

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

Washington, D.C.

ALTON SANDERS, an individual, Charging
Party

vs.

Case 20-CA-035419

24 HOUR FITNESS USA, INC., Charged Party

**EMPLOYER'S REPLY BRIEF IN SUPPORT OF EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE'S DECISION AND IN RESPONSE TO THE ACTING
GENERAL COUNSEL'S ANSWERING BRIEF**

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I. INTRODUCTION

24 Hour Fitness USA, Inc. (“the Employer,” “the Company,” “Respondent,” or “24 Hour Fitness”) submits this Reply to the Acting General Counsel’s (“AGC”) response to the Employer’s Exceptions to the Decision of the Administrative Law Judge (“ALJ”).¹

This case presents for the first time the question of whether a voluntary, bilateral arbitration agreement waiving class actions violates the Act. The AGC’s attempt to characterize 24 Hour Fitness’s voluntary arbitration program (“the Arbitration Agreement” or “the Agreement”) as a mandatory condition of employment is contradicted by the undisputed record. The record evidence establishes that since 2007, newly hired 24 Hour Fitness Team Members have the right to choose for themselves whether to accept the terms of the Agreement. The Agreement also provides sufficient procedural substitutes for class claims as it permits joinder and administrative agency claims. The Agreement is thus distinguishable from the agreement at issue in *D.R. Horton* and is permissible under the Act.

The ALJ’s Decision is defective in other respects, despite the AGC’s contentions to the contrary. Among other things, the ALJ erred in finding that the charge is not time-barred with respect to the Agreement as it pertained to 24 Hour Fitness Team Members hired before 2007. The record contains no evidence showing that the Agreement has been enforced against any Team Member hired before 2007 within the statute of limitations period pertinent to this charge.

Finally, even if the Board decides that the Agreement violated the Act in any manner, the Board cannot order the improper retroactive remedy requested by the AGC.

¹ This Reply Brief is accompanied by a separate Reply Brief to Charging Party Alton Sanders’s (“Sanders”) Answering Brief and an Answering Brief to the Cross-Exceptions raised by the Acting General Counsel and Sanders. To avoid unnecessary duplication 24 Hour Fitness has responded only once to arguments that are duplicated between the AGC, Sanders, and Amicus Service Employees International Union (“SEIU”). Arguments in all of 24 Hour Fitness’s briefs apply equally to the AGC, Sanders, and the SEIU.

II. 24 HOUR FITNESS'S EXCEPTIONS SHOULD BE SUSTAINED

A. 24 Hour Fitness's Agreement Is Lawful Under The Act Because It Is Not A Mandatory Condition Of Employment.

In *D.R. Horton*, the Board expressly declined to reach the “more difficult question” of whether “an employer can enter into an agreement that is not a condition of employment with an individual employee to resolve either a particular dispute or *all potential employment disputes through non-class arbitration rather than litigation in court.*” 357 NLRB No. 184, slip op. at p. 13, n. 28 (2012) (emphasis added). This question of first impression is of central importance here, and requires a different outcome than *D.R. Horton*.

24 Hour Fitness's Agreement is lawful under the Act, even assuming *D.R. Horton* was correctly decided (which it was not) because, unlike the agreement at issue in *D.R. Horton*, the Company's Agreement is voluntary and bilateral: each employee has the right to consider the Agreement and determine whether to submit all potential employment disputes to non-class arbitration. This distinguishing factor requires a different outcome than *D.R. Horton*. When there is a mandatory class action waiver, as there was in *D.R. Horton*, any employee who rejects the agreement is deprived of the right to continued employment. Here, the Team Member is presented with the option to submit potential employment disputes to non-class arbitration, and if the Team Member refuses, he or she can do so without fear of retaliation or the fear of losing a job. If, on the other hand, the Team Member decides not to opt out, that Team Member has made the voluntary decision to litigate all workplace grievances in accordance with the Agreement.

In fact, the Agreement does not become a mandatory condition of employment even after the expiration of the thirty-day opt-out period. There is no evidence in the record that any Team Member suffered an adverse employment action because he or she accepted the terms of the

Agreement and later pursued litigation against the Company in court. Because of this critical distinction, the AGC and Sanders fail in their united effort to classify the Company's voluntary opt-out Agreement as a mandatory condition of employment.

In arguing that this distinction nevertheless does not preclude the ALJ's finding that 24 Hour Fitness's Agreement is unlawful, the AGC relies substantially on the argument that a waiver of class or collective actions for future, potential employment disputes constitutes a prospective waiver of Section 7 rights. In so doing, the AGC misstates the effect of the class action waiver contained in the Agreement. When a Team Member decides not to opt out and agrees to submit future employment disputes to non-class or non-collective litigation, he or she is not waiving the *right* to litigate workplace grievances on behalf of his or her fellow workers, but merely the *form* in which that litigation must proceed.

The cases cited by the AGC in support of the "prospective waiver" argument are inapposite. In both cases, *Ishikawa Gasket* and *Mandel Security*, the employer asked the employee to agree to a blanket prohibition of future protected, concerted activities, including, in the case of *Mandel Security*, the right to seek administrative remedies from the NLRB. The agreements in these cases were mandatory—the employee would not benefit from those agreements (severance and reinstatement, respectively), unless they agreed to the prohibition. In contrast, 24 Hour Fitness's Agreement gives employees the *option* to leave open all avenues of litigation, or forego certain, specified forms, but does not broadly prohibit employees from addressing workplace grievances through concerted litigation.

There is also no evidence supporting the AGC's conclusory assertion that the Agreement "has been a condition of employment, because [Team Members] were bound to the [Agreement] whether they expressed a desire to be bound by it or not." (AGC Answering Brief, p. 17.) The

record establishes the opposite. During the last six years, 24 Hour Fitness Team Members have had the free and unfettered right to accept or reject the Agreement within their first thirty days of employment.² The Agreement and the opt-out process are entirely voluntary.³ To ensure that participation is voluntary, 24 Hour Fitness’s Agreement states in bold font that Team Members will not be retaliated against for opting out. Furthermore, 24 Hour Fitness has a simple opt-out procedure under which managers and supervisors are never involved or even aware that a Team Member has opted out.⁴ (Sanders Reply Brief, pp.7-9.) The existence of even a single opt-out—and the record establishes that there many—proves that this process works and is not illusory, but a real choice.

The fact that Team Members may have consented to be bound by the Agreement despite not having signed a handbook acknowledgement is irrelevant. A Team Member’s continued employment after receipt of the Employee Handbook and the expiration of the thirty-day opt-out period constitutes acceptance of the terms of the Agreement. *See, e.g., Morvant v. P.F. Chang’s China Bistro, Inc.*, 870 F. Supp. 2d 831, 837 (N.D. Cal. 2012) (“An employee’s continued employment has been found to constitute implied acceptance of the . . . terms of employment where the employee was informed that his or her continued employment would constitute acceptance of those . . . terms.”) The record contains no evidence that any Team Member has been bound by the Agreement without first having the opportunity to review it in advance and, if

² The Agreement’s class action waiver is only applicable after thirty days, assuming the Team Member elects not to opt out. (*See* Respondent’s Reply Brief to Sanders’s Answering Brief (“Sanders Reply Brief”), pp. 5-7.)

³ It is important to note that the decision to accept the terms of the Agreement is consistent with declining class participation in a lawsuit — a right inherent within the class action procedure.

⁴ Indeed, there is no evidence that any 24 Hour Fitness representative tried to persuade a single Team Member hired since January 1, 2007 against opting out of the Agreement. As the ALJ acknowledged, “there is no evidence of interference, restraint, or coercion that brought about the Charging Party’s or any other employee’s voluntary decision at the beginning of their employment to forego participation in class or collective actions.” (Dec. 12:36-39.)

he or she wished, to take advantage of the opt-out provision. In any event, even if the Board required a signature on the handbook acknowledgement to classify participation as voluntary, that is of no significance here, because the record evidence establishes that Sanders affirmatively signed the acknowledgment. (Tr. 39:17-40:4; G.C. Exh. 2; Jt. Exh. 2(B).)

B. The Agreement Does Not Prohibit Concerted Activity.

The AGC argues that the Agreement interferes with the collective rights of Team Members who opt out of the Agreement because they purportedly cannot engage in concerted activity with the majority of their Team Members, who are bound by the Agreement. That is not the case. A Team Member who opts out of the Agreement is able to file a class action lawsuit even if everyone else has agreed to arbitration with a class action waiver. Whether the class action meets the requirements for class certification is a separate issue. The Board has never held in any case that an employee filing a class action is necessarily entitled to class certification. *D.R. Horton*, 357 NLRB, slip op. at 10. If a putative class of employees in a lawsuit is too small to be a class, the lawsuit can continue as a joint action. Regardless, even if the employee's lawsuit initially filed as a class action proceeds as an individual action, all of the employee's rights would be and are respected.

C. The Agreement Provides Sufficient Procedural Substitutes For Class Or Collective Actions.

As stated above, it is not the form of the litigation that is protected, but rather the underlying "right" to access litigation for the benefit of one's self and others. This exact conduct could take the form of an individual case, multiple plaintiffs, a representative action, a collective action or a class action depending upon the forum, the underlying statutes, and the procedural rules. The Company's Agreement allows for concerted litigation through, among other devices, joinder and potential representative actions brought by administrative agencies such as the

Department of Labor and the Equal Employment Opportunity Commission (“EEOC”) on behalf of groups of employees. (Jt. Exh. 2(B); *see also* Jt. Exh. 2(A, C through E.) Even under *D.R. Horton*, the right to join claims or pursue administrative redress is sufficient to protect the right to concerted litigation by Team Members. *See Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013) (distinguishing arbitration agreement from the agreement at issue in *D.R. Horton* because the agreement in *Owen* permitted employees to file agency claims, which could result in agencies bringing a claim on behalf of a group of employees).

1. Joinder Is A Sufficient Procedural Substitute For Class Actions.

As explained in the Company’s Exceptions Brief, the availability of joinder allows 24 Hour Fitness Team Members to work in concert with one another, thereby providing Team Members a meaningful alternative to class or collective actions. The AGC and Sanders argue that joinder is an insufficient substitute for class or collective actions because joinder operates in a procedurally different manner in that joint actions are available only to Team Members who have already filed individual claims and class actions are appropriate when, among other things, joinder is impracticable. However, the ability to bring or participate in a class or collective action is merely a procedural device, and not a substantive right.⁵ *See, e.g., Deposit Guaranty Nat’l Bank v. Roper*, 445 U.S. 326, 332 (1980); Respondent’s Exceptions Brief, pp. 33-34, n. 11; Respondent’s Reply Brief In Response to Sanders’s Exceptions, pp. 3-5.) The AGC’s and

⁵ Because the opportunity to bring or participate in a class action is a procedural device, and not a substantive right, prohibiting employers from including a class action waiver in voluntary arbitration agreements would directly conflict with the Rules Enabling Act (“REA”). (*See* Respondent’s Exceptions Brief, pp. 36-37.) The AGC’s contention that the REA is inapplicable in the present matter is based on the mistaken premise that the ability to bring class or collective actions is elevated to a substantive right under the Act. This is precisely what the REA prohibits. But for court procedures creating class and collective actions, Section 7 would not by itself create such a substantive right. Expanding court procedures into substantive rights imbued from other statutes is exactly what the REA precludes. 28 U.S.C. § 2072(b); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999).

Sanders's efforts to distinguish the procedural differences between class or collective actions and joinder simply re-enforces that class or collective actions are procedural options, and not substantive rights in and of themselves. In both class/collective actions and joint actions, employees may concertedly bring legal action against an employer based on common claims. The differences between the forums are merely those of a procedural nature.

Despite the AGC's contention otherwise, the ability of Team Members to join claims is in no way weakened by the "nondisclosure" provision. The Policy plainly provides that "the parties will have the right to conduct civil discovery and bring motions, as provided by the Federal Rules of Civil Procedure." (Jt. Exh. 9.) Discovery affords Team Members the opportunity to obtain information from the Employer regarding similar claims brought by other Team Members against the Company, when appropriate. Moreover, though the Agreement may restrict Team Members from disclosing the existence, contents, or results of any arbitration, the plain language of the Agreement in no way restricts Team Members from otherwise disclosing workplace complaints, disputes, or potential claims they may have against the Company. Therefore, Team Members are free to discuss their workplace concerns with one another and devise strategies regarding potential joint actions if Team Members desire to do so. Accordingly, parties to the Agreement have the ability to utilize Rule 20 to join claims where appropriate.⁶ There is no evidence in the record suggesting that the language in the nondisclosure provision, as interpreted and enforced, has inhibited Team Members from bringing

⁶ The fact that the Agreement does not expressly use the words "joinder" or "consolidation" is immaterial, as is the fact that the Agreement does not expressly refer to Rule 20. The Agreement adequately and broadly incorporates all of the Federal Rules of Civil Procedure, except Rule 23. Consequently, Team Members are provided sufficient assurance that all of the procedural options available in federal court, other than class or collective actions, are available to them in arbitration. Team Members are typically represented by counsel in arbitrations, and attorney representation is mandatory in court. Counsel can fully explain joinder to the involved Team Member, and Team Members can pursue joinder provided they consent to do so.

joint claims against Respondent. Accordingly, the AGC's contention that the nondisclosure provision renders the prospect of joinder illusory is without merit.

2. The Agreement Also Permits Team Members To Act Concertedly Through Agency Claims.

Beyond permitting joinder, the Agreement allows for administrative charges with agencies such as the Department of Labor and the EEOC. (Jt. Exh. 2(B); *see also* Jt. Exh. 2(A, C through E.) Through administrative charges, Team Members preserve the ability to act concertedly and bring claims on behalf of themselves and their co-workers. For example, if a charge filed with the EEOC alleges that a "pattern or practice" of discrimination against a group of similarly situated Team Members, the EEOC can bring representative claims on behalf of those Team Members pursuant to 42 U.S.C. § 2000e-6. *See Owen*, 702 F.3d 1050; *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002) (holding that a private arbitration agreement between an individual and that individual's employer does not prevent the EEOC from filing a court action in its own name and recovering monetary damages). As such, the Agreement preserves Team Members' ability to engage in concerted litigation when appropriate.

D. The Charge Is Time-Barred With Respect To Team Members Hired Prior To 2007 As There Is No Evidence In The Record That The Company Enforced The Agreement Against Them.

The record contains no evidence of a single incident in which 24 Hour Fitness has enforced the Agreement within the Section 10(b) limitations period against a Team Member who was hired prior to January 2007. Given the absence of such record evidence, the ALJ erred by not finding that the charge is time-barred with respect to those Team Members. *See Mason & Hanger-Silas Mason Co.*, 167 NLRB 894, 894 (1967) (no violation with respect to employer's promulgation of an unlawful no-solicitation rule because promulgation occurred more than six months prior to filing of charge; however, there was evidence that rule was enforced during

statutory period).⁷

E. The ALJ's Retroactive Remedy In This Case Is Improper.

The AGC is requesting that 24 Hour Fitness move to vacate earlier order court orders compelling individual arbitration, even in cases which have since been dismissed. This is, beyond a doubt, a retroactive remedy despite the AGC's and Sanders's efforts to characterize it otherwise. In determining whether retroactive relief is appropriate, the Board must consider "the reliance of the parties on preexisting law, the effect of retroactivity on the purposes of the Act, and any particular injustice arising from retroactive application." *SNE Enterprises, Inc.*, 344 NLRB 673, 673 (2005). None of those three factors justify a retroactive remedy in this case.

As described more fully in Respondent's Answering Brief, the first element, the parties' reliance on preexisting law, weighs against retroactive relief.

With regard to the second element, as described in Answering Brief, retroactive application in this instance would not sufficiently advance the purposes of the Act to justify such a disruptive remedy because the remedy would likely interfere with rulings issued by Article III courts and/or arms' length settlement agreements entered into between the litigants.

Applying the third element, retroactive application in this case is unjust because it invalidates thousands of agreements that 24 Hour Fitness and its Team Members voluntarily entered into in reasonable reliance on the law as it existed at the time the parties entered into

⁷ In any event, as explained in Respondent's Exceptions Brief, if the Board determines that the Company violated the Act with respect to the application of the Agreement with regard to those Team Members hired prior to January 1, 2007, and that Sanders's charge is not time-barred with respect to those individuals, the most appropriate and just remedy is to provide each of those Team Members with a thirty-day window to opt out of the Agreement. This is the same opportunity that 24 Hour Fitness provided to its Team Members in Texas in June 2012 after the Fifth Circuit Court of Appeals rendered its decision in the matter of *John Carey v. 24 Hour Fitness USA, Inc.*, in which the court affirmed an order denying the Company's motion to compel individual arbitration based on the Agreement. *See Carey v. 24 Hour Fitness USA, Inc.*, 2012 U.S. Dist. LEXIS 143879, *3-7 (S.D. Tex. 2012)

those agreements. The putative remedy would require 24 Hour Fitness to re-raise issues pertaining to the enforceability of the Agreement that the courts have already ruled upon. Simply ordering the Employer to re-raise the issue will require the Company to incur significant attorneys' fees and costs as 24 Hour Fitness would be required to retain counsel to submit briefing and argument to the various courts in order to comply with the order. Beyond that, if the Board elects to require the Employer to reimburse its Team Members for expenses, including attorneys' fees and costs, incurred in enforcing the Agreement, such expenses would be, beyond doubt, substantial and by no means "minor and limited," as the AGC suggests.

III. CONCLUSION

Respondent again respectfully requests that the Board reject those portions of the ALJ's Decision excepted to by the Employer, dismiss Sanders's charge, and find that the Arbitration Agreement does not violate Sections 7 and 8(a)(1) of the National Labor Relations Act.

Respectfully submitted,

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STATEMENT OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is 650 California Street, 20th Floor, San Francisco, California 94108.2693. On February 21, 2013, I served the within document(s):

1. EMPLOYER'S COMBINED ANSWERING BRIEF TO ACTING GENERAL COUNSEL'S AND CHARGING PARTY'S CROSS-EXCEPTIONS;
2. EMPLOYER'S REPLY BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION AND IN RESPONSE TO THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF; and
3. EMPLOYER'S REPLY BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION AND IN RESPONSE TO CHARGING PARTY ALTON SANDERS'S AND AMICUS SEIU'S ANSWERING BRIEF.



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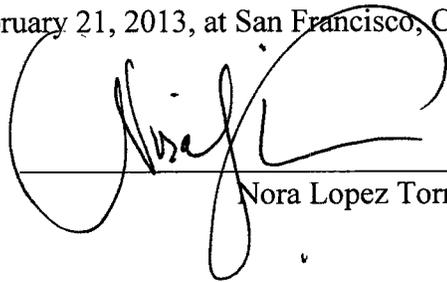
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