IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DANIEL P. POTTER, CLERK

DIVISION 5

Los Angeles County Superior Court

ROBERTO GOMEZ,
Plaintiff and Appellant,
v.
JOHNNY REBS' OF BELLFLOWER, INC. et al.,
Defendants and Respondents.
B303353
Los Angeles County Super. Ct. No. BC664011

***** REMITTITUR *****

I, Daniel P. Potter, Clerk of the Court of Appeal of the State of California, for the Second Appellate District, do hereby certify that the attached is a true and correct copy of the original order, opinion or decision entered in the above-entitled cause on May 12, 2021 and that this order, opinion or decision has now become final.

Defendants are awarded their costs on appeal.

Witness my hand and the seal of the Court
affixed at my office this

Aug 13, 2021

DANIEL P. POTTER, CLERK

by: K. Dominguez,
Deputy Clerk

cc: All Counsel (w/out attachment)
File

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

ROBERTO GOMEZ,

Plaintiff and Appellant,

v.

JOHNNY REBS' OF BELLFLOWER, INC., et al.,

Defendants and Respondents.

B303353

(Los Angeles County Super. Ct. No. BC664011)

APPEAL from a judgment of the Superior Court of the County of Los Angeles, Barbara Scheper, Judge. Affirmed.

Lyon Law, Geoffery C. Lyon, for Plaintiff and Appellant.

CDF Labor Law, Todd R. Wulffson and Denisha P. McKenzie, for Defendants and Respondents.

I. INTRODUCTION

Plaintiff Roberto Gomez appeals from a judgment confirming an arbitration award in favor of his former employer.[1] Finding no error, we affirm.

II. FACTUAL BACKGROUND[2]

Beginning in 2013, plaintiff was employed as a server at the Bellflower location of Johnny Rebs', a restaurant owned and operated by Johnny Rebs' of Bellflower, Inc.

In April 2015, defendants hired Michelle Good[3] as a bartender at the Bellflower location. Shortly after she was hired, Good complained to her supervisor that a fellow bartender was touching her inappropriately and sending her inappropriate texts. Sometime prior to August 2015, Good complained again about mistreatment by two coworkers. In October 2015,

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1 Plaintiff sued Johnny Rebs' of Bellflower, Inc. and Johnny Rebs', Inc. (collectively defendants), asserting, among others, claims for retaliation and discrimination under the Fair Employment and Housing Act (FEHA), Government Code section 12940 et seq., and Labor Code section 1102.5.

2 Because our review of the trial court's order confirming the arbitrator's award does not involve the sufficiency of the evidence in support of that award, we provide only a summary of the facts giving rise to plaintiff's claims as context for the procedural background and legal discussion that follow.

3 In September 2015, Good married plaintiff.

defendants terminated Good's employment because she allegedly gave away free drinks and pocketed cash.

In December 2015, Good filed a sexual harassment lawsuit. The following August, defendants suspended plaintiff without pay because (1) he allegedly threatened a coworker, Justin Singer, who would not provide Good's lawyers favorable information about Good's lawsuit; and (2) he refused to cooperate with defendants' internal investigation of those allegations. Defendants thereafter terminated plaintiff in October, citing as justification Singer's deposition testimony in Good's lawsuit confirming that plaintiff had threatened him because he failed to provide Good's lawyers with favorable information about her claims.[4]

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[4] During his deposition, Singer testified as follows: "'[Plaintiff] approaches me and he says, Have you been getting phone calls? And I say I'm not sure because I don't answer those phone calls. He said, Can you just please talk to [Good's lawyers]. Just say what you know. You won't get in trouble with Johnny Rebs' or anything like that, just say what you know. Be truthful. . . . I do the friendly thing and I say okay and I called. [¶] 'They asked me some questions. Everything I say I end with, this is just hearsay, this is just rumors, because it was. I end that phone call. Later on at work, [plaintiff] . . . tells me that [Good] is really pissed off at me, that I didn't really help them out with the case at all. She expected me to. [¶] 'I don't know what she knows or thinks I know, but she expected [me to] help out a lot. Apparently I didn't help out at all. She was very extremely mad about that. She said that I'm no longer . . . welcome at their house, because sometimes I would go hang out with [plaintiff] at their house. And I'm no longer welcome there because of that. [¶] 'And then they also said – [plaintiff] told me at work to call [Good's lawyers] back and to say – I don't know what he thinks I

III. PROCEDURAL BACKGROUND

A. *Complaint and Stipulation to Arbitrate*

In June 2017, plaintiff filed a complaint against defendants asserting nine claims, including FEHA and Labor Code violations.[5] Following defendants' answer, the parties stipulated to arbitrate the dispute pursuant to their agreement to submit employment disputes between them to binding arbitration under the employment rules of the American Arbitration Association. Based on the stipulation, the trial court stayed the action pending the outcome of the arbitration.

B. *Interim Award on the Merits*

The arbitration hearings before a retired Superior Court judge proceeded over a four-day period—November 7 through 9, 2018, and January 17, 2019. During the hearings, the parties called four witnesses to testify, including plaintiff and Good, submitted excerpts from the deposition testimony of other

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know or what he wanted, but he did say if I don't, then that's a threat. He even repeated it, that's a threat. This is from [] Good, but [plaintiff is] carrying the message and that's a threat.'"

[5] Plaintiff asserted, among others, FEHA claims for retaliation for opposing sexual harassment, discrimination based on his association with Good, and failure to prevent retaliation and discrimination. He also asserted Labor Code claims for failure to provide meal and rest breaks and whistleblower retaliation.

witnesses, including Singer, and introduced documentary exhibits.

On May 5, 2019, the arbitrator issued his "Interim Award" in which he found there was insufficient evidence to support any of plaintiff's claims, and concluded that plaintiff should therefore take "nothing from any of the causes of action set forth in his [arbitration] demand." The arbitrator also granted defendants an award of costs subject to the filing of appropriate briefing and a memorandum of costs.

C. *Motion to Tax Costs/Vacate Award Before the Arbitrator*

On May 17, 2019, defendants filed with the arbitrator a memorandum of costs seeking a total of $62,060.10. In response, plaintiff filed a motion to strike or tax costs, arguing that he should not be liable for defendants' costs under FEHA because his case was not frivolous, unreasonable, or groundless. Plaintiff also proceeded to argue the merits of the award, including that it violated due process and was otherwise unenforceable because it fell "below the rational standard articulated by the courts."

In response to plaintiff's filing, defendants submitted an "opposition to [plaintiff's] motion to vacate [a]rbitration [a]ward."

The arbitrator conducted a hearing on the motion to tax costs, as well as on plaintiff's other arguments, which the arbitrator construed as a "motion to vacate the interim award." Among other things, the arbitrator tentatively concluded that his interim award was based on "an erroneous evaluation of the record and the authorities on my part." At the time of the hearing, the arbitrator believed that "[plaintiff] would not have been terminated when he was terminated if he had not engaged

in . . . protected activities." Following the arguments of counsel, including defendants' argument that under Code of Civil Procedure section 1284, the arbitrator lacked the power to modify or change the substance of his award, the arbitrator took the matter under submission and set a date for a further hearing and ruling.

At the continued hearing on August 9, 2019, the arbitrator heard additional argument on the motion to vacate and then denied it. The arbitrator also denied defendants' request for costs.

D. *Cross-Petitions to Confirm and Vacate Award in the Trial Court*

On September 23, 2019, defendants filed in the trial court a form petition to confirm the award under Code of Civil Procedure section 1285 et seq. In support of the petition, defendants submitted a copy of the parties' stipulation to arbitrate that attached the arbitration agreement, as well as the notice of the arbitrator's ruling on plaintiff's motion to vacate the award that attached copies of the interim award and the findings of fact and conclusions of law.

On September 30, 2019, plaintiff filed an opposition to the motion to confirm and a cross-petition to vacate the award under Code of Civil Procedure section 1286.2.[6] In support of his petition, he submitted a "[r]ecord of all arbitration documents

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[6] Although it appears that plaintiff filed an opposition and cross-petition that he included in his designation of the record on appeal, that document is not in our record.

and hearings pertinent to confirming or vacating arbitration award" that included the reporter's transcripts of the four evidentiary hearings before the arbitrator and a separate appendix of exhibits.

In their reply brief, defendants argued that plaintiff had failed to establish any of the grounds for vacating an arbitration award enumerated in Code of Civil Procedure section 1286.2 and that, in any event, the award was well reasoned and based on applicable law.

On October 11, 2019, the trial court conducted a hearing on the cross-petitions. It rejected plaintiff's argument that the award in this case violated public policy. In response to plaintiff's argument, the court stated, "I think that your disagreement goes to an alleged mistake of law that the [arbitrator] may have made in evaluating the cases in light of the testimony that he received. I disagree that this is something that the court can or should get itself involved in." The court then issued a minute order that denied the motion to vacate and confirmed the award. On November 5, 2019, the court entered a judgment based on the arbitrator's final award from which plaintiff timely appealed.

IV. DISCUSSION

Plaintiff contends that the arbitration award should be vacated because it conflicts with his unwaivable statutory rights under FEHA and the Labor Code. According to plaintiff, the public policy exception to the general rule of arbitral finality enables us to conduct a detailed and independent review of the

evidence in support of his FEHA and Labor Code claims[7] and conclude that the arbitrator made several erroneous legal conclusions in his award warranting reversal. We disagree.

A. *Standard of Review*

Our review of a judgment confirming an arbitration award is limited to the grounds set forth in Code of Civil Procedure sections 1286.2 (to vacate) and 1286.6 (for correction). (*Richey v. AutoNation, Inc.* (2015) 60 Cal.4th 909, 916 (*Richey*); *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 33 (*Moncharsh*).) We review the trial court's order de novo where the facts are undisputed. (*Panoche Energy Center, LLC v. Pacific Gas & Electric Co.* (2016) 1 Cal.App.5th 68, 99; *SWAB Financial, LLC v. E*Trade Securities, LLC* (2007) 150 Cal.App.4th 1181, 1196.) To the extent the court's ruling rests upon a determination of disputed facts, we review for substantial evidence. (*Panoche Energy Center, LLC v. Pacific Gas & Electric Co., supra*, 1 Cal.App.5th at p. 99; *SWAB Financial, LLC v. E*Trade Securities, LLC, supra*, 150 Cal.App.4th at p. 1196.)

"We apply a highly deferential standard of review to the award itself, insofar as our inquiry encompasses the arbitrator's resolution of questions of law or fact. Because the finality of

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[7] Plaintiff challenges on appeal the arbitrator's rulings on his: (1) FEHA retaliation claim under Government Code section 12940, subdivision (h); (2) whistleblower retaliation claim under Labor Code section 1102.5; (3) failure to prevent retaliation claim under Government Code section 12940, subdivision (k); and association discrimination claim under Government Code sections 12940, subdivision (a) and 12926.

arbitration awards is rooted in the parties' agreement to bypass the judicial system, ordinarily "'[t]he merits of the controversy between the parties are not subject to judicial review.' [Citations.]' (*Moncharsh, supra*, 3 Cal.4th at p. 11.)

"Under this rule, courts will not review the arbitrator's reasoning or the sufficiency of the evidence supporting the award. (*Moncharsh, supra*, 3 Cal.4th at pp. 10–11.) Moreover, absent 'narrow exceptions' . . . , 'an arbitrator's decision cannot be reviewed for errors of fact or law.' ([*Id.*] at p. 11.) These exceptions do not encompass all errors that are apparent on the face of the award and cause substantial injustice. (*Id.* at p. 32.) Circumstances justifying judicial review arise when the arbitrator imposes a remedy not authorized by the arbitration agreement. (*Advanced Micro Devices*, [*Inc. v. Intel Corp.* (1994)] 9 Cal.4th [362,] 375 [(*Advanced Micro Devices*)]; see *Cotchett, Pitre & McCarthy v. Universal Paragon Corp.* (2010) 187 Cal.App.4th 1405, 1416–1417 & fn. 1 . . . .)" (*Cooper v. Lavely & Singer Professional Corp.* (2014) 230 Cal.App.4th 1, 12.)

B. *The Public Policy Exception to Rule of Arbitral Finality*

"The California Arbitration Act (Code Civ. Proc., § 1280 et seq.) and the Federal Arbitration Act (9 U.S.C. § 10 et seq.) provide limited grounds for judicial review of an arbitration award. Under both statutes, courts are authorized to vacate an award if it was (1) procured by corruption, fraud, or undue means; (2) issued by a corrupt arbitrator; (3) affected by prejudicial misconduct on the part of the arbitrator; or (4) in excess of the arbitrator's powers. (Code Civ. Proc., § 1286.2, subd. (a); 9 U.S.C. § 10(a).) An award may be corrected for

(1) evident miscalculation or mistake; (2) issuance in excess of the arbitrator's powers; or (3) imperfection in the form. (Code Civ. Proc., § 1286.6; 9 U.S.C. § 11.) . . . [¶]

"Arbitrators may exceed their powers by issuing an award that violates a party's unwaivable statutory rights or that contravenes an explicit legislative expression of public policy. (See, e.g., *Board of Education v. Round Valley Teachers Assn.* (1996) 13 Cal.4th 269, 272–277 . . . [arbitrator exceeded powers by giving effect to collective bargaining provisions that violated statutory rights in Ed[ucation] Code]; *California Dept. of Human Resources v. Service Employees Internat. Union, Local 1000* (2012) 209 Cal.App.4th 1420, 1434 . . . [arbitrator lacked power to make an award that violated explicit public policy favoring legislative oversight of state employee contracts when he interpreted a memorandum of understanding between union and state to require salary increases the Legislature did not approve].) However, '"[a]rbitrators do not ordinarily exceed their contractually created powers simply by reaching an erroneous conclusion on a contested issue of law or fact, and arbitral awards may not ordinarily be vacated because of such error . . . ."' (*Cable Connection*[*, Inc. v. DIRECTV, Inc.* (2008)], 44 Cal.4th [1334,] 1360–1361.)" (*Richey*[*, supra*,] 60 Cal.4th [at pp.] 916–917.) "Arbitral finality is the general rule, and the public policy exception permitting courts to vacate an arbitration award arises in only limited and exceptional circumstances. (*Advanced Micro Devices*[*, supra*,] 9 Cal.4th [at p.] 373 . . . ; *Moncharsh*[*, supra*,] 3 Cal.4th [at p.] 32 . . . .)" *City of Richmond v. Service Employees Internat. Union, Local 1021* (2010) 189 Cal.App.4th 663, 666 (*City of Richmond*).)

C. *Analysis*

In plaintiff's view, the arbitration award "must be vacated because it contravenes the FEHA and Labor Code public policies against terminating an employee for opposing sexual harassment and retaliation." Plaintiff continues, "[a]n arbitrator exceeds his powers if his award contravenes an unwaivable statutory right or an explicit legislative expression of public policy."[8]

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[8] Plaintiff tries to bring this case within one of the grounds for vacating an award enumerated in Code of Civil Procedure section 1286.2 by asserting that the arbitrator exceeded his powers. But in doing so, plaintiff confuses an award made in excess of an arbitrator's powers with one that violates public policy. "[E]xcess of power and violation of public policy are more properly understood as distinct concepts. An arbitrator has exceeded his or her powers if the arbitrator 'strayed beyond the scope of the parties' agreement by resolving issues the parties did not agree to arbitrate' (*Moncharsh, supra*, 3 Cal.4th at p. 28), ordered an unauthorized remedy (*Advanced Micro Devices,* [ ] *supra*, 9 Cal.4th at p. 375), or resolved nonarbitral issues (*Board of Education v. Round Valley Teachers Assn.*[*, supra*,] 13 Cal.4th [at pp.] 269, 275–276, 287 . . .]). Public policy, on the other hand, is an exception rooted in common law and stems from a court's power to refuse enforcement of illegal contracts. (*Paperworkers v. Misco, Inc.* (1987) 484 U.S. 29, 42 . . . [(*Misco*)]; *Moncharsh, supra*, [3 Cal.4th] at pp. 28–29, 31–33.) 'A court's refusal to enforce an arbitrator's award under a collective-bargaining agreement because it is contrary to public policy is a specific application of the more general doctrine, rooted in the common law, that a court may refuse to enforce contracts that violate law or public policy.' (*Misco, supra*, 484 U.S. at p. 42.)" (*City of Richmond, supra*, 189 Cal.App.4th at p. 669–670.)

Plaintiff's argument seems to be that: (1) the arbitrator erred when he concluded there was insufficient evidence to support plaintiff's claim that he had been terminated in retaliation for opposing sexual harassment and discrimination; and (2) based on such error, the arbitrator's award violated the public policy against such retaliation. To the extent plaintiff complains that the evidence supported a ruling in his favor, we reject that argument. (*Moncharsh, supra*, 3 Cal.4th at pp. 10–11.)

At bottom, plaintiff's argument is that, because his case involved his unwaivable statutory rights under FEHA and the Labor Code, the public policy exception automatically applies. Plaintiff, however, fails to explain in what manner the award was inconsistent with the vindication of his rights under FEHA or the Labor Code.[9] For example, he does not claim that the arbitration

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[9] In *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, our Supreme Court held that FEHA claims can and should be arbitrated as long as the arbitration includes basic procedural requirements that enable the plaintiff to vindicate his or her statutory rights. "We conclude that [FEHA] claims are in fact arbitrable *if* the arbitration permits an employee to vindicate his or her statutory rights. [I]n order for such vindication to occur, the arbitration must meet certain minimum requirements, including neutrality of the arbitrator, the provision of adequate discovery, a written decision that will permit a limited form of judicial review, and limitations on the costs of arbitration." (*Armendariz v. Foundation Health Psychcare Services, Inc., supra*, 24 Cal.4th at pp. 90–91.) Thus, FEHA grants plaintiffs an unwaivable right to a fair hearing on their claims. It does not, however, guarantee that they will prevail on those claims in an otherwise fair arbitration.

proceeding itself was unfair, that he was denied discovery, that he was prevented from presenting or cross-examining witnesses, or that he was otherwise thwarted in his efforts to prove his claims. Similarly, he does not contend that the arbitrator was biased, corrupt, or that the award was procured by fraud or undue influence. Rather, he claims only that the arbitrator misconstrued his evidence and made errors of law under FEHA or the Labor Code, without citing a case in which the public policy exception applied under such circumstances.

Under plaintiff's broad construction of the public policy exception, every arbitration award that denied relief under FEHA or the Labor Code would be open to plenary judicial review as "inconsistent" with the policies underlying those statutory schemes. In effect, "[t]he public policy exception would swallow the rule of arbitral finality" (*City of Richmond, supra*, 189 Cal.App.4th at p. 675) if courts were to review the merits of every arbitration award that denied a plaintiff's statutory claims. As explained by the court in *City of Richmond,* "[w]e are bound by principles established by our Supreme Court, which compel deference to arbitration awards and limited use of the public policy exception. [Citations.]" (*Id.* at p. 675.) "'Absent a clear expression of illegality or public policy undermining this strong presumption in favor of private arbitration, an arbitral award should ordinarily stand immune from judicial scrutiny.' ([*Moncharsh, supra*, 3 Cal.4th] at p. 32.)" (*City of Richmond, supra*, 189 Cal.App.4th at p. 670.)

V. DISPOSITION

The orders denying the motion to vacate and confirming the arbitration award are affirmed. Defendants are awarded their costs on appeal.

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KIM, J.

We concur:

RUBIN, P. J.

MOOR, J.