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Forum

Cases of Two Women Illustrate Harm of Mandatory Arbitration Clauses

BY GAY CROSTHWAIT GRUNFELD AND NURA MAZNAVI

Around the same time in 2007, two women were subjected to blatant discrimination, each by a different California employer. The first, an African-American woman and supervisor of mortgage underwriters for a large mortgage lender, claims she endured racist comments before being fired for blowing the whistle on her employer's mortgage loan practices. The second, a Vietnamese-American Muslim woman and debt collection agent, claims she was terminated for refusing to remove her Islamic headscarf, the hijab.

Now, a year after filing lawsuits for violations of California public policy and the Fair Employment and Housing Act, only the first plaintiff will have her day in court. The second plaintiff will not because her employer's lawyer drafted a more airtight arbitration clause and forced the case into a pro-business arbitration forum, resulting in delays until the employer declared bankruptcy. The similarities between these two cases, contrasted with the different way each unfolded, illustrate how mandatory arbitration clauses in employment agreements disproportionally favor employers, underscoring the need for prompt legislative action.

In late 2006, the first plaintiff began to grow concerned that underwriters in her employer's branch office were being pressured to approve potentially improper loans. According to her complaint, when the plaintiff spoke out about the loans and racist comments, her responsibilities were reduced and then she was fired.

The second plaintiff worked at a Sacramento-based national debt collection agency. According to her complaint, just days after she started work — in a cubicle where her only interactions occurred via telephone — the plaintiff was informed that she was not allowed to wear religious attire in the workplace, and ordered to remove her hijab. When the plaintiff refused to remove the hijab, she was discharged.

Each woman filed a lawsuit in Superior Court, one in Contra Costa County and the other in Sacramento County. Each defendant moved to compel arbitration, based on mandatory arbitration agreements the plaintiffs had signed on their first day of work as a condition of their employment.

Nine years ago, in *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal.4th 83 (2000), the California Supreme Court allowed mandatory arbitration of FEHA discrimination claims, even where an employee signed the agreement as a condition of employment, provided certain standards are met. Post-*Armendariz*, a predispute employment arbitration agreement will be upheld if it: "'(1) provides for neutral arbitrators, (2) provides for more than minimal discovery, (3) requires a written award, (4) provides for all of the types of relief that would otherwise be available in court, and (5) does not require employees to pay either unreasonable costs or any arbitrators' fees or expenses as a condition of access to the arbitration forum.'" Courts have applied *Armendariz* to a variety of pre-employment arbitration clauses with divergent results. See, e.g., *Ontiveros v. DHL Express (USA), Inc.*, 164 Cal.App.4th 494 (2008); *Jones v. Humanscale Corp.*, 130 Cal.App.4th 401 (2005); *Little v. Auto Stiegler, Inc.*, 29 Cal.4th 1064 (2003). The net result of these decisions is a jurisprudence in which outcome is largely based on how regularly in-house counsel update their arbitration agreements and how cleverly they draft them.

In the first plaintiff's case, the Contra Costa Superior Court refused to compel arbitration. The court concluded that her employer's agreement was procedurally and substantively unconscionable: It was provided to the employee in a take-it-or-leave-it manner, granted the arbitrator exclusive authority to determine arbitrability, and allowed the company to modify the arbitration agreement unilaterally. By contrast, the motion to compel the second plaintiff into arbitration was granted. Her employer's lawyer had created an arbitration agreement tailored more closely to the language of *Armendariz*.

What the court did not realize when it granted the debt collection agency's motion was that the very factors that constitute substantive unconscionability under *Armendariz* would effectively deprive the plaintiff of the vindication of her rights.

For more than eight months, the second plaintiff attempted — unsuccessfully — to commence arbitration. The first several weeks were spent trying to cajole the debt collection agency's lawyer to commence arbitration without the threat of a looming court deadline or the watchful eye of a judge. Taking full advantage of *Armendariz*'s holding that an employer may specify potential arbitrators, the debt collection agency refused to proceed with any service other than its preferred and routine provider, the National Arbitration Forum. The full extent of the National Arbitration Forum's pro-business bias was revealed just last month, when the Minnesota attorney general forced the company out of consumer arbitrations, citing extensive ties to the debt collection industry. Litigation against the National Arbitration Forum for its unfair business practices is also pending in the San Francisco Superior Court. From the

moment the plaintiff's claim was filed with the company, her case entered a black hole. The National Arbitration Forum refused to begin arbitration until alleged deficiencies in the claim were cured and fees were paid by the defendant. The debt collection agency delayed paying the company's fees, confident there would be no repercussions and having no incentive to move forward. The National Arbitration Forum also imposed barriers not contemplated by FEHA, including requiring the plaintiff to verify her complaint and suddenly staying the case after the defendant filed an attorney fees request. It was nearly impossible to speak to a company representative about these developments. Almost six months after filing, the second plaintiff had not received the names of potential arbitrators or a date for the hearing. While these delays may have persuaded the Superior Court to lift the stay, shortly before such a motion was filed, the company declared Chapter 7 bankruptcy, likely ending the second plaintiff's case. The first plaintiff's case, by contrast, is set for trial early next year.

Had the matter not been compelled into arbitration, the debt collection agency would have faced enforceable court-imposed deadlines, including a case management conference, discovery subject to sanctions and a scheduled trial date. Judicial oversight would have increased the second plaintiff's chances of either having her day in court or forcing her former employer into a settlement prior to the company's declaration of bankruptcy.

In *Armendariz*, the Supreme Court admonished that an "arbitration agreement cannot be made to serve as a vehicle for the waiver of statutory rights created by the FEHA." But this is exactly what is happening after motions to compel arbitration are granted. Once compelled into arbitration by purportedly "conscionable" agreements, employees lose all control over the resolution of their civil rights claims. *Armendariz* and its progeny bestow on employers overwhelming power to delay and forum-shop. As Cliff Palefsky, a leading opponent of mandatory arbitration, wrote in 2001, "The fight against mandatory arbitration is the civil rights issue of our time." California courts thus far have been unwilling or unable to ban mandatory arbitration of FEHA claims or regulate arbitration services. Legislative efforts at the state level have also failed, with bills banning mandatory employment arbitration vetoed by the governor. While the recent shutdown of the National Arbitration Forum's consumer arbitration service is a positive sign, others may spring up if no regulatory or legislative action is taken. There is only one surefire solution: Congress must act quickly on the recently re-introduced Arbitration Fairness Act of 2009, currently pending in the U.S. Senate. The act would outlaw mandatory pre-dispute arbitration for claims based on federal or state constitutional or statutory prohibitions on discrimination, including the racial and religious discrimination faced by the employees in these cases. Without this legislation, too many civil rights plaintiffs will find themselves in the morass created by employer-friendly mandatory arbitration, and lose their ability to vindicate important constitutional and civil rights.

Gay Crosthwait Grunfeld is a partner and **Nura Maznavi** is an associate at Rosen, Bien, & Galvan, a litigation firm in San Francisco.