

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CONVERGYS CORPORATION

and

Cases 14-CA-075249  
and 14-CA-083936

HOPE GRANT, an Individual

**COUNSEL FOR THE GENERAL COUNSEL'S**  
**BRIEF IN SUPPORT OF CROSS-EXCEPTIONS**

**I. Statement of the Case**

On October 25, 2012, Administrative Law Judge Arthur J. Amchan (ALJ) issued his decision in which he found that Respondent Convergys Corporation violated Section 8(a)(1) of the Act by maintaining and enforcing a mandatory provision in its employment applications that waives the right of employees to maintain class or collective actions pertaining to their employment in any forums. Counsel for the Acting General Counsel (General Counsel) takes no exception to the ALJ's findings and conclusions in this regard as the ALJ correctly identified and analyzed the facts and issues presented in reaching his conclusions. The ALJ's proposed Order and Notice Posting correctly provides for certain remedies.

The ALJ erred, however, in his proposed remedy for the unfair labor practices with respect to the maintenance of a court motion to enforce the waiver agreement at issue in a Fair Labor Standards Act (FLSA) suit brought by Charging Party Hope Grant. Specifically, the ALJ failed to order Respondent to cease and desist from seeking

dismissal of class or collective actions in any judicial or arbitral forums on the basis of the waiver employees were coerced to sign as part of the application process, and the ALJ failed to order Respondent to affirmatively notify any judicial or arbitral forums where the waiver has been used to seek dismissal of class and collective actions by employees that the waiver has been rescinded and that Respondent no longer opposes the seeking of collective or class action type relief; and, further, failed to order Respondent to reimburse Charging Party Hope Grant for any attorneys's fees and litigation expenses directly related to responding to Respondent's Motion to Strike Class and Collective Allegations. Furthermore, with respect to the notice posting, the ALJ failed to include a cease and desist provision that the Respondent not seek dismissal of class and collective actions in any judicial or arbitral forums on the basis of the waiver at issue, and the notice omitted an affirmative obligation informing employees that the Respondent would notify all judicial or arbitral forums where the waiver has been used as a defense to dismiss class or collective actions by employees that the waiver has been rescinded and that Respondent no longer opposes the seeking of collective or class action type relief.

The case was submitted to the ALJ on a stipulated record.

## **II. Discussion**

A complete and comprehensive remedy for the violations of the Act found by the ALJ with respect to the unlawful maintenance and enforcement of the waiver would require that the Respondent be ordered to take steps to withdraw its motion to enforce the waiver and affirmatively take steps to ensure that the waiver is not maintained or used in any proceeding in any forum. Paragraph 4D of the Complaint alleged that on July 22, 2012, Respondent filed a motion to strike the class and collective action allegations of a FLSA civil suit filed by Grant, on behalf of herself and other employees, to recoup unpaid

wages and overtime pay. (Complaint p. 5) The General Counsel specifically requested the remedy for the violation to include a cease and desist order prohibiting Respondent from “..using the waiver agreement for any purpose in any pending administrative or judicial proceedings and take affirmative steps to inform the hearings or courts in any pending proceedings, where the waiver agreements are at issue, that the waiver agreement is rescinded and held for naught and Respondent’s employees are released from the waiver agreement.” (Complaint p. 6)

The ALJ rightly found that the Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing the waiver agreement it coercively obtained from its employees. (ALJD p. 4, LL. 3-6) However, the ALJ did not order Respondent to take any affirmative steps to withdraw its motion to strike class and collective action allegations in the FLSA suit and to take action to ensure the waiver agreement is not used in any other judicial or arbitral proceeding to the detriment of employees. The evidence establishes that the waiver agreement is in use in no less than 39 call centers in 17 states across the country, in different jurisdictions. (Stip. paras. 8, 12 and 13; Exh. N)

The ALJ erred in his proposed remedy for the unfair labor practices with respect to the maintenance of a court motion to enforce the waiver agreement at issue in a Fair Labor Standards Act (FLSA) suit brought by Charging Party Hope Grant. Specifically, the ALJ failed to order Respondent to cease and desist from seeking dismissal of class or collective actions in any judicial or arbitral forums on the basis of the waiver employees were coerced to sign as part of the application process, and the ALJ failed to order Respondent to affirmatively notify any judicial or arbitral forums where the waiver has been used to seek dismissal of class and collective actions by employees that the waiver has been rescinded and that Respondent no longer opposes the seeking of collective or

class action type relief. Thus, in particular, to remedy the legal consequences of Respondent's unlawful motion and return employees to the *status quo ante*,<sup>1</sup> Respondent should be required to withdraw its motion for individual arbitration, if pending, or to move the appropriate court to vacate its order for individual arbitration, if Respondent's motion has already been granted and a motion to vacate can still be timely filed.<sup>2</sup> Any such motion to vacate should be made jointly with the affected employees, if they so request.<sup>3</sup> We note that nothing in our requested order would preclude Respondent from amending its motion to seek lawful collective or class arbitration rather than a class or collective

---

<sup>1</sup> Of course, consistent with the Board's usual practice in cases involving unlawful legal actions, Respondent should be ordered to reimburse employees for any attorney's fees and litigation expenses directly related to opposing the employer's unlawful motions to compel individual arbitration. See *Bill Johnson's Restaurants*, 461 U.S. 731, 747 (1983) ("If a violation is found, the Board may order the employer to reimburse the employees whom he had wrongfully sued for their attorney's fees and other expenses" and "any other proper relief that would effectuate the policies of the Act"), on remand, 290 NLRB 29, 30 (1988); *Phoenix Newspapers*, 294 NLRB 47, 51 (1989); *Summitville Tiles, Inc.*, 300 NLRB 64, 67, 77 (1990).

<sup>2</sup> We note that, depending on the jurisdiction, a motion for relief from judgment or order due to legal error, pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, may be timely filed for a short period beyond the entry of final judgment (see, e.g., *Steinhoff v. Harris*, 698 F.2d 270, 275 (6th Cir. 1983) (the vast majority of courts that have concluded that legal error comes within the meaning of Rule 60(b)(1) have also determined that. . . the moving party must make his or her motion within the time limits for appeal), and even beyond the expiration of the period for filing an appeal (see, e.g., *Lairsey v. Advance Abrasives Co.*, 542 F. 2d 928, 930-932 (5th Cir. 1976) (permitting a Rule 60(b) motion after the time limit for appeal had expired, but within one year of the judgment, where there had been a change in the underlying law).

<sup>3</sup> In this regard, we note that the Board has in the past ordered such a joint motion or petition where an employer has unlawfully used the legal system to interfere with an employee's Section 7 rights. See, e.g., *Baptist Memorial Hospital*, 229 NLRB 45, 46 (1977) ("[w]e shall also require Respondent to rectify the effects of its unlawful conduct by joining with [the employee] in petitioning the Memphis Municipal Court and Police Department to expunge any record of [the employee's] arrest and conviction").

lawsuit, as long as employees were able to exercise their collective legal rights in some forum.<sup>4</sup>

With respect to the notice posting, the ALJ failed to include a cease and desist provision that the Respondent not seek dismissal of class and collective actions in any judicial or arbitral forums on the basis of the waiver at issue, and the notice omitted an affirmative obligation informing employees that the Respondent would notify all judicial or arbitral forums where the waiver has been used as a defense to dismiss class or collective actions by employees that the waiver has been rescinded and that Respondent no longer opposes the seeking of collective or class action type relief. These remedial provisions are essential to a complete remedy capable of dispelling the effects of the unfair labor practices found and assuring employees of the concrete steps Respondent must take to purge its violation.

Section 10(c) of the Act authorizes the Board to issue an order requiring a party adjudged to have committed an unfair labor practice to “take such affirmative action..as will effectuate the policies of th[e] Act.” The Board’s power in fashioning remedies for unfair labor practices is a “broad discretionary one.” *NLRB v. J.H. Rutter-Rex Mfg.*, 396 U.S. 258, 262-263 (1969). The Board’s standard remedy where an employer violates the Act includes posting a notice informing employees of their rights, the violations found by the Board, the employer’s undertaking to cease and desist from further unlawful conduct, and affirmative action to be taken by the employer to redress the actual violations found. See,

---

<sup>4</sup> This would be consistent with the General Counsel’s long-standing position that employers may lawfully require employees to bring their claims in arbitration, rather than in court, as long as all of their substantive rights are preserved (including their statutory right to engage in collective legal activity). See, e.g., *O’Charley’s Inc.*, Case 26-CA-19974, Advice Memorandum dated April 16, 2001, at 5-7 (“Section 7 does not provide a right to select any particular forum to concertedly engage in activities for mutual aid or protection”).

e.g., *Pennsylvania Greyhound Lines, Inc.*, 1 NLRB 1, 52 (1935), enf. denied in relevant part 91 F.2d 178 (3rd Cir. 1937), revd. 303 U.S. 261 (1938).

The imposition of a remedial order affirmatively requiring Respondent to withdraw its motion to strike class and collective allegations in the FLSA suit and notify any judicial or arbitral forums where the waiver has been raised as a defense that it has been rescinded and that Respondent no longer opposes the seeking of collective or class action type relief, as well as the posting of a notice with similar assurances to employees, is not an extraordinary remedy in these circumstances.<sup>5</sup> Under Board law, such remedies are appropriate.

Specifically, where the Board has adjudged an employer to have filed or pursued legal action that violates Section 8(a)(1) it has been customary to include in a remedial order a specific undertaking to withdraw the offending legal action and also the posting of a notice with specific reference to withdrawing of the lawsuit. Thus, for example, in *Loehmann's Plaza*, 305 NLRB 663, 671 (1991), the Board ordered the respondent to seek to have the injunction granted against the union withdrawn.

In *Federal Security, Inc.*, 336 NLRB 703 (2001), remanded on other grounds, 2002 WL 31234984 (D.C. Cir. 2002), the Board ordered the respondent to take affirmative steps to file a motion with the court to withdraw its lawsuit and file a motion to vacate the default orders entered and those still operative.<sup>6</sup> These cases establish that upon a finding here

---

<sup>5</sup> Cf. *Garage Mgmt Corp.*, 334 NLRB 940 (2001) (holding that a remedial order awarding attorney fees expended by a union in defending a retaliatory state court suit that violated Section 8(a)(1) is a standard remedy and not an extraordinary remedy).

<sup>6</sup> We note that legal actions that have an illegal objective may be found to be unlawful *ab initio*, in contrast to legal actions against "arguably protected" conduct, which are only unlawful to the extent they are continued after the General Counsel issues complaint, pursuant to *Loehmann's Plaza*. See, e.g., *Manno Electric*, 321 NLRB 278, 297-98 (1996), enf. per curiam mem. 127 F.3d 34 (5th Cir. 1997).

that the Respondent's motion to strike class and collective allegations violated the Act, as the ALJ found, it follows that the remedial order and notice posting must contain provisions that require withdrawal of the motion or any such attempts to enforce the waiver in any forum.

The requested affirmative provision to withdraw the Respondent's motion and inform any judicial or arbitral forum where the waiver is in use that the waiver has been rescinded is well within the Board's remedial powers and discretion, and such would more meaningfully effectuate the Act. The remedy sought here would not determine the outcome of the FLSA suit at issue; it does not prohibit Respondent from urging any other lawful defenses it may have that do not interfere with Section 7 rights. The remedy sought by the General Counsel is narrower and more modest than the remedy in other cases where the Board has ordered respondent-employers to withdraw entire lawsuits. The requested remedy does not purport to direct any court or arbitral forum to take any action at all. Admittedly, that would be manifestly outside the Board's authority. The requested remedy does no more than put the onus on the Respondent, who has been adjudged to have engaged in unlawful conduct in violation of Section 8(a)(1), to ensure that it no longer uses the unlawful waiver in any legal action.

The requisite notice posting in this case, with language stating the cease and desist and affirmative obligation to withdraw Respondent's motion and notify any judicial or arbitral forum of the rescission of the waiver, takes on even more significance in this case where the FLSA suit is ongoing and employees have to make a decision presently as to whether to join or not join the class. Without the appropriate notice posting language employees may not know of the status of disposition of the FLSA suit and how their right to elect to join or not join in the class action is impacted by the Board's decision, and there

would be an appreciable risk of remedial failure. To best police the Respondent's undertakings under the remedial provisions of this case, employees should be notified that Respondent is under an affirmative obligation to inform any judicial or arbitral forum where it has relied on the waiver agreement that the agreement has been found unlawful and can no longer be relied upon to compel employees to bring any claims regarding their employment individually.

### III. Conclusion

For the reasons set forth above, Counsel for the General Counsel respectfully requests that the Board issue a modified Order requiring Respondent to cease and desist from using the waiver in any judicial or arbitral forum, and to take affirmative steps to inform any judicial or arbitral forum in any pending proceedings that the waiver has been rescinded and that Respondent no longer opposes the seeking of collective or class action type relief.<sup>7</sup>

---

<sup>7</sup> The remedial order should be modified to order Respondent to cease and desist from:

Seeking the dismissal of class or collective actions in any judicial or arbitral forum on the basis of the waiver of such rights to maintain class or collective actions that applicants for employment and employees have been required to sign.

And for Respondent to take the following affirmative step necessary to effectuate the policies of the Act:

Notify any judicial or arbitral forums where the waiver agreement has been used to seek dismissal of class or collective actions by employees regarding their employment that the waiver agreement has been rescinded and that Respondent no longer opposes the seeking of collective or class action type relief.

Reimburse employees for any attorneys' fees and litigation expenses directly related to responding to the Respondent's Motion to Strike Class and Collective Allegations.

Further, Counsel for the General Counsel respectfully requests that the notice posting be modified to include provisions notifying employees of Respondent's undertaking to cease and desist from using the waiver in any judicial or arbitral forum and informing any such forums that the waiver has been rescinded and that Respondent no longer opposes the seeking of collective or class action type relief.<sup>8</sup>

January 18, 2013

Respectfully submitted,



Rotimi Solanke, Counsel for the  
General Counsel  
National Labor Relations Board  
Region 14  
1222 Spruce Street, Room 8.302  
St. Louis, MO 63103-2829

---

<sup>8</sup> The notice posting should be modified to include the following provisions:

WE WILL NOT seek the dismissal of any class or collective actions in any judicial or arbitral forums on the basis of the waiver of such rights to maintain class or collective actions that we have required you to sign.

WE WILL notify judicial or arbitral forums where the waiver agreement has been used as a defense to seek dismissal of the class or collective actions that the waiver agreement has been rescinded and that we no longer oppose the seeking of collective or class action type relief.

WE WILL reimburse employees for any attorneys' fees and litigation expenses directly related to responding to our Motion to Strike Class and Collective Allegations in the Fair Labor Standards Act suit brought by Hope Grant and other employees.

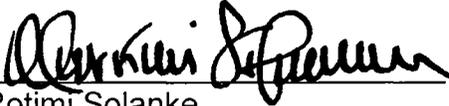
**CERTIFICATE OF SERVICE**

Pursuant to the National Labor Relations Board's Rules and Regulations, the Counsel for the General Counsel's Answering Brief to Respondent's Exceptions, Cross-Exceptions to Order and Notice to Employees of the Administrative Law Judge, and Brief in Support of Cross-Exceptions were served via electronic mail on this 18<sup>th</sup> day of January 2013, on the following parties:

Raymond D. Neusch, Attorney at Law  
Attorney for Respondent  
Frost Brown Todd LLC  
3300 Great American Tower  
301 E. 4th Street  
Cincinnati, OH 45202-4113  
Email: rneusch@fbtlaw.com

Russell C. Riggan, Attorney at Law  
Attorney for Charging Party  
132 W. Washington Ave., Suite 100  
Kirkwood, Missouri 63122  
E-mail: russ@rigganlawfirm.com

Mark A. Potashnick, Attorney at Law  
Attorney for Charging Party  
Weinhaus & Potashnick  
11500 Olive Blvd., Suite 133  
St. Louis, MO 63141  
E-mail: markp@wp-attorneys.com

  
Rotimi Solanke  
Counsel for the General Counsel