should accept review for the reasons described in Part E, and hold that: (1) a mandatory arbitration policy can be imposed through an employee handbook where an at-will employee receives reasonable notice of the handbook and begins or continues working for the employer; (2) a provision requiring the parties to attempt to resolve a dispute amicably

before commencing an arbitration does not necessarily render an arbitration agreement substantively unconscionable; and (3) if a pre-condition to commencing an arbitration is substantively unconscionable, but can be severed from the agreement without significantly affecting the nature of the arbitration, then severance is required.

Based upon the foregoing, the Court should reverse the decision of the Court of Appeals and remand for further proceedings consistent with this Court's decision.

DATED this 12th day of July, 2019.

Respectfully submitted,

DORSEY & WHITNEY LLP

Michael W. Droke, WSBA #25972
Todd S. Fairchild, WSBA #17654
Jasmine Hui, WSBA #49964
Attorneys for Petitioner

APPENDIX

1. Published Court of Appeals Decision in *Burnett v. Pagliacci Pizza, Inc.*, 2019 Wn. App. LEXIS 1522, 2019 WL 2498721 (No. 78356-4-I, published June 17, 2019).

2. Copy of RCW 4.16.080(2).

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STEVEN BURNETT, individually and on behalf of all others similarly situated, Respondent, v. PAGLIACCI PIZZA, INC., a Washington corporation, Appellant.	No. 78356-4-I DIVISION ONE PUBLISHED OPINION FILED: June 17, 2019

SMITH, J. — When Steven Burnett was hired as a delivery driver by Pagliacci Pizza Inc., he was required to sign an "Employee Relationship Agreement" to begin work. He was also given an employee handbook containing a mandatory arbitration policy and told to read it at home. When Burnett later sued Pagliacci for various wage-related claims, Pagliacci moved to compel arbitration under the policy printed in its handbook. Pagliacci appeals the trial court's denial of that motion.

We hold that because Burnett did not have a reasonable opportunity to review the arbitration policy before he was required to sign the Employee Relationship Agreement, the circumstances surrounding the formation of the parties' agreement to arbitrate were procedurally unconscionable. We hold further that the mandatory arbitration policy is substantively unconscionable because certain prerequisites to arbitration required by the policy unreasonably

favor Pagliacci by limiting employees' access to substantive remedies and discouraging them from pursuing valid claims. Therefore, we affirm.

FACTS

Pagliacci hired Burnett as a delivery driver for Pagliacci's Valley Street location in October 2015. Upon hire, Burnett attended a mandatory orientation, which took between 40 minutes and an hour. At the orientation, Burnett was shown around the store, given Pagliacci T-shirts, and told about Pagliacci's history and values. He also watched some videos about how to succeed as a delivery driver. Additionally, Burnett was given some forms and told to sign them so that he could start working. One of those forms was an Employee Relationship Agreement (ERA), which Burnett signed. Burnett was also given a copy of Pagliacci's "Little Book of Answers" (Little Book) and told to read it at home. Although the ERA directs the employee to "learn and comply with the rules and policies outlined in our Little Book . . . , including those that relate to positive attitude, public safety, company funds, tips and FAIR [Fair and Amicable Internal Resolution] Policy," the ERA does not mention arbitration.

Pagliacci terminated Burnett's employment on January 22, 2017. In October 2017, Burnett filed a putative class action against Pagliacci, alleging among other things that Pagliacci failed to provide delivery drivers with required rest and meal periods, failed to pay all wages due to delivery drivers, wrongfully retained delivery charges, and made unlawful deductions from delivery drivers' wages.

Pagliacci moved to compel arbitration of Burnett's claims under its

mandatory arbitration policy, which is printed in the Little Book. That policy provides:

> The company has a mandatory arbitration policy with which you must comply for the binding resolution of disputes without lawsuits. If you believe you have been a victim of illegal harassment or discrimination or that you have not been paid for all hours worked or at less than the rate of pay required by law or that the termination of your employment was wrongful, you submit the dispute to resolution in accordance with the F.A.I.R. Policy and if those procedures are not successful in resolving the dispute, you then submit the dispute to binding arbitration before a neutral arbitrator pursuant to the Washington Arbitration Act.

The "F.A.I.R. Policy" referred to in the mandatory arbitration policy requires that before commencing arbitration, the employee first "report the matter and all details" to his or her supervisor (Supervisor Review). If Supervisor Review does not resolve the matter to the employee's satisfaction, he or she may initiate nonbinding conciliation, wherein the "F.A.I.R. Administrator will designate a responsible person at Pagliacci Pizza (who may be its owner) to meet face-to-face with you in a non-binding Conciliation." The F.A.I.R. Policy also includes the following limitations provision:

> You may not commence an arbitration of a claim that is covered by the Pagliacci Pizza Arbitration Policy or commence a lawsuit on a claim that is not covered by the Pagliacci Pizza Arbitration Policy unless you have first submitted the claim to resolution in conformity with the F.A.I.R. Policy and fully complied with the steps and procedures in the F.A.I.R. Policy. If you do not comply with a step, rule or procedure in the F.A.I.R. Policy with respect to a claim, you waive any right to raise the claim in any court or other forum, including arbitration. The limitations set forth in this paragraph shall not be subject to tolling, equitable or otherwise.

Burnett opposed Pagliacci's motion to compel arbitration. He argued that the mandatory arbitration policy was both procedurally and substantively

unconscionable, but the trial court did not reach those arguments. Instead, it concluded that although Burnett agreed under the ERA to "learn and comply with the rules and policies outlined in our Little Book," the Little Book was not incorporated by reference into the ERA. The court therefore denied Pagliacci's motion, finding there was no agreement to arbitrate.[1]

Pagliacci moved for reconsideration, arguing that the Little Book was incorporated by reference into the ERA. Pagliacci also argued that regardless of whether it was incorporated by reference into the ERA, the Little Book created an agreement to arbitrate because Burnett received a copy of it and then continued his employment thereafter. The court denied Pagliacci's motion for reconsideration. Pagliacci appeals.[2]

ANALYSIS

Pagliacci argues that the trial court erred by denying its motion to compel arbitration and its subsequent motion for reconsideration. We disagree.

Arbitrability is a question of law that we review de novo. McKee v. AT&T Corp., 164 Wn.2d 372, 383, 191 P.3d 845 (2008). "The burden of proof is on the party seeking to avoid arbitration." McKee, 164 Wn.2d at 383. "Regardless of

---

[1] Although the trial court did not reach Pagliacci's unconscionability arguments in its written order, it indicated in its oral ruling that it had concerns regarding the Little Book both in terms of procedural unconscionability and substantive unconscionability.

[2] A superior court's order denying a motion to compel arbitration is not expressly listed as an appealable decision under RAP 2.2, and Pagliacci did not seek discretionary review under RAP 2.3. But in Stein v. Geonerco, Inc., 105 Wn. App. 41, 43-45, 17 P.3d 1266 (2001), we recognized that the right to arbitrate is a "substantial right" under RAP 2.2(a)(3) and held that an order denying a motion to compel arbitration is appealable on an interlocutory basis. Burnett does not argue otherwise.

whether the Federal Arbitration Act[3] . . . or the Washington uniform arbitration act[4] . . . applies, our analysis as to whether . . . claims are subject to arbitration begins in the same manner." Weiss v. Lonnquist, 153 Wn. App. 502, 510, 224 P.3d 787 (2009).[5] Specifically, "[a]s arbitration is a matter of contract, parties cannot be compelled to arbitrate unless they agreed to do so." Weiss, 153 Wn. App. at 510.

In determining whether an agreement to arbitrate exists, we first determine whether the parties have agreed to arbitrate a particular matter by applying ordinary contract principles. Weiss, 153 Wn. App. at 511; see also Tjart v. Smith Barney, Inc., 107 Wn. App. 885, 895-97, 28 P.3d 823 (2001) (considering whether an arbitration agreement existed before analyzing whether the arbitration agreement was enforceable). Where, as here, no material facts are in dispute, contract interpretation is a question of law that we review de novo. Dave Johnson Ins. v. Wright, 167 Wn. App. 758, 769, 275 P.3d 339 (2012). Additionally, if an agreement to arbitrate exists, "[g]eneral contract defenses such as unconscionability may invalidate arbitration agreements." McKee, 164 Wn.2d at 383. Unconscionability is also a question of law reviewed de novo. McKee, 164 Wn.2d at 383.

For the reasons that follow, we conclude that an agreement to arbitrate exists here but that the agreement is unconscionable and unenforceable.

---

[3] 9 U.S.C. §§ 1-16.

[4] Chapter 7.04A RCW.

[5] For this reason, we do not decide whether the Federal Arbitration Act applies, an issue that was raised below but not argued on appeal.

Existence of Arbitration Agreement

Pagliacci argues that the trial court erred by concluding that the mandatory arbitration policy was not incorporated into the ERA and consequently there was no agreement to arbitrate. We agree.

"Incorporation by reference allows the parties to 'incorporate contractual terms by reference to a separate . . . agreement to which they are not parties, and including a separate document which is unsigned.'" W. Wash. Corp. of Seventh-Day Adventists v. Ferrellgas, Inc., 102 Wn. App. 488, 494, 7 P.3d 861 (2000) (alteration in original) (quoting 11 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 30:25, at 233-34 (4th ed. 1999)). "'But incorporation by reference is ineffective to accomplish its intended purpose where the provisions to which reference is made do not have a reasonably clear and ascertainable meaning.'" Seventh-Day Adventists, 102 Wn. App. at 494 (quoting 11 WILLISTON & LORD, § 30:25, at 234). "'[I]t must be clear that the parties to the agreement had knowledge of and assented to the incorporated terms[.]'" Seventh-Day Adventists, 102 Wn. App. at 494-95 (alterations in original) (quoting 11 WILLISTON & LORD, § 30:25, at 234).

In Seventh-Day Adventists, the court held that a "Trade Contract" "clearly and unequivocally incorporate[d] the 'Contract Project Documents' and the 'Contract Documents'" by stating that work would be performed "in accordance with the 'Project Contract Documents'" and "'in accordance with Contract Documents.'" Seventh-Day Adventists, 102 Wn. App. at 492, 495. Here, like the Trade Contract in Seventh-Day Adventists, the ERA clearly and unequivocally

incorporates the Little Book. Specifically, the ERA expressly provides that employees will, on their own initiative, "learn and comply with the rules and policies outlined in our Little Book of Answers." Furthermore, Burnett does not argue that there was any lack of clarity that the Little Book described in the ERA is the same Little Book that he received at orientation. For these reasons, the rules and policies in the Little Book were incorporated by reference into the ERA.

Burnett makes no attempt to distinguish Seventh-Day Adventists even though he cites that case for the proposition that incorporation by reference must be clear and unequivocal. Instead, he argues that "an employment contract telling an employee to read 'on your own time' a separate employment handbook is not 'clear and unequivocal' incorporation by reference." But the ERA not only directs the employee to read the Little Book on his or her own time, it also requires the employee to comply with the rules and policies outlined therein. Therefore, Burnett's argument is not persuasive, and we conclude that an agreement to arbitrate exists here.[6]

Enforceability of Arbitration Agreement

Having concluded that the parties agreed to arbitrate, we next consider whether the parties' agreement is enforceable. For the reasons that follow, we conclude that the circumstances surrounding the formation of the parties'

[6] Pagliacci argues in the alternative that the Little Book itself created an arbitration agreement regardless of whether it was incorporated into the ERA. Because we conclude that the mandatory arbitration policy was incorporated by reference into the ERA, we do not address Pagliacci's alternative argument here. But because Pagliacci raises that argument again in the context of procedural unconscionability, we address it in the next section.

arbitration agreement were procedurally unconscionable and that the mandatory arbitration policy is substantively unconscionable. We also conclude that severance of the substantively unconscionable provisions is inappropriate here and thus hold that the mandatory arbitration policy is unenforceable.[7]

Procedural Unconscionability

Washington law recognizes two categories of unconscionability: substantive and procedural. Zuver v. Airtouch Commc'ns, Inc., 153 Wn.2d 293, 303, 103 P.3d 753 (2004). "Procedural unconscionability is 'the lack of meaningful choice, considering all the circumstances surrounding the transaction.'" Zuver, 153 Wn.2d at 303 (quoting Nelson v. McGoldrick, 127 Wn.2d 124, 131, 896 P.2d 1258 (1995)). To determine whether an agreement is procedurally unconscionable, we look to the following circumstances surrounding the parties' transaction to determine whether the party claiming unconscionability lacked meaningful choice: (1) the manner in which the contract was entered, (2) whether the party claiming procedural unconscionability had a reasonable opportunity to understand the terms of the contract, and (3) whether the important terms were hidden in a maze of fine print. Zuver, 153 Wn.2d at 303. Our Supreme Court has cautioned that "'these three factors [should] not be applied mechanically without regard to whether in truth a meaningful choice existed.'" Zuver, 153 Wn.2d at 303 (alteration in original) (quoting Nelson, 127

[7] Pagliacci suggests that Burnett was required to file a cross appeal to argue that the parties' agreement to arbitrate is unconscionable. But this suggestion has no merit because we can affirm on any basis supported by the record. Bavand v. OneWest Bank, 196 Wn. App. 813, 825, 385 P.3d 233 (2016).

Wn.2d at 131).

Although not determinative, if an agreement constitutes an adhesion contract, that supports a finding that the agreement is procedurally unconscionable. See Zuver, 153 Wn.2d at 305 (analyzing whether an arbitration agreement was an adhesion contract but observing that "the fact that [the] arbitration agreement is an adhesion contract does not end our inquiry"). Washington courts have adopted the following factors to determine whether an adhesion contract exists: "'(1) whether the contract is a standard form printed contract, (2) whether it was prepared by one party and submitted to the other on a 'take it or leave it' basis, and (3) whether there was no true equality of bargaining power between the parties.'" Zuver, 153 Wn.2d at 304 (internal quotation marks omitted) (quoting Yakima County (W. Valley) Fire Prot. Dist. No. 12 v. City of Yakima, 122 Wn.2d 371, 393, 858 P.2d 245 (1993)).

Here, the ERA, including the Little Book and Pagliacci's mandatory arbitration policy, constitutes an adhesion contract. Specifically, the ERA is a standard form printed contract that Burnett was required to sign to begin employment, i.e., on a "take it or leave it" basis. Moreover, Pagliacci does not argue that the ERA is not an adhesion contract. Rather, Pagliacci argues that even if the ERA is an adhesion contract, the circumstances surrounding its formation—and specifically the formation of the parties' agreement to arbitrate—were not procedurally unconscionable. But we disagree.

Mattingly v. Palmer Ridge Homes, LLC, 157 Wn. App. 376, 238 P.3d 505 (2010), is instructive. In Mattingly, Steven and Deborah Mattingly entered an

agreement with Palmer Ridge Homes LLC under which Palmer Ridge would construct a custom home for the Mattinglys. Mattingly, 157 Wn. App. at 382. Six months later, the Mattinglys signed an application to enroll in Palmer Ridge's "2-10 Home Buyers Warranty new home warranty program" (2-10 HBW warranty). Mattingly, 157 Wn. App. at 383. As part of the enrollment, the Mattinglys acknowledged that they read a sample copy of the "Warranty Booklet" and understood that their claims and liabilities were limited by the terms and conditions in the booklet. Mattingly, 157 Wn. App. at 383. However, the Mattinglys did not in fact see a copy of the warranty booklet before they signed the enrollment application. Mattingly, 157 Wn. App. at 383.

After discovering problems with the construction of their home, the Mattinglys sued Palmer Ridge. Mattingly, 157 Wn. App. at 386. Palmer Ridge moved for summary judgment, arguing that the Mattinglys' claims were barred by the 2-10 HBW warranty's limitations provisions. Mattingly, 157 Wn. App. at 386. The trial court agreed and dismissed the Mattinglys' claims. Mattingly, 157 Wn. App. at 386.

On appeal, Division Two of this court concluded that the 2-10 HBW warranty limitations were unenforceable. Mattingly, 157 Wn. App. at 392. It held that the circumstances surrounding the 2-10 HBW warranty are "suspect, as there is no evidence in the record that the Mattinglys had a reasonable opportunity to understand the terms contained within the booklet, and the terms remain buried in the booklet." Mattingly, 157 Wn. App. at 392. Specifically, the court observed that the Mattinglys did not receive a sample copy of the booklet

before signing the warranty enrollment and that even if the Mattinglys *had* received the booklet, the limitations provisions—though in bold and larger typeface than surrounding text—were on page 7 of a 32-page booklet. Mattingly, 157 Wn. App. at 391-92.

Here, as in Mattingly, the circumstances surrounding the formation of the parties' arbitration agreement are suspect. As in Mattingly, there is no evidence in the record that Burnett had a reasonable opportunity to understand the terms contained in the Little Book—and specifically the mandatory arbitration policy—before he signed the ERA. Instead, the record reflects that Burnett was not afforded an opportunity to review the Little Book before signing the ERA: Burnett testified that he was told to sign the ERA to begin work and instructed to read the Little Book at home. Furthermore, like the warranty limitations in Mattingly, Pagliacci's mandatory arbitration policy is buried in a booklet: Although it is written in plain English, it appears on page 18 of the 23-page Little Book, in the same font size and with the same formatting as surrounding sections. For these reasons, we conclude that Burnett lacked meaningful choice in agreeing to arbitrate, and thus the circumstances surrounding the formation of the parties' arbitration agreement were procedurally unconscionable.

Pagliacci argues that Mattingly is distinguishable because it does not concern an employment relationship. It also points out that while the Mattinglys did not receive the warranty booklet until well after they signed the agreement that incorporated it, the Little Book was reasonably available to Burnett throughout his employment. But the fact that Mattingly was not an employment

case is not a relevant distinguishing factor because, as discussed, we apply ordinary contract law to determine the validity of an agreement to arbitrate. McKee, 164 Wn.2d at 383. And it is irrelevant that the mandatory arbitration policy was available to Burnett *after* he signed the ERA if he did not have a reasonable opportunity to review it *before* he signed the ERA into which it was incorporated. Pagliacci's arguments are not persuasive.

Pagliacci also contends that the mandatory arbitration policy is not "'hidden in a maze of fine print'" and that Burnett's failure to read it is not a defense to enforcement. Pagliacci relies on Tjart to support its arguments. But in Tjart, the employee completed an employment application which *itself* contained an arbitration provision. Tjart, 107 Wn. App. at 891-92. Indeed, in concluding that the employee had a reasonable opportunity to understand that she was agreeing to arbitrate her future claims, we observed that "the arbitration provision was obvious in the fairly short contract." Tjart, 107 Wn. App. at 898-99. Here, by contrast, the arbitration policy is not printed—or even *mentioned*—in the ERA itself. Instead, it is buried in a separate booklet that, as discussed, Burnett did not have a reasonable opportunity to review before signing the ERA. Indeed, nothing in the ERA suggests that the Little Book contains an arbitration clause, and even the Little Book's own table of contents describes the section in which the arbitration policy appears as the "Mutual Fairness *Benefits*"[8] section, giving no indication to the reader that it might contain a one-way arbitration clause. Tjart is not persuasive and neither is Pagliacci's argument that the mandatory

[8] (Emphasis added.)

arbitration policy is not hidden. Cf. Romney v. Franciscan Med. Grp., 186 Wn. App. 728, 349 P.3d 32 (2015) (holding that arbitration clause was not procedurally unconscionable where employees signed multiple employment contracts that contained the same arbitration agreement addendum).

Pagliacci next argues that the mandatory arbitration policy is not procedurally unconscionable because "the case law shows that an employer can impose new terms of employment on *existing* employees at any time, simply by amending a handbook and giving employees notice that the conditions of their employment have changed." Pagliacci asserts that the Little Book itself was enough to create a binding arbitration agreement even if not incorporated into the ERA, and that Burnett became bound by the mandatory arbitration policy because he received a copy of the Little Book and continued his employment thereafter. Pagliacci chiefly relies on Gaglidari v. Denny's Restaurants, Inc., 117 Wn.2d 426, 815 P.2d 1362 (1991), to support this assertion, but that reliance is misplaced.

In Gaglidari, the plaintiff, Ronda Gaglidari, was hired as a bartender by Denny's Restaurants Inc. (Denny's) in 1980. Gaglidari, 117 Wn.2d at 428. On her first day of work, Gaglidari received a copy of the 1979 employee handbook, which described Denny's termination procedures. Gaglidari, 117 Wn.2d at 428. The handbook stated that "fighting on duty was grounds for immediate dismissal" but provided for counseling review and review by a certain level of manager for infractions not covered by the immediate dismissal provision. Gaglidari, 117 Wn.2d at 428. In 1986, Denny's gave Gaglidari an alcoholic beverage handbook

stating that fighting on company premises, regardless of whether on duty or not, was grounds for immediate dismissal. Gaglidari, 117 Wn.2d at 429, 436.

In 1987, Denny's fired Gaglidari after she was involved in a fight on company premises while off duty. Gaglidari, 117 Wn.2d at 429-30. Gaglidari sued Denny's for failing to comply with the termination procedures in its 1979 employee handbook. Gaglidari, 117 Wn.2d at 430. A jury returned a verdict in Gaglidari's favor. Gaglidari, 117 Wn.2d at 431.

On appeal, our Supreme Court observed that although employment relationships are traditionally terminable at will, "an employment relationship terminable at will can be modified by statements contained in policy manuals or handbooks." Gaglidari, 117 Wn.2d at 433. The court also stated that "[a]n employer may unilaterally amend or revoke policies and procedures established in an employee handbook" but that "an employer's unilateral change in policy will not be effective until employees receive reasonable notice of the change." Gaglidari, 117 Wn.2d at 434. The Supreme Court explained, based on these principles, that the 1979 employee handbook formed a contract pursuant to which Denny's would have been required to follow certain procedures before terminating Gaglidari for fighting while off duty. Gaglidari, 117 Wn.2d at 433. But the court held that the 1986 alcoholic beverage handbook achieved a modification to the 1979 handbook such that on-premises fighting, regardless of duty status, became grounds for immediate dismissal. Gaglidari, 117 Wn.2d at 436. The court then remanded for a new trial on whether Denny's conclusion that Gaglidari was guilty of fighting was reasonable, in good faith, and supported

by substantial evidence such that immediate dismissal was warranted. Gaglidari, 117 Wn.2d at 436, 451.

In short, the Gaglidari court considered whether a contract was formed between Denny's and Gaglidari solely to determine what, if any, procedures an *employer* had agreed to follow before terminating an employee and whether the *employer* had complied with those procedures. Gaglidari, 117 Wn.2d at 431. Gaglidari does not, as Pagliacci contends, stand for the proposition that an employee handbook can create an arbitration agreement enforceable by the employer against its employee. Furthermore, Pagliacci cites no Washington authority holding that an employer can foist an arbitration agreement on an employee simply by including an arbitration clause in an employee handbook that is provided to the employee. Therefore, we are not persuaded by Pagliacci's argument that the Little Book created an arbitration agreement merely because Burnett received a copy of it and continued his employment thereafter.

Pagliacci concedes that "[n]o reported Washington decision specifically addresses arbitration policies in the context of employee handbooks" but argues that under Gaglidari, employee handbooks create obligations that are binding on employees and the mandatory arbitration policy should be no exception. Specifically, Pagliacci attempts to analogize the Little Book to the handbook in Gaglidari, which Pagliacci observes "imposed a 'contractual' obligation on the employee not to fight on company premises as a condition of her employment." But this argument ignores the context in which the contract analysis in Gaglidari arose. The Gaglidari court did conclude that Denny's employee handbook, as

modified by the alcoholic beverage handbook, created a contract between Gaglidari and Denny's, wherein Gaglidari agreed to abide by the policies and procedures outlined in the handbook. Gaglidari, 117 Wn.2d at 435-36. But as discussed, the court reached this conclusion in the context of determining whether Gaglidari's behavior was grounds for immediate dismissal. An employee's agreement to comply with a policy or risk immediate dismissal is readily distinguishable from an employee's agreement to submit his or her claims to arbitration. That the former agreement can be secured by providing the employee with a handbook does not mean that the latter agreement can be secured in the same manner. Pagliacci's argument is not persuasive.

Pagliacci also relies on Govier v. North Sound Bank, 91 Wn. App. 493, 957 P.2d 811 (1998), to argue that an employer may unilaterally bind its employee to obligations via an employee handbook. Again, its reliance is misplaced. In Govier, the plaintiff, Deborah Govier, was hired by North Sound Bank in 1991 as a loan originator. Govier, 91 Wn. App. at 495. On Govier's first day of work, she received a copy of the bank's personnel handbook, which provided that after Govier reached the end of a 90-day probationary period, she would be considered a "'permanent employee'" and dismissed "'only after a thorough review of the performance record by the supervisor and the President or Vice President.'" Govier, 91 Wn. App. at 495 (emphasis omitted).

In 1993, North Sound Bank presented its loan originators, including Govier, with a new employment agreement. Govier, 91 Wn. App. at 496. The new agreement was for a 1-year period, changed the compensation structure for

loan originators, eliminated sick leave and holiday and vacation pay, and allowed either party to terminate on 20 days' written notice. Govier, 91 Wn. App. at 496-97. Loan originators were directed to sign the new employment agreement or be terminated. Govier, 91 Wn. App. at 496. Govier, who was unhappy with the new terms, refused to sign the agreement and consequently was terminated. Govier, 91 Wn. App. at 497.

Govier sued, alleging that North Sound Bank had breached the employment contract embodied in the original personnel handbook. Govier, 91 Wn. App. at 497. Division Two of this court disagreed, holding that the personnel handbook had the force of a unilateral contract, i.e., "one in which the promisor does not receive a promise in return as consideration." Govier, 91 Wn. App. at 499. It recognized that in the handbook context, an employer that promises specific treatment in specific situations can revoke or modify those promises without mutual assent. Govier, 91 Wn. App. at 500. The court thus held that by receiving a new agreement changing the duration of her employment from indefinite to one year and eliminating other benefits, Govier could no longer enforce the former handbook terms against the bank. Govier, 91 Wn. App. at 501-02.

Like the Gaglidari court, the Govier court conducted its analysis in the context of determining whether an employer was bound by the promises it made to its employee. But as discussed, that is not the case here, where Pagliacci seeks to bind its employee. Neither Govier nor Gaglidari supports Pagliacci's argument that because an arbitration clause appeared in an employee handbook

that was provided to Burnett, the parties' arbitration agreement is procedurally conscionable.

Pagliacci next observes that "[n]umerous state and federal courts have found binding agreements to arbitrate based on employee handbooks," citing—without discussion—to a number of federal and out-of-state cases. These cases are not binding, and we decline to address them.

Because we hold that Pagliacci's mandatory arbitration policy is procedurally unconscionable, we must next address Burnett's argument that procedural unconscionability alone is sufficient to render Pagliacci's mandatory arbitration policy unenforceable. He relies on Gandee v. LDL Freedom Enterprises, Inc., 176 Wn.2d 598, 603, 293 P.3d 1197 (2013), for the proposition that "either substantive *or* procedural unconscionability is sufficient to void a contract." Although Pagliacci does not argue otherwise, we note that this proposition, while accurately excerpted from Gandee, is not a complete statement of the law. Specifically, the Gandee court cited Adler v. Fred Lind Manor, 153 Wn.2d 331, 347, 103 P.3d 773 (2004), but in Adler, the Supreme Court expressly reserved ruling on whether procedural unconscionability—as opposed to substantive unconscionability—alone is sufficient to void a contract. Adler, 153 Wn.2d at 346-47. And in Gandee, only substantive unconscionability was alleged. Gandee, 176 Wn.2d at 603.

That said, both Division Two and Division Three of this court have invalidated agreements based on procedural unconscionability alone. Specifically, in Mattingly, discussed above, Division Two invalidated the 2-10

HBW warranty limitations based solely on its conclusion that the circumstances surrounding the warranty's formation were procedurally unconscionable. Mattingly, 157 Wn. App. at 392. And in Gorden v. Lloyd Ward & Associates, PC, 180 Wn. App. 552, 323 P.3d 1074 (2014), Division Three invalidated an arbitration agreement based solely on procedural unconscionability.

Furthermore, and as discussed, Burnett was not afforded an opportunity to review the Little Book before signing the agreement into which it was incorporated. Indeed, even the ERA itself states that the employee "[o]n your own initiative . . . *will* learn . . . the rules and policies outlined in our Little Book of Answers,"[9] suggesting that employees are not expected to have had an opportunity to fully comprehend the Little Book's contents *before* signing the ERA. And as discussed, the ERA does not even mention the arbitration policy, which is buried toward the end of the Little Book. In short, it is apparent from this record that Burnett lacked meaningful choice in agreeing to arbitrate. Therefore, we hold that procedural unconscionability alone renders Pagliacci's mandatory arbitration policy unenforceable.

Finally, and although not necessary to our conclusion that procedural unconscionability alone renders Pagliacci's mandatory arbitration policy void, we observe that Pagliacci's mandatory arbitration policy requires employees to arbitrate discrimination, unlawful termination, and wage-related claims, which include claims with respect to which employees have a statutory right to maintain a civil action. See, e.g., RCW 49.60.030(2) (providing that any person deeming

[9] (Emphasis added.)

himself or herself injured by a violation of the Washington State Civil Rights Act "shall have a civil action in a court of competent jurisdiction"); RCW 49.52.070 (providing that any employer that willfully deprives an employee of any part of his or her wages "shall be liable in a civil action by the aggrieved employee"). And although not addressed by either party, waiver requires "an intentional and voluntary relinquishment of a known right." Jones v. Best, 134 Wn.2d 232, 241, 950 P.2d 1 (1998). Here, as discussed, Burnett did not have a reasonable opportunity to understand that he was agreeing to arbitrate—much less to understand the types of claims he was agreeing to arbitrate or to intentionally and voluntarily relinquish his right to pursue those claims in court. Therefore, we are very skeptical that under the circumstances presented here, Burnett effectively waived any statutorily conferred right to maintain a civil action.

Substantive Unconscionability

"'Substantive unconscionability involves those cases where a clause or term in the contract is alleged to be one-sided or overly harsh.'" Zuver, 153 Wn.2d at 303 (quoting Schroeder v. Fageol Motors, Inc., 86 Wn.2d 256, 260, 544 P.2d 20 (1975)). "'Shocking to the conscience', 'monstrously harsh', and 'exceedingly calloused' are terms sometimes used to define substantive unconscionability." Nelson, 127 Wn.2d at 131 (quoting Montgomery Ward & Co. v. Annuity Bd. of S. Baptist Convention, 16 Wn. App. 439, 444, 556 P.2d 552 (1976)).

Here, Burnett argues that Pagliacci's mandatory arbitration policy is substantively unconscionable because (1) it requires employees, but not

Pagliacci, to submit certain claims to arbitration and (2) the F.A.I.R. Policy, which is a prerequisite to arbitration, contains a limitations provision that is overly harsh. Although we disagree that the mandatory arbitration policy is substantively unconscionable merely because its arbitration requirement is not mutual, we agree that the F.A.I.R. Policy's overly harsh limitations provision renders the mandatory arbitration substantively unconscionable.

Zuver is instructive here. There, the court evaluated an employment arbitration agreement that included: (1) a confidentiality provision stating that all arbitration proceedings, including settlements and awards, would be confidential and (2) a remedy limitations provision under which the employee waived the right to seek punitive damages. Zuver, 153 Wn.2d at 298-99. Our Supreme Court held that these provisions were substantively unconscionable. Specifically, the court concluded that the confidentiality provision was substantively unconscionable because it "hampers an employee's ability to prove a pattern of discrimination or to take advantage of findings in past arbitrations." Zuver, 153 Wn.2d at 315. Additionally, "keeping past findings secret undermines an employee's confidence in the fairness and honesty of the arbitration process," potentially discouraging employees from pursuing valid discrimination claims. Zuver, 153 Wn.2d at 315. The court also concluded that the remedies limitation provision was substantively unconscionable because the provision "blatantly and excessively favors the employer" by barring the employee from collecting punitive or exemplary damages while allowing the employer to collect such damages in its claims against the employee. Zuver, 153 Wn.2d at 318.

In discussing the remedies limitation provision, the Zuver court also expressly rejected the concurrence/dissent's assertion that the plaintiff in Zuver was "seeking invalidity based simply on a lack of mutuality of obligations." Zuver, 153 Wn.2d at 317 n.16. The court instead explained that the plaintiff was *not* complaining about mere lack of mutuality and stated, "[W]e are not concerned here with whether the parties have mirror obligations under the agreement, but rather whether the *effect* of the provision is so 'one-sided' as to render it patently 'overly harsh' in this case." Zuver, 153 Wn.2d at 317 n.16 (emphasis added) (quoting Schroeder, 86 Wn.2d at 260).

In short, the Zuver court's analysis demonstrates that arbitration agreements are not substantively unconscionable merely because they are not mutual. Therefore, we reject Burnett's argument that Pagliacci's mandatory arbitration policy is substantively unconscionable merely because it requires Burnett, but not Pagliacci, to arbitrate certain claims. Cf. Tjart, 107 Wn. App. at 901 (explaining that by agreeing to arbitrate, party does not give up substantive right but only the ability to raise it in court).

But Zuver also demonstrates that nonmutual provisions in an arbitration agreement are substantively unconscionable when, like the confidentiality and remedies limitations provisions in Zuver, they have the effect of limiting an employee's ability to access substantive remedies or discouraging an employee from pursuing valid claims. To that end, we conclude for the reasons that follow that the mandatory arbitration policy is substantively unconscionable because the F.A.I.R. Policy, which is a prerequisite to arbitration, contains a limitations

provision that is substantively unconscionable.

First, as Burnett points out, the limitations provision "effectively shortens the statute of limitations for any claim by an employee who no longer works for [Pagliacci]" because a terminated employee has no way to "[i]nformally report the matter and all details to your supervisor," as required by the F.A.I.R. Policy's Supervisor Review procedure. In other words, the limitations provision acts as a complete bar to arbitration and suit for employees who do not become aware that they have a potential claim until after their employment with Pagliacci ends. Such a bar "blatantly and excessively favors" Pagliacci and is substantively unconscionable. Zuver, 153 Wn.2d at 318-19.

Pagliacci argues that "[t]he only reasonable interpretation of the F.A.I.R. policy is that it is intended to apply to current employees" and not to former employees. But Pagliacci's proffered interpretation would require us to read into the F.A.I.R. Policy an exception that is not expressed therein. Pagliacci's proffered interpretation also contradicts the F.A.I.R. Policy's unambiguous limitations provision, which states: "If you do not comply with a step, rule or procedure in the F.A.I.R. Policy with respect to a claim, you waive any right to raise the claim in any court or other forum, including arbitration." We are not persuaded by Pagliacci's liberal interpretation of this limitations provision, which Pagliacci itself drafted in unambiguous terms.[10] Cf. Sales Creators, Inc. v. Little

[10] Indeed, Pagliacci itself pointed out below that Burnett "never requested resolution via Pagliacci's internal F.A.I.R. Policy," suggesting that even Pagliacci believed at one time that the F.A.I.R. Policy applied to terminated employees like Burnett.

Loan Shoppe, LLC, 150 Wn. App. 527, 531, 208 P.3d 1133 (2009) ("In interpreting an arbitration clause, the intentions of the parties *as expressed in the contract* control.") (emphasis added).

Next, although not raised by Burnett, the limitations provision not only bars claims for terminated employees, but also effectively shortens the time period for *any* employee to assert claims against Pagliacci. Specifically, the F.A.I.R. Policy's limitations provision prohibits an employee from commencing arbitration (or filing suit) until he or she has fully complied with the policy's steps and procedures. And "a claim sought to be arbitrated is subject to the same limitations of time for the commencement of actions as if the claim had been asserted in a court." RCW 7.04A.090(3). Therefore, the F.A.I.R. Policy's limitations provision has the effect of shortening, by whatever time it takes to complete the procedures set out in the F.A.I.R. Policy, the period during which employees may assert their claims under Pagliacci's two-step arbitration policy.

To this end, our Supreme Court has repeatedly held that arbitration provisions that contain unreasonable contractual limitations periods are substantively unconscionable. For example, in Adler, the court held that an arbitration agreement's 180-day limitations period was substantively unconscionable because it provided the employer with unfair advantages. Adler, 153 Wn.2d at 357. Specifically, the Adler court observed that the limitations period could require employees to forgo the opportunity to file discrimination complaints with and have them investigated by the Equal Employment Opportunity Commission or the Washington Human Rights Commission. Adler,

153 Wn.2d at 357. The limitations period in Adler also deprived employees of continuing violation and tolling doctrines under federal and state discrimination laws. Adler, 153 Wn.2d at 356-57. In Gandee, the court held that a provision shortening the statute of limitations from the 4 years provided by the Consumer Protection Act[11] to 30 days was substantively unconscionable. Gandee, 176 Wn.2d at 607. And in Hill v. Garda CL Northwest, Inc., 179 Wn.2d 47, 55, 308 P.3d 635 (2013), the court concluded that an arbitration clause's 14-day limitations provision was substantively unconscionable where employees would otherwise have a 3-year period to bring the type of claims contemplated.

Here, the mandatory arbitration policy does not contain a specified limitations period. But because the time required for F.A.I.R. Policy compliance is entirely indeterminate, it—like the contractual limitations periods in Adler, Gandee, and Hill—is substantively unconscionable because it provides Pagliacci with unfair advantages. Specifically, and as discussed, the F.A.I.R. Policy, which is a prerequisite to arbitration, acts as a complete bar to arbitration unless an employee has "fully complied with the steps and procedures in the F.A.I.R. Policy." Therefore, an employee must anticipate and build in time to fully comply with the F.A.I.R. Policy before the applicable limitations period expires. But the time required for compliance is not within the employee's control. Under the F.A.I.R. Policy, Pagliacci makes no commitment to address disputes or schedule nonbinding conciliation within a specified period of time after the employee has reported the matter or initiated conciliation. Nor does the policy provide any

[11] Chapter 19.86 RCW.

"release valve" that allows employees to commence arbitration if conciliation under the F.A.I.R. Policy takes more than a specified amount of time, or if the applicable statute of limitations is set to expire while the employee is attempting to comply with the F.A.I.R. Policy. Indeed, the F.A.I.R. Policy's limitations provision provides just the opposite: Regardless of how long the conciliation procedure takes, the bar to arbitration "shall not be subject to tolling, equitable or otherwise."

Finally, Pagliacci does not dispute that the F.A.I.R. Policy contains no exception to Supervisor Review even when the employee's supervisor is the person subjecting the employee to unfair conduct or harassment. In such cases, Supervisor Review, like the confidentiality provision in Zuver, "undermines an employee's confidence in the fairness and honesty of the arbitration process and thus potentially discourages that employee from pursuing a valid . . . claim." Zuver, 153 Wn.2d at 315.

For these reasons and because full compliance with the F.A.I.R. Policy is a prerequisite to arbitration, the limitations provision in the F.A.I.R. Policy renders the mandatory arbitration policy substantively unconscionable.[12]

Pagliacci argues that its mandatory arbitration policy is not substantively unconscionable because it does not contain any of the specific types of

[12] Burnett also argues that the mandatory arbitration policy is substantively unconscionable because (1) the procedure prescribed by the F.A.I.R. Policy conflicts with the ERA and (2) Pagliacci reserves for itself a unilateral right to amend the Little Book (and therefore the mandatory arbitration policy). But because we conclude that the mandatory arbitration policy is substantively unconscionable on other grounds, we do not consider these arguments.

provisions that our Supreme Court has found to be substantively unconscionable, such as contractual limitations periods, fee-splitting requirements, or limitations on the amount or types of damages recoverable. But we are not limited by the specific types of provisions that the Supreme Court has already deemed substantively unconscionable. Rather, our inquiry is whether the effect of Pagliacci's two-step mandatory arbitration policy is "so one-sided and harsh that it is substantively unconscionable." Zuver, 153 Wn.2d at 318. For the reasons discussed, we conclude that it is.

Severance

As a final matter, Pagliacci argues that even if the mandatory arbitration policy is substantively unconscionable due to the F.A.I.R. Policy's limitations provision, the F.A.I.R. Policy must be severed from the mandatory arbitration policy, leaving the agreement to arbitrate intact. We disagree.

"'Severance is the usual remedy for substantively unconscionable terms, but where such terms pervade an arbitration agreement, [this court] refuse[s] to sever those provisions and declare[s] the entire agreement void.'" Woodward v. Emeritus Corp., 192 Wn. App. 584, 602, 368 P.3d 487 (2016) (alterations in original) (quoting Gandee, 176 Wn.2d at 603). "Stated differently, when severance will 'significantly alter both the tone of the arbitration clause and the nature of the arbitration contemplated by the clause,' the appropriate remedy is to invalidate the entire agreement." Woodward, 192 Wn. App. at 602 (quoting Gandee, 176 Wn.2d at 607). Nevertheless, severance cannot cure the procedural deficiencies concerning the formation of an arbitration agreement.

Gorden, 180 Wn. App. at 565.

Here, Pagliacci's mandatory arbitration policy is both substantively *and* procedurally unconscionable, so severance is inappropriate. Cf. Adler, 153 Wn.2d at 350 n.9, 351 (remanding to trial court for further proceedings regarding procedural unconscionability and noting that if the employee proved his procedural unconscionability claim on remand, "the arbitration agreement would be void").

Pagliacci chiefly relies on Zuver to argue that severance is required here, but that reliance is misplaced. In Zuver, the court did sever the substantively unconscionable terms from the arbitration agreement. Zuver, 153 Wn.2d at 320-21. But Zuver is distinguishable because there, the court concluded that the arbitration agreement in question was not procedurally unconscionable. Zuver, 153 Wn.2d at 306. Additionally, the Zuver court relied in part on the fact that the parties' arbitration agreement contained a severability clause. Zuver, 153 Wn.2d at 320. Here, severance cannot cure the arbitration policy's procedural deficiencies, and there is no severability clause in the ERA. Therefore, Zuver does not require severance.

We affirm.

WE CONCUR:

RCW 4.16.080

Actions limited to three years.

The following actions shall be commenced within three years:

(1) An action for waste or trespass upon real property;

(2) An action for taking, detaining, or injuring personal property, including an action for the specific recovery thereof, or for any other injury to the person or rights of another not hereinafter enumerated;

(3) Except as provided in RCW **4.16.040**(2), an action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument;

(4) An action for relief upon the ground of fraud, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud;

(5) An action against a sheriff, coroner, or constable upon a liability incurred by the doing of an act in his or her official capacity and by virtue of his or her office, or by the omission of an official duty, including the nonpayment of money collected upon an execution; but this subsection shall not apply to action for an escape;

(6) An action against an officer charged with misappropriation or a failure to properly account for public funds intrusted to his or her custody; an action upon a statute for penalty or forfeiture, where an action is given to the party aggrieved, or to such party and the state, except when the statute imposing it prescribed a different limitation: PROVIDED, HOWEVER, The cause of action for such misappropriation, penalty, or forfeiture, whether for acts heretofore or hereafter done, and regardless of lapse of time or existing statutes of limitations, or the bar thereof, even though complete, shall not be deemed to accrue or to have accrued until discovery by the aggrieved party of the act or acts from which such liability has arisen or shall arise, and such liability, whether for acts heretofore or hereafter done, and regardless of lapse of time or existing statute of limitation, or the bar thereof, even though complete, shall exist and be enforceable for three years after discovery by aggrieved party of the act or acts from which such liability has arisen or shall arise.

[**2011 c 336 § 83; 1989 c 38 § 2; 1937 c 127 § 1; 1923 c 28 § 1;** Code 1881 § 28; **1869 p 8 § 28; 1854 p 363 § 4;** RRS § 159.]

NOTES:

Reviser's note: Transitional proviso omitted from subsection (6). The proviso reads: "PROVIDED, FURTHER, That no action heretofore barred under the provisions of this paragraph shall be commenced after ninety days from the time this act becomes effective;".

DORSEY & WHITNEY LLP

July 12, 2019 - 4:14 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	78356-4
Appellate Court Case Title:	Steven Burnett, Respondent v. Pagliacci Pizza, Appellant
Superior Court Case Number:	17-2-25978-1

The following documents have been uploaded:

- 783564_Petition_for_Review_20190712152050D1329868_5480.pdf
  This File Contains:
  Petition for Review
  The Original File Name was Court of Appeals No 783564I Petition for Review.pdf

A copy of the uploaded files will be sent to:

- bchandler@terrellmarshall.com
- enusser@terrellmarshall.com
- fairchild.todd@dorsey.com
- hui.jasmine@dorsey.com
- tmarshall@terrellmarshall.com

Comments:

To Whom It May Concern, The filing fee is being mailed to the Supreme Court Clerk's office. Thank you kindly.

Sender Name: Molly Price - Email: price.molly@dorsey.com
Filing on Behalf of: Michael William Droke - Email: droke.michael@dorsey.com (Alternate Email:)

Address:
Columbia Center
701 Fifth Avenue Suite 6100
Seattle, WA, 98104
Phone: (206) 903-8713

Note: The Filing Id is 20190712152050D1329868