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No. 97429-2

(No. 78356-4-I, Court of Appeals, Division I)

**IN THE SUPREME COURT OF THE STATE OF WASHINGTON**

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STEVEN BURNETT, individually and on behalf of all others similarly  
situated,

Respondent,

v.

PAGLIACCI PIZZA, INC., a Washington corporation,

Appellant.

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**BRIEF OF AMICUS CURIAE WASHINGTON EMPLOYMENT  
LAWYERS ASSOCIATION**

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## I. INTRODUCTION AND IDENTITY OF AMICUS

In *Burnett v. Pagliacci Pizza, Inc.*, 9 Wn. App. 2d 192 (2019), the Court of Appeals considered the enforcement of a “mandatory arbitration policy” contained within a unilaterally imposed employee handbook that Pagliacci expected its employees to read at home without pay “on their own initiative.” The Court ruled that the arbitration agreement was both procedurally and substantively unconscionable.

It is manifestly unfair for an employer to bury a purported arbitration “agreement”—by nature a bilateral contract—in a unilateral policy manual without expressly informing the employee of the bilateral provision and securing an acknowledgement that the employee has read and understood the provision. Here, the “mandatory arbitration policy” deters the exercise of legal rights through burdensome exhaustion requirements, does not give fair notice to employees what they are agreeing to or what arbitration is, does not inform employees that they are forfeiting their right to trial by jury, and references an act—the Washington Arbitration Act—that specifically excludes employment disputes. RCW 7.04A.030(4).

WELA consists of approximately 220 Washington lawyers and is a chapter of the National Employment Lawyers Association. WELA advocates in favor of employee rights in recognition that employment with fairness and dignity is fundamental to the quality of life. WELA has a strong interest in preserving employees’ ability to make a meaningful choice about whether to waive their rights to a judicial forum.

This Court should rule that the arbitration agreement contained in Pagliacci's Little Book of Answers is procedurally unconscionable.

## **II. SUMMARY OF ARGUMENT**

The touchstone of the doctrine of unconscionability is fairness. This doctrine is particularly important in the employment context, where in the vast majority of cases the employer holds all the negotiating power when it comes the terms and conditions of employment. Employers abuse this power when they either procedurally or substantively unduly tip the scales in their favor by drafting policies that don't adequately inform the new employee as to the actual terms and conditions of employment, or when those terms and conditions are overwhelmingly in their favor.

At the outset of employment, employers present a wide variety of documents for the employee to sign, including *inter alia* documents relating to insurance and taxes. Employers also often present an employee handbook or policy book with an acknowledgment that the handbook has been received and the employee will comply with its provisions. The employee handbook is often comprised of dozens of pages and contains promises made by the employer together with the employer's expectations for employees' conduct and performance. As a practical matter, it is exceedingly rare that an employee will read the contents of the employee handbook before work begins. It is even rarer that an employee will object to any provision contained in the employee handbook which is always presented on a take-it-or-leave-it basis. The employee must sign all documents presented in order to begin working.

Sometimes an employee will be presented with agreements to be signed separate and apart from the initial employment documents and handbook acknowledgment. These stand-alone agreements include non-compete agreements, non-disclosure agreements, non-solicitation agreements, or *arbitration agreements*. When presented separately, an arbitration agreement typically explains in some detail the nature of arbitration, the place of the arbitration, who pays the costs, and rights being waived, including the right to seek redress in court and the right to trial by jury. Separate arbitration agreements generally encourage the employee to ask questions and/or seek legal counsel. Here, the arbitration agreement inserted into a handbook consists of two sentences, and says nothing more than if the F.A.I.R. 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.” This gives the employee little notice about the rights being surrendered and promises being made.

An arbitration agreement presented in an employee handbook is enforceable only when all of the requisites for contract formation are present. Arbitration agreements are by their very nature bilateral—an exchange of promises—not unilateral. Employers must not be permitted to bury bilateral “agreements” of any kind in a unilaterally imposed handbook absent very explicit notice, in close proximity to the employee’s acknowledging signature, that the employee is agreeing to certain bilateral terms. To do otherwise is procedurally unconscionable. And here,

Pagliacci seeks to enforce a “mandatory arbitration policy” which the employee is expected to read off the clock on their “own initiative.”

Finally, it is worth noting that an employer is not compelled to bury an abbreviated arbitration agreement in an employee handbook. The only apparent reason for doing so is to deny the employee the opportunity to know and understand the contractual provisions to which they are bound. This Court should not sanction that deception. Without explicit notice, an arbitration agreement contained in an employee handbook is procedurally unconscionable.

### **III. FACTUAL AND PROCEDURAL BACKGROUND**

Plaintiff was hired by Pagliacci as a delivery driver. At the time of his hire, he was required to sign an Employee Relationship Agreement (“ERA”). The ERA provides that employees are employees-at-will and can be terminated at any time in any manner with or without notice and without cause. It further provides that employees will learn and comply with the rules stated in the “Little Book of Answers.” The ERA does not directly or indirectly mention arbitration.

The Little Book contained a dispute resolution process (“F.A.I.R.”) and a “Mandatory Arbitration Policy.” The arbitration policy required the employee to submit any dispute for resolution in accordance with the F.A.I.R. Policy, and if those procedures are not successful in resolving the dispute, then the employee was to submit the dispute to binding arbitration. The arbitration requirement consisted of two sentences and said nothing more than if the F.A.I.R. 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.” Nothing in the handbook explains what arbitration means, that the right to trial by judge or jury is being waived, or who pays the costs. Nothing advises the employee they can ask questions or consult an attorney before signing.

The F.A.I.R. Policy requires that before commencing arbitration, the employee must 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 non-binding conciliation, and 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 further provides that failure to comply with all provisions of the dispute resolution process forecloses any right to bring a claim in either arbitration or court. The Little Book states: “The limitations set forth . . . shall not be subject to tolling, equitable or otherwise.”

Pagliacci terminated Mr. Burnett’s employment on January 22, 2017. In October 2017, Mr. Burnett filed a putative wage-and-hour 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. Plaintiff alleged that the arbitration policy was both procedurally and substantively unconscionable. The trial court

ruled that because the Little Book was not incorporated into the ERA, there was no binding agreement and denied the motion to compel arbitration.

The Court of Appeals granted discretionary review. The Court of Appeals ruled that the Little Book *was incorporated* into the ERA and that a contract had been formed. *Burnett v. Pagliacci Pizza, Inc.*, 9 Wn. App 192, 201. The Court distinguished *Gaglidari v. Denny's Restaurants, Inc.*, 117 Wn.2d 426, 815 P.2d 1362 (1991), on the grounds that the contract formed by the Handbook in that case was enforceable against the *employer* but not the *employee*. “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.” *Id.* at 208.

Turning to the mandatory arbitration policy, the Court of Appeals found that the ERA including the Little Book was an adhesion contract. *Id.* at 203. The arbitration policy was “buried in a booklet” in the same font size and formatting as the surrounding sections. *Id.* at 205. The Court also found that “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.” (Emphasis added.) *Id.* at 204. Moreover, the Court concluded that “Burnett lacked meaningful choice in agreeing to arbitrate, and thus the circumstances surrounding the formation of the parties' arbitration agreement were procedurally unconscionable.” *Id.* at 205. Without further explanation, the Court reasoned, “[a]n 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.” *Id.* at 209-10. The Court held that “procedural unconscionability alone renders Pagliacci's mandatory arbitration policy unenforceable.” *Id.* at 211.

The Court of Appeals then ruled that the provisions of the arbitration agreement were substantively unconscionable because the conciliation and grievance provision acted as a complete bar to arbitration and suit for employees who do not become aware of the claim until after the termination of their employment. *Id.* at 214. Moreover, the necessity of compliance with the grievance and conciliation policy as a prerequisite to arbitration necessarily shortened the statute of limitations, which the Court found to be a separate basis for unconscionability. *Id.* at 217. The Court rejected Pagliacci’s argument 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. *Id.* at 206-7. On this point, the Court of Appeals is wrong in light of binding precedent. While it is true that an employer *can* impose new terms of employment by amending a handbook more generally, as set forth below such amendments should not apply to policies that are by their nature bilateral “agreements” rather than simple “policies.”

Finally, the Court declined to sever the unconscionable portions of the arbitration agreement principally because severance is not a remedy

for procedural unconscionability. *Id.* at 218. Moreover, there was no severance clause in the ERA or Little Book. *Id.* at 219.

This Court granted review.

#### IV. ARGUMENT

##### A. Arbitration Agreements are Bilateral Contracts

“In any breach of contract action, the first question a reviewing court must answer is whether an enforceable contract has been created.” *Storti v. University of Washington*, 181 Wash.2d 28, 34, 330 P. 3d 159 (2014). Contracts may be “bilateral,” meaning a promise for a promise, or unilateral, meaning a promise for performance. *Id.* at 35.

In *Thompson v. St. Regis*, 102 Wn.2d 219, 685 P.2d 1081 (1984), the Court for the first time considered whether and under what circumstances the promises made in an employee handbook could be enforceable. The Court recognized two general theories. The first was a simple contract theory. “Under this approach the requisites of contract formation, offer, acceptance and consideration, are necessary predicates to establishing that policies in an employment manual are part of the employees' original employment contract or part of the employment contract as modified by the parties.” *Id.* at 228. Where these predicates are satisfied the promises made by both employers and employees are enforceable. *Id.* at 229 (“an employee and employer can contractually obligate themselves concerning provisions found in an employee policy manual and thereby contractually modify the terminable at will relationship”). Consideration may be established “where employees continue in employment when they otherwise would not be required to do

so. As long as the employees incur some legal detriment—by continuing to work, for example—the requirement of consideration is met.” *Storti v. University of Washington*, 181 Wn.2d at 37-38.

The second theory discussed in *Thompson* is a *sui generis* claim where the employer creates an atmosphere of fair treatment and job security and the employee relies upon the promises made in the Handbook. “Independent of this contractual analysis, however, we hold that employers may be obligated to act in accordance with policies as announced in handbooks issued to their employees.” *Thompson*, 102 Wn. 2d at 229. In the absence of an enforceable written contract, “if an employer, for whatever reason, creates an atmosphere of job security and fair treatment with promises of specific treatment in specific situations and an employee is induced thereby to remain on the job and not actively seek other employment, those promises are enforceable components of the employment relationship.” *Id.* at 230. The Court’s purpose was to ameliorate the harshness of the “employment-at-will” doctrine. *Id.* at 228. Under this *sui generis* handbook claim the promises made by the employer cannot be treated as illusory. *Id.* at 230. Under this theory, only the promises made by the employer are enforceable and not promises made by the employee. Promises made by the employee are enforceable only for contracts where all the requisites of normal contract formation (offer, acceptance, and consideration) are satisfied.

In *Gaglidari v. Denny's Restaurants, Inc.*, 117 Wn.2d 426, 815 P.2d 1362 (1991), an employee was given a detailed employee handbook at the outset of employment. The employee signed an acknowledgment

agreeing to abide by the terms of the handbook. The original handbook provided that fighting *on duty* was grounds for immediate dismissal. For other types of infractions (presumably to include fighting off duty, but on company premises), progressive discipline applied. *Id.* at 428. The company later modified the handbook which provided that fighting *on company premises* was grounds for immediate dismissal. *Id.* at 429. Although made available to Plaintiff, a copy was never given to her. However, the employer did give Plaintiff an alcoholic beverage handbook, and Plaintiff signed and acknowledged that she would comply with its terms. This book *also* provided that fighting on company premises was grounds for immediate dismissal. *Id.* at 430.

Although not on duty, Plaintiff was later fired for fighting on company premises. There was no progressive discipline. *Id.* The employee claimed that the original handbook constituted an employment contract modifying a terminable at will relationship and that the handbook was violated by terminating her employment without progressive discipline.

The court ruled that the original handbook formed a contract between the employer and employee because the employee signed the acknowledgment and agreed to abide its provisions. It also ruled that the employer could unilaterally modify the terms of the contract “provided that the employer gives affected employees reasonable notice of the policy changes.” *Id.* at 434. The court found that the employer failed to give the employee reasonable notice of the policy change in subsequent handbooks. *Id.* at 435. But because Plaintiff did have notice of the

alcoholic beverage handbook that authorized immediate termination for fighting on premises, she was bound by its terms, and could be terminated for fighting on premises without progressive discipline.

An employee's agreement to comply with the employer's general performance and conduct policies or be terminated does not create a *bilateral* contract because even without that agreement in place, the employee, as an employee at will, can be fired without cause. The nature of this kind of contract is unilateral in that the employer offers to pay the employee for work performed, subject to certain workplace rules and standards contained in the handbook, and the employee accepts those terms by her performance of the work. A handbook can create a *unilateral* contract between the employer and employee and subsequent changes can be binding so long as the employee is given reasonable notice. *See Gagliardi v. Denny's Restaurants, Inc.*, 117 Wn.2d. at 434.

In contrast, employers often seek to secure (or impose) *bilateral* agreements with their employees, including non-competition agreements, non-solicitation agreements, non-disclosure agreements, and arbitration agreements. These agreements are by their nature *bilateral* – an exchange of promises – in this case, the mutual agreement by both parties to submit to arbitration for resolution of disputes. Neither the Court of Appeals in *Burnett* nor the Supreme Court in *Gagliardi* addressed the difference between unilateral and bilateral contracts within this context. While an

employer can impose such bilateral agreements on its employees, it must do so in a way that is procedurally and substantively fair.<sup>1</sup>

**B. Arbitration Agreements Inserted in an Employee Handbook Are Enforceable Only if the Employee is Given Explicit Notice**

A contract exists when there is “mutual assent to its essential terms.” *Jacob's Meadow Owners Ass'n v. Plateau 44 II, LLC*, 139 Wn. App. 743, 765, 162 P.3d 1153 (2007). *See also Kramer v. Toyota Motor Corp.*, 705 F.3d 1122, 1126 (9th Cir. 2013) (“arbitration 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”).

To determine whether a contract is procedurally unconscionable, courts “look to the circumstances surrounding their transaction to determine whether [the employee] lacked meaningful choice: ‘[t]he manner in which the contract was entered, whether [the employee] had a reasonable opportunity to understand the terms of the contract, and

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<sup>1</sup> Unlike Pagliacci’s “Little Book of Answers,” virtually every handbook ever written contains a disclaimer. The disclaimer is generally written in bold and capital letters and proclaims that nothing contained in the handbook creates a contract either express or implied and that any perceived promises contained in the Handbook are unenforceable. Such a disclaimer may be insufficient to defeat a *sui generis* handbook claim, and the promises of the employer may nevertheless be enforceable. *See Swanson v. Liquid Air Corporation*, 118 Wn.2d 512, 532, 826 P. 2d 664 (1992) (“We reject the premise that this disclaimer can, as a matter of law, effectively serve as an eternal escape hatch for an employer who may then make whatever unenforceable promises of working conditions it is to its benefit to make”). But if a disclaimer is sufficient to defeat a contract claim, neither the promises made by the employer nor the employee are unenforceable. *This includes arbitration agreements.* Bilateral agreements contained in a handbook with a disclaimer are unenforceable because there is no contract, and the courts need not reach the question of whether they are procedurally or substantively unconscionable. *See Esparza v. Sand & Sea, Inc.*, 2 Cal. App. 5th 781, 790-91 (2016) (holding that a mere reference to an employee handbook with an arbitration policy does not create an enforceable obligation to arbitrate when that handbook states that it does not create enforceable rights).

whether the important terms [were] hidden in a maze of fine print.” *Adler v. Fred Lind Manor*, 153 Wn. 2d 331, 334, 103 P. 3d 773 (2004). The key inquiry for finding procedural unconscionability is whether or not there was meaningful choice. *Id.* at 348-49.

“Congress intended there to be at least a knowing agreement to arbitrate employment disputes before an employee may be deemed to have waived the comprehensive statutory rights, remedies and procedural protections prescribed in Title VII and related state statutes.” *Prudential Ins. Co. of Am. v. Lai*, 42 F.3d 1299, 1304 (9th Cir. 1994). Thus, “[a]ny bargain to waive the right to a judicial forum for civil rights claims . . . in exchange for employment or continued employment must at the least be express: the choice must be explicitly presented to the employee and the employee must explicitly agree to waive the specific right in question.” *Nelson v. Cyprus Bagdad Copper Corp.*, 119 F.3d 756, 762 (9th Cir. 1997). In *Nelson*, the Ninth Circuit held that simply signing a form acknowledging receipt of an employee Handbook did not amount to assent to an arbitration agreement where the acknowledgment form did not mention the existence of an arbitration clause in the Handbook or notify the employee that the acceptance of the Handbook constituted an agreement to arbitrate. 119 F.3d at 761. The Court ruled that “nothing in the acknowledgment form notified [the employee] that by agreeing to ‘read and understand’ [the Handbook,] he was additionally agreeing to waive any rights or remedies.” *Id.* However, if the acknowledgment specifically directs the employee’s attention to the arbitration clause in the handbook, then the arbitration agreement may be given effect so long as it

is otherwise conscionable. *Kummetz v. Tech Mold, Inc.*, 152 F.3d 1153, 1155-56 (9th Cir. 1998). *See also Bailey v. Federal National Mortgage Association*, 209 F. 3d 740, 746 (D.C. Cir. 2000) (“the unilateral promulgation by an employer of arbitration provisions in an Employee Handbook does not constitute a ‘knowing agreement’ on the part of an employee”) (citing *Nelson*).

Here, Pagliacci imposed its mandatory arbitration policy in an unfair manner through woefully insufficient notice, making it unenforceable under the doctrine of procedural unconscionability. Pagliacci has its employees sign the one-page ERA without affording an employee time to read the much longer “Little Book of Answers,” and without paying them to do so. The ERA purports to incorporate the Little Book, but the ERA does not make explicit reference to “arbitration” or explain what arbitration is, and does not inform the employee that he or she is signing away their constitutional right to seek redress in court and to a jury trial. Instead, it only references the “FAIR Policy,” but does not explain what that is or that it entails mandatory arbitration and forfeiture of rights.

This Court should hold that Pagliacci’s Mandatory Arbitration Policy is procedurally unconscionable, and clarify that in order for an employer to enforce bilateral agreements contained in a unilateral employee handbook, the employer must 1) provide the employee with the essential terms of the Arbitration Policy (or other bilateral policy, *i.e.*, noncompetition); 2) explicitly give notice to the employee that the handbook contains an Arbitration Policy using the actual word

“Arbitration” with a statement that the employee is agreeing to dispute resolution outside of court; and 3) secure an acknowledging signature in close proximity to the notice that the employee has received, reviewed, and understands the Arbitration Policy (or other bilateral term). In the alternative, an employer can present an employee with a separate, stand-alone arbitration agreement clearly identified as such and explaining in readily understandable language the nature of each party’s obligations.

**C. Pagliacci’s Mandatory Arbitration Policy Itself Is Procedurally Unconscionable**

In addition to the problem of insufficient notice in the ERA, Pagliacci’s Mandatory Arbitration Policy itself is procedurally unconscionable. As stated above, the procedural unconscionability inquiry focuses on meaningful choice by looking at factors such as: “[t]he manner in which the contract was entered, whether [the employee] had a reasonable opportunity to understand the terms of the contract, and whether the important terms [were] hidden in a maze of fine print.” *Adler v. Fred Lind Manor*, 153 Wn. 2d 331, 334, 103 P. 3d 773 (2004) (internal citations and quotation marks omitted).

Here, Pagliacci had its employees sign a separate document, the Employee Relations Agreement, and told Mr. Burnett to take the “Little Book of Answers” home to read on his “own initiative.” By definition, this means that Pagliacci does not afford new employees a “reasonable opportunity” to review and understand the contents of the Little Book. If an employee takes the initiative to read the Little Book, they read first about the “F.A.I.R.” procedures, buried in the Little Book in the same

font and text size, which require an employee to attempt to resolve any issue, including issues of sexual or racial harassment and failure to pay wages, by first approaching their own manager, then a “F.A.I.R.” Administrator. The “F.A.I.R.” procedure then specifically admonishes the employee that they are barred from pursuing any claim in court or arbitration if they have failed to first exhaust these internal grievance steps. By its terms, the “F.A.I.R.” procedure requires an employee who has been terminated, like Mr. Burnett, to return to his place of employment after his termination to pursue these internal steps. This requirement is unreasonable and unfair, and will necessarily deter employees (and especially former employees) from exercising statutory civil rights.

On the following page, the “Mandatory Arbitration Policy” is all of two sentences long and says nothing more than if the F.A.I.R. 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 Little Book does not explain the nature of arbitration, the place or county of the arbitration, who pays the costs, or the rights a Pagliacci employee is giving up, including the right to seek redress in court and the right to trial by jury. Nor does the Little Book encourage the employee to ask questions and/or seek legal counsel. While none of these factors may be dispositive of the unconscionability inquiry, their combination results in unfairness and lack of meaningful choice through the Little Book’s failure to provide adequate information about

what the Mandatory Arbitration Policy means or requires. This renders Pagliacci's Policy unconscionable and unenforceable.

**D. Pagliacci Cannot Enforce Policies It Doesn't Pay Its Employees to Read and Understand, which is a Crime**

When an employer requires an employee to perform work, that employer must pay the employee Washington's minimum wage under the Minimum Wage Act. RCW 49.46.010 and .020. An employer that fails to pay minimum wage for hours worked is guilty of a gross misdemeanor. RCW 49.46.100(1).

Here, Pagliacci's Employment Relations Agreement (ERA) instructs employees to review the "Little Book" "on your own initiative" and that employees are obligated to follow the policies contained in that book. Mr. Burnett's manager instructed him to take the "Little Book" home and read it there. There is no dispute that Pagliacci never paid Mr. Burnett for time spent reviewing and learning the "Little Book." That time was uncompensated, and Pagliacci violated the law by requiring Mr. Burnett to work off the clock.

As a matter of public policy, this Court should hold that Pagliacci is barred from enforcing any employee obligations it foisted on Mr. Burnett without paying him to review and understand those obligations prior to signing the ERA, and that to do so is procedurally unconscionable.

**V. CONCLUSION**

This Court should affirm the opinion of the Court of Appeals, declare the Pagliacci's Mandatory Arbitration Policy is unenforceable due to procedural unconscionability because both the notice in the ERA and

the Mandatory Arbitration Policy itself denied Mr. Burnett and the putative class any meaningful choice about whether to accede to mandatory binding arbitration of all disputes and legal claims. The Court should then hold that in order for an employer to enforce bilateral agreements contained in a unilateral employee handbook, the employer must 1) provide the employee with the essential terms of the Arbitration Policy (or other bilateral policy, *i.e.*, noncompetition); 2) explicitly give notice to the employee that the handbook contains an Arbitration Policy using the actual word “Arbitration” with a statement that the employee is agreeing to dispute resolution outside of court; and 3) secure an acknowledging signature in close proximity to the notice that the employee has received, reviewed, and understands the Arbitration Policy (or other bilateral term). Finally, the Court should hold that requiring an employee to review and learn policies (and especially those that are bilateral agreements by nature) without paying them to do so is procedurally unconscionable, rendering those policies unenforceable.

RESPECTFULLY SUBMITTED this 9<sup>th</sup> day of December, 2019.

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**DECLARATION OF SERVICE**

I hereby declare that on December 9, 2019, I electronically filed the foregoing *Brief of Amicus Curiae Washington Employment Lawyers Association* with the Supreme Court of the State of Washington, and arranged for service of a copy of the same on the parties to this action as follows:

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**BY SUSAN L. CARLSON**  
**CLERK**

January ESPARZA, Plaintiff and Respondent,

v.

SAND & SEA, INC., et al.,  
Defendants and Appellants.

B268420

Filed 8/22/2016

**Synopsis**

**Background:** Former employee brought action against former employer alleging causes of action for sexual harassment, sex discrimination, wrongful termination, and intentional infliction of emotional distress. Former employer filed petition to compel arbitration. The Superior Court, Los Angeles County, No. SC122803, [Gerald Rosenberg, J.](#), denied the petition, and former employer appealed.

The Court of Appeal, [Collins, J.](#), held that employee handbook, welcome to employment letter, and policy acknowledgement did not create a mutual agreement to arbitrate.

Affirmed.

**\*\*476** APPEAL from an order of the Superior Court of Los Angeles County, [Gerald Rosenberg](#), Judge. Affirmed. (Los Angeles County Super. Ct. No. SC122803)

**Attorneys and Law Firms**

Telep Law, [Desiree Telep](#), Irvine, Tina Dao for Plaintiff and Respondent.

Greenberg Traurig, [Mark D. Kemple](#), [Karin L. Bohmholdt](#) and [Nicholas A. Insogna](#), Los Angeles, for Defendants and Appellants.

[COLLINS, J.](#)

**\*783 INTRODUCTION**

The question in this case is whether an arbitration provision in an employee handbook is legally enforceable. The employee handbook containing the arbitration provision included a welcome letter as the first page, which stated, “[T]his handbook is not intended to be a contract (express or implied), nor is it intended to otherwise create any legally enforceable obligations on the part of the Company or its employees.” The employee signed a form acknowledging she had received the handbook, which mentioned the arbitration provision as one of the “policies, practices, and procedures” of the company. The acknowledgement form did not state that the employee agreed to the arbitration provision, and expressly recognized that the employee had not read the handbook at the time she signed the form. Under these circumstances, we find that the arbitration provision in the employee handbook did not create an enforceable agreement to arbitrate. We therefore affirm the trial court's denial of the employer's petition to compel arbitration.

**\*784 FACTUAL AND PROCEDURAL BACKGROUND**

Plaintiff and respondent January Esparza began employment at Shore Hotel on November 19, 2012. On her first day of work, Esparza was given an employee handbook. The first page of the handbook stated:

“Welcome to Shore Hotel!

“We are excited to have you as a member of our team. At Shore Hotel, every team member plays a vital role in the **\*\*477** success of our organization and we look forward to your many contributions.

\* \* \*

“This handbook will give you both an overview and a better understanding of Shore Hotel and the core policies by which we operate.... You should never hesitate to ask questions or speak directly to your supervisor or the Human Resources department.

“This handbook replaces and supersedes all prior verbal descriptions, written policies and other written materials and memorandum [sic] that may have been distributed; unless otherwise notes [sic]. *Employees should understand, however, that this handbook is not intended to be a contract (express or implied), nor is it intended to otherwise create any legally*

*enforceable obligations on the part of the Company or its employees.* [Italics added.] The Company reserves the right to revise, modify, delete, or add to any and all policies, procedures, work rules, or benefits stated in this handbook or in any other document at any time (except as to its at-will employment policy) without prior notice....

“Welcome aboard!”

We will refer to this page of the employee handbook as the “welcome letter.”

A section titled “Agreement to Arbitrate” spanned pages 3 and 4 of the employee handbook. Unlike the rest of the employee handbook, this section was printed in all capital letters, and it was written in the first person from the employee's perspective. The section began, “I further agree and acknowledge that the company and I will utilize binding arbitration to resolve all disputes that may arise out of the employment context. Both the company and I agree that any claim, dispute, and/or controversy that either I may have against the company ... or the company may have against me ... shall be submitted to and determined exclusively by binding arbitration under the \*785 Federal Arbitration Act....” The section discussed the scope of disputes under the agreement, the qualifications for an arbitrator, and other procedural issues relating to arbitration. It continued, “I understand and agree to this binding arbitration provision, and both I and the company give up our right to trial by jury of any claim I or the company may have against each other.”

The handbook then explained employment basics such as the company anti-harassment policy, the attendance policy, the dress code, and payroll. The last two pages of the 52–page employee handbook consisted of identical copies of a “policy acknowledgement,” one labeled as the employer copy, and one labeled as the employee copy. The policy acknowledgement stated:

“This handbook is designed to provide information to employees of Sand & Sea, Inc. (Shore Hotel) regarding various policies, practices and procedures that apply to them including our Arbitration Agreement. Shore Hotel and its employees acknowledge that their relationship is ‘at will’ and that either party can terminate that relationship at any time for any reason. Shore Hotel reserves the right to modify, alter or eliminate any and all of the policies and procedures set forth herein at any time, for any reason, with or without notice. *Neither this manual nor its contents constitute, in whole or*

*in part, either an express or implied contract of employment with Shore Hotel or any employee.* [Italics added.]

“While this handbook is not intended to state all of the conditions of employment and all of the principles which help to guide our people in the performance of their duties, it will give you general information \*\*478 in regard to certain policies and benefits related to your employment.

\* \* \*

“I acknowledge that I have received Sand & Sea Inc.'s (Shore Hotel) Employee Handbook. *I also acknowledge that I am expected to have read the Employee Handbook in its entirety no longer after one week after receiving it,* and that I have been given ample opportunity to ask any questions I have pertaining to the contents of the employee handbook. I also understand that this Handbook is Company property and that it must be returned upon termination of my employment. I understand that failure to abide by these provisions may result in disciplinary action up to and including the termination of my employment.”

Esparza signed the policy acknowledgement on November 19, 2012, her first day of work. Esparza's employment with Shore Hotel ended on August 2, 2013. On July 8, 2014, Esparza filed a complaint against Shore Hotel; she later added Steve Farzam, identified as the owner of the hotel, as a defendant. \*786 In her first amended complaint, which was the operative complaint below, Esparza alleged causes of action for sexual harassment, sex discrimination, wrongful termination, and intentional infliction of emotional distress.

On July 28, 2015, more than a year after Esparza first filed her complaint, defendants filed a petition to compel arbitration. Defendants argued that Esparza's claims arose from her employment at Shore Hotel, and “because Plaintiff signed her assent to a conspicuous and unambiguous agreement to arbitrate claims of the very type at issue here, arbitration is mandatory.” Defendants acknowledged that both parties had served discovery requests, and defendants' demurrer to the first amended complaint was pending before the court. With their motion, defendants submitted the entire employee handbook, including the welcome letter and the policy agreement signed by Esparza.

Esparza opposed defendants' petition to compel arbitration. She argued, “Ms. Esparza did not assent or agree to arbitration.... Ms. Esparza simply acknowledged that she

received Shore Hotel's Employee Handbook, and she also acknowledged that she was to have read the Employee Handbook one week after receiving it." Esparza also argued that the arbitration provision was procedurally and substantively unconscionable, and that defendants forfeited their right to demand arbitration by engaging in litigation for a year before seeking to enforce the arbitration provision.

In their reply, defendants argued that Esparza "freely agreed to arbitrate all disputes arising from her employment." They argued that the policy acknowledgment Esparza signed "expressly incorporated the employment terms and conditions of employment [sic] set forth in the preceding pages." Because Esparza had a week to review the handbook, defendants argued, she had the opportunity to "accept employment subject to [the handbook's] terms, or to seek employment elsewhere." Defendants also argued that the terms of the employment agreement were not unconscionable, and that defendants' participation in the very early stages of litigation should not be deemed a forfeiture of their right to arbitrate.

The trial court denied defendants' petition. It held, in full, "Defendants' motion to compel arbitration is denied. [¶] There is no agreement to arbitrate. [¶] The Policy Acknowledgement signed by plaintiff does not impose an obligation to arbitrate nor is the arbitration provision in the handbook incorporated by reference. To the contrary, the acknowledgement states that the \*\*479 handbook is not an employment agreement."

Defendants timely appealed.

### \*787 STANDARD OF REVIEW

There is a strong public policy favoring contractual arbitration, but that policy does not extend to parties who have not agreed to arbitrate. (*Molecular Analytical Systems v. CIPHERGEN Biosystems, Inc.* (2010) 186 Cal.App.4th 696, 704, 111 Cal.Rptr.3d 876 (*Molecular Analytical Systems*.) To establish a valid agreement to arbitrate disputes, "[t]he petitioner bears the burden of proving the existence of a valid arbitration agreement by [a] preponderance of the evidence, and a party opposing the petition bears the burden of proving by a preponderance of the evidence any fact necessary to its defense." (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 972, 64 Cal.Rptr.2d 843, 938 P.2d 903.) California law governs the determination as to whether an agreement was reached. (*Rosenthal v. Great Western*

*Fin. Securities Corp.* (1996) 14 Cal.4th 394, 409–410, 58 Cal.Rptr.2d 875, 926 P.2d 1061 (*Rosenthal*.) "[W]hen a petition to compel arbitration is filed and accompanied by prima facie evidence of a written agreement to arbitrate the controversy, the court itself must determine whether the agreement exists and, if any defense to its enforcement is raised, whether it is enforceable." (*Id.* at p. 413, 58 Cal.Rptr.2d 875, 926 P.2d 1061; see also *Code Civ. Proc.*, § 1281.2 ["the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists"].)

An order denying a petition to compel arbitration is an appealable order. (*Code Civ. Proc.*, § 1294, subd. (a).) "When 'the language of an arbitration provision is not in dispute, the trial court's decision as to arbitrability is subject to de novo review.' [Citation.] Thus, in cases where 'no conflicting extrinsic evidence is introduced to aid the interpretation of an agreement to arbitrate, the Court of Appeal reviews de novo a trial court's ruling on a petition to compel arbitration.' [Citation.]" (*Molecular Analytical Systems, supra*, 186 Cal.App.4th at p. 707, 111 Cal.Rptr.3d 876.) Here, the evidence is not in dispute, and therefore we review the trial court's decision de novo.

### DISCUSSION

Defendants argue that Esparza's signature on the policy acknowledgement indicates that "Plaintiff expressly acknowledged that the terms and conditions in the Employee Handbook would bind her should she accept employment with Shore Hotel." As a result, defendants argue, they presented prima facie evidence of an agreement to arbitrate, and the trial court erred by concluding that there was no agreement. The language of the policy acknowledgement does not support defendants' conclusion.

" 'In California, "[g]eneral principles of contract law determine whether the parties have entered a binding agreement to arbitrate." [Citations.]' ( \*788 *Pinnacle v. Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 236, [145 Cal.Rptr.3d 514, 282 P.3d 1217].) 'An essential element of any contract is the consent of the parties, or mutual assent.' [Citation.] (*Donovan v. RRL Corp.* (2001) 26 Cal.4th 261, 270, [109 Cal.Rptr.2d 807, 27 P.3d 702].) Further, the consent of the parties to a contract must be communicated by each party to the other. (*Civ.Code*, § 1565, subd. 3.) 'Mutual assent

is determined under an objective standard applied to the outward manifestations or expressions of the parties, i.e., the **\*\*480** reasonable meaning of their words and acts, and not their unexpressed intentions or understandings.’ (*Alexander v. Codemasters Group Limited* (2002) 104 Cal.App.4th 129, 141 [127 Cal.Rptr.2d 145], disapproved on other grounds in *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 524, [113 Cal.Rptr.3d 327, 235 P.3d 988].)” (*Serafin v. Balco Properties Ltd., LLC* (2015) 235 Cal.App.4th 165, 173, 185 Cal.Rptr.3d 151 (*Serafin*).)

The issue here is whether the employee handbook created a mutual agreement to arbitrate. *Mitri v. Arnel Management Co.* (2007) 157 Cal.App.4th 1164, 69 Cal.Rptr.3d 223 (*Mitri*), which neither party cites, is on point in two respects. In that case, the defendant employer supported its petition to compel arbitration with documents showing that its employee handbook contained a section titled “Arbitration Agreement,” and that the plaintiff employees acknowledged receiving the employee handbook. (*Id.* at pp. 1167–1168, 69 Cal.Rptr.3d 223.) The arbitration agreement in the handbook said, “As a condition of employment, all employees are required to sign an arbitration agreement,” and “Employees will be provided a copy of their signed arbitration agreement.” (*Ibid.*) However, the employer did not produce evidence of any signed arbitration agreements. (*Ibid.*) The trial court denied the employer’s petition, and the defendants appealed.

The Court of Appeal held that the employer failed to establish the existence of an agreement to arbitrate, citing two separate bases relevant here. The employer argued, as defendants do here, that the employees’ acknowledgement that they received the handbook, coupled with the fact that the handbook contained an arbitration provision, was sufficient to show that the employees agreed to the arbitration provision. The *Mitri* court rejected that argument because the handbook’s reference to a separate arbitration agreement that the employees were required to sign “completely undermines any argument by defendants [that] the provision in the handbook itself was intended to constitute an arbitration agreement between [the employer] and its employees.” (*Mitri, supra*, 157 Cal.App.4th at pp. 1170–1171, 69 Cal.Rptr.3d 223.) In addition, the handbook’s statement that employees would be provided with a copy of their signed arbitration agreement “reinforc[ed] an intent to have employees sign a separate arbitration agreement to effectuate [the employer’s] policy of arbitrating employment claims.” (*Id.* at p. 1171, 69 Cal.Rptr.3d 223.) The language of the handbook itself therefore suggested that the handbook did not create an agreement between the parties.

**\*789** Here, the handbook also indicated to the reader that it was not intended to establish an agreement.<sup>1</sup> The welcome letter at the beginning of the handbook explicitly stated that “this handbook is not intended to be a contract (express or implied), nor is it intended to otherwise create any legally enforceable obligations on the part of the Company or its employees.” This statement undermines defendants’ argument that the handbook and its arbitration provision actually *was* intended to create a legally enforceable obligation to arbitrate.

Defendants argue that welcome letter’s statement that the handbook did not create a contract “was intended only to disclaim that the Employee Handbook creates an *employment contract*” and that the policy acknowledgement “clarifies” this by **\*\*481** stating that the handbook is not a “contract of employment.” However, the language of the welcome letter was extremely broad, stating that the handbook “is not intended to ... create any legally enforceable obligations.” Defendants now ask us to find that the arbitration provision *did* create a legally enforceable obligation, despite the express language to the contrary. We decline to do so. Mutual assent is determined by the reasonable meaning of the parties’ words and acts. (*Serafin, supra*, 235 Cal.App.4th at p. 173, 185 Cal.Rptr.3d 151.) When language in a contract is clear and explicit, that language governs interpretation. (Civ. Code, § 1638.) To the extent there is any ambiguity in this language we construe it against defendants, the drafters of the language. (*Rebolledo v. Tilly’s, Inc.* (2014) 228 Cal.App.4th 900, 913, 175 Cal.Rptr.3d 612.) “If a party can show that it did not know it was signing a contract, or that it did not enter into a contract at all, both the contract and its arbitration clause are void for lack of mutual assent.” (*Saint Agnes Medical Center v. PacificCare of California* (2003) 31 Cal.4th 1187, 1200, 8 Cal.Rptr.3d 517, 82 P.3d 727.) Here, the reasonable interpretation of the welcome letter is that it meant exactly what it said—that the handbook was not intended to create “any legally enforceable obligations,” including a legally enforceable obligation to arbitrate.

The second basis for the *Mitri* court’s holding focused on the language of the acknowledgement form. The acknowledgement form in *Mitri* stated that the handbook was intended to be “ ‘an excellent resource for employees with questions about the Company,’ ” and “ ‘[e]mployees are encouraged to carefully review the Employee Handbook and become familiar with the contents and periodic updates.’ ” (*Id.* at p. 1173, 69 Cal.Rptr.3d 223.) The court noted,

“Conspicuously absent from the acknowledgment receipt form is any reference to an *agreement* by the employee to abide by the employee handbook’s arbitration agreement provision.” (*Ibid.*) The court **\*790** concluded, “We cannot and will not create a term of a contract between the parties that the evidence does not show was ever agreed upon by the parties.... Taken as a whole, the documents submitted by defendants in support of their motion do not constitute an arbitration agreement.” (*Ibid.*, citation omitted.)

Here, the policy acknowledgement that Esparza signed also did not state that she agreed to abide by the arbitration agreement within the handbook. Instead, the policy acknowledgement stated that the handbook “is designed to provide information to employees ... regarding various policies, practices and procedures that apply to them including our Arbitration Agreement.” As in *Mitri*, therefore, the policy acknowledgement suggests that it is merely informational. In addition, the policy acknowledgement explicitly recognized that Esparza had not read the handbook yet. Presumably, therefore, Esparza would not know the contents of the handbook or the arbitration provision at the time she signed the form. We have no basis to assume that Esparza agreed to be bound by something she had not read. (See, e.g., *Rosenthal v. Great Western Fin. Securities Corp.*, *supra*, 14 Cal.4th at p. 421, 58 Cal.Rptr.2d 875, 926 P.2d 1061 [a contract is void where a party, before making the agreement, lacks a reasonable opportunity to learn its terms].)

Defendants argue that because Esparza was expected to read the handbook within a week, and she continued to work at Shore Hotel after that week, she must have impliedly agreed to the arbitration provision. But “ ‘[a]bsent a clear agreement to submit disputes to arbitration, **\*\*482** courts will not infer that the right to a jury trial has been waived.’ [Citations.]” (*Adajar v. RWR Homes, Inc.* (2008) 160 Cal.App.4th 563, 569, 73 Cal.Rptr.3d 17.) Furthermore, this case is unlike *Harris v. TAP Worldwide, LLC* (2016) 248 Cal.App.4th 373, 203 Cal.Rptr.3d 522 (*Harris*), where the arbitration provision, set apart from the employee handbook as an appendix, stated, “If Employee voluntarily continues his/her employment with TAP [Worldwide, LLC] after the effective date of this Policy [or January 1, 2010], Employee will be deemed to have knowingly and voluntarily consented to and accepted all of the terms and conditions set forth herein without exception.” (*Harris*, at p. 379, 203 Cal.Rptr.3d 522.) Based on this language, the court held that “upon commencing employment, the employee was deemed to have consented to the agreement to arbitrate by virtue of

acceptance of the Employee Handbook. Plaintiff cannot have it both ways, acceptance of the at will job offer with all its emoluments and no responsibility to abide by one of its express conditions.” (*Id.* at p. 384, 203 Cal.Rptr.3d 522.) No such contractual language existed in the employee handbook here. To the contrary, the welcome letter declared that the handbook did not “create any legally enforceable obligations,” the policy acknowledgement said the handbook provided “general information” about employer policies, and there was no stated requirement that the employee **\*791** agree to any of these policies. These facts do not support a conclusion that the parties mutually assented to be bound by the arbitration provision in the handbook.

“To support a conclusion that an employee has relinquished his or her right to assert an employment-related claim in court, there must be more than a boilerplate arbitration clause buried in a lengthy employee handbook given to new employees. At a minimum, there should be a specific reference to the duty to arbitrate employment-related disputes in the acknowledgment of receipt form signed by the employee at commencement of employment.” (*Sparks v. Vista Del Mar Child and Family Services* (2012) 207 Cal.App.4th 1511, 1522, 145 Cal.Rptr.3d 318, abrogated on other grounds by *Harris*, *supra*, at p. 390, 203 Cal.Rptr.3d 522.) Defendants argue that because the policy acknowledgement referenced the arbitration agreement, it was binding on Esparza. However, the policy acknowledgement only referenced the arbitration agreement as one of the “various policies, practices, and procedures that apply” to employees. It did not indicate that Esparza agreed to be bound by it. Rather, the end of that paragraph stated, “Neither this manual nor its contents constitute, in whole or in part, either an express or implied contract of employment,” which, along with the language in the welcome letter discussed above, suggested that nothing in the handbook was legally binding on the parties.

In addition, the policy acknowledgement stated that the handbook was company property that had to be returned when Esparza’s employment terminated. Its last sentence, just above Esparza’s signature, stated that “failure to abide by these provisions may result in disciplinary action up to and including the termination of my employment.” The policy acknowledgement gave Esparza no notice that it created an agreement binding her to any of the handbook provisions *after* her employment at Shore Hotel terminated. Coupled with the language acknowledging that Esparza had not read the handbook yet (and therefore had not read the arbitration provision), the policy acknowledgement does not support

defendants' argument that Esparza agreed to the arbitration provision when she signed the policy acknowledgment.

**\*\*483** Defendants argue that the trial court erred when it reasoned that there was no arbitration agreement in part because the policy acknowledgement “is not an employment agreement.” They point out that an employment contract is not necessary to establish an enforceable arbitration agreement, and we agree. (See, e.g., *Sanchez v. Carmax Auto Superstores California, LLC* (2014) 224 Cal.App.4th 398, 401–402, 168 Cal.Rptr.3d 473.) But this critique of the court's reasoning does not affect defendants' burden to demonstrate the existence of an enforceable arbitration agreement. Moreover, we review the trial court's ruling, not its reasoning. ( **\*792** *Orcilla v. Big Sur, Inc.* (2016) 244 Cal.App.4th 982, 994, 198 Cal.Rptr.3d 715.) The court's statement about an employment agreement does not undermine its ruling that the handbook and policy acknowledgement do not evidence a mutual agreement to arbitrate.

Defendants urge us to follow *24 Hour Fitness, Inc. v. Superior Court* (1998) 66 Cal.App.4th 1199, 78 Cal.Rptr.2d 533 and *Serpa v. California Surety Investigations, Inc.* (2013) 215 Cal.App.4th 695, 155 Cal.Rptr.3d 506, which, according to defendants, demonstrate enforceable arbitration agreements in employee handbooks under similar circumstances. These cases are not on point. In *24 Hour Fitness*, the Court of Appeal considered whether an arbitration agreement between an employee and employer was enforceable against defendants other than the employer, and whether the agreement was

unconscionable. In *Serpa*, the court also considered whether an arbitration agreement between an employee and employer was unconscionable. Neither of these cases considered whether the parties had reached an agreement to arbitrate in the first instance, which is the question here. Instead, they only considered the applicability of defenses to the enforceability of existing arbitration agreements. Cases are not authority for propositions not considered. (See *Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 680, 36 Cal.Rptr.3d 495, 123 P.3d 931.)

In sum, the handbook, including the welcome letter and policy acknowledgment, was insufficient to meet defendants' burden to demonstrate an agreement to arbitrate. The trial court did not err by denying defendants' petition to compel arbitration.

## DISPOSITION

The trial court's order denying defendants' petition to compel arbitration is affirmed. Esparza is entitled to costs on appeal.

Epstein, P. J., and Willhite, J., concurred.

## All Citations

2 Cal.App.5th 781, 206 Cal.Rptr.3d 474, 2016 IER Cases 272,058, 16 Cal. Daily Op. Serv. 9249, 2016 Daily Journal D.A.R. 8745

## Footnotes

- 1 We note that this case differs from *Mitri* in that defendant asserts that the handbook and policy acknowledgement are “a single integrated document” so that no separate arbitration agreement was required.

# MACDONALD HOAGUE & BAYLESS

December 09, 2019 - 4:50 PM

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