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Court of Appeals No. 78356-4-I

THE PORTION OF THE REPLY THAT GOES BEYOND THE CONTINGENT ISSUE RAISED IN THE ANSWER TO THE PETITION FOR REVIEW IS STRICKEN

SUPREME COURT OF THE STATE OF WASHINGTON

STEVEN BURNETT, Respondent,

v.

PAGLIACCI PIZZA, INC., Petitioner.

REPLY IN SUPPORT OF PETITION FOR REVIEW

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A. INTRODUCTION

Employee contends that the decision of the Court of Appeals simply follows previous published decisions regarding whether an employee can be required to arbitrate wage-and-hour claims. This assertion is not supported by any court decision citation, and there is no Washington case deciding whether an employer can require its employees to arbitrate wage-and-hour claims. This is an issue of first impression in Washington. It is particularly important given the strong presumption favoring arbitration under Washington and Federal law, which presumption was not mentioned by the Court of Appeals below.

Nor did the Court of Appeals hold in this case that an employer can never require arbitration of wage-and-hour claims. The Court claimed that it was "apply[ing] ordinary contract law" to find that Employee's written agreement to learn and comply with the policies contained in the Handbook was unconscionable, because Employee signed the agreement before he had an opportunity to read the Handbook. Ct. App. Opp. at 12. The Court also held that giving Employee notice of the Handbook on his first day of work did not create a binding contract under this Court's holding in *Gaglidari v. Denny's Rests.*, 117 Wn.2d 426, 815 P.2d 1362 (1991). Ct. App. Opp. at 15.

The Court's rulings conflict with several reported decisions concerning employee handbooks provided to employees after their

employment had already commenced. The conflict apparently resulted from the Court of Appeals applying principles of bilateral contract formation rather than the "unilateral" procedures authorized by this Court in *Gaglidari*. *Id.* at 434-45, 815 P.2d at 1367 ("An employer may unilaterally amend or revoke policies and procedures established in an employee handbook") (citation omitted).

The central issue here is what procedures are required to create an enforceable arbitration agreement through an employee handbook. The Court of Appeals held that handbooks can be used to create policies and procedures binding upon employers, but not upon employees. Ct. App. Op. at 15. That decision conflicts with this Court's ruling in *Gaglidari* that the "contractual" obligations created by a handbook can flow both ways. And for Ms. Gaglidari, that included the obligation not to fight on company premises upon sanction of employment termination.

Employee argues that "arbitration is a matter of consent, not coercion." Answer at 1 (citations omitted). Similarly, the Court of Appeals stated that "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." Ct. App. Op. at 15. In fact, numerous published decisions show that an employer can notify an employee of non-negotiable conditions

of employment which the employee can either accept, by working for the employer after receiving notice, or reject, by choosing to work elsewhere. The Court of Appeals decision directly conflicts with this legal principle, and this Court should accept review to resolve that conflict.

Absent Supreme Court precedent directly addressing mandatory arbitration provisions in employee handbooks, Employee argues that the Court of Appeals should have the last word on the important public policy issues presented here. *See* Answer at 9. But in addition to the unresolved conflicts between the reported decisions, the Court of Appeals opinion raises more questions than it resolves. These questions are essential to all employers and employees in Washington. For example:

- Does an employer need to send a new employee home to read a handbook before the employee begins his first day of work?
- If that is true, then does an employer need to send all existing employees home to read a newly revised employee handbook that will govern their continued, at-will employment?
- Is it *per se* unconscionable to require any form of mediation or informal dispute resolution procedure as a condition to filing an arbitration?

- Could the substantive unconscionability found in this case be avoided by putting a specific time limit on the amount of days or weeks it takes for the informal dispute resolution procedure to be completed?

Without Supreme Court review, employers are left without guidance on these issues, creating unpredictability for employers and employees.

The issues presented for review are too important to be decided in an appeal narrowly focused on one employee and one handbook. Reviewing the published case law, there can be no doubt that employers often present employees with non-negotiable arbitration agreements to sign as a condition of new or continued employment. The Court of Appeals' holdings extend to any arbitration policy required by any contracting party, not just employment-related agreements. Washington employers and contracting parties need to know what procedures are required to create enforceable arbitration agreements, and whether mandatory arbitration policies are like other important policies that employers routinely "impose" upon their employees though handbooks.

B. ARGUMENT

1. The Court of Appeals Decision Conflicts with this Court's Decision in *Gaglidari*

The Court of Appeals held that no enforceable arbitration agreement was formed because Employee did not have an opportunity to read the Handbook before agreeing to abide by its terms. Yet, the relevant facts in *Gaglidari* are virtually identical, and this Court reached the opposite conclusion. Rhonda Gaglidari received one handbook when she was hired in 1980; she received a second handbook in 1986, containing "the provision that fighting on company premises was grounds for immediate dismissal;" she became involved in a fight on company premises in 1987. *Gaglidari*, 117 Wn.2d at 428-29, 815 P.2d 1364. This Court found that Ms. Gaglidari was bound by the terms of both handbooks.

Like Ms. Gaglidari, Employee received the Handbook when hired, signed an agreement stating that he would learn and comply with the rules and policies contained in the Handbook, then worked and accepted myriad benefits under the Handbook for almost two years. Yet the Court of Appeals found no enforceable agreement to arbitrate in that same Handbook.

In an effort to avoid this conflict, Employee argues that "[t]he employer in *Gaglidari* was not trying to bind the *employee* to any obligation; it was defending a breach of contract action by saying that it met

its own obligations under the contract." *See* Answer at 7 (emphasis in original). This argument echoes the Court of Appeals, which stated: "the *Gaglidari* court considered whether a contract was formed between Denny's and Gaglidari solely to determine what, if any, procedures an employer had agreed to follow before terminating an employee and whether the employer had complied with those procedures." Ct. App. Op. at 15.

These statements do not accurately reflect this Court's description of the issue it was deciding or the conclusion it reached. This Court described the issue it was deciding as follows: "Whether the employee handbooks, distributed to plaintiff, for which *she signed an acknowledgment agreeing to abide by their rules and policies* and which contained termination procedures, *created a contract* between defendant and plaintiff." *Gaglidari*, 117 Wn.2d at 432, 815 P.2d at 1365 (emphasis added). This Court then clearly explained why the employee was bound by the terms of those handbooks:

> Plaintiff's receipt of the handbook satisfied the requisites of contract formation. Defendant extended an offer by providing the handbook and training plaintiff on alcoholic beverage service in accordance with the requirements contained in the handbook. Plaintiff accepted the offer by signing for the handbook and participating in the training. The consideration was plaintiff's continuation of her employment.

Id. at 435, 815 P.2d at 1367.

Although the relevant facts in *Gaglidari* are substantially identical to the facts of this case, the Court of Appeals found Employer's Mandatory Arbitration Policy to be unenforceable. According to the Court of Appeals, an agreement to learn and comply with the rules and policies set forth in an employee handbook is procedurally unconscionable if the employee agreed before he had an opportunity to read the handbook. The Court reached this conclusion despite the fact that, for almost two years, Employee enjoyed the benefits and protections of the policies described in the Handbook.

The lynchpin of the Court of Appeals' decision is the fact that Employee signed the Employment Relationship Agreement before he claims he had an opportunity to review the Handbook. The Court held:

> … there is no evidence in the record that [Employee] had a reasonable opportunity to understand the terms contained in the Little Book—and specifically the mandatory arbitration policy—*before* he signed the [Employee Relationship Agreement]. Instead, the record reflects that [Employee] was not afforded an opportunity to review the Little Book *before* signing the ERA: [Employee] testified that he was told to sign the ERA to begin work and instructed to read the Little Book at home. … [W]e conclude that [Employee] lacked meaningful choice in agreeing to arbitrate, and thus the circumstances surrounding the formation of the parties' arbitration agreement were procedurally unconscionable.

Ct. App. Op. at 11. The Court further held: "it is irrelevant that the mandatory arbitration policy was available to Burnett after he signed the ERA if he did not have a reasonable opportunity to review it before he signed the ERA into which it was incorporated." Ct. App. Op. at 12.

The Court's ruling directly conflicts with *Gaglidari*, where the employee had been employed by Denny's Restaurants for six years before she was presented with the new employee handbook. Like Employee here, Ms. Gaglidari necessarily reviewed the new handbook *after* her employment began, not before. She accepted her employer's offer by "signing for the handbook," and the consideration was the "continuation" of her at-will employment. *Gaglidari*, at 435, 815 P.2d at 1367. Whether she actually read the handbook before "signing for [it]" is not discussed in the opinion. This Court was clear that Ms. Gaglidari's agreement to comply with the new handbook was a condition of her continued employment – just like Employee here.

2. The Court of Appeals Decision Conflicts with Other Published Decisions

The Court of Appeals ruling conflicts with other published decisions in several respects. First, the Court's emphasis on when Employee signed the Employee Relationship Agreement is misplaced, because signing a written document is not essential under Washington law. "A party may consent to arbitration without signing an arbitration clause, just as a party may consent to the formation of a contract without signing a written document." *Romney v. Franciscan Med. Grp.*, 186 Wn. App. 728, 747, 349 P.3d 32, 42 (2015) (citation omitted); accord *Marcus & Millichap Real*

Estate Inv. Servs. of Seattle, Inc. v. Yates, Wood & MacDonald, Inc., 192 Wn. App. 465, 474-75, 369 P.3d 503, 507 (2016) (holding that voluntary membership in a professional organization established assent to an arbitration agreement contained in the organization's bylaws).

This principle is particularly relevant in an at-will employment relationship, where either party is free to terminate if they are not satisfied with the available terms and conditions. That is why Washington courts have emphasized the need for "reasonable notice" rather than a signature. "Actual notice is reasonable notice." *Govier*, 91 Wn. App. at 502, 957 P.2d at 817, citing *Gaglidari*, 117 Wn.2d at 435 (other citations omitted).

In this case, Employee received actual notice of the Handbook and he had the same "meaningful choice" as the employees in *Gaglidari* and other cases: he could either accept the offered terms of employment, or "choose employment elsewhere." *Romney*, 186 Wn. App. at 740, 349 P.3d at 38.

The Court of Appeals decision also conflicts with decisions showing that it is not necessary for an employee to read a handbook before his first day of work. *See Gaglidari* (employee bound by the terms of a handbook she received six years after her employment began); *Tjart v. Smith Barney, Inc.*, 107 Wn. App. 885, 896 28 P.3d 823, 829 (2001) (employee bound by arbitration agreement she was "told to sign" after her employment began);

Govier v. N. Sound Bank, 91 Wn. App. 493, 504-05, 957 P.2d 811, 818 (1998) (employer could lawfully modify the terms of plaintiff's employment two years after her employment began; employee's option was to accept the new terms or resign).

This Court should grant review to address the substantial conflict between the Court of Appeals decision and other published cases where employers "imposed" new or modified terms of employment on their employees as a condition of their employment.

3. *Mattingly* Does Not Resolve the Many Conflicts Between the Court of Appeals Decision and Other Published Decisions

Like the Court of Appeals, Employee relies heavily upon *Mattingly v. Palmer Ridge Homes*, LLC, 157 Wn. App. 376, 238 P.3d 505 (2010). But that case does not resolve the conflicting decisions or address the important issues of public interest presented here. *Mattingly* is easily distinguishable because it does not concern any type of terminable-at-will contractual relationship. It concerned a typical bilateral contract where neither party was free to "walk away" after the agreement was signed. Nor does *Mattingly* concern employment agreements, employee handbooks or arbitration agreements.

The plaintiffs in *Mattingly* signed a land purchase and construction agreement where they agreed to pay the defendant $563,750 to construct a

new home. They could not simply walk away from that contract, as Employee was free to do in this case. CP 58 (employment expressly agreed to be "at will"). One reason why employers can "unilaterally" impose rules and policies on "at will" employees, and also change those policies after the employment begins, is because at will employees are free to terminate the relationship. *See Gaglidari*, 117 Wn.2d at 433, 815 P.2d at 1366.

A second important distinction is that Employee received the Handbook when employment began. The Mattinglys did not receive the "booklet" limiting their warranties until after the land purchase and construction agreement had "closed," and they were obligated to pay $563,750 to the defendant. *Mattingly*, 157 Wn. App. at 382-383, 238 P.3d at 507-508. The *Mattingly* Court held that "documents incorporated by reference usually must be reasonably available, at the least, so that the essentials of a contract can be discerned by the signer." *Mattingly*, 157 Wn. App. at 392, 238 P.3d at 512. The Handbook here was not just "reasonably available." It was in Employee's possession throughout his employment. CP 142.

Because *Mattingly* does not concern an "at will" contractual relationship, it does not address the principles of *unilateral* contract formation discussed in *Gaglidari* and related cases. *Gaglidari*, 117 Wn.2d at 432-34, 815 P.2d at 1366-67; *see Cascade Auto Glass, Inc. v. Progressive*

Cas. Ins. Co., 135 Wn. App. 760, 145 P.3d 1253 (2006) (applying the legal principle described in *Gaglidari* to a terminable-at-will auto repair pricing agreement).

4. Employee's Other Arguments Should Not Prevent Review

Employee argues that there is no conflict between the decision in this case and the published opinion in *Tjart v. Smith Barney, Inc.*, 107 Wn. App. 885, 28 P.3d 823 (2001). According to Employee, the two decisions are factually distinguishable because "[i]n *Tjart*, the employee signed the document that contained the arbitration clause. In contrast, [Employee] signed [Employer's] Employment Relationship Agreement, which does not even use the word arbitration." Answer at 9 (citation omitted).

If this argument were correct, then this Court would not have found a binding contract in *Gaglidari*. Ms. Gaglidari did not sign the handbook containing the 'no fighting' provision. She simply signed "a form acknowledging receipt of the manual and agreeing to abide by the rules." *Gaglidari*, 117 Wn.2d at 428-29, 815 P.2d 1364. The facts are virtually identical here, where Employee signed a one-page employment agreement where he expressly agreed to "learn and comply with the rules and policies outlined in" the Handbook. CP 58.

Employee also argues that the Court of Appeals applied "well-established standards" regarding "one-sided" arbitration agreements. Answer at 10. To the contrary, the Court's decision conflicts with existing precedent holding that parties to an agreement are not required to have "identical" or "mirror" obligations. *Zuver v. Airtouch Commc'ns, Inc.*, 153 Wn.2d 293, 317, 103 P.3d 753, 766-67 (2004); *Romney*, 186 Wn. App. at 742, 349 P.3d at 39. "Washington courts have long held that mutuality of obligation means both parties are bound to perform the contract's terms—not that both parties have identical requirements." *Zuver*, 153 Wn.2d at 317, 103 P.3d at 766-767 (citations omitted).

Here, the Handbook obligated Employer to provide numerous benefits and protections to Employee, including paid time off, available medical insurance, employee discounts, and a 401k retirement plan with Employer matching. CP 66-69. The Court of Appeals decision conflicts with *Zuver* and other reported decisions.

5. Employer Did Not Waive Any Argument Presented in the Petition for Review

Employee has argued at every level that Employer somehow waived certain arguments. Employee's argument was rejected by both the Superior Court and by the Court of Appeals, both of which addressed all of Employer's arguments on the merits. In essence, Employee objects to the

fact that Employer has at times cited additional case law in support of arguments made in an earlier brief, or has responded in a reply brief to an argument raised for the first time by Employee in an opposition brief. Neither of those constitutes a waiver. *See Wilcox v. Lexington Eye Inst.*, 128 Wn. App. 234, 241, 122 P.3d 729, 732 (2005) (holding that a new legal theory based on the same evidence could be raised for the first time in a motion for reconsideration).

In any event, Employee's waiver argument has no relevance at this stage, where the issues and arguments heard and decided by the Court of Appeals are clearly identified in its published decision. Employer's petition for review concerns the findings and conclusions contained within the four corners of that decision.

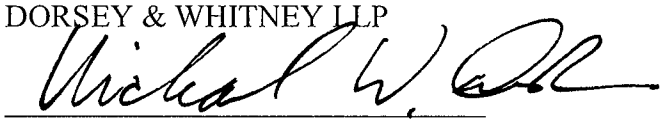
C. CONCLUSION

This Court should accept review for the reasons set forth above and in the Petition for Review.

DATED this 27th day of August, 2019.

Respectfully submitted,

DORSEY & WHITNEY LLP



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