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## California Court Holds Arbitration Provision of Collective Bargaining Agreement Inapplicable to Statutory Discrimination Claims

By Kenneth M. Jones

A recent California state court decision highlights for all employers with a unionized workforce the need for careful drafting of collective bargaining agreements. In the recent case of [Mendez v. Mid-Wilshire Care Center](#), 220 Cal.App.4th 534 (2013) the Second District of the California Court of Appeal held that the arbitration provision in a collective bargaining agreement was inapplicable to an employee's statutory discrimination claims asserted under the California Fair Employment and Housing Act ("FEHA") (*California Government Code* § 12940 et seq.)

Mendez was employed by Mid-Wilshire as a unionized nurse's assistant at a skilled nursing facility. During her employment she became ill and took medical leave for several weeks. Her employment was terminated when she sought to return to work. Mendez consulted her union representative, who attempted to get her job back, but the effort was unsuccessful. Thereafter, Mendez filed a lawsuit against Mid-Wilshire alleging claims for disability discrimination, failure to provide a reasonable accommodation, age discrimination in violation of FEHA, and various common law claims.

Mid-Wilshire responded to the lawsuit by filing a motion to compel arbitration and stay the action, asserting that all of Mendez's claims were subject to the grievance and arbitration procedures contained in the collective bargaining agreement ("CBA") between

Mid-Wilshire and the union. The trial court denied Mid-Wilshire's motion, finding that the arbitration provision of the CBA was not sufficiently specific in identifying the disputes subject to arbitration, including but not limited to whether FEHA claims were subject to arbitration. The trial court also found the arbitration provision vague regarding whether arbitration was mandatory because the CBA stated that claims "may" be submitted to arbitration as opposed to "shall."

Mid-Wilshire appealed the decision, arguing that the trial court erred by determining that Mendez's FEHA claims were not subject to arbitration. The court of appeal, however, affirmed the trial court's order. The appellate court held that though there is a strong public policy in favor of arbitration, a court must first determine if the parties have agreed to arbitrate the subject matter of the dispute.

The appellate court pointed out that in *Wright v. Universal Maritime Service Corp.* 525 U.S. 70 (1998), the United States Supreme Court held that the presumption favoring arbitration of disputes arising out of collective bargaining agreements does not apply to statutory violations (such as violations of the FEHA), and that a requirement to arbitrate statutory claims in a collective bargaining agreement must be "particularly clear." The Court noted that the CBA governing the employment relationship between Mendez and Mid-Wilshire did not cite FEHA or any other anti-discrimination statutes, but merely contained general statements regarding Mid-Wilshire's obligations to comply with the law, such as, "It is the policy of the Employer and the Union to be in compliance with all City, County, State and Federal regulations relative to discrimination," and, "The employer agrees to abide by applicable Federal and State laws and regulations and local ordinances." Mere mention of these general statutes in the CBA was insufficient to demonstrate that claims under them were intended to be subject to the arbitration clause. Moreover, the Court stated that the arbitration provision failed to meet the standard under *Wright* that a waiver of the employee's right to have employment discrimination claims heard in court be "clear and unmistakable."

This decision again underscores the care that must be taken by employers and their counsel in drafting arbitration agreements. CBAs in particular should clearly state that the arbitration provision is applicable to statutory claims and cite the specific statutes, whether they be anti-discrimination or other statutes. The agreement should also state that arbitration is mandatory and that the employer and the employee expressly waive their rights to have a court determine their claims. Following these rules will significantly enhance the employer's chances of enforcing the arbitration agreement in court.

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