Supreme Court Copy

Case No. S174475

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

SONIC-CALABASAS A, INC.,

Plaintiff and Appellant,

vs.

FRANK MORENO,

Defendant and Respondent.

After a Decision of the Court of Appeal, Case No. B204902,
Second Appellate District, Division Four

Appeal from the Superior Court of Los Angeles County,
Case No. BS107161, Honorable Aurelio N. Munoz, Judge

REPLY TO ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

Sonic Calabasas A, Inc. advances three arguments in its Answer to the Petition for Review, none of which withstand even the most cursory scrutiny. First, Sonic argues that review of the Court of Appeal decision is not justified under Rule 8.500(b) of the California Rules of Court because there is no important question of law that needs to be settled. Next, Sonic asserts that because arbitration proceedings must include all necessary procedures for the vindication of substantive rights, an employee loses nothing by being forced to arbitrate a wage claim without first being allowed to have the claim heard by the Labor Commissioner. Finally, Sonic argues that *Preston v. Ferrer* (2008) 128 S.Ct. 978 compels a "blanket rejection" of the Labor Commissioner's jurisdiction over any wage claim that is covered by an arbitration agreement. We will address each of these contentions below.

LEGAL DISCUSSION

I. Review Is Appropriate and Necessary Under Rule 8.500(b) In Order to Settle An Important Question of Law

Sonic's assertion that this case does not present an important issue of law is premised upon its myopic view of the issue that was decided by the Court of Appeal, and its failure to acknowledge the enormous significance

of that decision, and the terrible impact it will have on a multitude of low and middle-income wage claimants.

The issue for review is not whether there was some evidence the lower court overlooked pertaining to Mr. Moreno's specific knowledge, skills, abilities or resources that would or would not enable him, as an individual, to vindicate his statutory rights in an arbitral forum. There is no question that any such particularized inquiry focusing on just one wage claimant would not present an "important issue of law" within the meaning of Rule 8.500(b). The issue, rather, is whether a Berman waiver can only be challenged by such a particularized inquiry, or whether such Berman waivers are unenforceable against all wage claimants with statutory wage claims.

A particularized inquiry would be triggered when a Berman wage claimant files an opposition to an employer's petition to compel arbitration. Typically unrepresented low and middle-income wage claimants would face a near impossible task of litigating the issue (or for that matter, even comprehending the issue) of whether their specific knowledge, skills, abilities or resources are sufficiently deficient to require access to the Berman hearing process in order to vindicate their statutory rights under the Labor Code. Claimants with the least knowledge, skills, abilities and

resources would be the most incapable of litigating this issue. The minuscule number of Berman wage claimants that can afford private counsel[1] would be the only claimants effectively able to litigate this issue, but their ability to do so would suggest, under the test adopted by the court of appeal, that they could also effectively litigate their wage claims in an arbitral forum without access to the Berman process. In short, the test adopted by the court of appeal will function to eliminate access to the Berman process for all wage claimants covered by arbitration agreements, and will therefore have a devastating effect on the multitude of wage claimants who are financially unable to afford counsel.

Sonic's insistence that there can be no "blanket rule" precluding Berman waivers cannot be reconciled with this Court's blanket rule that "an arbitration agreement may not limit statutorily imposed remedies such as punitive damages and attorney fees" (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 103), and the blanket rule that a mandatory employment arbitration agreement "cannot generally

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[1] See Amicus Letter In Support of Petition for Review, filed by former DLSE chief counsels Anne P. Stevason and H. Thomas Cadell, Jr., in which they state that over 90% of wage claimants in *de novo* proceedings filed by employers qualify for legal representation by DLSE under Labor Code § 98.4, under which legal representation is provided to "a claimant financially unable to afford counsel."

require the employee to bear any *type* of expense that the employee would not be required to bear if he or she were free to bring the action in court." (*Armendariz, supra,* at p. 110.) This Court deliberately decided not to require a particularized inquiry of each employee's ability to pay a portion of the cost of an arbitrator in order to excuse the employee from bearing that expense. In instead adopting a "blanket rule" prohibiting such costs, this Court observed: "This rule will ensure that employees bringing FEHA claims will not be deterred by costs greater than the usual costs incurred during litigation, costs that are essentially imposed on an employee by the employer." (*Armendariz, supra,* at p. 111.)

The same considerations apply here. The Berman process offers wage claimants a cost-free method of vindicating their statutory wage claims – both during the proceedings before the Labor Commissioner and, if the employee prevails in those proceedings, during the employer's *de novo* appeal from the Labor Commissioner's decision. Anything other than a blanket rule prohibiting Berman waivers, and denying enforcement of a Berman waiver contained in a mandatory arbitration agreement, will necessarily deter employees from bringing statutory wage claims, by subjecting those employees to costs that are not present in the Berman and post-Berman hearing *de novo* review process.

II. The Rights Lost By Wage Claimants As the Result of a Berman Waiver Cannot Be Restored On an Ad Hoc Basis By Arbitrators

Sonic's contention that arbitrators can somehow provide wage claimants with all "necessary procedural features" to ensure that they can vindicate their unwaivable statutory rights obfuscates the fact that the "procedural features" at issue herein – the right to one way fee shifting under Labor Code § 98.2(c), the right to appointed counsel under Labor Code § 98.4, the right to free interpreter services under Labor Code § 105(b), and the right to require the employer to post an undertaking under Labor Code § 98.2(b) – are "procedural features" that cannot be imposed, as a matter of law, unless the Labor Commissioner first holds a Berman hearing and issues a decision in the claimant's favor.

Any attempt to impose these procedures in an arbitration, other than an arbitration resulting from a *de novo* appeal from a Berman decision, would run afoul of the Federal Arbitration Act, which requires courts "to place arbitration agreements upon the same footing as other contracts." (*Gilmer v. Interstate/Johnson Lane Corp.* (1991) 500 U.S. 20, 24. For example, in *Doctor's Associates, Inc. v. Casarotto* (1996) 517 U.S. 681, the Supreme Court held that the FAA preempted a Montana statute which conditioned enforceability of arbitration agreements on compliance with a

special notice requirement that was not applicable to contracts generally. The Court explained, "The Act makes any such state policy unlawful, for that policy would place arbitration clauses on an unequal 'footing,' directly contrary to the Act's language and Congress's intent." (*Doctor's Associates, supra,* at p. 686.) In other words, "states may not disfavor arbitration agreements" viz-a-viz all other contracts. (*Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066, 1078.)

The procedural rights at issue herein could not be included in an arbitration (other than a *de novo* arbitration on appeal from a Berman decision), as that would disfavor arbitration agreements by subjecting such agreements to requirements that do not apply to employment contracts that do not provide for arbitration. The only means by which employees not covered by arbitration agreements can secure these procedural rights is by filing a wage claim with the Labor Commissioner, and prevailing in a Berman hearing. These procedural rights flow from the Labor Commissioner's decision in the employee's favor.

The only way to place arbitration agreements on the "same footing" as other employment contracts is to deny enforcement of the arbitration agreement, when Berman proceedings are pending, until the Labor Commissioner issues a decision following the Berman hearing, so as to

ensure that the wage claimant will have the procedural rights he is entitled to under state law to vindicate his statutory claim in the arbitral forum, should the employer seek a *de novo* appeal of the Labor Commissioner's decision. Any other approach would run afoul of *Armendariz* or the FAA. Enforcing arbitration while the Berman process is pending would violate public policy by denying the wage claimant critical procedural tools needed for the vindication of unwaivable statutory rights under the Labor Code. Conversely, grafting these post-Berman hearing procedural tools onto an arbitration proceeding, other than a *de novo* arbitration on appeal from a Labor Commissioner decision, would impermissibly subject arbitration agreements to unique requirements not otherwise applicable to employment contracts that do not provide for arbitration.

III. *Preston* Does Not Support Sonic's Contention That the Labor Commissioner Can Never Assume Jurisdiction Over a Wage Claim Covered by an Arbitration Agreement

Preston v. Ferrer, supra, did not involve an employee wage claim and did not present any issue as to the enforceability of an arbitration agreement on public policy or unconscionability grounds. *Preston* did not in any manner address or implicate the principles set out in *Armendariz.* For those reasons, it has no applicability to the question of whether a

Berman waiver contained within an employment pre-dispute arbitration agreement should be enforced to prohibit an employee from having his statutory wage claim heard by the Labor Commissioner.

Preston involved a dispute arising under the provisions of the Talent Agencies Act (Labor Code § 1700, *et seq.*, "TAA"), regarding the validity of a contract between an artist and a "personal manager." The contract contained an arbitration clause. The TAA governs the relationship between artists and talent agents, and vests the Labor Commissioner with exclusive jurisdiction over disputes arising under the TAA, subject to *de novo* review in the superior court. (Labor Code § 1700.44(a); *Styne v. Stevens* (2001) 26 Cal.4th 42.) When the personal manager, Preston, sought to initiate arbitration in order to recover fees due under the contract, the artist, Ferrer, filed a petition to determine controversy with the Labor Commissioner under § 1700.44(a), asserting that the contract was void because Preston had been acting as an unlicensed talent agent.

In his efforts to oppose arbitration, Ferrer never argued that arbitration would stand in the way of his vindication of any statutory rights under the FAA. Ferrer did not contend that he could not vindicate these rights without initial access to the Labor Commissioner's adjudicatory process. That is not surprising, as the role of the office of the Labor

Commissioner in hearing talent agent disputes under the TAA is qualitatively different and far more limited than its function under the Berman process. Under the TAA, the Labor Commissioner performs the exact function of an arbitrator by holding hearings and issuing decisions, and the Commissioner's role comes to an end once its decision is issued, regardless of whether one party or the other files a *de novo* appeal from that decision. In contrast, under the Berman process, the Labor Commissioner is charged with the obligation to provide legal representation throughout employer initiated *de novo* proceedings to any employee who prevailed in the administrative hearing if that employee is unable to afford private counsel. And unlike the one-way attorney fee shifting statute that benefits an employee who prevails in a Berman hearing when the employer files a *de novo* appeal, there is no fee shifting statute attached to a *de novo* appeal under the TAA.

Consequently, Ferrer presented no *Armendariz* based challenge to arbitration. Instead, he argued that the Labor Commissioner's exclusive primary jurisdiction under the TAA survived Federal Arbitration Act preemption because, in his view, the FAA only preempts state laws that lodge jurisdiction in a judicial forum, and does not preempt state laws that lodge primary jurisdiction in an administrative forum. The Supreme Court

"disapprove[d] the distinction between judicial and administrative proceedings drawn by Ferrer." (*Preston, supra,* 128 S.Ct. at p. 987.)

We have no quarrel with the proposition that FAA preemption does not distinguish between a non-arbitral judicial forum and a non-arbitral administrative forum. But just as FAA preemption does not distinguish one non-arbitral forum from another, the principles set out in *Armendariz* apply to every pre-dispute arbitration agreement, regardless of whether the party seeking to enforce the arbitration agreement is attempting to prevent the other party from proceeding in a judicial or administrative forum.

Under the FAA, states have the power to invalidate arbitration contracts only "upon such grounds as exist at law or in equity for the revocation of any contract." (9 U.S.C. § 2; *Armendariz, supra,* 24 Cal.4th at p. 98.) "The *Armendariz* requirements are ... applications of general state law contract principles regarding the unwaivabilty of public rights to the unique context of arbitration, and accordingly, are not preempted by the FAA." (*Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1079.) "[S]ection 2 of the FAA and cases interpreting it make clear that state courts have no such obligation" to enforce contractual terms that are unconscionable or contrary to public policy; rather "[a]greements to arbitrate may not be used to harbor terms, conditions and practices that

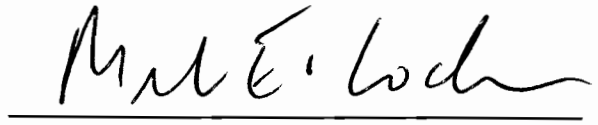
undermine public policy." (*Discover Bank v. Superior Court* (2005) 36 Cal.4th 148, 166, internal citation and quotes omitted.) "The purpose of Congress in 1925 [when it enacted the FAA] was to make arbitration agreements as enforceable as other contracts, but not more so." (*Prima Paint Corp. v. Flood & Conklin Mfg. Co.* (1967) 388 U.S. 395, 404, n. 12.)

As this Court observed in *Discover Bank, supra,* "the principle that class action waivers are, under certain circumstances, unconscionable as unlawfully exculpatory is a principle of California law that does not specifically apply to arbitration agreements, but to contracts generally." (36 Cal.4th at 165.) Here, too, any contract between an employer and its employees that purports to waive the employees' access to the Berman process violates California's public policy, whether that contract is in the form of an arbitration agreement or not. And there is nothing in *Preston* that suggests otherwise.

CONCLUSION

For all of the reasons set out above and in the petition for review, it is respectfully requested that review be granted.

Dated: August 7, 2009

By: 

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CERTIFICATION OF WORD COUNT
(Cal. Rules of Court, Rule 8.204)

The text of this Reply to the Answer to the Petition for Review consists of 2,350 words as counted by the Corel Word Perfect X4 word processing program used to generate this document.

LOCKER FOLBERG LLP

Dated: August 7, 2009

Miles E. Locker
Attorney for Defendant and Respondent

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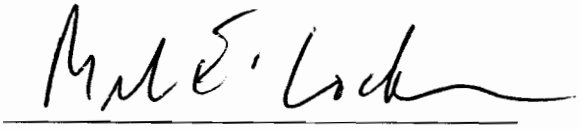

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