



July 21, 2011

Employer's Arbitration Agreement is Unenforceable Where it is Both Procedurally and Substantively Unconscionable

Sharon Elizabeth Zullo v. The Superior Court of Santa Clara County
Court of Appeal, Sixth District (July 12, 2011)

Employers have the right to require employees to sign arbitration agreements as a condition of employment. Courts, however, have placed certain restrictions on those agreements, without which the agreements may be unenforceable. In this case, the court found that the arbitration agreement was unenforceable.

In 2004, Inland Valley Publishing Co. ("Inland"), the publisher of a weekly newspaper, hired Sharon Zullo. She sued Inland for wrongful termination in violation of California's Fair Employment and Housing Act ("FEHA"), alleging that her supervisor discriminated against her based on her race and national origin, and that her termination occurred after complaining about the treatment. Inland petitioned to compel arbitration based on an arbitration policy in its Employee Handbook. The policy stated that disputes arising out of employee termination, or claims for discrimination, must be submitted to binding arbitration. Ms. Zullo argued that the arbitration agreement was unconscionable and, therefore, unenforceable. However, the trial court granted the motion to compel arbitration.

The Court of Appeal agreed with Ms. Zullo. The invalidity of an arbitration agreement may be proved based on unconscionability. Both procedural and substantive unconscionability must be present to invalidate a contract. However, they need not be present in equal parts. The *procedural* element focuses on the manner in which the agreement was entered into. The court will consider whether the



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agreement was entered into because of "oppression" or "surprise." The *substantive* element refers to overly harsh or unjustifiable one-sided results.

Here, the purported agreement was actually an employer policy, implemented like other policies in the handbook, on a "take it or leave it" basis. It failed to give adequate notice of applicable arbitration rules, allowed Inland a full range of remedies while limiting Ms. Zullo to binding arbitration, and imposed time limits on Ms. Zullo without imposing similar limits on Inland. Thus, the Court of Appeal found that the agreement was unconscionable and unenforceable.

COMMENT

An arbitration agreement will be set aside if it is both procedurally and substantively unconscionable. Where an agreement is found to be procedurally unconscionable, a sliding scale is applied based upon the degree of substantive unfairness. This means that an agreement that has been imposed on an employee may still be enforceable if the terms and requirements of the agreement are mutual, and apply equally to both the employee and the employer.

For a copy of the complete decision see:

[HTTP://WWW.LOWBALL.COM/WWW.COURTINFO.CA.GOV/OPINIONS/DOCUMENTS/H036242.PDF](http://www.lowball.com/www.courtinfo.ca.gov/opinions/documents/H036242.pdf)

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