No. 97429-2
Court of Appeals No. 78356-4-I

IN THE SUPREME COURT OF WASHINGTON

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

Respondent,

v.

PAGLIACCI PIZZA, INC.,

Petitioner.

RESPONDENT'S RESPONSE TO AMICUS CURIAE MEMORANDUM OF WASHINGTON HOSPITALITY ASSOCIATION

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I. INTRODUCTION

The Washington Hospitality Association's Amicus Curiae Memorandum provides no reason for this Court to grant review of the Court of Appeals' well-reasoned decision. The Memorandum is largely based on characterizations of the Court of Appeals' decision that are not supported by any citation to the decision and are inaccurate.

According to the Association, the Court of Appeals so "expanded application" of this Court's well-established unconscionability principles that "it is uncertain how, or even if, employers and employees may agree to alternative dispute resolution." Memorandum at 3. Of course, the Court of Appeals did nothing of the sort. It simply ruled that "the circumstances surrounding the formation of the parties' agreement to arbitrate were procedurally unconscionable." Opinion at 1. Pagliacci presented employees with a one-page Employee Relationship Agreement to sign. The Mandatory Arbitration Policy "is not printed—or even mentioned" in that Agreement. Opinion at 12. "Instead, it is buried in a separate booklet" that employees "did not have a reasonable opportunity to review" before signing the Employee Relationship Agreement. *Id.* Employers can easily avoid any uncertainty about the enforceability of their arbitration clauses created by this ruling by putting them in the documents they give employees to sign.

The Association's argument that the Court of Appeals' substantive unconscionability ruling will discourage the use of informal pre-dispute resolution procedures is similarly alarmist. Pagliacci's Mandatory Arbitration Policy and "F.A.I.R." Policy do not simply require that employees try to resolve disputes informally before resolving a claim. Instead they provide: "If you do not comply with a step, rule or procedure in the F.A.I.R. Policy with respect to a claim, you waive any right to raise the claim in court or any other forum, including arbitration." Opinion at 23. The Association fails to explain how a provision purporting to waive an employee's right to ever bring a claim in any forum is necessary or effective to promote "open workplace relations." Memorandum at 9.

II. RESPONSE TO AMICUS ARGUMENTS

1. The Court of Appeals concluded that Pagliacci's arbitration clause is procedurally unconscionable because it was hidden from employees, not merely because it was part of an adhesive contract.

The Court of Appeals correctly recognized that the fact that an arbitration agreement is presented in an adhesion contract is relevant but does not necessarily make the agreement procedurally unconscionable. "Although not determinative, if an agreement constitutes an adhesion contract, that supports a finding that the agreement is procedurally unconscionable." Opinion at 9 (discussing and quoting *Zuver v. Airtouch*

Comms., 153 Wn.2d 293, 304–305, 103 P.3d 753 (2004)). The court then discussed over ten pages why the presentation of the agreement deprived Mr. Burnett of meaningful choice. Opinion at 9–19. As the court explained, nothing in the Employee Relationship Agreement Mr. Burnett signed "suggests that the [employee handbook] contains an arbitration clause, and even the [employee handbook's] own table of contents describes the section in which the arbitration policy appears as the 'Mutual Fairness *Benefits*' section, giving no indication to the reader that it might contain a one-way arbitration clause." Opinion at 12 (emphasis added by court). On top of that, Mr. Burnett was directed to sign the Employee Relationship Agreement before reading the employee handbook. *Id.* at 19.

The Association's argument that the Court of Appeals "primarily relied upon its conclusion that the agreement was a contract of adhesion, coupled only with the fact that the relevant employee guide containing the clause was provided to the employee on his first day of work and he was told to read it at home," Memorandum at 5, is unpersuasive because it is not accurate. The claim that under the Court of Appeals' decision, "employers are now vulnerable and open to an argument that arbitration agreements in handbooks, or even standalone agreements presented on the first day of employment, can never be enforceable," Memorandum at 6, is equally overstated. The Court of Appeals ruled that an employee was

deprived of meaningful choice about whether to accept an arbitration agreement because the document he signed said nothing about arbitration. To the extent employers needed to be told that hiding arbitration clauses from employees deprives employees of meaningful choice about whether to accept the clauses, the Court of Appeals has done so. Employers who needed to be told to conspicuously disclose arbitration agreements to their employees can adjust their practices accordingly.

The two un-reported authorities citied by the Association have no relevance to the factual or legal issues in this case. In *Oakley v. GMRI*, No. CV-13-042-RHW, 2013 WL 5433350, at *1 (E.D. Wash. Sept. 27, 2013), the employee signed a "Dispute Resolution Process Acknowledgement," which included a full paragraph acknowledging that disputes would be subject to the company's "DRP." The "DRP handbook"—not a general employment handbook—contained additional details about the policy. *Id.* In contrast, the Employee Relationship Agreement Mr. Burnett signed merely said he would "learn and comply with the rules and policies outlines in our Little Book. . . ., including those that relate to . . . FAIR Policy." *See* Opinion at 2; CP 58. And the *Oakley* court did not address the unconscionability arguments raised by the employee because the arbitration clause contained an express delegation clause delegating the issue to the arbitrator. *Id.* at *2. *Turner v. Vulcan, Inc.*, 190 Wn. App.

1048 (2015) (unpublished), is about an arbitration agreement presented in a stand-alone letter that has no relation to the facts of this case. *Id.* at *7. *Turner* simply applied *Tjart v. Smith Barney, Inc.*, 107 Wn. App. 885, 897, 28 P.3d 823 (2002), which the Court of Appeals' Opinion distinguishes at length. *See* Opinion at 12.

2. Pagliacci's F.A.I.R. Policy is not a mere pre-claim dispute resolution procedure.

Nothing in the Court of Appeals' Opinion implies that "any pre-claim mandatory dispute resolution procedure is only advantageous to the employer and 'shocking to the conscience.'" Memorandum at 9. The Opinion does not address "any" internal dispute resolution procedure, it addresses the one Pagliacci actually established. Pagliacci set up a two-step process, where an employee was required to first "report the matter and all details" to his or her supervisor. Opinion at 3. There is no exception for disputes such as sexual harassment by the supervisor, or for former employees who no longer have a supervisor. Second, the employee must initiate non-binding Conciliation. Then, "the F.A.I.R. Administrator will designate a responsible person at Pagliacci (who may be its owner) to meet face-to-face with you in a non-binding Conciliation." *Id.* There is no limit on how long this process may take. Finally the F.A.I.R Policy contains a "Limitations of Actions" section, which bars employees from

bringing a claim in any forum, including arbitration, if the employee does not comply with "a step, rule or procedure in the F.A.I.R. Policy with respect to a claim." *Id.*

The Court of Appeals concluded that these provisions combine to act as "a complete bar to arbitration and suit" for former employees like Mr. Burnett because they cannot complete the first step of reporting to a supervisor. Opinion at 23. The Association does not argue that the plain language of Pagliacci's policies is subject to any other interpretation. And the Association fails to explain why the "valid goal of promoting open workplace relations" requires an informal pre-claim dispute resolution process that wholly deprives employees of their ability to bring a claim if they fail to satisfy a "step, rule or procedure" that is part of such a process. While other processes may benefit employers and employees, the prerequisites to arbitration Pagliacci created "unreasonably favor Pagliacci by limiting employees' access to substantive remedies and discouraging them from pursing valid claims." Opinion at 1–2. The Court of Appeals correctly found these provisions substantively unconscionable as required by this Court's precedent.

III. CONCLUSION

The Association's arguments for accepting Pagliacci's petition for review are no more persuasive than Pagliacci's own arguments. Mr.

Burnett respectfully requests that the Court reject the petition for all the foregoing reasons and for the reasons set forth in his response to the petition.

RESPECTFULLY SUBMITTED AND DATED this 8th day of October, 2019.

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