

Arbitration Provision in Employment Agreement Invalidated Because Employer Failed to Attach Arbitration Rules

Russell I. Glazer
November 2010

While California law favors enforcing arbitration agreements in most contexts, arbitration clauses in employment agreements receive special scrutiny. A recent decision of the California Court of Appeal demonstrates that even seemingly minor shortcomings can undo an arbitration clause in an employment contract. In *Trivedi v. Curexo Technology Corporation*, the appellate court invalidated the arbitration clause of an employment agreement, largely because the employer had neglected to provide the employee with a copy of the procedural rules that the American Arbitration Association would use to adjudicate the arbitration.

Trivedi was Curexo's president and chief executive officer. His employment agreement contained a provision obligating the parties to arbitrate "[a]ny dispute arising out of or relating to this Agreement." The arbitration was to be conducted by the American Arbitration Association, pursuant to its "National Rules for the Resolution of Employment Disputes." The agreement also provided that "[t]he prevailing party shall be entitled to recover from the other party all costs, expenses and reasonable attorney fees incurred in any arbitration."

After Curexo fired Trivedi, he filed suit against the company, asserting ten causes of action, including age discrimination, race and color discrimination, national origin discrimination, unlawful business practices, breach of employment contract, and intentional infliction of emotional distress. The trial court denied Curexo's motion to compel arbitration, finding the agreement was "both procedurally and substantively unconscionable."

The Court of Appeal affirmed the trial court's ruling. It agreed that the contract was procedurally unconscionable for two reasons. First, Curexo had drafted the agreement and presented it to Trivedi on a "take it or leave it basis." Second, the appellate court ruled that "the failure to provide a copy of the arbitration rules to which the employee would be bound supported a finding of procedural unconscionability." The appellate court noted that the omission was "no trifling matter," because the American Arbitration Association's rules "extend over 26 single-spaced pages."

The Court of Appeal also agreed with the trial court's determination that the agreement was substantively unconscionable. In reaching this conclusion, the appellate court focused on the provision of the arbitration agreement entitling the prevailing party to recover its attorneys' fees. The appellate court noted that, under both federal and California law, an unsuccessful employment discrimination plaintiff need only pay the employers' attorneys' fees if the court determines that the action is "frivolous." (In contrast, employers who lose employment discrimination claims are required to pay the employees' attorneys' fees as a matter of course.) Since the arbitration agreement made it easier to subject Trivedi to an award of attorneys' fees than the law would otherwise allow, the Court of Appeal concluded that the provision "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."

Curexo claimed that the arbitration agreement would have no such effect, because the American Arbitration Association's rules would require the arbitrator to award attorneys' fees only "in accordance with applicable law." The appellate court rejected this contention because Curexo had not provided Trivedi with the rules containing this provision. The appellate court held, "relying on a document that Trivedi was never provided cannot relieve Curexo of the effect of the unlawful provision in the arbitration clause which it drafted and insisted upon."

Conclusion

As a result of the Appellate Court's decision, Curexo will be forced to participate in a lengthy and expensive lawsuit which will likely culminate in a jury trial unless the parties reach an out-of-court settlement. Curexo could have avoided this result if it had made small changes to the arbitration provision in its employment agreements and had provided its employees with a copy of the procedural rules that would apply in the event of an arbitration.