

Ferguson v. Countrywide Credit Industries, Inc.  
Employee (P) v. Employer (D)  
298 F.3d 778 (9th Cir. 2002).

NATURE OF CASE: Appeal of denial of motion to compel arbitration.

RULE OF LAW: An arbitration agreement is unconscionable, and therefore unenforceable, where it is a prerequisite to employment, job applicants are not permitted to modify the terms of the agreement, and the terms are one-sided, favoring the employer.

FACTS: Misty Ferguson (P) sued Countrywide Credit Industries Inc. and her supervisor for sexual harassment, retaliation, and hostile work environment. Countrywide (D) moved to compel the matter to arbitration pursuant to an employment contract, which required Ferguson (P) to arbitrate her claims. The district court refused to compel arbitration, holding that the arbitration agreement was unenforceable under the doctrine of unconscionability.

ISSUE: Is an arbitration agreement unconscionable, and therefore unenforceable, where it is a prerequisite to employment, job applicants are not permitted to modify the terms of the agreement, and the terms are one-sided, favoring the employer?

HOLDING AND DECISION: (Pregerson, J) Yes. An arbitration agreement is unconscionable, and therefore unenforceable, where it is a prerequisite to employment, job applicants are not permitted to modify the terms of the agreement, and the terms are one-sided, favoring the employer. A contract is unenforceable under the doctrine of unconscionability where there is both procedural and substantive unconscionability. Procedural unconscionability exists here, because the bargaining power of each party is unequal: Ferguson (P) had to sign the agreement, and accept all of its terms, or not get the job applied for. Substantive unconscionability also exists here, because the terms of the agreement are one-sided: The agreement compels arbitration of Ferguson's (P) claims, but exempts from arbitration the claims of Countrywide (D). In addition, Countrywide's (D) agreement requires Ferguson (P) to pay filing fees for arbitration, which could exceed the costs of litigation. Finally, the agreement includes limitations on the number of subjects Ferguson (P) could raise during discovery. While the discovery provision in the arbitration agreement is not so one-sided that it alone could be called unconscionable, in the context of an arbitration agreement that overall favors Countrywide (D), it too is unconscionable. Affirmed.

ANALYSIS: The outcome of this case, decided in California, stands in direct contrast to *Carter v. Countrywide Credit Industries, Inc.*, 362 F.3d 294 (5th Cir. 2004), also set forth in your casebook. *Carter* was decided in Texas, which is generally much more lenient on arbitration agreements.