

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 14**

In the Matter of:	:
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	:
CONVERGYS CORPORATION,	: Cases 14-CA-075249 and
	: 14-CA-083936
	:
and	:
	:
HOPE GRANT, An Individual.	:

**CONVERGYS CORPORATION’S REPLY BRIEF TO COUNSEL FOR THE GENERAL
COUNSEL’S ANSWERING BRIEF TO RESPONDENT’S EXCEPTIONS AND TO
CHARGING PARTY’S RESPONSE TO THE EMPLOYER’S OBJECTIONS TO THE
ALJ’S DECISION**

Pursuant to § 102.46(h) of the Board’s Rules and Regulations, Respondent Convergys Corporation (“Respondent” or the “Company”) files this Reply to the answering briefs¹ of Counsel for the Acting General Counsel (“General Counsel”) and Charging Party Hope Grant (“Charging Party”) in opposition to the Company’s Exceptions to the decision of the Administrative Law Judge (“ALJ.”)

I. INTRODUCTION

Both the Charging Party and the General Counsel come up woefully short in their attempts to defend the ALJ’s Decision. Both parties ignore key arguments made by the Company, rely upon internally inconsistent and irreconcilable interpretations of the National

¹ Coordinating efforts, the Charging Party and General Counsel filed separate briefs addressing different issues in response to the Company’s Exceptions. The Charging Party’s brief (the “Charging Party’s Answering Brief” or “C.P. Brief”) addresses the legality of the Company’s Class and Collective Action Waiver (the “Waiver”), and the General Counsel’s brief (the “General Counsel’s Answering Brief” or “G.C. Brief”) addresses the legality of the Company’s attempts to enforce the Waiver. This Reply addresses both issues.

Labor Relations Act (the “Act”), and ignore long-standing precedent of the National Labor Relations Board and federal courts. What is more, in the ten short weeks since the Company submitted its Exceptions, the Eighth Circuit Court of Appeals—the circuit in which this case arises—has handed down a major decision that further undermines the ALJ’s Decision. Shedding serious doubt on the validity of *D.R. Horton*, 357 NLRB No. 84 (2012), the very case upon which the ALJ’s Decision is founded, the Eighth Circuit overturned *Owens v. Bristol Care, Inc.*, 2012 U.S. Dist. LEXIS 33671 (W.D.Mo. Feb. 28, 2012)—the single case most heavily relied upon by the Charging Party in her Answering Brief, and one of the few cases in the country that did not reject the Board’s reasoning in *D.R. Horton*. Thus, for the reasons articulated in the Company’s Brief in Support of Exceptions (the “Company’s Brief”) and this Reply, the Board should reverse the ALJ’s Decision, find that the Company has not violated the Act, and dismiss the Complaint.

II. ARGUMENT

A. The Company’s Waiver Does Not Violate the Act.

1. The Eighth Circuit Has Rejected *D.R. Horton*.

As is explained in the Company’s Brief, the ALJ’s decision relies almost exclusively on the Board’s decision in *D.R. Horton, supra*, to find that the Company’s Waiver violates Section 8(a)(1) of the Act. The Charging Party’s Answering Brief follows suit, further attempting to bolster *D.R. Horton*’s precedential value by citing to *Owen v. Bristol Care, Inc., supra*, one of the rare needles in an ever-growing haystack of federal cases rejecting *D.R. Horton*’s rationale and holding. The ALJ’s and the Charging Party’s arguments miss the mark for a number of reasons, however, and must be rejected as a matter of law.

First and foremost, the Charging Party’s heavy reliance on *Owen*, as well as her prediction “that *Owen*’s holding will be affirmed by the Eighth Circuit,” is severely misplaced:

the Eighth Circuit overturned *Owen* on January 7, 2013—a full 11 days before the Charging Party served its Answering Brief in this matter. *Owen v. Bristol Care, Inc.*, --- F.3d ----, 2013 WL 57874 (8th Cir. 2013). In reversing the district court’s decision, the Court of Appeals reviewed a litany of reasons why *D.R. Horton* “carries little persuasive authority”:

First, the NLRB limited its holding to arbitration agreements barring *all* protected concerted action. . . . In contrast, the [arbitration agreement] does not preclude an employee from filing a complaint with an administrative agency such as the Department of Labor (which has jurisdiction over FLSA claims, see 29 U.S.C. § 204), the Equal Employment Opportunity Commission, the NLRB, or any similar administrative body. . . . Further, nothing in the [arbitration agreement] precludes any of these agencies from investigating and, if necessary, filing suit on behalf of a class of employees. Second, even if *D.R. Horton* addressed the more limited type of class waiver present here, we still would owe no deference to its reasoning. . . . This court . . . is “not obligated to defer to [the Board’s] interpretation of Supreme Court precedent under *Chevron* or any other principle.” . . . Additionally, although no court of appeals has addressed *D.R. Horton*, nearly all of the district courts to consider the decision have declined to follow it.

Id. at *3 (internal citations omitted, emphasis original). Each of these points is fully applicable to the present case, and establishes that any purported invalidation of the Waiver based on *D.R. Horton* would be rejected outright by the Eighth Circuit—which, according to the Charging Party, “may eventually review the Board’s decision in this matter.” C.P. Brief, p. 6. In short, *D.R. Horton* was bad law when the Company filed its Exceptions, and it has only become worse law in the intervening weeks. The Board should take this opportunity to revisit *D.R. Horton* and harmonize Board law with the law being applied almost universally by the federal courts.

2. It Is Irrelevant That the Waiver Is Not Part of an Arbitration Agreement.

The Charging Party also incorrectly claims that the Company “misses the critical point” that this case does not involve an arbitration agreement, but the lower court (and now Eighth Circuit) cases rejecting *D.R. Horton* “have done so because those courts desire to follow

Supreme Court precedent on compelling arbitration under the Federal Arbitration Act ('FAA').” C.P. Brief, p. 3. This is a superficial distinction that does not withstand scrutiny when analyzed more deeply in light of the purpose of the FAA.² As is articulated in the Company’s Brief, the Supreme Court has explained that the FAA’s “purpose was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, *and to place arbitration agreements upon the same footing as other contracts.*” *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991)(emphasis added). Thus, the FAA does not grant arbitration agreements special status; it simply requires courts to enforce arbitration agreements just as they would enforce any other contract.

The implication is crystal-clear: if—as the Eight Circuit³ and a plethora of other federal courts have held—a class and collective action waiver found in an *arbitration agreement* is enforceable, then a class and collective action waiver found in *any other* contract must be enforceable as well. To hold otherwise would flip the FAA on its head, turning it into a statute that grants arbitration agreements *superior* status over other contracts, when it was only meant to remedy the *inferior* status that courts had ascribed to arbitration agreements in the past. *Id.* It is therefore irrelevant that this case does not involve an arbitration agreement, as arbitration agreements are on “equal footing” with other contracts. *Id.* The Company’s Waiver would be enforceable if it were in an arbitration agreement, so it is enforceable although it is not in an

² As the Company’s Brief in Support of Exceptions discusses in greater detail, the Board is also not authorized to interpret statutes other than the Act, such as the FAA and the Fair Labor Standards Act (“FLSA”). See *N.L.R.B. v. Bildisco & Bildisco*, 465 U.S. 513, 104 S.Ct. 1188, 79 L.Ed.2d 482 (1984); *NLRB v. C&C Plywood Corp.*, 385 U.S. 421, 427 (1967) (“the [NLRA] does not undertake governmental regulation of wages, hours, or working conditions”). This is among the many reasons regularly cited by courts in declining to defer to the Board’s decision in *D.R. Horton*. See, e.g., *Delock, supra*, 2012 WL 3150391 at *3.

³ Recall that in *BPS Guard Services, Inc. v. NLRB*, 942 F.2d 519 (8th Cir.1991), the Eighth Circuit held that “‘Congress has not given to the NLRB the power or authority to disagree, respectfully or otherwise, with decisions of this court,’ and ‘[f]or the Board to predicate [orders] on its disagreement with [the Court of Appeals] is for it to operate outside the law.’” *Id.* at 524 (quoting *Allegheny Gen. Hosp. v. NLRB*, 608 F.2d 965, 970 (3rd Cir.1979)).

arbitration agreement. *See id.*; *Owen, supra*; *Palmer v. Convergys Corp.*, No. 7:10-CV-145, 2012 WL 425256 (M.D.Ga. Feb. 9, 2012).

3. The Charging Party's Remaining Arguments Are Misguided.

The Charging Party also unpersuasively argues that the Waiver is invalid because “the Act protects employees’ right to *pursue* class and collective litigation.” C.P. Brief, p. 5 (emphasis added). She then cites *D.R. Horton* and other cases at length for a number of propositions, including:

- “Section 7 ‘protects employees from *retaliation* by their employer when they seek to improve their working conditions through resort to administrative and judicial forums.”
- “[T]he NLRA protects employees’ ability to join together to *pursue* workplace grievances, including through litigation.”
- “[T]he ‘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[.]”

Id. at pp. 5-6 (quoting *D.R. Horton, supra*; *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-567 (1978)) (emphasis added). None of these propositions has any bearing on this matter, however, as they show only that Section 7 protects employees from retaliation for concertedly *asserting* their legal rights, not that employees have a right to *adjudicate* claims collectively. *See, e.g., Salt River Valley Water Users Ass’n*, 99 NLRB 849 (1952). Indeed, the Waiver in no way prevents employees from generally “asserting” their rights, joining together to “pursue” grievances or from “seeking” to improve working conditions; it simply precludes them from *adjudicating* their claims collectively. Moreover, no claims or acts of “retaliation” are at issue in this case. The Company has not disciplined or discharged *any* employee for pursuing a class or collective action, and there have been no allegations that it has. Thus, the Waiver complies with the Act.

Finally, the Charging Party simply ignores the long-standing Board precedent, cited in the Company's Brief, that applicants for employment are not "employees" under the Act. *Star Tribune*, 295 NLRB 543 (1989) (citing *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971)) ("Applicants for employment do not fall within the ordinary meaning of an employer's 'employees.'"). Instead, the Charging Party suggests that the Act nevertheless applies to the Company's applicants because the Company is "requiring applicants to sign waivers of [a right] *guaranteed by the Act* as a condition of employment." C.P. Brief, p. 7 (emphasis added). This argument puts the cart before the horse. As the Company has argued throughout the pendency of this case, the so-called right to bring a class or collective action is *not* a right guaranteed by the Act. Thus, the Company's refusal to consider for employment an applicant who does not sign the Waiver does not violate the Act any more than any other condition of employment does. For these reasons, the ALJ erred in finding the Waiver to be invalid, and the Board should not adopt his Decision.

B. The Company's Attempt to Enforce the Waiver Does Not Violate the Act.

1. The Waiver Does Not Require the Relinquishment of a Substantive Right.

General Counsel's Answering Brief, which argues that the Company has violated the Act by attempting to enforce its Waiver, fares no better than the Charging Party's Answering Brief. General Counsel argues that the Company's efforts to enforce the class action waiver at issue in this case in a lawsuit brought by the Charging Party violate Section 8(a)(1) of the Act, as found by the ALJ. General Counsel's position is premised on the concept that the right to engage in collective action is fundamental to the Act. The problem for the General Counsel, however, arises when rights under the Act are interrelated to rights under other statutes such as the FLSA.

As courts have noted, the Board has no particular expertise in interpreting statutes other than the Act, and, therefore, such interpretations are entitled to no deference. The overwhelming

weight of judicial authority is that the right to proceed under the FLSA as a collective or class action is a procedural right, not a substantive one. Thus, it may be waived by employees.

Indeed, the Eighth Circuit reached this very conclusion in *Owen v. Bristol Care, Inc.*, *supra*:

Even assuming Congress intended to create some “right” to class actions, if an employee must affirmatively opt in to any such class action, surely the employee has the power to waive participation in a class action as well.

Id., at *2. Consequently, in rejecting the Board’s rationale in *D.R. Horton* and finding class waivers enforceable in claims brought under the FLSA, the Eighth Circuit—once again, the very Court of Appeals in whose jurisdiction this case arises—joined with all the other courts of appeals to have considered the issue by concluding that proceeding under the FLSA as a collective or class action is a procedural right, not a substantive one. *Id.*, at *4.

2. Because the Waiver Is Lawful, So Too Is the Company’s Enforcement of It.

In an argument that can be described as circular at best, the General Counsel also claims that the Company’s attempt to enforce the Waiver is unlawful because it has an unlawful objective. G.C. Brief, p. 4. In a related argument, the General Counsel also claims that “employees have the Section 7 right to be free from employer interference with their right to engage in collective legal activity.” *Id.*, p. 9. These contentions, however, are based upon the erroneous presumptions that the Waiver itself is unlawful and that employees have a Section 7 right to adjudicate an FLSA claim collectively—which, as is explained through the Company’s briefings in this matter, are not the case. Because the Company is free to condition employment on the applicant’s signing the Waiver, it naturally follows that the Company is entitled to enforce the Waiver after it has been signed.

In fact, General Counsel’s suggestion that the Company is “interfering” with a Section 7 right by seeking to enforce the Waiver leads to the illogical conclusion that an employer may not

defend itself against class or collective action. General Counsel attempts to escape this fallacy by acknowledging that “Section 7 does not guarantee class certification if the requirements for certification under Rule 23 are not met (i.e., the putative class lacks sufficient numerosity, commonality, etc.)—as the Board stated in *D.R. Horton*, “[w]hether a class is certified depends on whether the requisites for certification under Rule 23 have been met.”” *Id.*, p. 9. But if an employer *can* defend against—and ultimately defeat—a motion for class certification without violating the Act, then it must be the case that Section 7 does not guarantee that a motion for certification will go unopposed *or* be successful.

Even in *D.R. Horton*, the Board concedes that “there is no Section 7 right to class certification” and an “employer remains free to assert any and all arguments against certification.” *D.R. Horton* at sl. op. 10, fn 24. In order to reconcile this inconsistency, it must be the case that the underlying cause of action provides the remedy, and that cause of action, brought through a lawsuit, is the protected activity. An employee’s attempt to use procedural rules in the FLSA litigation process is not protected activity under Section 7. Thus, enforcing the waiver does not violate Section 8(a)(1).

3. The Board Was Not Properly Constituted When It Issued *D.R. Horton*.

Finally, General Counsel also disputes the Company’s assertion that the Board should decline to follow *D.R. Horton* because the Board was improperly constituted when it issued the decision. As is explained in the Company’s Brief, *D.R. Horton* was decided by Members Pearce and Becker after Member Hayes was recused. In *New Process Steel v. NLRB*, 130 S.Ct. 2635 (2010), the Court made it clear that two members have authority to act on behalf of the Board only when there has been a valid delegation by at least three members. There was no such delegation in *D.R. Horton*. Moreover, Member Becker’s recess appointment had expired at least

by the end of December 2011. See Department of Justice Opinion, January 6, 2012 concerning the Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions. In addition, the recent decision of the D.C. Circuit Court of Appeals in *Noel Canning v. NLRB*, --- F.3d ---, 2013 WL 276024 (D.C. Cir. 2013) makes it clear that Member Becker's recess appointment itself to the Board was invalid *ab initio* as it did not occur during an intersession recess of the Senate. Consequently, he properly could not have participated in the January 3, 2012, decision, thereby reducing the decision-maker to one. Thus, *D.R. Horton* was decided by a Board without a quorum and, therefore, has no legal effect or precedential value.

III. CONCLUSION

The Board's decision in *D.R. Horton* forms the foundation of the ALJ's Decision. However, numerous courts—most recently, the Eighth Circuit Court of Appeals—have explicitly rejected the rationale and validity of *D.R. Horton*. It is irrelevant that these court decisions involve class and collective action waivers found in arbitration agreements; the FAA is intended to ensure that arbitration agreements are treated consistently with all other agreements, so a waiver that is valid in an arbitration agreement must be equally valid in another agreement. Courts have also consistently found that the right to bring a collective action under the FLSA is a procedural right that may be waived. Finally, the Company may seek to enforce its Waiver just as it may bring any other defense to a class or collective action; employees are guaranteed, at most, the right to *seek* certification, not to seek it without opposition. Based on all the foregoing, the Board should overrule the ALJ's Decision, find that Convergys has not violated Section 8(a)(1) of the Act, and dismiss the Complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing has been filed electronically and has been served upon the following individuals, electronically and by regular U.S. mail, this 1st day of February, 2013:

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