COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

CC RESTAURANT, L.P., AND CAFE CENTRAL,	§	No. 08-19-00285-CV
Appellants,	§	Appeal from the
v.	§	County Court at Law Number Three
SABINA OLAGUE,	§	of El Paso County, Texas
Appellee.	§	(TC# 2019DCV0613)
	§	

DISSENT

What happens when an employer requires its applicants or employees to sign an agreement to arbitrate disputes, the employee signs the agreement but the employer does not, and then the employer seeks to enforce the agreement? One might think that could never happen, but a host of reported cases and the record before this Court says otherwise.[1] Here, the employee (Sabrina Olague) signed two documents presented to her by the employer (Café Central) acknowledging her agreement to arbitrate certain disputes, but Café Central never put its signature on the agreement. Nonetheless, it now seeks to compel arbitration of an employment dispute between

[1] *See Huckaba v. Ref-Chem, L.P.*, 892 F.3d 686, 690 (5th Cir. 2018); *SK Plymouth, LLC v. Simmons*, 605 S.W.3d 706, 711 (Tex.App.--Houston [1st Dist.] 2020, no pet.); *Hi Tech Luxury Imports, LLC v. Morgan*, No. 03-19-00021-CV, 2019 WL 1908171, at *1 (Tex.App.--Austin Apr. 30, 2019, no pet.); *Wright v. Hernandez*, 469 S.W.3d 744, 756 (Tex.App.--El Paso 2015, no pet.); *In re Bunzl USA, Inc.*, 155 S.W.3d 202 (Tex.App.--El Paso 2004, orig. proceeding).

the parties. One approach to the question is to ask if the shoe were on the other foot, would a court enforce the arbitration agreement? That is, if Sabina Olague sought to compel arbitration, could Café Central defeat the request by claiming it never signed the operative document?

The two documents at issue are a "Claims Resolution Program" which details the arbitration program, and which Olague signed, but Café Central did not. The other document is a "Notice of Arbitration Agreement" (the "Notice") with language stating that if Olague submitted an application, or worked after the "effective date," she and the employer were bound by the arbitration program described in the Claims Resolution Program. I could agree that if the Claims Resolution Program were the only document in the case, Café Central would not be bound to arbitrate and the mutuality of the promises would evaporate (then to, the enforceability of the arbitration clause). But based on the language in the Notice, coupled with the act of Sabina Olague appearing for work (and more importantly, Café Central allowing her to show up for work), I believe both parties are bound to the arbitration agreement. Accordingly, I respectfully dissent.

As the majority ably notes, the "Claims Resolution Program" document by its terms obligates the parties to actually sign the document--and for reasons unfathomable to me, Café Central did not do that. But the other document in the case--the Notice--allows for another avenue to find a mutually enforceable promise to arbitrate. That document begins this way:

CC RESTAURANT, LP D/B/A CAFE CENTRAL ('EMPLOYER')

NOTICE TO ALL APPLICANTS & EMPLOYEES

OF

ARBITRATION AGREEMENT

> **You (Employee or applicant) and the Employer agree to and are bound by the current Claims Resolution Program ('Agreement'), and waive any right to a jury trial and agree to final and binding arbitration of all legal disputes that could otherwise be brought as a lawsuit, when you submit an application or start or continue work for the Employer after the Effective Date, as provided in the Agreement.**

> On and after 12:01 a.m. on the Effective Date of ____, 2013, all legal 'Disputes' between you and the Employer (as defined in the Agreement) will be arbitrated . . . .

Out of this document, three concepts shape my view of this case.

First, when a notice is given to employees stating that their continued employment constitutes assent to an arbitration agreement, the agreement is enforceable. *In re Halliburton Co*., 80 S.W.3d 566, 568 (Tex. 2002) ("Yet we made clear that when an employer notifies an employee of changes to the at-will employment contract and the employee 'continues working with knowledge of the changes, he has accepted the changes as a matter of law.'"), *quoting Hathaway v. General Mills, Inc.*, 711 S.W.2d 227, 229 (Tex. 1986). This Court made the same point in *Firstlight Federal Credit Union v. Loya*, 478 S.W.3d 157, 168 (Tex.App.--El Paso 2015, no pet.). And the Texas Supreme Court more recently reiterated the point in *In re Copart, Inc.*, 619 S.W.3d 710 (Tex. 2021) (per curiam).[2] Here, Olague acknowledged the enforceability of the agreement by continuing to work after being informed that in doing so, she agreed to arbitrate certain disputes. Café Central acknowledged the enforceability of the same agreement by allowing Olague on its premises to perform work, (and presumably paying her for her services).[3]

The second important factor is that the Notice explicitly states that the "*Employer* agree[s] to and [is] bound by the current Claims Resolution Program (emphasis added)." The language in

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[2] In *Huckaba v. Ref-Chem, L.P.*, 892 F.3d 686, 690 (5th Cir. 2018), the court appropriately concluded that watered down language only stating that the employee's continued employment constitutes consideration for the agreement, could not overcome an unexecuted document which by its terms required execution by both parties. The difference here is that the Notice language explicitly states that continued employment binds both employee and employer to the terms of the arbitration agreement. In that regard, the language of the Notice is distinguishable from that in *Huckaba*. And that kind of language was entirely missing in this Court's opinion in *In re Bunzl USA, Inc.*, 155 S.W.3d 202 (Tex.App.--El Paso 2004, orig. proceeding). That being said, the distinctions drawn in *Huckaba*, *Bunzl*, and this Court's other opinion, *Firstlight Federal Credit Union*, are fine ones and a party operates at its own peril by failing to strictly attend to the details of its own documentation, particularly when asking the other party to waive a significant right like the right to a jury trial.

[3] The Notice document was signed by Olague in June of 2013 and she alleges she was discharged by Café Central in December 2016.

the Notice, coupled with Olague reporting to work and Café Central allowing Olague to work, precludes either party from disavowing the agreement. Both parties have given something in exchange for the promise to arbitrate, and both parties have said in the Notice that they are bound by the Claims Resolution Program. So, whether Café Central actually signed the Claims Resolution Program is beside the point.[4] The Notice--along with the actions that both parties took pursuant to the Notice--evidences adoption of the terms in the Claims Resolution Program. We said as much in *Firstlight*, where the employee was presented with a similar "notice" document, but the employee failed to sign the form, even though the form stated "[Y]ou are required to print the last page, sign and date, and return [the] completed [form]." *Firstlight*, 478 S.W.3d at 162-63. Despite the form being unsigned, this Court enforced it based on the conduct of the employee appearing for work. *Id.* at 169-70. Obtaining a signature was "an alternative method of agreement[.]" *Id*.

The final piece is that the Notice adopts the Claims Resolution Program which contains the essential terms of an arbitration agreement. It outlines the types of disputes that are to be governed by arbitration and Olague's employment discrimination allegations fall within the class of disputes to be arbitrated. It also contains a comprehensive procedure governing arbitration. And our jurisprudence commands that mandamus is the appropriate remedy to enforce binding arbitration agreements. *See e.g. In re Dallas Peterbilt, Ltd., L.L.P.*, 196 S.W.3d 161, 163 (Tex. 2006)

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[4] By contrast, the Claims Resolution Program has different verbiage. It states "By accepting employment with the company, or by continued employment with Company, each employee agrees to resolve all legal claims against the Company through the arbitration process . . . ." So unlike the Notice, the Claims Resolution Program does not tie the Employer's agreement to be bound to the continued employment of the employee. Given this difference in language, and our obligation to harmonize and give effect to all terms of a contract, this added language in the Notice must mean something, and I conclude it provides an alternate means to bind the parties to the substantive terms of the arbitration agreement as contained in the Claims Resolution Program. *See Firstlight Fed. Credit Union*, 478 S.W.3d at 169 ("Standard contract principles dictate that in construing a contract, the court 'must examine and consider the entire writing in an effort to harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless.'"), *quoting Italian Cowboy Partners, Ltd. v. Prudential Ins. Co of Am.,* 341 S.W.3d 323, 333 (Tex. 2011).

(enforcing arbitration policy similarly presented through a notice to applicants, followed by the applicant's acceptance of the job); *Jack B. Anglin Co. v. Tipps,* 842 S.W.2d 266, 272-73 (Tex. 1992) (noting there is no adequate remedy by appeal for a party denied its contracted-for arbitration right under the FAA).

For these reasons, I would sustain Appellants' Issue and enter an order compelling arbitration.

JEFF ALLEY, Justice

August 27, 2021

Before Rodriguez, C.J., Palafox, and Alley, JJ.