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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

JACOB LEYVA, Plaintiff and Respondent, v. PATINA RESTAURANT GROUP, Defendant and Appellant,	B256091 (Los Angeles County Super. Ct. No. BC523997)

APPEAL from an order of the Superior Court of Los Angeles County. Joseph R. Kalin, Judge. Affirmed.

Sheppard, Mullin, Richter & Hampton, Ryan D. McCortney and Christopher J. Taylor for Defendant and Appellant.

Law Offices of Donald S. Lucien and Darryl M. Lucien for Plaintiff and Respondent.

Defendant and appellant Patina Restaurant Group (Patina) appeals from the denial of its motion to compel arbitration in this employment discrimination action brought by its former employee, plaintiff and respondent Jacob Leyva. The main factual dispute in this case is whether Leyva was a permanent employee, who simply alternated jobs and locations based on season, or if, in the alternative, he was a temporary employee whose employment was terminated at the end of each season and who was rehired at the start of the following season. As we shall discuss, substantial evidence supports the latter view; Levya was employed for months at a time and was required to reapply for employment for each successive season in which he sought to work for Patina. For this reason, we conclude substantial evidence supports the trial court's implied findings that Leyva's failure to hire claims are outside the scope of the arbitration agreement and we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

For a number of years, Leyva was seasonally employed as a food server by Patina at the Hollywood Bowl. Outside of the Hollywood Bowl season, Leyva was employed by Patina as a bartender at the Music Center. In February 2009, Leyva sustained an injury to his wrist, requiring surgery. In July 2009, he returned to work at the Hollywood Bowl. The record is not entirely clear as to whether Leyva returned to work as a bartender at the Music Center in the fall 2009-spring 2010 season. If he did, that was the last time he worked at the Music Center. He did, however, continue to work summers at the Hollywood Bowl in 2010 and 2011. His last day of employment was November 3, 2011.

In April 2012, Leyva applied for work as a food server for the summer 2012 Hollywood Bowl season. According to Leyva, he was refused employment because of his wrist disability. Leyva had pursued a workers' compensation action against Patina in connection with his wrist injury. Leyva's operative complaint alleges that, in March 2012, Patina received "settlement documents" from Leyva's workers' compensation action which indicated permanent disability to his wrist. Leyva alleges that Patina

refused to hire him for the summer 2012 season because of that disability, or, alternatively, because he had pursued a workers' compensation action.

On October 9, 2013, after receiving a right to sue letter from the Department of Fair Employment and Housing (DFEH), Leyva filed his initial complaint in this action. His complaint alleged several causes of action for employment discrimination based on disability. The allegations of his complaint state that Leyva's employment was "terminated" due to his disability.

Leyva had signed an arbitration agreement prior to commencing employment for the summer 2010 Hollywood Bowl season. We will discuss the language of this agreement later in the opinion, but it appears clear that, if Leyva's employment is considered to be a *single course of employment* which was allegedly *wrongfully terminated*, Leyva's causes of action would be subject to arbitration under the agreement. Relying on this agreement and the language of Leyva's complaint, Patina moved to compel arbitration.

In response, Leyva filed his first amended complaint, the operative pleading, which explained that Leyva successfully completed the summer 2011 Hollywood Bowl season and was simply *not rehired* for the summer 2012 season. Leyva opposed the motion to compel with evidence that his employment had, in fact, terminated with the summer 2011 Hollywood Bowl season. This included his declaration, and a document Patina had filed in the workers' compensation action, in which Patina had taken the position that Leyva's employment had terminated in November 2011 "because the season at the Hollywood Bowl ended and for no other reason."

In reply, Patina argued that the first amended complaint should be disregarded as a sham pleading.[1] Patina also submitted evidence that Leyva had previously taken the position, in his DFEH complaint, that he was, in fact, complaining about a termination, not a failure to rehire. We note, however, that the DFEH document does not quite

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[1] Patina did not formally move to strike the first amended complaint; it simply argued that the court should not consider the first amended complaint in ruling on the motion to compel arbitration.

support Patina's position in the manner Patina has argued. Patina stated that, in Leyva's DFEH complaint, "he stated, under penalty of perjury, that 'I was terminated.' " In fact, Leyva's statement in that document was, "I was terminated/not rehired." Patina correctly relied on an application Leyva submitted to the Workers Compensation Appeals Board, seeking additional benefits on the basis that he had been "terminated" for seeking workers' compensation benefits.

A hearing was held on Patina's motion to compel arbitration, but it was not reported. After the hearing, the trial court denied the motion to compel. Patina filed a timely notice of appeal.

DISCUSSION

1. *Standard of Review*

The standard of review for an order on a motion to compel arbitration is: (1) substantial evidence, where the trial court's decision on arbitrability was based on the resolution of disputed facts; or (2) de novo, where no conflicting evidence was admitted or the extrinsic evidence is essentially undisputed. (*Hartnell Community College Dist. v. Superior Court* (2004) 124 Cal.App.4th 1443, 1448-1449.)

"Under both California and federal law, arbitration is strongly favored and any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. [Citations.] The burden is on the party opposing arbitration to show the agreement cannot be interpreted to apply to the dispute. [Citation.]" (*Balandran v. Labor Ready, Inc.* (2004) 124 Cal.App.4th 1522, 1527.) However, "[t]here is no policy in favor of arbitrating a dispute the parties did not agree to arbitrate." (*Id.* at p. 1528.)

2. *Substantial Evidence Supports the Conclusion that Leyva's Causes of Action are Based on a Failure to Hire*

In arguing the motion to compel arbitration, both parties relied on extrinsic evidence to support their characterization of Leyva's causes of action. Patina argued that the causes of action were based on a termination of employment; Leyva argued that the

causes of action were based on a failure to rehire after seasonal employment had terminated. Substantial evidence supports the trial court's implied conclusion that Leyva's characterization was correct. In a document filed in the workers' compensation action, Patina's human resources director authenticated payroll screen printouts which set forth the dates of Leyva's employment. Those printouts indicate that Leyva's last date of employment was November 3, 2011, and that his employment ended on that date because it was "[s]easonal [w]ork." Leyva's declaration provided further support for the conclusion. Therefore, when Levya was refused employment for the summer 2012 Hollywood Bowl season, the act constituted a failure to hire Leyva, not a termination of existing employment.

3. *The Arbitration Clause Does Not Encompass Failure to Hire Disputes*

That there was substantial evidence of a failure to hire does not, of course, mean the parties could not have agreed to arbitrate that dispute. To resolve that issue, we turn to the language of the arbitration agreement. The agreement was a single page document signed by Leyva at the time he signed his employment agreement prior to the 2010 Hollywood Bowl season. In pertinent part, the arbitration agreement provides as follows: "The Company [Patina] is committed to providing the best possible working conditions for its employees. However, the Company and its employees recognize that occasionally differences may arise during or following an employee's employment with the Company. By accepting or continuing employment with the Company, you agree and understand that both you and the Company mutually agree to resolve and [*sic*] binding arbitration any claim that, in the absence of this Agreement, would be resolved in a court of law under applicable state or federal law. The claims governed by this agreement are those that you or the Company may have relating to your employment with, behavior during or termination from, the Company. Claims for workers' compensation or unemployment compensation benefits are not subject to this agreement. [¶] By accepting or continuing employment with the Company, you and the Company both agree to resolve such claims through **final and binding arbitration.** This includes, but is not limited to, claims of

employment discrimination because of race, sex, religion, national origin, color, age, disability, medical condition, martial [*sic*] status, gender identity, sexual preference or any other characteristic protected by applicable law. It also includes any claim you might have for unlawful harassment including sexual harassment and unlawful retaliation; any claims under contract or tort law; any claim for wages, compensation or benefits; and any claim for trade secret violations, unlawful competition or breach of fiduciary duty." The arbitration agreement also states, "You and the Company hereby agree that this agreement shall survive the termination of your employment with the Company."

The issue properly framed for us is whether causes of action arising out of a failure to rehire are within the scope of this agreement. The key sentence is the one which defines the scope of the agreement: "The claims governed by this agreement are those that you or the Company may have relating to your employment with, behavior during or termination from, the Company." A failure to hire does not relate to "behavior during" or "termination from" employment. The more knotty question is whether a failure to hire is a claim "relating to your employment with" the Company.

In answering this question, we are guided by *Balandran v. Labor Ready Inc., supra*, 124 Cal.App.4th 1522 (*Balandran*). In that case, the defendant provided temporary labor to its customers, under a business model whereby the employees were considered employees of the defendant, not employees of the defendant's customers. The defendant made clear to the members of its workforce that they were considered its employees *only* when they were on a job; at the end of the workday, the employee was considered to have quit until such time as the employee was sent on another assignment. (*Balandran, supra*, 124 Cal.App.4th at p. 1525.) When the defendant complied with the request of a customer to send it male workers only, a group of female temporary laborers brought suit against the defendant for gender discrimination. (*Id*. at p. 1526.) The defendant sought to compel arbitration, the trial court denied the motion, and the Court of Appeal affirmed. (*Id*. at p. 1524.) The issue was whether the plaintiffs' claims, which were, under the clear terms of the business relationship, a failure to *hire* (or rehire) rather than a failure to send on a particular assignment, fell within the scope of the arbitration

agreement the plaintiffs had signed. Each plaintiff had agreed to arbitrate " 'disputes arising out of my employment.' " (*Id*. at p. 1525, emphasis omitted.) The Court of Appeal concluded that preemployment claims of discrimination in hiring indisputably did not arise out of the applicants' employment. As they were not considered employees when they were merely applying for work, they "did not have an 'employment' out of which any of their disputes could arise." (*Id*. at p. 1528.)

Although the contractual language in this case is a bit different from that in *Balandran*—the *Balandran* contract required arbitration of " 'disputes arising out of [the employee's] employment,' " while Patina's contract requires arbitration of claims "relating to [the employee's] employment with [Patina]"—we find the difference immaterial. Patina's arbitration agreement mandates arbitration of claims relating to its employees' employment; Leyva's failure to hire claim did not relate to an actual, rather than a prospective, employment with Patina. At the time Patina refused to hire Leyva, there was no employment to which the failure to hire related.[2] Thus, the arbitration clause does not apply to Leyva's failure to hire claims. This conclusion is further supported by the language in the agreement stating that the employee agrees to arbitration, "[b]y accepting or continuing employment with the Company." Notably absent from this clause is any suggestion that a prospective employee accepts the agreement by *applying* for employment.

A broader arbitration clause might well have applied to preemployment disputes. An employer may lawfully draft an arbitration agreement that clearly and unambiguously applies to preemployment disputes. (*Lopez v. Charles Schwab & Co., Inc.* (2004)

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2 The *Balandran* court noted that if the arbitration clause applied to " 'other employment related issues,' " such language, standing alone, would apply to preemployment disputes, as preemployment discrimination is an unlawful employment practice, which is therefore employment related. (*Balandran, supra,* 124 Cal.App.4th at p. 1528.) This does not impact our analysis. Preemployment discrimination would fall within an "other employment related issues" clause, because such a clause refers to "employment" in the abstract. In our case, the clause "relating to your employment with [Patina]" does not refer to the concept of employment, but the employee's specific employment with Patina. Actual employment is a prerequisite to its application.

118 Cal.App.4th 1224, 1232.) Similarly, an employer can draft an agreement that applies to disputes whether or not the disputes arise out of employment. (*Monzon v. Southern Wine & Spirits of California* (N.D. Cal. 2011) 834 F.Supp.2d 934, 939, 941.) In this case, however, Patina drafted an arbitration clause that is restricted to claims relating to its employees' employment; preemployment claims are simply not included.

Patina argues that, because Leyva had previously been employed by Patina, Leyva's failure to hire claims are in fact "relat[ed] to" Leyva's prior employment with Patina. In this regard, Patina notes that the arbitration clause expressly provides that it survives termination of employment. Leyva's claims are not founded on what Patina did during his prior employment. True, Leyva's wrist injury occurred on the job, and Leyva will presumably take the position that he was able to perform the functions of his job based on evidence that he did, in fact, successfully perform the job for several summers after his wrist was injured. But, even assuming that a March 2010 arbitration agreement reaches backward to the 2009 employment (when the injury occurred) and forward to a 2011 employment (after which Leyva was not rehired), the essence of the cause of action was the April 2012 rejection of Leyva's application. There would be no causes of action without the April 2012 refusal to hire; the complaint relates solely to that act, even though some of Leyva's evidence may ultimately refer to previous terms of employment. Our conclusion might be different if Leyva had alleged, or Patina had produced substantial evidence, that seasonal employees are presumed to be rehired the following year. In such a circumstance, Patina would have had a stronger argument that Leyva's failure to hire claim did, in fact, relate to his 2011 employment. But Leyva made no such allegations and Patina introduced no such evidence. To the contrary, substantial evidence supported the conclusion that Leyva's prior employment had terminated, he was required to reapply, and Patina rejected his application.

DISPOSITION

The order denying the motion to compel arbitration is affirmed. Leyva shall recover his costs on appeal.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

GRIMES, J.