

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: June 9, 2008

TO : Joseph Norelli, Regional Director
Region 20

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Neiman Marcus
Case 20-CA-33510

This case was submitted for advice on the issue of whether the Employer violated Section 8(a)(1) of the Act when it imposed on the Charging Party and other unrepresented employees, as a condition of employment, a mandatory arbitration agreement that prohibits an arbitrator from consolidating or joining employee claims or from considering or certifying employee claims as a class action.

We conclude that the Employer violated Section 8(a)(1) by prohibiting arbitrators from consolidating or joining two or more claims, but did not violate Section 8(a)(1) by prohibiting arbitrators from considering or certifying claims as class actions.

FACTS

The Employer operates 31 department stores in various states throughout the country. Its sales employees are unrepresented. The Charging Party, Taylor Bayer, has been employed as a Cosmetics Associate by the Employer's San Francisco, California store since March 20, 2006. There are approximately 100 employees employed in his department and approximately 500 to 600 employees employed in the store.

On June 20, 2007, Bayer received a copy of a document entitled, "The Neiman Marcus Group, Inc., Mandatory Arbitration Agreement" (Agreement). The Agreement provides, as relevant here, that effective July 15, 2007, "all complaints, disputes, and legal claims" that employees have against the Employer must be submitted to binding arbitration. It further provides that all employees employed by the Employer "knowingly and voluntarily" waive "any and all rights they have under law to a trial before a jury or before a judge in a court of law." According to the Agreement, "mandatory arbitration is not optional. If you are an employee on or after July 15, 2007 . . . you are deemed to have accepted and agreed to the Mandatory

Arbitration Agreement by coming to work after that date." In addition, section 15 of the Agreement sets forth a prohibition on the consolidation of employee claims as follows:

Class Action Prohibition. The arbitrator shall not consolidate claims of different employees into (1) proceeding, nor shall the arbitrator have the authority to consider, certify, or hear an arbitration as a class action. While section 22 hereof contains a severability clause, this provision that precludes class actions may not be severed from this Agreement for any reason.

The Agreement also states that it does not prohibit employees from filing charges or complaints "with the National Labor Relations Board, the Equal Employment Opportunity Commission, or like state agencies."¹

After Bayer reviewed the Agreement, he discussed it with over 50 of his co-workers. Like Bayer, they were concerned with the Agreement's terms but many believed that they had no choice but to sign it. Bayer, however, refused to sign the Agreement and, as a result, was told by a manager that his last day would be July 14.² He subsequently filed an unfair labor practice charge alleging that the Employer violated Section 8(a)(1) when it imposed on its employees, as a condition of employment, a mandatory arbitration agreement that precludes the filing of consolidated claims and class actions.

ACTION

We conclude that the Region should issue a complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) by imposing on its employees, as a condition of employment, a mandatory arbitration agreement that prohibits an arbitrator from consolidating or joining employee claims. The complaint should not allege that the Employer violated Section 8(a)(1) by prohibiting an

¹ The Employer has indicated that the Agreement will be amended to state "or like federal or state agencies." To this end, the Employer has posted on its website documents clarifying this aspect of the Agreement.

² Another employee refused to sign the Agreement and also chose not to report to work after July 15 because she did not want to have been "deemed to have accepted and agreed" to the Agreement's terms. When her employment was thereafter terminated, she filed a lawsuit alleging that she had been constructively discharged.

arbitrator from considering or certifying claims as class actions.

1. Employees Have a Section 7 Right to File Joint Grievances

Under Section 7 of the Act, employees are guaranteed the right to engage in concerted activities for the purpose of mutual aid and protection. An employer's policies that interfere with that right constitute unfair labor practices under Section 8(a)(1) of the Act.

It has long been recognized that the ambit of Section 7 is broad. Thus, in Eastex, Inc. v. NLRB,³ the Supreme Court found, as relevant here, that the "mutual aid and protection" clause protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums. Consistent with this ruling, the Board has specifically found that the filing of collective complaints and lawsuits constitutes protected concerted activity under the Act.

For example, in Trinity Trucking & Materials Corp.,⁴ the employees filed a lawsuit against the employer alleging a breach of contract. The employer sent letters warning that if the employees did not withdraw the punitive damages portion of the lawsuit within 48 hours, they would be discharged. They were thereafter terminated when they refused. The Board found that the filing of the lawsuit by a group of employees was protected activity and that a contrary decision by an arbitrator regarding the rights of the employees to file the lawsuit was repugnant to the purposes of the Act.

Similarly, in Harco Trucking, LLC,⁵ laid off employee Wood filed a lawsuit against the employer alleging that it had failed to pay the prevailing wages at certain of its job sites. Wood subsequently amended the prevailing wage lawsuit as a class action on behalf of other similarly situated employees. When the employer again began hiring, it refused to rehire Wood because of the pending lawsuit. The Board, adopting the findings of the administrative law judge, found that the employer had violated Section 8(a)(1) of the Act by refusing to hire Wood because he had engaged in the protected concerted activity of filing and

³ 437 U.S. 556, 555-56 (1978).

⁴ 221 NLRB 364 (1975).

⁵ 344 NLRB 478 (2005).

maintaining a lawsuit in California Superior Court on behalf of himself and his coworkers.

As these and many other decisions make clear,⁶ employees have the statutory right under Section 7 of the Act to vindicate their own rights, along with the rights of similarly situated coworkers, through the filing of lawsuits that join or consolidate two or more claims.

We recognize that Section 7 does not provide a right to select any particular forum for the vindication of employee rights. Thus, in O'Charley's Inc.,⁷ we concluded that where an arbitration agreement required only that the charging party forego traditional judicial forums, but did not require the relinquishment of any substantive rights, the agreement did not violate the Act. Employees can therefore be required, as a condition of employment, to waive their rights to file claims in a judicial forum.

Here, however, the Employer's Mandatory Arbitration Agreement imposes two distinct limitations on the resolution of employee claims. It not only dictates that employees resolve all legal disputes through binding arbitration, rather than in judicial forums, but it also prohibits the arbitrator from joining or consolidating two or more claims. Because employees are precluded from bringing their claims outside the arbitral forum, and because within the arbitral forum arbitrators are precluded from joining or consolidating claims, employees are effectively prevented from exercising their Section 7 right to file collective claims. The Employer has therefore violated Section 8(a)(1).

⁶ See also La Madri Restaurant, 331 NLRN 269, 275-76 (2000) (finding employees unlawfully discharged for engaging in protected concerted activity including filing a lawsuit in Federal court for violations of federal and state labor laws); 52nd Street Hotel Associates, 321 NLRB 624 (1996) (finding that a federal lawsuit filed by employees to vindicate rights to payment for overtime work and the right to avail themselves of the safeguards of the Fair Labor Standards Act was protected concerted activity); Mohave Elec. Coop., Inc. v. NLRB, 206 F.3d 1183, 1188-89 (D.C. Cir. 2000) (filing of judicial petition "supported by fellow employees and joined by a co-employee" was protected concerted activity); Tri-County Transportation, Inc., 331 NLRB 1153, 1155 (2000) (finding that three employees were engaged in protected activity by filing unemployment claims together).

⁷ Case 26-CA-19974, Advice Memorandum dated April 16, 2001.

2. The Employees Did Not Voluntarily Waive their Section 7 Right to File Joint Claims

The Employer contends that, even if Section 7 of the Act protects its employees' rights to file collective claims, it is well settled that employees or their representatives can waive statutory rights and that the employees did so here by signing the Agreement or by continuing to work after being notified of the Agreement's terms.

Under the generally accepted definition, a waiver is the voluntary relinquishment, express or implied, of a legal right or advantage.⁸ In Alexander v. Gardner-Denver,⁹ the Supreme Court observed that in determining the effectiveness of any waiver, a court must determine at the outset whether the waiver was "knowing and voluntary."¹⁰ In Lefkowitz v. Turley,¹¹ the Supreme Court further observed that "[a] waiver secured under threat of substantial economic sanction cannot be deemed voluntary."¹²

In this case, there can be no doubt that the employees did not voluntarily waive their Section 7 rights to collectively file their claims in the arbitral forum. Rather, it is undisputed that the Employer's Mandatory Arbitration Agreement was imposed as a condition of employment and, if an employee chose not to be bound, his

⁸ Black's Law Dictionary, 1574 (7th ed. 2004).

⁹ 415 U.S. 36, 52 at fn.15 (1974). Although Gardner-Denver addressed Title VII of the Civil Rights Act of 1964, 42 U.S. §2000e et seq., a waiver of rights under federal employment statutes is analyzed using this standard as well. See, e.g., Rivera-Flores v. Bristol-Meyers Squibb Caribbean, 112 F.3d 9, 12-14 (1st Cir. 2007) (finding that agreement constituted a knowing and voluntary waiver of ADA rights); Smart v. Gillette Co. Long-Term Disability Plan, 70 F.3d 173, 181-83 (D.Mass. 1995) (finding that an employee's severance agreement constituted a knowing and voluntary waiver of her ERISA rights).

¹⁰ Id.

¹¹ 414 U.S. 70, 82-83 (1973) (finding that a waiver of the constitutional privilege against self incrimination could not be termed voluntary where it was secured under the threat of the loss of government contracts - which the Court found was the equivalent of the loss of a profession).

¹² Id.

only option was to resign. Employees were therefore forced to choose between forfeiting their jobs or forfeiting their rights to join together to file collective claims. Under these circumstances, employees cannot be deemed to have voluntarily relinquished their Section 7 rights.

3. Employees Do Not Have a Section 7 Right to Use a Class Action Procedure

Although an argument could be made that employees have a Section 7 right to pursue class action claims,¹³ we conclude that, so long as the Employer permits the filing of joint claims, it does not unlawfully interfere with its employees' right to engage in concerted activity by prohibiting class actions.

Thus, a class action is primarily a procedural mechanism designed to facilitate joining multiple parties with similar or identical claims. Under Rule 23 of the Federal Rules of Civil Procedure, incorporated as the class action procedure under the Equal Employment Opportunity Act and most employment-related statutes, class actions allow one or more individuals to bring a claim on behalf of all others, even when those class members have not filed charges with the administrative agency. Once a class has been certified, class members must be identified and notified through reasonable efforts, and individual class members who do not opt-out of the class action are bound by the decision.¹⁴ This procedure promotes judicial economy and efficiency by obviating the need to adjudicate the same issue repeatedly. In addition, by allowing litigation of multiple claims in a single action, it both conserves resources and prevents inconsistent adjudication.

Unlike in other statutory contexts, a prohibition on class actions arguably interferes with substantive rights

¹³ See, e.g., Hoboken Shipyards, Inc., 275 NLRB 1507, 1516 (1985) (finding that the filing of a class action was concerted activity within the meaning of the Act); United Parcel Service, Inc., 252 NLRB 1015, 1018 (1980) (employees filed class action lawsuit regarding rest breaks and solicited support from other employees; "It is well settled that activities of this nature are concerted protected activities[.]").

¹⁴ The Fair Labor Standards Act sets forth a slightly different structure for class claims. Unlike the opt-out provisions of Rule 23, § 216(b) of the FLSA is an opt-in class provision -- an employee cannot be made a party to an FLSA-related proceeding without his consent. See 29 U.S.C. §216.

under the Act, which has as its cornerstone the right of employees to join together to advance their interests on a collective basis. In other words, the Employer's class action prohibition is not entirely procedural, as the Employer contends, because it does have some "substantive" effect.

We conclude, however, that the class action mechanism is primarily a procedural device and that the effect on Section 7 rights of prohibiting its use is not significant. Any claims that could be brought as a class action could also be brought as a joinder of multiple claims. And, since any claims brought under the Employer's arbitration system would involve a group of employees who are known to one another, there is no need for a class representative to bring claims on behalf of unidentified class members. Consequently, under the Employer's arbitration system, a class action would be primarily a procedural device that would facilitate, and perhaps make more effective, the filing of concerted claims, but which is not necessary for bringing concerted actions. Although Section 7 prohibits the Employer from denying employees the ability to adjudicate collective claims, the Employer is not required to assist employees in bringing them. Accordingly, the Employer's action in precluding arbitrators from considering or certifying claims as class actions does not violate Section 8(a)(1).

Pursuant to the forgoing, we conclude that a complaint should issue, absent settlement, alleging that the Employer violated Section 8(a)(1) when it imposed on the Charging Party and other unrepresented employees, as a condition of employment, a Mandatory Arbitration Agreement that prohibits an arbitrator from consolidating or joining employee claims.

B.J.K.