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WHERE'S THE BEEF? NLRB RULES THAT WENDY'S FRANCHISEE'S MANDATORY CLASS ACTION WAIVER IS UNLAWFUL

By Phillip C. Bauknight

In late February 2016, the National Labor Relations Board ruled that Respondent Great Lakes Restaurant Management, LLC ("Great Lakes"), which operated several Wendy's Restaurants in Buffalo, New York, violated the National Labor Relations Act by maintaining and enforcing an arbitration agreement that prohibits its employees from participating in collective or class action. In rendering this decision, the Board reaffirmed its ruling in *D.R. Horton*, 357 NLRB No. 184 (2012), *enf. denied in relevant part*, 737 F.3d 344 (5th Cir 2013), which held that arbitration agreements containing mandatory class or collective action waivers violate the Act.

FACTUAL BACKGROUND

On March 26, 2015, the Board's General Counsel issued a complaint alleging that Great Lakes maintained a Dispute Resolution Program, which violated the Act. Specifically, a booklet provided to employee applicants, which outlined the terms of the Program, stated on the first page, and in bold letters, that "this program is a condition of your employment and is the mandatory and exclusive means by which [covered] problems may be resolved, so read the information in this program booklet carefully."

Additionally, contained within the booklet was a provision that stated:

The employee and company each agree, that there shall be no class or collective action arising from any employee's claim(s), and each employee may only maintain a claim under this plan on an individual basis and may not participate in collective action.

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The booklet also contained a lengthy and detailed list of federal and state claims subject to arbitration and included only a small list of claims exempt from the Program's mandatory arbitration provision. The booklet did not identify unfair labor practice charges as exempt from the mandatory arbitration provision. Great Lakes also required employees to sign a Program Agreement which stated that "the Company and I agree that all legal claims or disputes covered by the Agreement must be submitted to binding arbitration and that this binding arbitration will be the sole and exclusive remedy for resolving any such claim or dispute."

In response to the General Counsel's complaint, Great Lakes filed an answer admitting that it maintained the Program and that the Program booklet "speaks for itself." Great Lakes otherwise denied the remainder of the factual allegations in the Complaint. The General Counsel then moved for summary judgment.

THE BOARD'S DECISION

The Board found that the Program booklet -- which Great Lakes admitted "speaks for itself" - described in detail the mandatory arbitration agreement that explicitly required employees to waive their right to maintain collective or class action. For that reason, the Board held that Great Lakes' maintenance of the Program violated Section 8(a)(1) of the Act, which makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7" of the Act.

The Board then held that the Program further violated Section 8(a)(1) of the Act because employees would reasonably believe that the Program "bars or restricts their right to file and pursue unfair labor practice charges with the Board." The Board explained that when an employer's rule does not explicitly restrict Section 7 rights, a Section 8(a)(1) violation can be found if there is a showing that employees would "reasonably construe" the language to prohibit Section 7 activity.

Here, the Board observed that the Program booklet included specific provisions that identified which claims were, and were not, subject to mandatory arbitration. While the booklet categorized claims for "wages or other compensation; contract breaches; wrongful termination; [and] discrimination" among those subject to mandatory arbitration, the booklet did not include unfair labor practice charges among the claims exempt from mandatory arbitration. As a result, the Board determined that such language would cause an employee to reasonably believe that they were prohibited from filing an unfair labor practice charge.

TAKEAWAYS

The Board reaffirmed its position that mandatory class or collective action waivers violate the National Labor Relations Act. While the Board's decisions on mandatory class action waivers have been reversed by the Fifth Circuit previously, the Board is steadfast in its position that such contractual agreements are unlawful. As a result, given this lack of clarity, employers should remain cognizant of this divergence and consult with their attorneys when drafting any arbitration agreement offered to employees at the outset of their employment.

This decision also highlights the danger of responding to a complaint with the response that

"a document speaks for itself." As a practical matter, because documents cannot speak, we discourage reliance on such a response when preparing an answer to a complaint. Rather, we recommend that, when faced with the prospect of having to respond to a filed complaint, employers should consult with their attorneys and either admit or deny the specific facts alleged, and avoid conclusory responses such as "the document speaks for itself." As evidenced in this decision, such responses can be interpreted as tacit admissions to be used against employers later in litigation.

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