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NO. 97201-0

SUPREME COURT OF THE STATE OF WASHINGTON

JEOUNG LEE and SHERRI MCFARLAND, on their own and on behalf
of all persons similarly situated,

Respondents,

v.

EVERGREEN HOSPITAL MEDICAL CENTER a/k/a KING COUNTY
PUBLIC HOSPITAL DISTRICT #2

Petitioner.

**WASHINGTON STATE NURSES ASSOCIATION'S BRIEF OF
*AMICUS CURIAE***

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IDENTITY AND INTERESTS OF *AMICUS*

Washington State Nurses Association (WSNA) is a statewide professional association and labor organization that provides leadership for the nursing profession and promotes quality health care for consumers through education, advocacy, and influencing health care policy in Washington. WSNA represents more than 17,000 nurses at Washington hospitals and health care facilities, including at Evergreen Hospital and Medical Center (Evergreen).

It has long been an integral part of WSNA's mission to ensure that nurses across the State of Washington receive the rest breaks and meal periods that they are entitled to under state law and that their members receive fair, accurate wages, including compensation when employers fail to provide nurses with their breaks. *See, e.g., Wash. State Nurses Ass'n v. Sacred Heart Med. Ctr.*, 175 Wn.2d 822, 287 P.3d 516 (2012); *Pugh v. Evergreen Hospital Med. Ctr.*, 177 Wn. App. 363, 368, 312 P.3d 665 (2013), *rev. denied*, 180 Wn.2d 1007 (2014); *Chavez v. Our Lady of Lourdes Hospital at Pasco*, 190 Wn.2d 507, 415 P.3d 224 (2018) (as *amicus curiae*). WSNA's collective bargaining agreements (CBAs) sometimes provide contractual rest and meal break rights that are coextensive with state law, as the Evergreen-WSNA CBA does.

On February 11, 2019, the Court of Appeals issued its opinion in

Lee v. Evergreen Hosp. Med. Ctr., 7 Wn. App. 566, 434 P.3d 1071, *rev. granted*, 193 Wn.2d 1029, 447 P.3d 167 (2019), issuing several holdings regarding the effect of the Evergreen-WSNA CBA on WSNA-represented nurses' statutory rest and meal break rights. WSNA herein explains why its CBA with Evergreen does not waive nurses' substantive statutory rest and meal break rights or their ability to enforce those rights in court. WSNA also seeks to ensure that pursuit of contractual grievances remains within the exclusive province of WSNA.

INTRODUCTION

The Court of Appeals below held that the nurses' claims were statutory, rather than contractual; that the WSNA-Evergreen CBA did not unambiguously waive the nurses' right to pursue their statutory rest and meal break rights in a judicial forum; and that Evergreen waived its right to compel arbitration. *Id.* at 566-68. This Court should affirm.

However, while the Court of Appeals reached the correct result, the opinion has the potential to confuse the question of whether a CBA has waived employees' statutory rights with the question of whether the CBA has waived the employees' right to seek redress in a judicial forum. In evaluating whether Evergreen's motion to compel was appropriately denied, the Court must determine whether the Evergreen-WSNA CBA contains a clear and unmistakable waiver of the rest or meal break rights

set forth in WAC 296-126-092 and, separately, whether the CBA clearly and unmistakably waives the employees' right to bring their statutory claims in a judicial forum. The answer to both of these questions is no.

The Court of Appeals suggests that the trial court could have compelled arbitration of the nurses' statutory claims had Evergreen not waived its right to compel arbitration. This was error. A court may not compel arbitration of individual employees' statutory claims under a CBA's grievance arbitration provisions where, as here, the CBA's arbitration provision does not expressly cover individual employees' statutory claims, and it does not clearly and unmistakably state that the ability of employees to enforce statutory rights in court has been waived.

STATEMENT OF THE CASE

WSNA adopts Section II(1), (2), and (4) of Plaintiffs/Respondents' Statement of the Case provided in their Supplemental Brief.

ARGUMENT

I. This Court should hold that the Evergreen-WSNA CBA does not waive the nurses' statutory rest and meal break rights.

A. The Washington legislature established that only in limited circumstances can a CBA supersede employees' rest and meal break rights under WAC 296-126-092.

The Washington state legislature has declared that "[t]he welfare of the state of Washington demands that all employees be protected from conditions of labor which have a pernicious effect on their health" and

“that unsanitary conditions of labor exert such pernicious effect.” RCW 49.12.010. “Conditions of labor” include “the conditions of rest and meal periods for employees.” RCW 49.12.005(5). The legislature has empowered the Washington State Department of Labor and Industries (L&I) to promulgate rules and regulations fixing conditions of labor for the protection of the safety, health, and welfare of employees. RCW 49.12.091.

This Court has acknowledged that “rest periods help ensure nurses can maintain the necessary awareness and focus required to provide safe and quality patient care.” *Sacred Heart Med. Ctr.*, 175 Wn.2d at 832. Beyond a nurse’s ability to provide safe patient care, receiving inadequate rest and meal breaks has immediate impacts on a nurse’s safety and wellbeing. Due to the physical demands of the job, nurses are at increased risk of sustaining musculoskeletal injuries, and a nurse’s work schedule, including working long hours or working without breaks, is associated with an increased risk of neck, shoulder, and back musculoskeletal disorders.¹ The U.S. Center for Disease Control reports a link between length of working hours and nurses’ increased risk for back disorders,

¹ Lipscomb, Trinkoff, Geiger-Brown, & Brady, *Musculoskeletal problems of the neck, shoulder, and back and functional consequences in nurses*, AMERICAN JOURNAL OF INDUSTRIAL MEDICINE, 41(3):170-8 (2002); *see also* Trinkoff, Le, Geiger-Brown, Lipscomb, & Lang, *How Long and How Much Are Nurses Working?* AMERICAN JOURNAL OF NURSING, 106(4), 60-71 (2006).

odds for higher alcohol use, increased smoking and higher risk for auto accidents.² Fatigue is another problem that plagues nursing, causing the majority of nurses to be concerned about their ability to provide patient care safely.³ Nurse fatigue has been found to contribute to driving drowsiness, affects sleep patterns, and is linked to depression, anxiety, and health complaints.⁴ Researchers have found a pressing need for steps to be taken to promote restorative breaks for nurses.⁵

In 1976, L&I determined that working for long stretches of time without meal periods and rest periods created “conditions of labor” with pernicious effect on employees’ health. L&I promulgated WAC 296-126-092, entitling workers to mandatory rest breaks and meal periods and prohibiting employers from working employees longer than specific durations without rest and meal breaks. WAC 296-126-092.⁶

² Caruso, Hitchcock, Dick, Russo, Schmit, *Overtime and Extended Work Shifts: Recent Findings on Illnesses, Injuries and Health Behaviors*, CDC WORKPLACE SAFETY AND HEALTH, April 2004.

³ Bird, J (2013). Survey: Nurse understaffing, fatigue threatens patient safety. FierceHealthcare.

⁴ Bahr, Buth, Martin, Peters, Swanson, Warhanek, Ryan, *White Paper: Nurse Scheduling and Fatigue in the Acute Care 24 Hour Setting*, Evidence Table I, at p. 19, citing Ruggiero, J.S., *Correlates of fatigue in critical care nurses*, RESEARCH IN NURSING & HEALTH, 26, 434-442 (2003).

⁵ Negati, Shepley, & Rodiek, *A Review of Design and Policy Interventions to Promote Nurses’ Restorative Breaks in Health Care Workplaces*, SAGE JOURNALS (2016).

⁶ In 2019, the legislature enacted rest and meal break protections for health care facility employees. RCW 49.12.480. These rights went into effect on January 1, 2020, and require, among other things, uninterrupted rest and meal breaks for nurses. *Id.*

In general, the “the provisions of chapter 49.12 RCW operate as a base,” and parties negotiating labor contracts are constrained to terms that “enhance or exceed those minimum standards.” *Wingert v. Yellow Freight Systems, Inc.*, 146 Wn.2d 841, 852, 50 P3d 256 (2002); *see also Valles v. Ivy Hill Corp.*, 410 F.3d 1071, 1082 (9th Cir. 2005); *Watson v. Providence St. Peter Hosp.*, No. C12-5352 BHS, 2013 WL 3777171 *5, Question 15 (W.D. Wash. July 17, 2013); L&I Admin. Policy ES.C.6, at 6 (rev. 12/1/17) (available at https://lni.wa.gov/workers-rights/_docs/esc6.1.pdf).

In 2003, the legislature enacted two limited situations in which a CBA’s rest and meal break provisions may lawfully supersede the minimum rest and meal break standards set forth in WAC 296-126-092. Relevant here, the legislature amended RCW 49.12.187 as follows:

Employees of public employers may enter into collective bargaining contracts...that specifically vary from or supersede, in part or in total, rules adopted under this chapter regarding appropriate rest and meal periods.

Where a public sector CBA does not “specifically vary from or supersede” WAC 296-126-092, employees retain separately enforceable contractual and statutory rights. *See id.*; *Frese v. Snohomish Cty.*, 129 Wn. App. 659, 669, 120 P.3d 89 (2005) (where regulation and public sector CBA both contemplate a meal period and require employer to pay wages to employees who must remain on the premises during meal periods, and

where CBA does not specify meal break arrangements different from regulation, trial court correctly refused to dismiss employees' state law causes of action).

A CBA only varies from the WAC when the CBA "change[s] in some usu. small way," "make[s] somewhat different," or "alter[s] in some way" the WAC requirements. Vary Definition, BLACK'S LAW DICTIONARY, (11th ed. 2019), *available at* Westlaw. To supersede means "To annul, make void, or repeal by taking the place of." Supersede Definition, *Id.* If a public sector CBA has neither altered nor annulled, voided, or repealed by taking the place of the requirements of WAC 296-126-092, then RCW 49.12.187 does not apply. Moreover, the statute allows a CBA to vary or supersede the WAC only "in part." RCW 49.12.187. If it does, then the unaltered, un-repealed WAC requirements remain intact. *See id.*

B. Any CBA waiver of public employees' rest and meal break rights set forth in WAC 296-126-092 must be accomplished by explicitly stated "clear and unmistakable" language.

A public sector CBA may "specifically vary from or supersede, in part or in total," the rules set forth in WAC 296-126-092, but any such CBA language does not waive employees' rights under the regulation unless the waiver is "clear and unmistakable." *Pasco Police Officers' Ass'n v. City of Pasco*, 132 Wn.2d 450, 462, 938 P.2d 827 (1997) ("Courts

will not ‘infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is ‘explicitly stated.’ More succinctly, the waiver must be clear and unmistakable.’”) (quoting *Metro. Edison Co. v. N.L.R.B.*, 460 U.S. 693, 708, 103 S. Ct. 1467, 75 L. Ed. 2d 387 (1983)); *Hill v. Garda CL Nw., Inc.*, 191 Wn.2d 553, 570, 424 P.3d 207 (2018), *cert. denied*, 139 S. Ct. 2667, 204 L. Ed. 2d 1069 (2019); *Valles*, 410 F.3d at 1082, n. 12.

“Where...under state law waiver of state rights may be permissible, ‘the CBA must include ‘clear and unmistakable’ language waiving the covered employee’s state right ‘for a court even to consider whether it could be given effect.’” *Hill*, 191 Wn.2d at 571 (quoting *Valles*, 410 F.3d at 1076); *Cramer v. Consol. Freightways, Inc.*, 255 F.3d 683, 692 (9th Cir. 2001), *as amended* (Aug. 27, 2001) (“Where a party defends a state cause of action on the ground that the plaintiff’s union has bargained away the state law right at issue, the CBA must include “clear and unmistakable” language waiving the covered employees’ state right “for a court even to consider whether it could be given effect.”) (quoting *Livadas v. Bradshaw*, 512 U.S. 107, 125, 114 S.Ct. 2068, 129 L.Ed.2d 93 (1994)).⁷

⁷ Whether the CBA waived employees’ substantive rights is a question for a Court, not an arbitrator. *See Cramer*, 255 F.3d at 692 (“a court may look to the CBA to determine

A CBA that does not alter or supersede the rules in WAC 296-126-092, but instead provides the same rest and/or meal break rights as the regulation leaves the statutory rights intact. *See Frese*, 129 Wn. App. at 668-669 (holding statutory claim was not barred where CBA and regulation provided the same rights and the CBA did “not specify meal break arrangements that are different from what the regulation provides.”). In *Frese*, the Court of Appeals determined that the trial court correctly refused to dismiss the employees’ statutory cause of action, because the employer failed to show that the CBA specifically varied from or superseded the regulation, as is required by RCW 49.12.187, despite the fact that the CBA also provided for rest and meal breaks. *Id.*

Courts have long recognized that the existence of a contractual right that is similar to, or even identical to, a statutory right does not obviate the statutory right. Where a CBA provides a right that is similar or identical to a statutory right, the separate nature of those contractual and statutory rights is “not vitiated merely because both were violated as a result of the same factual occurrence.” *Mathews v. Denver Newspaper Agency LLP*, 649 F.3d 1199, 1204, 1206 (10th Cir. 2011) (quoting *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 50, 94 S. Ct. 1011, 39 L.

whether it contains a clear and unmistakable waiver of state law rights...”). *Hill, Valles, Cramer*, and *Livadas* all involved issues of federal preemption that are inapplicable in the public sector.

Ed. 2d 147 (1974)). Nor does a CBA referencing a statute suffice to waive the statutory right. *Id.* at 1206. In such a situation, the employees “hold two similar claims, one based in statute, and one based in contract.” *Id.*; *see also Ibarra v. United Parcel Serv.*, 695 F.3d 354, 358 (5th Cir. 2012) (holding employees maintain independent statutory and contractual rights, even if the CBA defines the contractual rights by reference to external law).

Contractual rights in a CBA and statutory rights may be, and often are, parallel and coextensive. *See id.* Thus, the Court of Appeals below correctly recognized that “a public or private employee’s statutory rights are distinct from her contractual rights.” *Lee*, 7 Wn. App. 2d at 577. Even where, as here, the legislature has allowed a public sector CBA to supersede rest and meal break regulations, CBA language will not waive the substantive statutory right unless it is explicitly stated in “clear and unmistakable” language. *See infra* at 11–14. The burden to establish a waiver exists rests on the party claiming the waiver. *Jones v. Best*, 134 Wn.2d 232, 242, 950 P.2d 1 (1998), *as corrected* (Feb. 20, 1998).

C. The Evergreen-WSNA CBA does not contain a clear and unmistakable waiver of the rest and meal break protections established by WAC 296-126-092.

The CBA between WSNA and Evergreen does not clearly and unmistakably waive any of the rest and meal break protections set forth in

WAC 296-126-092; Section 7.7 of the CBA provides parallel rights that mirror the WAC but not any that vary or supersede them.

The CBA provides for breaks in three places, but only Section 7.7 applies to 12-hour-shift Emergency Department nurses who comprise the class. That provision reads in full:

Meal periods and rest periods shall be administered in accordance with state law (WAC 296-126-092). Nurses shall be allowed an unpaid meal period of one-half (1/2) hour. Nurses required by the Employer to remain on duty during their meal period shall be compensated for such time at the appropriate rate of pay. All nurses shall be allowed a rest period of fifteen (15) minutes on the Employer's time, for each four (4) hours of working time.

CP 93, 133, 176.

The Court of Appeals correctly determined that Section 7.7 “does not vary from or supersede WAC 296-126-092.” *Lee*, 7 Wn. App. 2d at 573. As in *Ibarra*, 695 F.3d 354, the CBA creates a contractual right to rest and meal breaks, but it does not supersede the existing statutory right simply by stating breaks will be provided in accordance with the WAC.

As to rest breaks, the Court of Appeals correctly explained that Section 7.7's provision for 15 minute rest breaks “merely reflects compliance with rather than variance from the regulation,” which provides for rest periods of “no less than 10 minutes.” *Lee*, 7 Wn. App. 2d at 575 (emphasis added). Both Section 7.7 and the WAC require a rest break for

every four hours of work. Though the WAC contains additional requirements stated in Section 7.7, the CBA provides parallel contractual rights to those requirements by further requiring that breaks shall be administered “in accordance with state law (WAC 296-126-092).”

So too with meal breaks. Section 7.7 does *not* provide that nurses on 12-hour shifts will be provided *only one* meal break as Evergreen contends. CP 93, 133, 176; *compare* CP 114, 155, 198 (CBA Addendum 2 regarding combined 12-hour and 8-hour shift schedules: “Each shift will include one (1) thirty (30) minute unpaid lunch period...”); *Lee*, 7 Wn. App. 2d at 575, n. 19 (addendum providing for “one” meal period per shift does not apply to Emergency Department nurses). Rather, Section 7.7 specifically states that nurses “shall be allowed an unpaid meal period,” that on duty meal periods shall be compensated, and that “meal periods...shall be administered in accordance with state law.” CP 93, 133, 176.

Evergreen can provide meal periods for 12-hour shift nurses “in accordance with state law” by providing those nurses with “an unpaid meal period” for each five hours of work (e.g., 2 unpaid meal periods), by providing those nurses with “an unpaid meal period” and a second, paid, on duty meal period, or (with WSNA’s consent) by allowing nurses to individually waive their right to a second meal period. Evergreen

fabricates a problem with WAC compliance that does not exist by reading words into Section 7.7 that simply are not there.

Although Section 7.7 is silent as to when meal breaks must be provided, and it is silent on how nurses entitled to a second meal period will be provided it,⁸ Section 7.7's silence cannot satisfy the "specifically vary or supersede" requirement of RCW 49.12.187. To hold that it does would render the words "specifically vary or supersede" a nullity in contravention of rules of statutory construction. *Chelan Cty. v. Fellers*, 65 Wn.2d 943, 946, 400 P.2d 609 (1965). Read plainly, Section 7.7 does not specifically provide for *different* meal break rights than those set forth in WAC 296-126-092. To the contrary, it provides that meal breaks "shall be administered in accordance with" the WAC. CP 93, 133, 176. The Court of Appeals correctly concluded that Section 7.7 "merely comports with WAC 296-126-092." *Lee*, 7 Wn. App. 2d at 574.

In short, Evergreen nurses have coextensive contractual and statutory rest and meal break rights, and the "employees...hold two similar claims, one based in statute, and one based in contract" for violation of those independent rights. *Mathews*, 649 F.3d at 1206. The Court of Appeals correctly held that "the rest and meal breaks provided by

⁸ Section 7.7 is also silent, for instance, about whether the additional meal period owed to employees working three or more hours longer than a normal work day will be paid or unpaid or will be waived upon request. *C.f.*, CP 93, 133, 176 and WAC 296-126-092.

the CBA accord with state law.” *Lee*, 7 Wn. App. 2d at 576. Because there is no clear and unmistakable waiver of statutory rest and meal break rights in the WSNA-Evergreen CBA, this Court should affirm.

D. Even if the Court determines that Plaintiffs’ claims were contractual, rather than statutory, the trial court’s denial of Evergreen’s motion to compel arbitration should nevertheless be affirmed.

If this Court determines that Evergreen and WSNA have bargained rest and/or meal break language that varies from or supersedes, in whole or in part, WAC 296-126-092, and that plaintiff’s claims are therefore contractual, not statutory, in nature, denial of Evergreen’s motion to compel was nevertheless appropriate because the right to bring contractual grievances to arbitration belongs only to WSNA. Individual RNs do not have this right.

The grievance arbitration provisions of the CBA govern who can assert violations of the CBA. The CBA’s grievance procedure allows nurses to file grievances if they believe Evergreen has violated their contractual rights. CP 106-107 147-148, 190-191. But, “[i]f the grievance is not settled,” it is WSNA, not the individual nurses, that “may submit the issue in writing to final and binding arbitration.” CP 107, 148, 191. The CBA here provides WSNA exclusive control over taking grievances to arbitration. *Id.* A party cannot be required to submit to arbitration if that

party has not agreed to it. *Hill v. Garda CL Nw., Inc.*, 179 Wn.2d 47, 53, 308 P.3d 635 (2013).

Conversely, the nurses whose claims are at issue in this litigation are not signatory to any arbitration agreement with Evergreen, and thus have no separate basis (independent of WSNA's rights and responsibilities) upon which they can compel Evergreen to arbitrate any dispute they may have based on the contract language negotiated between Evergreen and WSNA. *See Powell v. Anheuser-Busch Inc.*, 457 F. App'x 679, 680 (9th Cir. 2011) (unpublished) (order compelling arbitration of individual employee's discrimination claim was improper where CBA did not clearly and unmistakably require arbitration of statutory claim and CBA conferred no right on individual employee to invoke arbitration of contract violations without the Union's participation).

WSNA has not pursued any contractual claims at issue in this litigation via arbitration, nor has it brought the statutory claims in this case. Even if plaintiffs' claims were contractual, which they are not, arbitration of individual employees' contract claims under the CBA, to which those employees are not signatory, cannot be compelled.

II. This Court should hold that the Evergreen-WSNA CBA does not clearly and unmistakably waive employees’ rights to bring statutory claims for rest and meal break violations in a judicial forum.

The Court of Appeals correctly held that, on its face, the CBA between WSNA and Evergreen does not waive union members’ abilities to enforce their statutory rights in a judicial forum and that the CBA’s grievance arbitration process does not encompass statutory claims. *Lee*, 7 Wn. App. 2d at 569, 573, 579-80.

“[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.” *Hill*, 179 Wn.2d at 53 (*quoting Satomi Owners Ass’n v. Satomi LLC*, 167 Wn.2d 781, 810, 225 P.3d 213 (2009)). This “gateway concern” is evaluated by the Courts, not by an arbitrator. *Id.*

The Court of Appeals correctly recognized that the Federal Arbitration Act (FAA) generally applies to CBAs, and Washington Courts apply federal substantive law to those agreements. *Lee*, 7 Wn. App. 2d at 572 (citing *Cox v. Kroger Co.*, 2 Wn. App. 2d 395, 403, 409 P.3d 1191 (2018)).⁹ It is undisputable that under such federal substantive law, a CBA that waives employees’ right to bring statutory claims in a judicial forum

⁹ The Court in *Cox* relied on *Brundridge v. Fluor Fed. Servs., Inc.*, 109 Wn. App. 347, 355, 35 P.3d 389 (2001) for the applicable standards to apply when determining whether to enforce an arbitration provision. However, those standards have been superseded by *Pyett* and its progeny. *Infra* 18–19.

must do so “clearly and unmistakably.” *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 251, 255, 129 S. Ct. 1456, 173 L. Ed. 2d 398 (2009); *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70, 80, 119 S. Ct. 391, 142 L.3d.2d 361 (1998); *Cox, supra*, 2 Wn. App. at 404. A waiver of the judicial forum does not occur where the agreement simply references a statute. *Id.*

A waiver requires both the express inclusion of a statutory right in the contract and an express provision that the grievance and arbitration procedure is the sole and exclusive remedy for those statutory violations. *Pyett*, 556 U.S. at 252 (finding waiver of judicial forum where CBA stated that the arbitration procedure would be “the sole and exclusive remedy for violations” of certain statutory rights). Additionally, “such a waiver may only occur where the arbitration agreement expressly grants the arbitrator authority to decide statutory claims.” *Mathews*, 649 F.3d at 1206 (relying on *Pyett*) and 1207 (that “contractual rights and statutory rights were coterminous is of no moment”); *see also Ibarra, supra*, 695 F.3d at 358-59 (applying *Pyett/Mathews* analysis). The Seventh Circuit reached the same conclusion, stating that an employee may be forced to use arbitration to pursue statutory claims, “so long as the collective bargaining agreement explicitly states that an employee must resolve his statutory as well as his contractual rights through the grievance procedure delineated in the

collective bargaining agreement.” *Vega v. New Forest Home Cemetery, LLC*, 856 F.3d 1130, 1134-35 (7th Cir. 2017) (citing *Pyett*, 556 U.S. at 258-59) (re-affirming that for a waiver to occur, CBA must clearly and unmistakably require employee to resolve their statutory as well as their contractual rights through the CBA grievance procedure).

The CBA between Evergreen and WSNA clearly does not waive the nurses’ right to assert in a judicial forum claims arising under the IWA and its implementing regulation, because it fails all of the tests established by *Pyett* and its progeny. The CBA’s grievance/arbitration procedure does not expressly include statutory rights (not to be confused with parallel, coextensive contractual rights), it does not provide that arbitration is the sole and exclusive remedy for statutory violations, and it does not empower the arbitrator to decide statutory claims. *See* CP 106–108, 147-148, 190-191.

Rather, the arbitration provision in the CBA applies to “breach[es] of the express terms and conditions of the Agreement.” CP 106, 147, 190. Nothing in the article suggests a broader application, or that the arbitration provision applies to statutory, not contractual, claims.¹⁰ Nothing in this

¹⁰ Evergreen’s argument that “[t]he ‘express terms’ [of the CBA] include historical practices under a CBA,” Evergreen’s Supp. Br. at 6, is unavailing. The case cited for that proposition actually states,

agreement satisfies the *Pyett* requirement that the agreement clearly and unmistakably subject statutory claims solely and exclusively to arbitration.

This case is similar to *Mathews, supra*, in which the employer argued that a CBA waived the employees' right to bring Title VII claims in court. The CBA did create a contractual right of action for discrimination, and it did so by defining the right "in accordance with and as required by applicable state and federal laws." 649 F.3d at 1204. Yet the Tenth Circuit concluded that in addition to the arbitral remedy, the employees could still assert Title VII claims in court because the arbitration provision did not "expressly grant...the arbitrator authority to decide statutory claims." *Id.* at 1206.

The WSNA-Evergreen CBA does not designate arbitration as the sole and exclusive remedy for statutory violations. Evergreen's motion to compel arbitration was for that reason properly rejected.

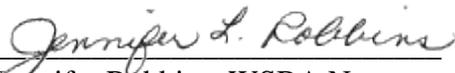
CONCLUSION

The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it.

United Steelworkers of Am. v. Warrior & Gulf Nav. Co., 363 U.S. 574, 581–82, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960). In so stating, the Court in fact drew a *distinction* between "express terms" and historical practices; it did not say that the latter is included in the former. Moreover, the Court was simply identifying the sources of law to which an arbitrator may look when *interpreting* a CBA, not dictating how a court should determine the scope of the subjects the parties agreed to submit to arbitration in the first place.

The CBA between WSNA and Evergreen neither waives the employees' rest or meal break rights as set forth in WAC 296-126-092 nor waives their right to pursue their state law rest and meal break claims in a judicial forum. Evergreen's motion to compel was properly denied. This Court should affirm.

Respectfully submitted this 6th day of January, 2020.

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DECLARATION OF SERVICE

I, Jennifer Woodward, declare under penalty of perjury in accordance with the laws of the State of Washington that the original of the preceding document with the Washington State Supreme Court using the appellate efileing system, which will provide notice of such filing to all required parties.

Executed this 6th day of January, 2020, at Seattle, Washington.


Jennifer Woodward, Paralegal

Appendix

457 Fed.Appx. 679

This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter

See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Ninth Circuit Rule 36-3. (Find CTA9 Rule 36-3) United States Court of Appeals, Ninth Circuit.

Fred POWELL, Plaintiff–Appellee,

v.

ANHEUSER–BUSCH INCORPORATED, a Missouri Corporation, Defendant–Appellant.

No. 10–55167.

|
Argued and Submitted Oct. 11, 2011.

|
Filed Nov. 3, 2011.

Synopsis

Background: Employee brought action against employer, alleging discrimination in violation of the California Fair Employment and Housing Act (FEHA). The United States District Court for the Central District of California, [Valerie Baker Fairbank](#), J., granted employee's motion to reconsider order compelling arbitration. Employer appealed.

Holding: The Court of Appeals held that granting motion to reconsider was warranted.

Affirmed.

West Headnotes (1)

[1] Labor and Employment

🔑 Proceedings

Granting employee's motion to reconsider previous order compelling arbitration pursuant to the collective bargaining agreement (CBA) was warranted in employee's action against employer alleging disability discrimination in

violation of the California Fair Employment and Housing Act (FEHA); CBA did not explicitly incorporate employee's disability discrimination claims, CBA provided arbitration procedures only as between employer and union, and employee was proceeding without union, which was not provided for in the CBA.  [West's Ann.Cal.Gov't.Code § 12940 et seq.](#)

[8 Cases that cite this headnote](#)

Attorneys and Law Firms

***679** [Rita Marie Morales](#), Law Offices of Rita Miranda–Morales, Santa Monica, CA, for Plaintiff–Appellee.

[Nicky Jatana](#), Jackson Lewis, LLP, Los Angeles, CA, for Defendant–Appellant.

Appeal from the United States District Court for the Central District of California, ***680** [Valerie Baker Fairbank](#), District Judge, Presiding. D.C. No. 2:09–cv–00729–VBF–VBK.

Before: [LEAVY](#) and [WARDLAW](#), Circuit Judges, and [MAHAN](#), District Judge. *

MEMORANDUM **

****1** Anheuser–Busch, Inc. (“ABI”) appeals the district court's January 8, 2010, order granting Fred Powell's motion for reconsideration of the district court's June 29, 2009, order compelling arbitration. We have jurisdiction pursuant to [9 U.S.C. § 16\(a\)](#), and we affirm.

The Collective Bargaining Agreement (“CBA”) between ABI and Powell's union, Teamsters Local Union No. 896 (“Union”), does not “clearly and unmistakably” require Powell to arbitrate claims of statutory discrimination. *See*  [14 Penn Plaza LLC v. Pyett](#), 556 U.S. 247, 129 S.Ct. 1456, 1474, 173 L.Ed.2d 398 (2009). Although it is unclear whether the district court relied on the lack of a clear and unmistakable waiver in granting Powell's motion for reconsideration, we may affirm on any basis supported in the record, “even if it differs from the district court's rationale.”  [Van Asdale v. Int'l Game Tech.](#), 577 F.3d 989, 994 (9th Cir.2009) (internal quotation marks omitted).

We will not interpret a CBA to waive an individual employee's right to litigate statutory discrimination claims unless the CBA waiver "explicit[ly] incorporat[es] ... statutory antidiscrimination requirements."  *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 80, 119 S.Ct. 391, 142 L.Ed.2d 361 (1998). The CBA here did not explicitly incorporate Powell's disability discrimination claims under the California Fair Employment and Housing Act ("FEHA"). See  *Cal. Gov't Code §§ 12940 et seq.* Although CBA Section 41 "recognizes" ABI's duty to comply with FEHA, it is clearly addressed to a situation where ABI's compliance with FEHA conflicts with any provision of the CBA. Where the only reasonable accommodation available conflicts with the CBA, and ABI adopts it anyway, the Union may challenge the accommodation through the grievance procedure. Section 41 speaks not at all to the right of an individual employee to litigate a FEHA claim against ABI.

Moreover, the CBA supplies arbitration procedures only as between ABI and the Union. The CBA provides no mechanism that would allow an individual to commence the grievance and arbitration process without the Union's participation, as is the case here. Nor is any mechanism provided to resolve disputes between ABI and an individual employee over the selection of an arbitrator; the arbitrator selection procedures set forth in Section 32.03 apply only to ABI and the Union. The CBA's failure to contain any arbitration procedures governing the arbitration of Powell's statutory claim against ABI is the very reason for the "complete breakdown in the arbitration process" found by the district court.

AFFIRMED.

All Citations

457 Fed.Appx. 679, 2011 WL 5234761

Footnotes

- * The Honorable [James C. Mahan](#), United States District Judge for the District of Nevada, sitting by designation.
- ** This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

BARNARD IGLITZIN & LAVITT

January 06, 2020 - 3:13 PM

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