

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
1/7/2020 4:29 PM  
BY SUSAN L. CARLSON  
CLERK

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 STATE ASSOCIATION FOR  
JUSTICE FOUNDATION

---

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

*Attorneys for Petitioner Pagliacci Pizza,  
Inc.*

## TABLE OF CONTENTS

	Page
I. INTRODUCTION .....	1
II. ARGUMENT .....	1
A. Not Binding Employees to Employee Handbook Terms Would Create a New Standard for Arbitration Contrary to both Federal and Washington Law. ....	1
B. Terms and Conditions Contained in an Employee Handbook are Binding on Burnett. ....	3
C. Arbitration Agreements Do Not Require Express Explanation or Waiver of Jury Trial. ....	5
D. The Burnett and Pagliacci Arbitration Agreement is Enforceable and Procedurally and Substantively Fair. ....	7
III. CONCLUSION.....	9

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b>Cases</b>	
<i>Adler v. Fred Lind Manor</i> , 153 Wn.2d 331, 103 P.3d 773 (2004).....	3, 5, 6, 9
<i>AT&amp;T Mobility, LLC v. Concepcion</i> , 563 U.S. 333, 131 S. Ct. 1740, 179 L.Ed.2d742 (2011).....	3, 6
<i>Burnett v. Pagliacci, Inc.</i> , 9 Wn. App. 2d 192, 442 P.3d 1267 (2019).....	2
<i>Epic Sys. Corp. v. Lewis</i> , 138 S. Ct. 1612, 200 L.Ed.2d 889 (2018).....	3, 7
<i>Gaglidari v. Denny’s Rest.</i> , 117 Wn.2d 426, 815 P.2d 1362 (1991).....	2, 3, 4, 5
<i>Lamps Plus, Inc. v. Varela</i> , 139 S. Ct. 1407, 203 L.Ed.2d 636 (2019).....	7
<i>Perry v. Thomas</i> , 482 U.S. 483, 107 S. Ct. 2520, 96 L. Ed. 2d 426 (1987).....	6
<i>Retail Clerks Health &amp; Welfare Tr. Funds v. Shopland Supermarket</i> , 96 Wn.2d 939, 640 P.2d 1051 (1982).....	7, 8
<i>Romney v. Franciscan Med. Grp.</i> , 128 Wn. App. 728, 349 P.3d 32 (2015).....	2
<i>Thompson v. St. Regis Paper Co.</i> , 102 Wn.2d 219, 685 P.2d 1081 (1984).....	1, 2, 3, 4
<i>Zuver v. Airtouch Commc’ns</i> , 153 Wn.2d 293, 103 P.3d 753 (2004).....	6, 9
<b>Statutes</b>	
Federal Arbitration Act (FAA) .....	1

**Other Authorities**

Wash. Const. Art. I. § 21 .....6

## I. INTRODUCTION

Both parties pose the initial question presented here as whether a contract was formed when Respondent Burnett signed the Pagliacci Employee Relationship Agreement, and whether the contract could be voided under the general defenses of unconscionability. This is a contract case, not merely a handbook case. Regardless, to hold that only employers are bound by contractual terms of employee handbooks, but not employees, necessarily creates a new standard for arbitration agreements directly contravening this Court's prior rulings, the Federal Arbitration Act (FAA), and United States Supreme Court precedent. Washington's longstanding law enforcing handbooks based on contract formation further support the arbitration consent in this case.

## II. ARGUMENT

### A. **Not Binding Employees to Employee Handbook Terms Would Create a New Standard for Arbitration Contrary to both Federal and Washington Law.**

Washington has long held that employers and employees are bound by terms in employee handbooks. *See Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 685 P.2d 1081 (1984). Obligations can arise under general contract principles of offer, acceptance, and consideration, all present here. *See* Petition for Review at 20; Supplemental Brief of Petitioner at 5-6. Obligations can even arise where an employee and

employer justifiably rely on terms in a handbook based on promises of specific treatment in specific situations. *See Thompson*, 102 Wn.2d at 230, 685 P.2d at 1087.

Pagliacci made myriad promises to Burnett on topics ranging from paid time off to free or reduced food in the Employee Relationship Agreement (“ERA”) and the Little Book of Answers (the “Handbook”). This constituted an agreement under general contract principles. *See Burnett v. Pagliacci, Inc.*, 9 Wn. App. 2d 192, 442 P.3d 1267 (2019).<sup>1</sup>

All parties agree that the terms in the Employee Relationship Agreement and the Handbook are binding on Pagliacci. *See Amicus Br.*, at 11-12; Supplemental Brief of Respondent at 11-12. If Pagliacci is bound by the ERA and the Handbook, then Burnett must also be bound by the arbitration policy. Burnett promised to arbitrate certain claims, either by express agreement and incorporation by reference as the Court of Appeals held, or by Pagliacci justifiably relying on Burnett’s agreement by

---

<sup>1</sup> 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 Gaglidari 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). The Court of Appeals agreed that an agreement was formed when Burnett signed the Employee Relationship Agreement which clearly and unequivocally incorporated the employee Handbook, including the bolded “MANDATORY ARBITRATION” requirement. *Burnett v. Pagliacci, Inc.*, 9 Wn. App. 2d 192, 200, 442 P.3d 1267, 1271 (2019). Moreover, terms of employment that are offered to an employee can be accepted by performance if it is a unilateral contract. *See Amicus Br.*, at 11 (citing *Multicare Med. Ctr. v. State*, 114 Wn.2d 572, 583, 790 P.2d 124 (1990)).

conveying paid time off and other benefits to him. Binding Pagliacci to terms in the Handbook, but allowing Burnett to escape his arbitration duty, necessarily applies a different, higher standard to the arbitration clauses compared to other contract provisions. The United States Supreme Court and this Court have repeatedly rejected that states may create new standards or requirements to apply to arbitration. *See AT&T Mobility, LLC v. Concepcion*, 563 U.S. at 333, 131 S. Ct. at 1742, 179 L.Ed.2d at 742; *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 344 n.6, 103 P.3d 773, 781 (2004). The United States Supreme Court also rejected a defense raised by employees that attacked the bilateral nature of arbitration. *See Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1623, 200 L.Ed.2d 889, 901 (2018). Neither side may cherry-pick the clauses they want to enforce. Both the employer and employee are bound.

**B. Terms and Conditions Contained in an Employee Handbook are Binding on Burnett.**

WSAJ and Burnett contend that case law discussing obligations contained in an employee handbook only address enforcement against an employer. This is simply untrue. This Court held that an employee was contractually bound by terms in an employee handbook, subjecting an employee to immediate termination for violation. *Gaglidari*, 117 Wn.2d at 435, 815 P.2d at 1367; *see also Thompson*, 102 Wn.2d at 229, 685 P.2d at

1087. In *Gaglidari*, the employee signed acknowledgment of an employee handbook she received at the start of her employment. *Gaglidari*, 117 Wn.2d at 428, 815 P.2d at 1364. The handbook provided that fighting on duty was grounds for immediate dismissal. *Id.* Several years later, Gaglidari signed acknowledgment for an alcoholic beverage handbook, which contained that fighting on company premises was grounds for dismissal. *Id.* This Court held that Ms. Gaglidari was contractually bound by the original handbook she signed at the start of her employment. *Id.* at 433-34, 815 P.2d at 1366-67. It further held that the alcoholic beverage handbook modified the terms of her employment, and that Gaglidari was bound by the term not to fight on company premises. *Id.* at 435, 815 P.2d at 1367. Where the employee had notice of the original handbook and the subsequent modification, this Court held there was an enforceable contract. *Id.* at 435, 815 P.2d at 1368. In *Thompson*, this Court held that “the employer’s act in issuing an employee policy manual can lead to obligations that govern the employment relationship.” *Thompson*, 102 Wn.2d at 229, 685 P.2d at 1087 (emphasis added). Thus, simply providing Mr. Burnett the Pagliacci handbook created obligations that “govern the employment relationship,” in this case, requiring arbitration.

Here, Pagliacci employees must adhere to the Unlawful Harassment Policy described on the very same page as Mandatory

Arbitration of the Handbook, or they risk termination of employment. Contrary to WSAJ's argument, policies like an Unlawful Harassment Policy do not just relate to employee performance. *See* Amicus Br., at 13. Such policies give employees the security of working in a safe and non-harassing work environment. Pagliacci further did not amend the ERA or Handbook while Burnett was employed. Unlike *Gaglidari*, the terms Burnett agreed to at the start of his employment remained unchanged throughout his employment. Burnett cannot accept all of the benefits of the ERA and Handbook, yet apply a special rule to the arbitration he seeks to avoid.

**C. Arbitration Agreements Do Not Require Express Explanation or Waiver of Jury Trial.**

This Court has flatly rejected WSAJ's argument that the arbitration clause should be voided because it implies a jury trial waiver. "As to the failure of the arbitration clause to include a jury waiver provision, the 'loss of the right to a jury trial is a necessary and fairly obvious consequence of an agreement to arbitrate.'" *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 337, 103 P.3d 773, 777 (2004) (internal citations omitted). *Adler* continued, 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." *Id.* WSAJ also cites criminal cases involving jury trial

waivers of constitutional rights that do not apply in this civil dispute. *See* Amicus Br., at 13. The right to jury trial can be waived in civil cases, where, like here, there is consent of the parties. Wash. Const. Art. I. § 21. As *Adler* held, the waiver is implicit in an agreement to arbitrate.

There is no reason to overrule *Adler* here. The essence of arbitration is that it changes the forum from civil courts to arbitration. The WSAJ's position would impose a new requirement on arbitration – an express jury waiver – that is absent from prior case law and insufficient to establish procedural or substantive unconscionability. As articulated in *Concepcion*, “[t]he FAA’s saving clause permits agreements to arbitrate to be invalidated by “generally applicable contract defenses, such as fraud, duress, or unconscionability,” but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue. *See Concepcion*, 563 U.S. at 339, 131 S. Ct. at 1746, 179 L.Ed.2d at 751. WSAJ’s argument relies on a defense that derives its meaning directly from the fact that an agreement to arbitrate is at issue. It attempts to use the “uniqueness of agreements to arbitrate” to create a new standard, which has been rejected. *See Zuver v. Airtouch Commc'ns*, 153 Wn.2d 293, 302, 103 P.3d 753, 759 (2004) (citing *Perry v. Thomas*, 482 U.S. 483, 493 n.9, 107 S. Ct. 2520, 96 L. Ed. 2d 426 (1987)). The United States Supreme Court has held that Congress commands courts to enforce,

not override, the terms of arbitration agreements. *See Epic Sys. Corp.*, 138 S. Ct. at 1623, 200 L.Ed.2d at 901. Further, “[...] 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 FAA.” *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1410, 203 L.Ed.2d 636, 636. Further, the savings clause of the FAA recognizes only *defenses* that apply to contracts. *Epic Sys.*, 138 S. Ct. at 1616, 200 L.Ed.2d at 889. A presumption in favor of arbitration to the fullest extent possible is required, and it compels arbitration of Burnett’s claims.

**D. The Burnett and Pagliacci Arbitration Agreement is Enforceable and Procedurally and Substantively Fair.**

WSAJ’s arguments on procedural and substantive unconscionability duplicate Burnett’s own briefing. Burnett had a meaningful choice to accept the terms and conditions of his employment because he received actual notice of the Handbook, he signed an acknowledgment agreeing to comply with the Handbook, and he attended a forty minute to one hour training during a new employee orientation where he was given the Handbook. *See* Supp. Br. of Petitioner, at 8. There is no evidence that Burnett was coerced or forced to sign the Employee Relationship Agreement, nor is there any evidence that Burnett signed under duress. *See Retail Clerks Health & Welfare Tr. Funds v. Shopland*

*Supermarket*, 96 Wn.2d 939, 944, 640 P.2d 1051, 1054 (1982) (duress must result from the other's wrongful or oppressive conduct; that a contract is entered under stress or pecuniary necessity is insufficient). Burnett had access to the Employee Relationship Agreement and Handbook throughout his employment. *See* Petition for Review at 14. He could have asked questions in orientation, or later. He also had the opportunity to choose employment elsewhere, but he did not. *See Id.* These facts do not "shock the conscience" for any provision of the Employee Relationship Agreement or Handbook, particularly not the statutorily-favored arbitration clause.

WSAJ incorrectly contends that the internal dispute resolution requirement limits the ability of an employee or former employee to bring claims against Pagliacci. *See* Amicus Br., at 17. The Pagliacci F.A.I.R. policy has none of the attributes that this Court has found substantively unconscionable. *See* Supplemental Brief of Petitioner at 13-17. To the contrary, courts have and should favor internal resolution processes like the F.A.I.R. Policy. *See Id.* at 15-16. To hold otherwise will flood the courts with lawsuits that could have been resolved informally before filing. The policy was never raised as a defense nor was it a fact or outcome that actually occurred in the case. *See Id.* at 16-17. As this Court wisely warned, if a party to an arbitration agreement could successfully

void the agreement because there was a *possibility* it could be constrained under one term, all contracts would be open to attack. *Zuver*, 153 Wn.2d at 323, 103 P.3d at 770. No such possibility exists here, and this agreement should be enforced.

### III. CONCLUSION

The WSAJ does not accurately frame the issues presented in the underlying case, or and argues for positions either decided by or directly contradicting existing federal and state case law. The ERA and incorporated handbook bound both Pagliacci and Burnett; to hold otherwise subjects arbitration to a unique standard. As *Adler* cautioned, consent to arbitration necessarily includes consent to waive a jury trial. The parties briefed the unconscionability issues at length. Pagliacci respectfully requests the Court reject the arguments raised by WSAJ.

DATED January 7, 2020.

Respectfully submitted,

DORSEY & WHITNEY LLP



---

Michael W. Droke, WSBA #25972  
*Attorney for Petitioner Pagliacci Pizza,  
Inc*

**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 STATE ASSOCIATION FOR JUSTICE FOUNDATION on the following, by the method indicated:

Blythe Chandler  
[bchandler@terrellmarshall.com](mailto:bchandler@terrellmarshall.com)  
Toby J. Marshall  
[tmarshall@terrellmarshall.com](mailto:tmarshall@terrellmarshall.com)  
Erika L. Nusser  
[enusser@terrellmarshall.com](mailto:enusser@terrellmarshall.com)  
Terrell Marshall Law Group  
936 North 34<sup>th</sup> Street, Suite 300  
Seattle, WA 98103

- Via Messenger
- Via Electronic Service
- Via Electronic Mail
- Via U.S. Mail
- Via Overnight Mail

Jason T. Dennett  
[jdennett@tousley.com](mailto:jdennett@tousley.com)  
Tousley Brain Stephens PLLC  
1700 7th Avenue, Suite # 2200  
Seattle, WA 98101

Valerie D. McOmie  
[valeriemcomie@gmail.com](mailto:valeriemcomie@gmail.com)  
4549 NW Aspen Street  
Camas, WA 98607 (360) 852-3332

Daniel E. Huntington  
[danhuntington@richter-wimberley.com](mailto:danhuntington@richter-wimberley.com)  
422 Riverside, Suite 1300  
Spokane, WA 99201

Jeffrey L. Needle  
[jneedlel@wolfenet.com](mailto:jneedlel@wolfenet.com)  
Law Office of Jeffrey L. Needle  
705 Second Avenue, Suite 1050  
Seattle, Washington 98104

Joseph Shaeffer  
[joe@mhb.com](mailto:joe@mhb.com)  
MacDonald Hoague & Bayless  
705 2nd Avenue, Suite 1500  
Seattle, WA 98104

Catharine Morisset  
[cmorisset@fisherphillips.com](mailto:cmorisset@fisherphillips.com)  
Fisher & Phillips LLP  
1201 Third Avenue, #2750  
Seattle, Washington 98101

DATED this 7<sup>th</sup> day of January, 2020.



DORSEY & WHITNEY LLP  
Michael W. Droke WSBA #25972  
Todd S. Fairchild, WSBA #17654  
Jasmine Hui, WSBA #49964  
Columbia Center  
701 Fifth Avenue, Suite 6100  
Seattle, WA 98104  
Telephone: (206) 903-8800

*Attorneys for Petitioner Pagliacci  
Pizza, Inc.*

# DORSEY & WHITNEY LLP

January 07, 2020 - 4:29 PM

## Transmittal Information

**Filed with Court:** Supreme Court  
**Appellate Court Case Number:** 97429-2  
**Appellate Court Case Title:** Steven Burnett, et al. v. Pagliacci Pizza, Inc.

### The following documents have been uploaded:

- 974292\_Other\_20200107162828SC046709\_4177.pdf  
This File Contains:  
Other - Petitioner's Response to Amicus Curiae Brief  
*The Original File Name was Petitioners Resp to Amicus Curiae Brief of WA State Assoc. for Justice Foundation.pdf*

### A copy of the uploaded files will be sent to:

- bchandler@terrellmarshall.com
- cmorisset@fisherphillips.com
- danhuntington@richter-wimberley.com
- enusser@terrellmarshall.com
- fairchild.todd@dorsey.com
- hui.jasmine@dorsey.com
- jdennett@tousley.com
- jmatautia@fisherphillips.com
- jneedlel@wolfenet.com
- joe@mhb.com
- nmorin@tousley.com
- noemiv@mhb.com
- tmarshall@terrellmarshall.com
- valeriemcomie@gmail.com

### Comments:

---

Sender Name: Molly Price - Email: price.molly@dorsey.com

**Filing on Behalf of:** Michael William Droke - Email: droke.michael@dorsey.com (Alternate Email: )

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

**Note: The Filing Id is 20200107162828SC046709**