



## Fifth Circuit Holds Procedural Unconscionability Determination Was From Judge, Not Arbitrator, Despite Delegation Clause

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An employee sued her former employer alleging that she was unlawfully terminated under federal law. During the course of her employment, the employee acknowledged on multiple instances that “all employment disputes” with the employer were subject to arbitration. The applicable version of her Arbitration Agreement also included a “delegation clause” that provided “any legal dispute . . . arising out of, relating to, or concerning the validity, enforceability or breach of this [Arbitration] Agreement, shall be resolved by final and binding arbitration.” The employee had viewed and electronically acknowledged that she understood and agreed to the Arbitration Agreement.

In response to the employer’s motion to compel arbitration, the employee argued there was no “meeting of the minds” because she did not understand she was agreeing to arbitrate. She also asserted that the Arbitration Agreement was procedurally unconscionable “because her assent was obtained through misrepresentation, she never had a meaningful opportunity to bargain, and there was a gross disparity in the parties’ bargaining power.” The district court compelled arbitration finding that there was a meeting of the minds and that the “procedural unconscionability objection went to the enforceability of the Arbitration Agreement and not its formation,” and must “be decided by the arbitrator under the Arbitration Agreement’s delegation clause.” The employee appealed.

The United States Court of Appeal for the Fifth Circuit held that there was a “meeting of the minds” based upon the employee’s electronic acknowledgment of the Arbitration Agreement and its terms. *See Bowles v. OFG, L.L.C.*, No. 18-60749, 2019 WL 2521667 (5th Cir. June 19, 2019). Specifically, the court rejected her claim that she “did not understand she was agreeing to arbitrate her employment disputes,” finding that her “unilateral lack of diligence” by failing to read the Arbitration Agreement did not “preclude contract formation.” However, the Fifth Circuit reversed the district court’s referral of the procedural unconscionability challenge to arbitration. Under Mississippi law, the court found it was clear that “[p]rocedural unconscionability goes to the formation of the contract.” Although recognizing that unconscionability allegations relating to the contract as a whole are from the arbitrator, the court held that the employee’s “procedural unconscionability objection challenges the formation of the Arbitration Agreement itself” and “the district court had the duty to resolve this challenge” notwithstanding the delegation clause.

**For more information, please contact:**

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