

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ZACKARY LOPEZ,

Plaintiff and Respondent,

v.

CARING FUNERAL SERVICE, INC., et
al.,

Defendants and Appellants.

G050862

(Super. Ct. No. 50862)

O P I N I O N

Appeal from an order of the Superior Court of San Bernardino County,
David Cohn, Judge. Affirmed.

Jackson Lewis, Frank M. Liberatore, Sherry L. Swieca and Shareef S.
Farag for Defendants and Appellants.

Fernandez & Lauby, Brian J. Mankin and Marisa L. Kautz for Plaintiff and
Respondent.

Caring Funeral Services, Inc., and its president James Larkin (collectively and in the singular referred to as Employer unless the context requires otherwise) appeal from the trial court’s order denying its petition to compel its former employee, Zackary Lopez, to arbitrate his putative wage and hour class action. We find no error and affirm the order.

I

A. *Employment and the Employee Handbook*

Employer owns and operates many funeral homes located throughout Southern California. It hired Lopez as a “funeral arranger” at a mortuary located in San Bernardino from June 2011 until the date of his voluntary resignation in April 2013.

During his employment, on January 31, 2012, Employer gave Lopez a 27-page employee handbook (handbook). Lopez declared he was required to sign the pages of the handbook if he wanted to remain employed.

i. Page 25 of the Handbook

Page 25 of the handbook devotes a full page to describing Employer’s “ARBITRATION PROCEDURES[.]” It discusses the following procedures: (1) selection of an arbitrator; (2) the arbitrator must be “licensed to practice law in the state where the [e]mployee is or most recently was employed” by Employer; (3) the arbitration proceeding must be conducted in “the country” in which the employee was employed; (4) the arbitration procedural rules shall be conducted in accordance with the rules used in the employee’s state of employment, and if there are none, then the American Arbitration Association (AAA) rules will apply; (5) the contents of the written arbitration award; (6) the applicable law “[i]n resolving claims governed by this agreement [shall] . . . apply the laws of the state in which the Employee is or most recently was employed by [Employer] and or federal law, if applicable[;]” and (7) that the arbitration proceedings and award must be kept confidential.

The bottom of page 25 contains a signature line for the employee, the date, and a place for a witness to sign. Above the signature line is the following warning: “By signing this agreement, you are agreeing to have any and all disputes between you and [Employer] (except those specifically excluded with certain Federal Laws) and those otherwise excluded by applicable [l]aw, if any, decided by binding arbitration and you are waiving your right to a jury or court [t]rial.”

ii. *Page 27’s Handbook Acknowledgement and Arbitration Paragraph*

The last page of the handbook, page 27, contains two sections separated by a short squiggly line. Above this line, and in all capital letters, is the word “acknowledgment” followed by a short paragraph stating the following: “I have received and reviewed the policies and procedures in the Employee Manual of [Employer] . . . [I] agree to abide by them during the term of my employment with the funeral home, realizing changes can occur at any time. I understand that this personal guide *is not a contract and nothing in the guide constitutes an offer or a contract* between [employer] and myself. I have read the above, am familiar with its terms and agree that my relationship with my employer shall be governed thereby.” (Italics added.)

Underneath the place designated for the employee’s signature for the acknowledgement is the following warning in bold, underlined, and italic font: “Failure to sign an updated acknowledgement of agreement in receiving an updated employee manual each year can and will subject the employee to suspension without pay, and/or termination.” (Emphasis omitted.)

Immediately underneath the squiggly line is a short paragraph stating the following: “By signing this agreement, you are agreeing to have any and all disputes between you and [Employer] (except those specifically excluded with certain Federal Laws) and those otherwise excluded by applicable [l]aw, if any, decided by binding arbitration and you are waiving your right to a jury or court [t]rial.” Under this sentence

is a place for the employee to sign and enter a date. There is also a separate line available for the signature of the “Witness (Manager).”

B. The Lawsuit

Lopez filed a class action complaint alleging 11 causes of action relating to violations relating to the Labor Code and the welfare commission wage orders. He alleged Employer failed to do the following: (1) pay regular and overtime wages; (2) pay minimum wages; (3) provide meal periods; (4) provide rest periods; (5) make timely payments; (6) provide itemized wage statements; (7) maintain records; (8) pay for time spent on-call; and (9) pay reimbursement for business expenses. The complaint also contained a cause of action alleging unfair competition (Bus. & Prof. Code, § 17200 et seq.) and a representative claim under the Private Attorneys General Act of 2004 (PAGA) (Lab. Code, §§ 2698 et seq.) on behalf of all aggrieved employees.

Employer responded by filing a petition to compel the arbitration of Lopez’s individual claims and sought to have the class allegations dismissed. Employer alleged its handbook contained a binding arbitration provision governed by the Federal Arbitration Act (FAA).

The motion was supported by Larkin’s declaration. In reference to the Employer’s claim the agreement was governed by the FAA, Larkin devoted a few sentences to the issue of whether the Employer engaged in interstate commerce. Larkin stated he oversaw the operations of the entire business. “[Employer] regularly engages in transactions involving interstate commerce. This includes doing business with companies in Indiana, Massachusetts, Utah, and Arkansas wherein [Employer] purchases supplies needed for its operations. [Employer] is also in the process of acquiring a business in Kansas.” This is the sum total of Larkin’s evidence supporting application of the FAA.

Lopez filed an opposition, arguing the arbitration agreement was governed by California law, not the FAA, which prohibits the arbitration of claims to collect unpaid

wages (citing Lab. Code, §§ 219 & 229). Lopez noted PAGA claims also cannot be compelled to arbitration and the agreement was unconscionable.

C. The Court's Ruling

On August 13, 2013, the court denied the petition to compel arbitration. In its minute order, the court simply stated, “The court finds that moving party has failed to establish a prima facie showing that an arbitration agreement existed.” (Capitalization omitted.)

The reporter’s transcript provides further insight into the court’s reasoning. The court explained, “The first issue is whether an arbitration agreement exists and the parties really haven’t discussed this in their briefs, but it is something that jumps out at the court” The court focused on the last page of the handbook and found relevant the statement there was nothing in the handbook that constituted an offer or a contract. It stated, “So I don’t see how the purported language about the arbitration later on the page can possibly constitute a contract when it says it is not a contract.” The court concluded there was “no mutuality of obligation at all” and the Employer did not sign the document “[s]o I don’t think there is a contract in the first instance for arbitration.”

The court noted this determination “moots” the other arguments. It commented that if the court viewed the handbook as a contract “even though it specifically says it isn’t, we next turn to what the law provides and California law” clearly provides “wage and hour claims cannot be compelled into arbitration.” (Citing Lab. Code, §§ 219, 229.) The court explained that under these circumstances the only way to compel arbitration was if the FAA applied and preempted California law. It determined Employer failed to get past the “hurdle” of proving the FAA applied. The court stated the only evidence on this issue was Larkin’s declaration and he provided only general information about Employer’s interstate commerce. The court stated Larkin generally asserted Employer “do[es] business” with other states and “purchases supplies needed for its operations.” Larkin also commented Employer was acquiring a

business outside California. The court found these vague statements about Employer's connections to interstate commerce were inadequate. It concluded, "[T]he problem with that is what about . . . Lopez's job? Did it involve interstate commerce in any way? The fact that the company has purchased some sort of supply that may be entirely unrelated to what . . . Lopez did[,] doesn't mean that his transactions involve interstate commerce. [¶] Now, I wouldn't be surprised if, in fact, they do. If he is a funeral director he probably handles a lot of funerals, people die out of state and the bodies are transported in across state lines and people are coming from all over the country to attend funerals and so forth, but that would be complete speculation on my part. There isn't any evidence that the transactions that . . . Lopez was involved in any way involved interstate commerce. There is just not enough there for me to conclude that the FAA applies and preempts so there are two reasons that I am denying [the petition to compel arbitration]."

Employer's counsel argued the FAA applied regardless of whether Lopez was involved in transactions affecting interstate commerce. Counsel argued the test was whether Lopez's employment and actions as an employee have an impact on the company's operations, which do imply interstate commerce.

The court replied there was no evidence Lopez's job had such an impact. It stated, "I mean it may be that they bought a couple of screws for an electrical plate from some company in Kansas and that is it. There needs to be a nexus of some kind and I would suspect that that exists . . . but I need some evidence of it and it is not there." The court added its FAA finding was merely a "secondary basis" for denying the petition.

II

A. Standard of Review

An order denying a petition to compel arbitration is appealable. (Code Civ. Proc., § 1294, subd. (a).) "In general, '[t]here is no uniform standard of review for evaluating an order denying a [petition] to compel arbitration. [Citation.] If the court's order is based on a decision of fact, then we adopt a substantial evidence standard.

[Citations.] Alternatively, if the court’s denial rests solely on a decision of law, then a de novo standard of review is employed. [Citations.]’ [Citation.]” (*Laswell v. AG Seal Beach, LLC* (2010) 189 Cal.App.4th 1399, 1406.)

On appeal, Employer concedes that under California law, Lopez could not ordinarily be compelled to arbitrate his Labor Code violation claims. Employer argues (1) the agreement is governed by the FAA, and (2) the court incorrectly determined there was no enforceable contract. We conclude the case can be resolved on the first issue and therefore we need not address the second contention.

B. Does the FAA apply?

The trial court ruled Employer failed to show the employment arbitration agreement was governed by the FAA. Section 2 of the FAA (9 U.S.C. § 2) states it applies to any “written provision in . . . a contract evidencing a transaction involving commerce.” The United States Supreme Court has “interpreted the term ‘involving commerce’ in the FAA as the functional equivalent of the more familiar term ‘affecting commerce’—words of art that ordinarily signal the broadest permissible exercise of Congress’ Commerce Clause power. [Citation.]” (*The Citizens Bank v. Alafabco, Inc.* (2003) 539 U.S. 52, 56 (*Citizens Bank*); *Shepard v. Edward Mackay Enterprises, Inc.* (2007) 148 Cal.App.4th 1092, 1097 (*Shepard*)).

Under this broad interpretation, “application of the FAA [is not] defeated because the individual [transaction], taken alone, did not have a ‘substantial effect on interstate commerce.’ [Citation.] Congress’ Commerce Clause power ‘may be exercised in individual cases without showing any specific effect upon interstate commerce’ if in the aggregate the economic activity in question would represent ‘a general practice . . . subject to federal control.’ [Citations.] Only that general practice need bear on interstate commerce in a substantial way. [Citations.]” (*Citizens Bank, supra*, 539 U.S. at pp. 56-57.)

Because Employer was asserting the applicability of the FAA, it had the burden to produce evidence showing the contract involved substantial interstate commerce. (*Shepard, supra*, 148 Cal.App.4th at p. 1101; see *Hoover v. American Income Life Ins. Co.* (2012) 206 Cal.App.4th 1193, 1207 (*Hoover*) [“burden to demonstrate FAA coverage by declarations and other evidence”].) Employer’s arbitration clause did not refer to the FAA, and as we will explain, Employer provided insufficient evidence regarding the FAA’s applicability.

The only evidence presented by Employer was contained in a small paragraph of Larkin’s declaration. Larkin did not describe Lopez’s job title, but this information could be found in Lopez’s declaration; he was employed as a “funeral arranger.” Employer did not provide any description of Lopez’s job duties as an “arranger” or his position in the company’s hierarchy. Instead, Larkin asserted the FAA applied because Employer engages in transactions involving interstate commerce by “doing business” with four different out-of-state companies. He stated Employer was “doing business” with these companies “wherein [Employer] purchases supplies needed for its operations.” In other words, Larkin asserted Employer purchased some sort of supplies from vendors located outside of California. Larkin did not elaborate on the nature or quantity of the supplies. He also did not explain how the supplies were utilized in the mortuary business, or the frequency of out-of-state purchases. Simply stated, he could be discussing the purchase of one box of paperclips from Utah or a continuous supply of expensive wooden caskets.

Larkin also stated Employer was “in the process” of acquiring a business in Kansas. We conclude this statement does not rise to the level of relevant evidence, much less substantial evidence, on the issue of the FAA applicability. The alleged purchase was incomplete and may not come to fruition. Moreover, the nature of the Kansas business was left open for speculation. Was Employer purchasing a car wash or a business related to mortuary services? To be substantial, supporting evidence must be

“of ponderable legal significance, . . . reasonable, credible and of solid value.” (Roddenberry v. Roddenberry (1996) 44 Cal.App.4th 634, 651.) “[I]t is ““substantial’ proof of the essentials which the law requires.” [Citations.]” (Ibid.) “Inferences may constitute substantial evidence, but they must be the product of logic and reason. Speculation or conjecture alone is not substantial evidence. [Citation.]” (Buckley v. California Coastal Com. (1998) 68 Cal.App.4th 178, 192.) It requires speculation and conjecture to say the Employer’s future hope of purchasing a Kansas-based business proves its arbitration agreement with a former mortuary employee substantially affects interstate commerce.

Consequently, the issue we must decide is whether the single fact Employer purchased an unknown type and quantity of supplies from vendors located outside California “bear[s] on interstate commerce in a substantial way. [Citations.]” (Citizens Bank, supra, 539 U.S. at p. 57.) We conclude the failure to describe the nature and amount of the supplies being purchased from interstate commerce is dispositive on this issue. The purchases cannot be of such a small amount or value to have involved “a merely ‘trivial’ impact on interstate commerce, which would be outside the limits of Congress’s power. [Citation.]” (Shepard, supra, 148 Cal.App.4th at p. 1101 [construction of plaintiff’s house “involved the receipt and use” of large quantity of identified building materials manufactured outside California].) Moreover, there was no evidence showing Lopez’s activities as an employee affected interstate commerce because there was no information explaining the scope of his contractual relationship with Employer. “[T]he proper test requires an analysis of whether the regulated activity ‘substantially affects’ interstate commerce.” (U.S. v. Lopez (1995) 514 U.S. 549, 559, italics added.)

The FAA only covers arbitration agreements with employers who operate “within the flow of interstate commerce.” (Allied-Bruce Terminix Companies Inc. v. Dobson (1995) 513 U.S. 265, 273 (Allied-Bruce).) Given Employer’s failure to provide

any evidence regarding the nature of the supplies purchased out of state, we must agree with the trial court's determination Employer failed to meet its burden of proof.

(Compare *Shepard, supra*, 148 Cal.App.4th at p. 1101.)

The *Hoover* case is similar to the case before us. It involved a sales agent's class claims alleging his employer, an insurance company, wrongly classified him and the other class members as independent contractors, rather than as regular employees, and that the company failed to pay state-mandated wages. (*Hoover, supra*, 206 Cal.App.4th at p. 1199.) The trial court denied the insurance company's petition to compel arbitration, and the appellate court affirmed after rejecting the insurance company's claim of FAA preemption. The court reasoned, "[The insurance company called AIL] had the burden to demonstrate FAA coverage by declarations and other evidence. [Citations.] The only established facts are that Hoover was a California resident who sold life insurance policies. Even though AIL is based in Texas, there was no evidence in the record establishing that the relationship between Hoover and AIL had a specific effect or 'bear[ing] on interstate commerce in a substantial way.' [Citation.] Hoover was not an employee of a national stock brokerage firm or the employee of a member of a national stock exchange. [Citations.] Unlike the plaintiff in *Guiliano v. Inland Empire Personnel, Inc.* (2007) 149 Cal.App.4th 1276, 1287, Hoover did not work in other states or engage in multimillion dollar loan activity that affected interstate commerce by negotiating with a bank that was headquartered in another state. Under these circumstances, if the FAA did not apply, the exception favoring federal preemption and arbitration did not operate." (*Hoover, supra*, 206 Cal.App.4th at pp. 1207-1208.) The court concluded the insurance company failed to make a sufficient showing to support a determination of FAA applicability and preemption.

The cases Employer cites on appeal involved strong evidence of interstate activity. (See *Citizens Bank, supra*, 539 U.S. at p. 57 [holding debt restructuring agreements involved interstate commerce where evidence showed debtor engaged in

substantial interstate business using bank loans and restructured debt was secured by all debtor's business assets, including "goods assembled from out-of-state parts and raw materials," and given general policy commercial lending activity is subject to Commerce Clause regulation]; *Allied-Bruce, supra*, 513 U.S. at pp. 281-282 [holding transaction involved interstate commerce because company was multistate and materials used to carry out terms of contract came from outside the state].) These cases are not analogous. Employer offered insufficient evidence to show the alleged arbitration agreement with Lopez involved interstate commerce, and we find no basis to reverse the court's ruling the FAA did not apply. Absent a showing that interstate commerce is involved in this particular contract, Lopez is entitled to pursue his claims for overtime wages and penalties in court without being obliged to arbitrate. (Lab. Code, § 229.)¹

III

The order is affirmed. Respondent shall recover his costs on appeal.

O'LEARY, P. J.

WE CONCUR:

MOORE, J.

THOMPSON, J.

¹ In light of our determination that state law allows Lopez to maintain his lawsuit for unpaid wages, we need not reach issues of whether there was a valid arbitration agreement and, alternatively, the claim was unconscionable.