

## A Survey Of Employment Arbitration Clause Cases

*Law360, New York (April 06, 2011, 1:55 PM ET)* -- One area that always gets the attention of the labor and employment bar is that of arbitration clauses. Not surprisingly, there were a few cases at the appellate and Supreme Court level that touched on this topic.

In *City of Richmond v. SEIU Local 1021* (2010) 189 Cal.App.4th 663 (hereinafter *Richmond*), a city employee was terminated for alleged sexual harassment. After the employee denied the harassment and contested his termination, the dispute went to arbitration as required by a collective bargaining agreement (CBA).

The arbitrator found for the employee, finding the sexual harassment charge time-barred because the city failed to take action within six months of learning of the alleged misconduct as required by the CBA. After the city petitioned to have the award vacated, the trial court granted the request on public policy grounds. The Court of Appeal reversed. *Id.* at 665-666.

The *Richmond* court emphasized that “[t]here is a ‘strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution.’” *Richmond*, 189 Cal. App.4th at 669, quoting *Moncharsh v. Heily & Blase* (1992) 3 Cal. 4th 1, 9.

Moreover, “[b]ecause the decision to arbitrate grievances evinces the parties’ intent to bypass the judicial system and thus avoid potential delays at the trial and appellate levels, arbitral finality is a core component of the parties’ agreement to submit to arbitration.” *Moncharsh*, 3 Cal. 4th at 10.

In this particular case, “[none of the] specified statutory grounds for vacating or correcting an arbitration award ... [were] applicable.” *Richmond*, 189 Cal. App. 4th at 669.

Also significant was that the arbitration award came pursuant to a collective bargaining agreement. “In reviewing arbitration awards in the labor-management field, courts are generally more restricted in their power to vacate than in other types of arbitration.” *Id.* at 670, quoting *Social Services Union v. Alameda County Training & Employment Bd.* (1989) 207 Cal. App. 3d 1458, 1464.

While one cannot ignore the strong public policy against sexual harassment in the workplace in both state and federal law (See Gov. Code, § 12920; 42 U.S.C. § 2000e-2(a)(1), 29 C.F.R. § 1604.11(a)), “[t]he relevant question ... is not whether there is a public policy against sexual harassment generally but whether according finality to the arbitrator’s decision would be incompatible with that public policy.” Richmond, 189 Cal. App. 4th at 671; Moncharsh, supra, 3 Cal. 4th at 33.

Here, the public policy against sexual harassment is not enough to prevent the reinstatement of the accused harasser “where the accusations are time-barred under a negotiated and reasonable limitation period.” Richmond, 189 Cal. App. 4th at 671.

While Richmond upheld the arbitrator’s award, in Pearson Dental Supplies v. Superior Court (2010) 48 Cal. 4th 665 (hereinafter Pearson) the California Supreme court vacated the arbitrator’s decision granting summary judgment for defendant in a case that addressed the conflict between case law holding that “a court is not permitted to vacate an arbitration award when the award is based on errors of law” (Id. at 669; see also Moncharsh, supra, 3 Cal. 4th at 25, 28), and decisions that “have indicated that the scope of judicial review may be somewhat greater in the case of a mandatory employment arbitration agreement that encompasses an employee’s unwaivable statutory rights.” Pearson, 48 Cal. 4th at 669; see also Armendariz v. Foundation Health Psychcare Services Inc. (2000) 24 Cal. 4th 83, 106-107.

In Pearson, the plaintiff sued Pearson Dental, alleging age discrimination in violation of California's Fair Employment and Housing Act. Pearson Dental eventually brought a motion to compel arbitration, and after the parties agreed on an arbitrator, successfully brought a motion for summary judgment “on the grounds that the claim was time-barred under the one-year contractual deadline for requesting arbitration.” Pearson, 48 Cal. 4th at 669.

Because the arbitrator misapplied the applicable tolling statute, the trial court vacated the arbitrator’s award. The Court of Appeal reversed, holding that the arbitrator’s error was not a valid ground on which to vacate the award.

The Supreme Court agreed with both lower courts that the arbitrator had made a clear error in finding the plaintiff’s claim was time barred. The court also noted, though, that neither Moncharsh, nor Armendariz, dealt directly with the question presented here: “[T]he proper standard of judicial review of arbitration awards arising from mandatory arbitration employment agreements that arbitrate claims asserting the employee’s unwaivable statutory rights.” Pearson, 48 Cal. 4th at 679.

Pearson presented a perfect example of what would happen if a procedural error was allowed to stand and a plaintiff, through no fault of his own, would thus be unable to get a hearing in any forum on the merits of his or her FEHA claims.

The court, therefore, held that “when ... an employee subject to a mandatory employment arbitration agreement is unable to obtain a hearing on the merits of his FEHA claims, or claims based on other unwaivable statutory rights, because of an arbitration award based on legal error, the trial court does not err in vacating the award.” Pearson, 48 Cal.4th at 680.

Put another way, “an arbitrator whose legal error has barred an employee subject to a mandatory arbitration agreement from obtaining a hearing on the merits of a claim based on such right has exceeded his or her powers within the meaning of Code of Civil Procedure Section 1286.2, subdivision (a)(4), and the arbitrator's award may properly be vacated.” *Id.*

Then there is *Trivedi v. Curexo* (2010), 189 Cal.App.4th 387. *Trivedi* sued *Curexo Technology Corp.* for claims that arose out of *Trivedi*'s termination as *Curexo*'s president and CEO. *Curexo*, pursuant to its employment agreement with *Trivedi*, brought a motion to compel arbitration.

*Trivedi*, though, asked the court to stay enforcement of the clause claiming unconscionability. *Curexo* sought to have the clause enforced, or, at minimum, sever the offending provisions and enforce the rest. The trial court, finding the arbitration clause procedurally and substantively unconscionable denied *Curexo*'s motion and refused to sever out the problematic provisions. The Court of Appeal affirmed. *Id.* at 390.

“Procedural unconscionability occurs when the stronger party drafts the contract and presents it to the weaker party on a ‘take it or leave it basis.’” *Trivedi*, 189 Cal. App. 4th at 393, quoting *Armendariz*, *supra*, 24 Cal. 4th at 113-114.

Because the evidence substantially supported the trial court's findings that “the [arbitration] agreement was prepared by [*Curexo*], it was a mandatory part of the agreement and [*Trivedi*] was not given a copy of the American Arbitration Association Rules” (*Trivedi*, 189 Cal. App. 4th at 393), the finding of procedural unconscionability was correct.

Substantively, the court took issue with the fact that the arbitration clause contained a mandatory attorneys' fee provision for the “prevailing party,” even though FEHA case law holds that a defendant can recover fees only when the plaintiff's claims “are found to be ‘frivolous, unreasonable, without foundation or brought in bad faith.’” *Trivedi*, 189 Cal. App. 4th at 394, quoting *Christiansburg Garment Co. v. EEOC* (1978) 434 U.S. 412, 416-417, 421-422; see also *Chavez v. City of Los Angeles* (2010) 47 Cal. 4th 970, 985.

Although AAA rules require the arbitrator to award attorneys' fees and costs “in accordance with applicable law,” and AAA rules would control in the case of any material inconsistency between the arbitration agreement and the AAA rules, the court did not find this argument persuasive given that the attorneys' fees clause was contrary to FEHA, and, just as importantly, the AAA rules had never been provided to the plaintiff. *Trivedi*, 189 Cal.App.4th at 395-396; see also *Fitz v. NCR Corp.* (2004) 118 Cal. App. 4th 702, 721.

Because “enforcing the arbitration clause and compelling *Trivedi* to arbitrate his FEHA claims lessens his incentive to pursue claims deemed important to the public interest, and weakens the legal protection provided to plaintiffs who bring nonfrivolous actions from being assessed fees and costs[,]” the court agreed with the trial court's determination that the clause was substantively unconscionable. *Trivedi*, 189 Cal. App. 4th at 395.

The Court of Appeal court also agreed with the trial court that, because the provision for injunctive relief “allows for broader relief than does [Code of Civil Procedure section 1281.8(b)], and because Curexo is more likely to invoke the remedy of injunctive relief, the provision favors it over Trivedi, and is [substantively] unconscionable.” Trivedi, 189 Cal. App. 4th at 396-397.

The court also rejected Curexo’s request to sever out the offending provisions from the arbitration agreement and enforce the remainder. With two different grounds for substantive unconscionability, including the significant change as to the recovery of attorney’s fees and costs, the agreement was “permeate[d] with unconscionability.” Id. at 398; Armendariz, 24 Cal.4th at 122.

Moreover, these substantive defects, along “with the procedural unconscionability underlying its formation, leads us to conclude that to enforce the agreement would, in practical effect, ‘impose arbitration on an employee ... as an inferior forum that works to the employer’s advantage.’” Trivedi, 189 Cal. App. 4th at 398, quoting Armendariz, 24 Cal. 4th at 124.

As it is not unusual for arbitration clauses in employment contracts to incorporate AAA rules and “prevailing party” attorneys’ fees clauses, not to mention employers not in the habit of passing out AAA rules to each and every employee, the Trivedi decision is significant and one that employers need to pay particular attention to.

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