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Supreme Court No. 97429-2

SUPREME COURT OF THE STATE OF WASHINGTON

STEVEN BURNETT, Respondent,

v.

PAGLIACCI PIZZA, INC., Petitioner.

PETITIONER PAGLIACCI PIZZA, INC.'S RESPONSE TO AMICUS
CURIAE BRIEF OF WASHINGTON EMPLOYMENT LAWYERS
ASSOCIATION

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I. INTRODUCTION

Both the United States and Washington Supreme Courts mandate that arbitration agreements must be presumed enforceable. Without addressing this mandate, the Washington Employment Lawyers Association (WELA) contends that arbitration provisions should be presumed unenforceable in the following ways: (a) if contained in an employee handbook, although Washington law enforces handbook provisions as binding contracts; (b) unless contained in a standalone document, unlike other provisions which may be incorporated into standalone contracts like the Employee Relationship Agreement here; (c) absent explicit notice if incorporated, unlike other provisions not requiring explicit notice.

This case involves Pagliacci's plainly-written arbitration requirement. It was given to Burnett upon hire. He attended new employee training and informed that he was bound by the provisions of the handbook. It must be enforced consistent with Washington and Federal precedent.

II. ARGUMENT

A. United States and Washington Supreme Court Law Presume Enforcement of Arbitration.

The United States Supreme Court has recently affirmed the strong presumption in favor of arbitrability and has directed state courts to

presume arbitrability of arbitration agreements. *See Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1410, 203 L.Ed.2d 636, 636 (2019). This Court has affirmed this principle, including in the employment context. *Zuver v. Airtouch Commc'ns*, 153 Wn.2d 293, 301, 103 P.3d 753, 758-59 (2004). Courts should consider arbitration agreements within the framework of this presumed enforceability. Yet the Court of Appeals never mentions the strong presumption in favor of arbitration once in its decision. WELA similarly begins its analysis by focusing on the doctrine of unconscionability. *See* Amicus Brief at 2. The U.S. Supreme Court has ruled that while arbitration agreements can be enforced according to their terms by relying on contract principles, “state law is preempted to the extent it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the [Federal Arbitration Act].” *Lamps Plus*, 139 S. Ct. at 1410, 203 L.Ed.2d at 636. The Federal Arbitration Act (FAA) requires courts to enforce arbitration agreements according to their terms. *Id.* As the U.S. Supreme Court and this Court have also held, the FAA applies to all employment contracts, except for employment contracts of certain transportation workers that do not apply here. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119, 121 S. Ct. 1302, 149 L. Ed. 2d 234 (2001); *Zuver*, 153 Wn.2d at 301, 103 P.3d at 758. Burnett admits that the Washington Arbitration Act may be incorporated as the

governing law for an employment arbitration agreement. *See* Resp. Supp. Brf. 5, n.1, citing *Dep't of Soc. & Health Servs. v. State Pers. Bd.*, 61 Wn. App. 778, 783, 812 P.2d 500 (1991). Any legal reasoning that would frustrate the purpose of the FAA to presume enforcement of arbitration would contravene established federal and state law precedent. The proper framework is a presumption in favor of arbitration.

B. The Court Cannot Demand a Higher Standard or Unique Requirements to Apply to Agreements to Arbitrate.

WELA proposes new, unique requirements for arbitration provisions that do not apply to other contracts. *See* Amicus Br., at 3, 14-15. This is contrary to longstanding precedent that courts cannot rely on the uniqueness of arbitration agreements as justification for imposing special requirements. *See Zuver*, 153 Wn.2d at 315 n.12, 102 P.3d at 766; *Tjart v. Smith Barney, Inc.*, 107 Wn. App. 885, 28 P.3d 823 (2001); *Govier v. N. Sound Bank*, 91 Wn. App. 493, 957 P.2 817 (1998); *Perry v. Thomas*, 482 U.S. 483, 492, 107 S. Ct. 2520, 2526-27 (1987). The United States Supreme Court argued that general contract principles cannot apply only to arbitration if they do not apply to other contracts. *See AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333, 339, 131 S. Ct. 1740, 1746, 179 L.Ed.2d 742, 751 (2011). This Court refuses to impose a higher

standard of review for arbitration agreements because it would impermissibly rely on the unique nature of agreements to arbitrate employment disputes as justification. *See Adler v. Fred Lind Manor*, 153 Wn.2d 331, 344 n.6, 103 P.3d 773, 781 (2004). WELA's position for a higher standard of review should be disregarded.

C. This Court Has Held Unilateral Arbitration Agreements Enforceable.

WELA argues that because an employee can be terminated at will, an employee's agreement to policies in a handbook constitute a unilateral contract, and an arbitration provision contained therein cannot be enforceable. *See Amicus Br.*, at 11. WELA contends that arbitration agreements are inherently bilateral, requiring special rules for enforcement. This is not the law.

As Burnett admits, a "rule of fundamental importance" is that "arbitration is a matter of consent, not coercion." *See Respondent's Response to Petition for Review* at 5 (citing *Lamps Plus*, 139 S. Ct. at 1415). As this Court has held, "a party to a contract which he has voluntarily signed cannot, in the absence of fraud, deceit, or coercion be heard to repudiate his own signature." *Retail Clerks Health & Welfare Tr. Funds v. Shopland Supermarket*, 96 Wn.2d 939, 944, 640 P.2d 1051, 1054 (1982) (internal citation omitted). Burnett consented to arbitration when he

signed the Employee Relationship Agreement incorporating the requirement to arbitrate, and there is no evidence of coercion, fraud or deceit here. Where Burnett, or any other employee, has consented to terms of conditions of employment, including bringing claims into arbitration, an agreement has been formed. *See* Petition for Review at 20; Supplemental Brief of Petitioner at 5-6, 11. This Court held that where general contract formation principles are present, including offer, acceptance, and consideration, a handbook can create binding obligations binding on both the employee and employer. *See Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 229, 685 P.2d 1081, 1087 (1984). WELA concedes that an employee handbook can be part of an employee contract if the requisites of contract formation are all present. *See Amicus Br.*, at 8. All of those elements were present here.¹

This Court has upheld unilateral arbitration requirements which could be invoked at the option of the party with the greater bargaining power, even against third parties who did not negotiate the underlying agreement. *See Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 815-16, 225 P.3d 213, 232 (2009). This Court ruled that despite the

¹ WELA further cites, in a footnote, a California appellate court case for the proposition that a handbook disclaimer can defeat contract formation of policies in a handbook. *See Amicus Br.*, at 12, n.1. But WELA rejects its own argument on the basis that Pagliacci's Handbook does not contain such disclaimer.

unilaterality of the arbitration clause, the party had failed to show that the clause was “so ‘one-sided’ and ‘overly harsh’ as to render it substantively unconscionable.” *Id.* (citing *Zuver*, 153 Wn.2d at 319 n.18, 103 P.3d at 767). The agreement was held enforceable. This Court further held that “[a]rbitration is not so clearly more or less fair than litigation that it is unconscionable to give one party the right of forum selection.” *Satomi*, 167 Wn.2d at 816, 225 P.3d at 232 (citing *Willis Flooring, Inc. v. Howard S. Lease Constr. Co. & Assocs.*, 656 P.2d 1184, 1186 (Alaska 1983)).

The Court of Appeals correctly held that Pagliacci’s Little Book of Answers was incorporated by reference into the Employee Relationship Agreement which Burnett signed at the start of his employment. *See Burnett v. Pagliacci, Inc.*, 9 Wn. App. 2d 192, 442 P.3d 1267 (2019). It held that the Pagliacci Employee Relationship Agreement clearly and unequivocally incorporated the Handbook because the agreement directed the employee to read the handbook on his or her own time and required the employee to comply with the rules and policies contained therein. *Burnett*, 9 Wn. App. 2d at 200, 442 P.3d at 1271 (citing *W. Wash. Corp. of Seventh-Day Adventists v. Ferrellgas, Inc.*, 102 Wn. App. 488, 494, 7 P.3d 861 (2000)). Burnett did assent to the policies and rules contained in the Handbook when he signed the Employee Relationship Agreement, and an agreement was properly formed.

D. Burnett Had Reasonable Notice and Opportunity to Understand the Arbitration Provision.

Burnett had a meaningful opportunity to review the terms of the Mandatory Arbitration Policy contained in Pagliacci's Handbook. Where an employee receives a copy of an employee handbook, training, and signs an agreement to comply with such policies, he has a meaningful choice to accept or reject its terms. *See Gaglihari v. Denny's Rest.*, 117 Wn.2d 426, 433-434, 815 P.2d 1362, 1366-67 (1991); *Romney v. Franciscan Med. Grp.*, 128 Wn. App. 728, 738, 349 P.3d 32, 37 (2015).

1. Pagliacci Never Denied Burnett the Opportunity to Review the Handbook Terms.

WELA implies that Pagliacci fraudulently or deceptively denied employees the opportunity to know and understand contractual provisions by placing it in the Handbook and not in a standalone document. *See Amicus Br.*, at 4. Burnett does not raise this argument as a defense. There is no evidence to support this statement or imply that Burnett was deceived simply because the arbitration clause was contained in the employee Handbook. To the contrary, employers like Pagliacci place important terms of employment, such as an Unlawful Harassment Policy, into employee handbooks because it is the primary place employees turn to remind themselves of workplace rules. As this Court has noted, handbooks are important for employees because they afford "the peace of

mind associated with job security and the conviction that he will be treated fairly.” *See Thompson*, 102 Wn.2d at 229-230, 685 P.2d 1087. Pagliacci’s handbook, in particular, is clearly written and easy to understand. The Employee Relationship Agreement states that Burnett is bound by the F.A.I.R. Policy contained in the Handbook, where the Mandatory Arbitration Policy is provided on the very next page. CP 71. Burnett admits he was given a copy of the Handbook and he assented to its terms when he signed the Employee Relationship Agreement. *See* CP 142 at ¶ 8; CP 58. A party must be bound by the terms of an agreement regardless of whether they read them or not. *See Tjart v. Smith Barney, Inc.*, 107 Wn. App. 885, 896, 28 P.3d 823, 829 (2001); *see also Gaglidari*, 117 Wn.2d 435-36, 815 P.2d at 1367-68 (holding that actual receipt of handbook and signed acknowledgment was enough to bind employee). Burnett made no demand for additional time to review the Employee Relationship Agreement or the Handbook, nor does the record show he ever read them.

2. Burnett Knowingly Waived a Trial by Jury When He Agreed to Arbitrate Certain Claims.

WELA cites old Ninth Circuit law to argue that an employee cannot waive their right to a jury trial if there is no express choice to do so. *See Amicus Br.*, at 13 *citing Nelson v. Cyprus Bagdad Copper Corp.*, 119 F.3d 756, 762 (9th Cir. 1997). *Nelson* is inapposite because it applied

a specific standard set forth under Title VII of the Civil Rights Act of 1964 that does not apply in this case. More importantly, in *Adler*, this Court held that a person who knowingly and voluntarily agrees to arbitration implicitly waives the right to a jury trial by agreeing to the alternate forum of arbitration. *Adler*, 153 Wn.2d at 337, 103 P.3d at 777. This Court rejected the idea that an express waiver of a jury trial is required in an agreement to arbitrate. *See Id.*, 153 Wn.2d at 337, 103 P.3d at 777. The agreement to arbitrate is alone sufficient to waive the right to a jury. When Burnett agreed to arbitrate his claims, he implicitly waived this right.

E. The Employee Relationship Agreement and Handbook Repeatedly State that Employees Will be Paid for All Time Worked, Therefore, WELA’s Final Argument is Spurious.

WELA raises a new argument suggesting that Pagliacci committed a criminal act by failing to pay Burnett for reading the Handbook. This argument is without merit and not raised by Burnett himself. This record contains no evidence of any general practice failing to pay employees for reading the handbook. To the contrary, the Employee Relationship Agreement is clear: “You understand that Pagliacci Pizza wants you to be paid for all time you work...” *See* CP 58. It includes the Human Resources Manager’s phone number to call if an employee believes they were asked to work off the clock. The Pagliacci Handbook states: “Pagliacci wants

you to be paid for all time worked, including rest breaks. [...] if your presence at the workplace while not clocked in is at the instruction of your manager (perhaps to attend a crew meeting), you are entitled to be paid for that time.” *See* CP 71 at 14.

There is no evidence that Burnett read or attempted to read the Handbook. He implicitly argues that he did not read it because he did not knowingly assent to arbitration. WELA argues without evidence that it is “exceedingly rare” that an employee will read the contents of an employee handbook before work begins. *See* Amicus Br., at 2. WELA’s contention (a) is not supported by record; (b) is not argued by Burnett, and therefore moot; (c) would create a new, higher standard for arbitration than this Court has held under *Gagliardi* and *Thompson*, therefore impermissibly singling out arbitration.

III. CONCLUSION

WELA requests unique standards for enforcing arbitration agreements contrary to Washington and United States Supreme Court precedent, and raises a payment for time worked issue that is not based on the record. Pagliacci respectfully requests the Court reject the arguments raised by WELA in their entirety.

DATED January 7, 2020.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "Michael W. Droke", written over a horizontal line.

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CERTIFICATE OF SERVICE

I certify that on January 7, 2020, I caused a true copy of the foregoing PETITIONER PAGLIACCI PIZZA, INC.'S RESPONSE TO AMICUS CURIAE BRIEF OF WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION on the following, by the method indicated:

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