CASE STUDY PREPARED FROM ORIGINAL PUBLISHED OPINION

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Wisdom v Accentcare, Inc. 1/3/12

Unconscionable terms; Mandatory Arbitration; Employment Agreement

Plaintiffs were employed by defendant AccentCare as on call staffing coordinators. They were required to respond to an off-hour call within 20 minutes. Plaintiffs filed a complaint for damages, alleging they were not paid for all of the overtime and time they spent handling off-hour calls. They stated causes of action for breach of implied contract, violation of Labor Code sections relating to the failure to pay wages and provide an accurate wage statement and other claims.

Four of the six plaintiffs signed acknowledgment forms when they applied for employment with AccentCare. The acknowledgment was the last page of an application form that AccentCare gave plaintiffs, along with several other forms, when they applied for a job. The last page of the form consisted of five initialed paragraphs and a signature at the bottom. The heading directed: "Acknowledge Your Understanding of the following Statements and Agreements by Placing Your Initials by Each Paragraph, then Sign and Date Below." The third of the five paragraphs was an arbitration agreement.

Plaintiffs did not negotiate the terms of the application form, nor were the provisions explained to them. They were not told that their signature on the form was optional, nor were they aware of the consequences of signing a binding arbitration agreement. By contrast, another plaintiff signed a different, two-page arbitration agreement when she was hired. The agreement provided that in exchange for her agreement to arbitrate, AccentCare also agreed to submit all claims and disputes to final and binding arbitration. Two of the plaintiffs did not sign any arbitration agreement. Defendants brought a motion to compel

arbitration of the claims asserted by the four plaintiffs. The trial court denied the motion. It found the agreements were procedurally and substantively unconscionable. Defendants brought this appeal.

The key issue put to the Third District Court of Appeal was whether the arbitration agreement was unconscionable. The Justices began by noting that both a procedural and substantive element of unconscionability must be present before a court may exercise its discretion to refuse to enforce an agreement. (*Armendariz v Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83) Although both elements must be present, they need not be present to the same degree. Essentially a sliding scale is invoked which disregards the regularity of the procedural process of the contract formation that creates the terms, in proportion to the greater harshness or unreasonableness of the substantive terms themselves. In other words, the 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.

An agreement is procedurally unconscionable if there was oppression or surprise due to unequal bargaining power. (*Little v Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064) A contract of adhesion is one which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it. As explained in *Armendariz*, there is little dispute that an arbitration agreement imposed on employees as a condition of employment without the opportunity for negotiation is adhesive. In many cases the arbitration agreement stands between the employee and necessary employment, and few employees are in a position to refuse a job because of an arbitration requirement. (*Armendariz*, at p. 115)

The Third DCA agreed with the trial court that there is evidence of procedural unconscionability here. The contract was adhesive and oppressive. There was unequal bargaining power. The agreement itself implied there was no opportunity to negotiate its terms. Although the agreement stated the arbitration was to be completed under the rules of the American Arbitration Association, the rules were not attached. The employee is forced to go to another source to find out the full import of what he or she is about to sign. Numerous cases have held that the failure to provide a copy of the arbitration rules to which the employee

would be bound, supported a finding of procedural unconscionability. (*Trivedi v Curexo Technology Corp.* (2010) 189 Cal.App.4th 387)

Here, even though the plaintiffs undoubtedly saw the arbitration paragraph when they initialed it, their declarations state they did not know what "binding arbitration" meant. No one explained it to them, and they were unaware they were giving up their right to trial. There is no evidence plaintiffs were sophisticated in legal matters. Combined with the take-it-or-leave-it circumstances surrounding the application for employment, there is a strong showing of procedural unconscionability.

The substantive element of unconscionability means that the agreement is overly harsh or one sided. (*Wherry v Award, Inc.* (2011) 192 Cal.App.4th 1242) In the context of an arbitration agreement imposed by an employer on an employee, a lack of mutuality renders a contract substantively unconscionable. (*Armendariz*, at p. 118) Given the disadvantages that may exist for plaintiffs arbitrating disputes, it is unfairly one-sided for an employer with superior bargaining power to impose arbitration on the employee as plaintiff but not to accept such limitations when it seeks to prosecute a claim against the employee, without at least some reasonable justification for such one-sidedness based on business realities. (*Armendariz*, at p. 118)

In this agreement, the phrases "I hereby agree," "I further agree," and "I agree" indicate only one party is agreeing to submit all disputes to arbitration, and that party is the one whose signature appears at the bottom of the form. The one-sidedness of the agreement is highlighted by the language of the Arbitration Agreement signed by another plaintiff wherein both she and AccentCare "agree to forego any right we each may have had to a a jury trial on these clams or disputes…" It concluded, "I further acknowledge that in exchange for my agreement to arbitrate, AccentCare, Inc. also agrees to submit all claims and disputes it may have with me to final and binding arbitration…" This language clearly demonstrates defendants knew how to draft a bilateral agreement.

In the cases cited, the use of bilateral language is evident, as in, "…I understand by agreeing to this binding arbitration provision, both I and the Company give up our rights to trial by jury." (*Little*, at p. 1070) There is no similar

language in the agreement at issue here. The arbitration language in the acknowledgment signed by plaintiffs did not create mutual obligations. This, combined with the elements of procedural unconscionability present in the circumstances of the execution of the agreement compel the conclusion that the arbitration agreement was unenforceable. The judgment is affirmed. Costs are awarded to plaintiffs.

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