IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

PAMELA HERRINGTON,
individually and on behalf of all
others similarly situated,

Plaintiff,

v.

WATERSTONE MORTGAGE CORPORATION,

Defendant.

OPINION AND ORDER

11-cv-779-bbc

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In this proposed collective action, plaintiff Pamela Herrington contends that defendant Waterstone Mortgage Corporation failed to pay its loan officers for overtime work, in violation of the Fair Labor Standards Act and state law. November 2011, when plaintiff filed her complaint, the parties have filed several motions.

First, defendant moved to to dismiss or stay the case on the ground that plaintiff's claims are subject to an arbitration agreement. In addition, defendant asked for "the costs associated with enforcing the arbitration provision" in this court, including attorney fees. Dkt. #13. Plaintiff sought leave to file a sur-reply brief to discuss the implications of a recent decision from the National Labor Relations Board. Dkt. #35. In response, defendant

filed a document it called an "opposition" to plaintiff's motion, but was actually a sur-sur-reply brief. Dkt. #36. I have considered both briefs.

While the parties were briefing defendant's motion to dismiss, each side filed an additional motion. Plaintiff filed a "motion to strike defendant's claim for attorneys' fees and costs," dkt. #15, which is simply the mirror image of defendant's request for costs. (Defendant does not have a "claim" for attorney fees or costs because it has not yet filed an answer or counterclaim.) Defendant filed a "motion to strike, for protective order and for sanctions," dkt. #18, in which it argues that counsel for plaintiff has engaged in inappropriate communication with potential class members.

With respect to defendant's motion to dismiss, plaintiff agrees with defendant that her claims fall within the scope of the parties' arbitration agreement. However, she says that the court should refuse to enforce the agreement because arbitration would be too costly for her and the agreement violates both the FLSA and the National Labor Relations Act.

Although plaintiff has failed to show that arbitration would be any more expensive than litigation in federal court, I agree with her that the arbitration agreement violates the NLRA because it includes a provision that requires her to give up her right under the statute to bring claims collectively. However, because the prohibition on collective actions is severable from the remainder of the arbitration agreement, I am granting defendant's motion to stay the case while pending arbitration. I am denying defendant's requests for costs and

sanctions and plaintiff's motion to strike.

OPINION

On April 7, 2011, the parties signed an employment agreement that included the following language:

> [A]ny dispute between the parties concerning the wages, hours, working conditions, terms, rights, responsibilities or obligations between them or arising out of their employment relationship shall be resolved through binding arbitration in accordance with the rules of the American Arbitration Association applicable to employment claims. Such arbitration may not be joined with or join or include any claims by any persons not party to this Agreement. Except as otherwise set forth herein, the parties will share equally in the cost of arbitration.

Defendant argues that all of plaintiff's claims in this case are subject to arbitration and must be dismissed or stayed.

As noted above, plaintiff does not deny that her claims fall within the scope of this provision, but she argues that the arbitration agreement is unenforceable for three reasons: (1) it places excessive costs on employees by requiring them to pay half the cost of arbitration; (2) it prohibits employees from bringing a collective action, in violation of the FLSA; and (3) it prohibits employees from engaging in "concerted activity" protected by the National Labor Relations Act. The parties agree that whether the agreement is enforceable is a question for the court. Lumbermens Mutual Casualty Co. v. Broadspire Management

Services, Inc., 623 F.3d 476, 480 (7th Cir. 2010).

With respect to her first argument, plaintiff says that she cannot afford the cost of arbitration, which she estimates at $14,000. Although she acknowledges that the arbitration agreement allows her to recover these expenses if she prevails, she says she cannot take that risk. Even if I assume that a fee shifting provision might not provide adequate protection in some circumstances, plaintiff's argument founders because she failed to conduct any comparison of the costs of litigating in federal court. James v. McDonald's Corp., 417 F.3d 672, 680 (7th Cir. 2005) ("The cost differential between arbitration and litigation is evidence highly probative to [the plaintiff's] claim that requiring her to proceed through arbitration, rather than through the courts, will effectively deny her legal recourse."). Particularly because her counsel admits that discovery is likely to be more streamlined in arbitration, Getman Decl. ¶ 6, dkt. #22-5, her failure to compare the relative costs dooms her claim of hardship.

Plaintiff's second argument focuses specifically on the part of the arbitration agreement that prohibits multiple-plaintiff arbitration proceedings. She says that it conflicts with 29 U.S.C. § 216(b) of the FLSA , which allows employees to bring a collective action so long as each gives his or her consent. However, this argument is undermined by Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 32 (1991), in which the Court stated that an arbitration agreement that eliminates class-wide relief is not necessarily invalid in cases

brought under the Age Discrimination in Employment Act, which also includes a collective action provision. Id. at 32 ("[E]ven if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred.").

Numerous other courts have relied on Gilmer to conclude that a waiver of rights in § 216(b) is permissible because that provision does not confer a substantive right. E.g., Long John Silver's Restaurants, Inc. v. Cole, 514 F.3d 345, 351 (4th Cir. 2008) (rejecting argument that "Congress expressly intended that the 'opt-in' procedure could not be waived by the parties' agreement to an alternate procedure"; "no court has explicitly ruled that the 'opt-in' provision of the § [2]16(b) provision creates a substantive, nonwaivable right."); Carter v. Countrywide Credit Industries, Inc., 362 F.3d 294, 298 (5th Cir. 2004) ("[W]e reject the Carter Appellants' claim that their inability to proceed collectively deprives them of substantive rights available under the FLSA."); Horenstein v. Mortgage Market, Inc., 9 Fed. Appx. 618, 619 (9th Cir. 2001) ("Appellants' contention that the arbitration clause in the Employment Agreements may not be enforced because it eliminates their statutory right to a collective action, is insufficient to render an arbitration clause unenforceable."); Copello v. Boehringer Ingelheim Pharmaceuticals Inc., 812 F. Supp. 2d 886, 894 (N.D. Ill. 2011) ("Courts routinely hold that FLSA does not grant employees the unwaivable right to proceed

in court collectively under § 216(b) . . . [W]hile FLSA prohibits substantive wage and hour rights from being contractually waived, it does not prohibit contractually waiving the procedural right to join a collective action."). See also Caley v. Gulfstream Aerospace Corp., 428 F.3d 1359, 1378 (11th Cir. 2005) (concluding that collective action waiver was not unconscionable under state law, citing Gilmer).

Plaintiff's third argument, that the prohibition on collective actions in the arbitration agreement violates the National Labor Relations Act, is her strongest. Under 29 U.S.C. § 157, "[e]mployees shall have the right to . . . engage in . . . concerted activities for the purpose of . . . mutual aid or protection." Under 29 U.S.C. § 158(a)(1), employers may not "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title." Plaintiff says that the collective action waiver interferes with her right to engage in a concerted activity protected by § 157.

A threshold question I asked the parties to brief is whether I have authority to enforce §§ 157 and 158 in light of statements by the Supreme Court that the National Labor Relations Board generally has exclusive jurisdiction over enforcement of those provisions. Amalgamated Utility Workers v. Consolidated Edison Co. of New York, 309 U.S. 261, 264 (1940) ("Congress declared that certain labor practices should be unfair, but it prescribed a particular method by which such practices should be ascertained and prevented. By the express terms of the Act, the Board was made the exclusive agency for that purpose."); San

Diego Building Trades Council, Millmen's Union, Local 2020 v. Garmon, 359 U.S. 236, 244-45 (1959) ("It is essential to the administration of the Act that these determinations [under § 157 and § 158] be left in the first instance to the National Labor Relations Board.").

Having reviewed the parties' supplemental briefs, I agree with plaintiff that Kaiser Steel Corp. v. Mullins, 455 U.S. 72 (1982), gives a federal court authority to invalidate a contractual provision that violates the NLRA. In that case, the Court stated: "While only the Board may provide affirmative remedies for unfair labor practices, a court may not enforce a contract provision which violates § 8(e) [another provision in § 158]." Id. at 86.

Defendant says that Kaiser Steel is distinguishable because, in that case, it was "unmistakably clear" that the contract violated the NLRA and the plaintiff was attempting to enforce the contract "in order to maintain the action." However, defendant cites no language from Kaiser Steel showing that either of these facts was relevant to the Court's decision. The Court of Appeals for the Seventh Circuit has interpreted Kaiser Steel as standing for the broad proposition that "a court may not enforce a contract provision which violates federal law." Costello v. Grundon, 651 F.3d 614, 623-24 (7th Cir. 2011).

With respect to the merits of plaintiff's argument that the collective action waiver violates §§ 157 and 158(a)(1), various decisions from federal courts and the National Labor Relations Board hold that collective actions are a "concerted activity" and that lawsuits for

unpaid wages under the FLSA are "for the purpose of . . . mutual aid or protection" within the meaning of § 157. Brady v. National Football League, 644 F.3d 661, 673 (8th Cir. 2011) ("[A] lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment is 'concerted activity' under § 7 of the National Labor Relations Act."); Leviton Manufacuring Co., Inc. v. NLRB, 486 F.2d 686, 689 (1st Cir. 1973) ("[T]he filing of a labor related civil action by a group of employees is ordinarily a concerted activity protected by § 7, unless the employees acted in bad faith."); Saigon Gourmet Restaurant, 353 NLRB No. 110 (2009) ("[A] wage and hour lawsuit [is] clearly protected concerted activity."); In re 127 Restaurant Corp., 331 NLRB 269, 269 (2000) (lawsuit filed on behalf of 17 employees regarding wages was protected activity); 52nd Street Hotel Associates, 321 NLRB 624, 624 (1996) (collective action brought under FLSA was protected activity), abrogated on other grounds by Stericycle, Inc., 357 NLRB No. 61 (2011); Host International, 290 NLRB 442, 443 (1988) (multiple-plaintiff lawsuit "concerning working conditions" was protected activity); United Parcel Service, Inc., 252 NLRB 1015, 1016 (1980) (class action lawsuit regarding lunch breaks is protected activity), enforced, 677 F.2d 421, 422 (6th Cir. 1982); Trinity Trucking & Materials Corp., 221 NLRB 364, 364 (1975) (filing of lawsuit by group of employees for failure to pay wages in accordance with contract was protected activity), enforced, 567 F.2d 391 (7th Cir. 1977).

In a recent opinion, the Board considered the precise question in this case and

concluded that an employer violates the NLRA by entering into individual arbitration agreements that include a prohibition on collective actions by employees. In re D.R. Horton, Inc., 357 NLRB No. 184 (2012), available at 2012 WL 36274. The Board began by noting that it "has consistently held that concerted legal action addressing wages, hours or working conditions is protected by" § 157. Id. at *2. It then stated that the Supreme Court has held that "employers cannot enter into individual agreements with the employees in which employees cede their statutory rights to act collectively." Id. at *6 (citing J.I. Case Co. v. NLRB, 321 U.S. 332 (1944)). In addition, the Board cited a case from the Court of Appeals for the Seventh Circuit for the proposition that such a contract violates the NLRA "even if 'entered into without coercion,' because it 'obligated [the employee] to bargain individually' and was a 'restraint upon collective action.'" Id. (quoting NLRB v. Stone, 125 F.2d 752, 756 (7th Cir. 1942)).

The Board rejected the argument that either the Federal Arbitration Act or Gilmer required it to enforce the agreement. It relied on the Supreme Court's statement in Gilmer, 500 U.S. at 26, than an arbitration agreement may not require a party to "forgo the substantive rights afforded by the statute." It then stated:

> The question presented in this case is not whether employees can effectively vindicate their statutory rights under the Fair Labor Standards Act in an arbitral forum. Rather, the issue here is whether the [arbitration agreement's] categorical prohibition of joint, class, or collective federal state or employment law claims in any forum directly violates the substantive rights vested in

employees by Section 7 of the NLRA.

* * *

> Any contention that the Section 7 right to bring a class or collective action is merely "procedural" must fail. The right to engage in collective action—including collective legal action—is the core substantive right protected by the NLRA and is the foundation on which the Act and Federal labor policy rest. . . . Rule 23 may be a procedural rule, but the Section 7 right to act concertedly by invoking Rule 23, Section 216(b), or other legal procedures is not.

D.R. Horton, 2012 WL 36274, at *12 (internal citations omitted).

It is not clear whether defendant disputes any of this as a general matter. It acknowledges that "a prohibition against a collective action may, in some instances, violate an employee's NLRA rights to engage in concerted activity to improve the terms and conditions of employment," Dft.'s Br., dkt. #32, at 11, but then it cites two district courts that came to a contrary conclusion. Grabowski v. Robinson, 2011 WL 4353998 (S.D. Cal. 2011); Slawienski v. Nephron Pharmaceutical Corp., 2010 WL 5186622 (N.D. Ga. Dec. 9, 2010).

In Slawienski, 2010 WL 5186622, at *2, the court wrote:

> There is no legal authority to support plaintiff's position [that a class action waiver violates the NLRA]. The relevant provisions of the NLRA, as well as the case law cited by plaintiff, deal solely with an employee's right to participate in union organizing activities. . . . That right is not implicated by the allegations in plaintiffs complaint. Indeed, it is apparent from the face of the complaint that plaintiff and the other opt-ins are not 'advocat[ing]

> regarding the terms and conditions of their employment.'... Rather, plaintiffs are pursuing FLSA claims in an attempt to collect allegedly unpaid overtime wages.

In Grabowski, 2011 WL 4353998, at *7-8, the court adopted the analysis in Slawienski, adding:

> Plaintiff, who resigned from his employment with Defendants six months before filing suit, has failed to show that this suit implicates the 'mutual aid or protection' clause, or that he suffered retaliation by Defendants. The Court finds that the NLRA does not operate to invalidate or otherwise render unenforceable the arbitration provisions of the Bonus Incentive Agreements signed by Plaintiff.

Id. at *8.

If defendant means to rely on these decisions for the proposition that collective actions for unpaid wages are not protected activity under § 157, he is off base. The statement in Slawienski that the NLRA "deal[s] solely with an employee's right to participate in union organizing activities" is directly contrary to the statement by the Supreme Court in Eastex, Inc. v. NLRB, 437 U.S. 556, 565-66 (1978), that "the 'mutual aid or protection' clause protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums." In Slawienski and Grabowski, both courts seem to conclude that actions for unpaid wages are not for "mutual aid or protection," but neither court explains its conclusion. The assumption seems to be that only claims for injunctive relief could qualify, but it is not clear why seeking

compensation for legal violations is any less an act of "mutual aid."

Further, neither court acknowledged any of the NLRB decisions cited by plaintiff in this case, presumably because the parties did not cite them. However, the Supreme Court has stated on multiple occasions that courts must give considerable deference to the Board's interpretations of the NLRA. ABF Freight System, Inc. v. NLRB, 510 U.S. 317, 324 (1994) (Board's views are entitled to "the greatest deference"); Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 891 (1984) (interpretations of Board will be upheld if "reasonably defensible") (internal citation omitted). Particularly because defendant develops no argument that the Board has interpreted the NLRA incorrectly, I see no reason to question the Board's judgment in this instance.

Defendant's primary argument against applying D.R. Horton is that the NLRA protects rights of "employees," not "former employees" such as plaintiff. (Defendant does not cite anything the record that establishes plaintiff's employment status, but plaintiff alleges in her complaint that she "left employment with Defendant on or about October 7, 2011." Dkt. #3, ¶ 41.) Although defendant cites no case law in support of this view, in Woodlawn Hospital v. NLRB, 596 F.2d 1330, 1336 (7th Cir. 1979), the court stated that "a discharge for activity not protected by the Act terminates employee status" under the NLRA. See also Halstead Metal Products, a Division of Halstead Industries, Inc. v. NLRB, 940 F.2d 66, 70 (4th Cir. 1991) (employee who resigned not protected under NLRA from

future discrimination, even if discrimination arises from participation in concerted activities with employees protected by Act).

This argument is a red herring. The question under § 158 is whether the employer has "interfere[d] with, restrain[ed], or coerce[ed] employees in the exercise of the rights guaranteed in section 157 of this title." Regardless whether plaintiff is an employee now, it is undisputed that she was an employee at the time defendant interfered with her right to pursue a collective action by requiring her to sign a waiver. Defendant seems to assume that the alleged interference is limited to its attempt to *enforce* the arbitration agreement in this case, but "[a]n employer's coercive action affects protected rights whenever it can have a deterrent effect on protected activity. This is true even if an employee has yet to exercise a right protected by the Act." Medeco Security Locks, Inc. v. NLRB, 142 F.3d 733, 745 (4th Cir. 1998). See also NLRB v. Vanguard Tours, Inc., 981 F.2d 62, 67 (2d Cir. 1992) (invalidating rule under § 158(a)(1) before rule was enforced); Jeannette Corp. v. NLRB, 532 F.2d 916, 918 (3d Cir.1976) (same). Thus, plaintiff need not show that she is still an "employee" with the meaning of the NLRA.

Also, defendant says that the Board was "illogical" to conclude that collective action waivers conflict with the "effort to vindicate work-place rights and the NLRA," D.R Horton, 2012 WL 36274, at *12, because an individual can bring about a change in workplace conditions without joining his claims with other employees. This is a non sequitur.

Although the goal of § 157 may be to improve workplace conditions, the way Congress chose to achieve that goal in the statute was through the protection of "concerted activity" of employees. The court's task is to apply the language of the statute as written, not to apply a general policy. Mertens v. Hewitt Associates, 508 U.S. 248, 261 (1993) ("[V]ague notions of a statute's 'basic purpose' are . . . inadequate to overcome the words of its text regarding the specific issue under consideration"). Thus, it is simply irrelevant whether an individual claim may be just as effective as a collective action.

Finally, defendant says that D.R. Horton conflicts with AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011), in which the Court declined to strike a class action waiver in an arbitration agreement. However, I agree with the Board that AT&T Mobility is not on point because the class action waiver in that case did not conflict with the substantive right of a federal statute. Rather, the question was whether the FAA preempted a ruling under state law by the California Supreme Court.

Accordingly, because the Board's interpretation of the NLRA in D.R. Horton, is "reasonably defensible," Sure-Tan, 467 U.S. at 891, I am applying it in this case to invalidate the collective action waiver in the arbitration agreement.

This does not end the matter, however. Although the NLRA guarantees plaintiff the right to pursue her claims collectively, it does not give her a right to pursue her claims in federal court rather than in arbitration. The employment agreement includes a severability

clause stating that any portion of the agreement found to be unenforceable "shall be deemed to be modified or redacted to the extent necessary" to bring the agreement in line with the law. Dkt. #14-1, at ¶ 15. Because the bar on collective actions is the only aspect of the arbitration agreement that violates the NLRA, this raises the question whether that provision is severable from the rest of the arbitration agreement, so that the matter can be resolved in arbitration, but in the context of a collective action.

In her opposition brief, plaintiff acknowledges that courts may sever invalid clauses in an otherwise valid arbitration agreement under some circumstances. E.g., Kristian v. Comcast Corp., 446 F.3d 25, 62 (1st Cir. 2006) (severing class action waiver from arbitration agreement). Generally, courts focus on two factors in making this determination: whether the unlawful provision is essential to the agreement as a whole and whether multiple unlawful provisions support the conclusion that the drafter of the agreement was attempting to undermine the other party's rights. E.g., Nino v. Jewelry Exchange, Inc., 609 F.3d 191, 206 (6th Cir. 2010) (in determining whether provision is severable, court should consider whether "the unconscionable aspects of the employment arbitration agreement constitute an essential part of the agreed exchange of promises between the parties" and whether "a multitude of unconscionable provisions in an agreement to arbitrate . . . evidence a deliberate attempt by an employer to impose an arbitration scheme designed to discourage an employee's resort to arbitration or to produce results biased in the employer's favor");

Booker v. Robert Half International, Inc., 413 F.3d 77, 84–85 (D.C. Cir. 2005) ("A critical consideration in assessing severability is giving effect to the intent of the contracting parties. . . . If illegality pervades the arbitration agreement such that only a disintegrated fragment would remain after hacking away the unenforceable parts . . . the judicial effort begins to look more like rewriting the contract than fulfilling the intent of the parties.").

Neither party argues that the collective action waiver is integral to the arbitration agreement or that a collective action could not be pursued in an arbitration proceeding. In fact, plaintiff says that "collective action procedures are not inherently incompatible with arbitration and at least some AAA arbitrators have approved collective actions and those decisions have been affirmed by the Courts." Plt.'s Br., dkt. #22, at 20-21 (citing Veliz v. Clintas, 2009 WL 1766691 (N.D. Cal. June 22, 2009)). This is consistent with the practice of the American Arbitration Association, which has published rules for class arbitration. American Arbitration Association, Supplementary Rules for Class Arbitration (Oct. 8, 2003), available at http://www.adr.org/aaa. As for defendant, it requests explicitly that a collective action proceed in arbitration rather than federal court in the event the court invalidates the collective action waiver. Dft.'s Br., dkt. #45, at 6-7.

Plaintiff's only argument against severance is that "there are several clauses that together combine to 'taint' the agreement as a whole." Plt.'s Br., dkt. #22, at 36. Plaintiff points to the cost-sharing provision as well as what she calls two "indemnity clauses" that

require plaintiff to reimburse defendant for costs associated with violations of the employment agreement. However, none of these other provisions support plaintiff's argument. With respect to the cost-sharing provision, plaintiff fails to show that it was unlawful. The other two provisions are not related to the arbitration clause and plaintiff fails to explain how they might be relevant to a determination regarding severability. Accordingly, I am severing the collective action waiver and granting defendant's motion to stay the case pending arbitration.

The remaining motions require little discussion. Defendant's requests for costs relies on the two "indemnity clauses" discussed above, with defendant arguing that plaintiff's attempt to bring a collective action is a violation of the arbitration agreement. Because I am invalidating the prohibition on collective actions, plaintiff's attempt cannot serve as the basis for an award of costs. This moots plaintiff's motion to "strike" the request for costs.

Also moot is defendant's motion to sanction plaintiff's counsel for contacting potential members of the collective action without notifying defendant or the court. Because I am agreeing with defendant that plaintiff's claims are subject to arbitration, I cannot decide the motion for sanctions. Defendant will have to raise that issue with the arbitrator.

ORDER

IT IS ORDERED that

1. Defendant Waterstone Mortgage Corporation's motion to dismiss, or, in the alternative to compel arbitration, and for costs, dkt. #13, is GRANTED IN PART. Plaintiff Pamela Herrington's claims must be resolved through arbitration, but she must be allowed to join other employees to her case.

2. Defendant's requests for costs is DENIED.

3. Plaintiff's motion to file a surreply brief, dkt. #35, is GRANTED.

4. Plaintiff's motion to "strike" defendant's request for costs, dkt. #15, is DENIED as moot.

5. Defendant's "motion to strike, for protective order and for sanctions," dkt. #18, is DENIED as moot.

6. Because the arbitration may dispose of the disputed issues, I am directing the clerk of court to close the case administratively, subject to reopening on motion of any party if issues remain for resolution after the arbitration has been completed.

Entered this 16th day of March, 2012.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge