

When A Gardener Cannot Be Required To Arbitrate: Court Of Appeal Affirms Trial Court Ruling That Employment Agreement Entered Into By Gardener, Who Spoke Limited English, Was Procedurally And Substantively Unconscionable, Such That Arbitration Could Not Be Imposed

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As many know, there has been an enormous amount of employment litigation in California. One measure that employers have taken to protect themselves is to require that employees sign employment agreements, which require arbitration (and a waiver of a jury trial), as a prerequisite to being hired. The Courts, as discussed in *The Morrison Law Journal*, have been reluctant to enforce arbitration agreements, at least in the employment context, where there is any significant issue of procedural or substantive unconscionability.

That trend is continuing.

In *Jose Merced Nunez v. Cycad Management, LLC* (2022) Westlaw 1099059 ("Nunez case"), the California Court of Appeal, Second Appellate District, affirmed a Trial Court's refusal to order a civil lawsuit into arbitration.

The Nunez case involved Jose Merced Nunez ("Nunez"), a gardener with Cycad Management, LLC ("Cycad"). Nunez was hired as a gardener in 2018. As a condition to being hired by Cycad, Mr. Nunez was required to sign an employment agreement that mandated arbitration of "all disputes between Employee and Company relating, in any manner whatsoever, to the employment or termination" of the employee. The agreement to arbitrate encompassed wage, tort, statutory, discrimination, and contract claims. The agreement to arbitrate limited discovery to "three depositions and an aggregate of thirty (30) discovery requests of any kind, including sub-parts." The agreement also provided that the arbitrator would be empowered to award attorney's fees against the employee.

Nunez filed suit against Cycad on August 27, 2019. Cycad answered the Complaint and initiated discovery. In April 2020, Cycad's attorney found the employment agreement and demanded arbitration. Cycad then filed a Motion to Stay Litigation and Compel Arbitration. Nunez opposed Cycad's Motion. Nunez argued that he had not had a reasonable opportunity to review the employment agreement as he spoke only limited English and had not been given a Spanish version of the agreement (or have a family member or friend review it with him). Cycad agreed that the signing of the employment agreement was a condition of employment, but argued that Nunez had been given a reasonable opportunity to read the agreement. The Trial Court ruled the agreement was procedurally unconscionable because it was presented to Mr. Nunez in a manner that rendered it a contract of adhesion. The Trial Court also ruled that the agreement was

substantively unconscionable because the agreement unfairly assigned arbitration fees and costs to Nunez, and imposed limitations on discovery.

The employer appealed. The Court of Appeal affirmed. The Court of Appeal noted that the employer had superior bargaining power and accepted Nunez' argument that he had not had an adequate opportunity to review the agreement (particularly because it was in not in Spanish). The Court of Appeal also affirmed on the basis that the agreement was unenforceable because it enabled the arbitrator to impose on Nunez all attorney's fees, plus filing, administrative fees, and arbitration fees.

The Nunez case marks another reminder of how important it is, at least in the employment context, to have the employer provide a reasonable opportunity to the employee to fully review and understand the employment agreement - where it imposes arbitration. In addition, employers who attempt to impose limitations on discovery and to allow arbitrators to "cost shift", may be precluded from doing so.

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