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Employment Law Alert

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Miller Law Group Secures Big Win for Employers in California

In a published decision and a win for employers that use arbitration agreements, the District Court for the Northern District of California has upheld an arbitration agreement over an employee's claims that the agreement did not meet California standards for the arbitration of discrimination claims and was an unlawful contract of adhesion. The case is *Cornejo v. Spenger's Fresh Fish Grotto* (N.D. Cal. May 17, 2010) 2010 U.S. Dist. LEXIS 48354. Miller Law Group attorneys Janine Simerly, Claudia Castillo, and Noah Levin represented Spenger's and its parent company McCormick and Schmick Restaurant Corp. (collectively, M&S) on its motion to compel arbitration.

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Ivan Cornejo, a busboy at Spenger's Fresh Fish Grotto in Berkeley, CA, sued M&S contending that he was racially harassed by his managers and co-workers and that the restaurant failed to accommodate his disability. He also alleged that the restaurant terminated his employment in retaliation for his discrimination complaint to the California Department of Fair Employment and Housing.

M&S filed a motion to compel arbitration, based on an Agreement to Arbitrate Disputes entered into between M&S and Cornejo. Cornejo opposed the motion, arguing that the agreement was not enforceable under California law because, among other things, it did not meet the legal requirements for arbitration of California Fair Employment and Housing Act (FEHA) claims as set forth in *Armendariz v. Foundation Health Psychcare Services* (2000) 24 Cal. 4th 83, and it was unconscionable.

The arbitration agreement at issue stated, in relevant part: "[T]he Parties agree that all disputes relating to their employment relationship or the termination of that relationship that are not resolved informally (or through conciliation of claims filed before the Equal Employment Opportunity Commission ("EEOC") or a state Fair Employment practices Agency), shall be fully and finally resolved exclusively by binding arbitration as set forth in this Agreement." The agreement also specified that arbitration proceedings would be conducted in accordance with the National Rules for the Resolution of Employment Disputes of the American Arbitration Association (AAA), and provided for a neutral arbitrator whose decision "shall be final and binding and is not subject to appeal."

Under *Armendariz*, agreements to arbitrate FEHA claims are permitted so long as the agreement allows the employee to vindicate all of their FEHA rights. In particular, an arbitration agreement must make these rights available to an employee: no limitation of remedies; adequate discovery; a written arbitration award and judicial review; no unreasonable costs or arbitration fees required of the employee; and, a neutral arbitrator. Here, Cornejo argued that the *Armendariz* standard was not satisfied because the arbitration agreement did not provide for a written arbitration award or judicial review.

The district court, however, found that the agreement complied with *Armendariz*. First, by incorporating the AAA arbitration rules -- which specify that awards shall be in writing -- the arbitration agreement implicitly required a written arbitration award. Second, the district court explained that *Armendariz* does not require judicial review of the merits of the decision, but only review of certain types of procedural unfairness in the arbitration proceedings that would be available to an employee under Cal. Civ. Code § 1286.2. The agreement here did not foreclose this procedural judicial review.

With respect to whether the agreement was unconscionable, the district court explained that an agreement that is both substantively and procedurally unconscionable will be invalidated. Some degree of unconscionability, however, can be tolerated: "[T]he more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa."

Cornejo argued that the agreement was procedurally unconscionable in that he was required to sign it, as is, and did not understand some of the terms. The court, holding that the degree of procedural unconscionability was low, pointed out that the agreement was a stand-alone, clearly labeled document, provided in Cornejo's first language (Spanish), and gave Cornejo the necessary procedural notice regarding the waivers it contained. What is more, Cornejo's signature on the agreement indicated that he was provided with an opportunity to review the agreement.

The court went on to explain that substantive unconscionability may be found where an agreement does not satisfy the *Armendariz* requirements or is "unfairly tilted" in the employer's favor. Here, the agreement satisfied *Armendariz*. And, the court concluded, it

was not one-sided because it provided that *all* employment disputes between Cornejo and M&S be submitted to arbitration, regardless of which party instituted the proceedings.

This decision underscores that careful drafting is key to the enforceability of arbitration agreements. Employers should ensure that agreements satisfy the *Armendariz* requirements, are fair and balanced, are written in plain language so that employees understand the terms, and that employees are given a full opportunity to review the agreement before signing.

Miller Law Group exclusively represents business in all aspects of California employment law, specializing in litigation, risk management, wage and hour class actions, ERISA litigation, and appellate law. If you have questions about this new development or your workplace obligations, please contact Michele Ballard Miller (mbm@millerlawgroup.com) or Carolyn Rashby (cr@millerlawgroup.com), or call (415) 464-4300. To learn more about our firm, visit our website at www.millerlawgroup.com.

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