

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

**KMART CORPORATION, A
SUBSIDIARY OF SEARS HOLDINGS
CORPORATION,**

Respondent

Case 06-CA-091823

and

RONALD DANIELS, an INDIVIDUAL,

Charging Party.

**RESPONDENT'S ANSWERING BRIEF IN RESPONSE TO COUNSEL FOR THE
GENERAL COUNSEL'S LIMITED CROSS-EXCEPTIONS TO THE DECISION OF
THE ADMINISTRATIVE LAW JUDGE**

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Dated: January 16, 2014

Counsel for Respondent

I. INTRODUCTION

Respondent Kmart Corporation (“Kmart” or “Respondent”)¹ submits this Answering Brief in response to Counsel for the General Counsel’s (“GC”) Limited Cross-Exceptions to the Decision of the Administrative Law Judge (“ALJ”) (“Cross-Exceptions”), which were filed on January 2, 2014.² In its Cross-Exceptions, the GC excepts to the ALJ’s remedy and order, asserting that the ALJ erred by failing to order the Respondent to do the following:

notify arbitral or judicial panels, if any, where Respondent has attempted to enjoin or otherwise prohibit employees from bringing or participating in class or collective actions, that it is withdrawing those objections and that it no longer objects to such employee actions...

(GC Exceptions 1).³ Consequently, the GC also excepts to the ALJ’s failure to include in his recommended Notice to Employees that Respondent took the steps described in the Proposed Remedy. *Id.*

The GC seeks this remedy without citing any legal authority holding that such extraordinary relief is warranted or appropriate in this case. Further, there is no factual basis for such a remedy in this case. The GC admits that she “does not know if any such lawsuits or objections thereto exist”. GC Br. 2. The GC made no attempt to introduce any evidence of such lawsuits at trial, yet now asks the Board to order the Proposed Remedy even though there is no

¹ Based on counsel for the General Counsel’s failure to prove that Sears Holding Corporation is an employer within the meaning of the Act, the ALJ dismissed the Complaint as it relates to Respondent Sears Holding Corporation. (ALJD 4:14-19).

² References to the ALJ’s Decision in this matter will appear as “ALJD_X:Y” where the X represents the page number and the Y represents the line number. References to the GC’s Cross-Exceptions will appear as “GC Exceptions X” where X represents the page number. References to the GC’s Brief in Support of Its Limited Cross-Exceptions to the ALJ’s Decision will appear as “GC Br. X” where the X represents the page number. References to Respondent’s Brief In Support of Its Exceptions to the ALJ’s Decision will appear as R. Br. X” where the X represents the page number.

³ For purposes of this Answering Brief, the additional remedy sought by counsel for the General Counsel will be referred to as the “Proposed Remedy”.

record evidence to show that such a remedy would be warranted in this case. GC Br. 2.

The Board should deny the GC's Cross-Exceptions because the Proposed Remedy is not supported by Board precedent, seeks to remedy conduct that is not alleged to be unlawful, and violates Respondent's rights under the First Amendment and Respondent's right to due process.

II. FACTS

As described more thoroughly in Respondent's Brief in Support of Its Exceptions to the ALJ's Decision filed on December 20, 2013 ("Exceptions"), Respondent communicated the Arbitration Policy/Agreement ("Agreement") at issue herein, to its non-union employees in April 2012 and offered employees the opportunity to opt-out of the Agreement and its class/collective action waiver. As described more thoroughly in Respondent's Exceptions, the Agreement is a lawful, voluntary arbitration agreement, which does not preclude employees from filing unfair labor practice charges, assures employees that they will suffer no retaliation if they exercise their right to opt-out of the Agreement, and includes clear and explicit instructions about the procedures for opting out. (R. Br. 4-8, 25-33.)

Despite the clear differences between the Agreement and the arbitration agreement in *D. R. Horton*, the ALJ concluded that the maintenance of the Agreement violates the Act. (ALJD 13:7-19.) As a result, the ALJ ordered Respondent:

to rescind or revise it to make clear to employees in all of its facilities in which the arbitration policy has been implemented that the policy does not require a waiver in all forums of their right to maintain collective actions, and shall notify employees of the rescinded or revised policy including by providing them a copy of the revised policy or specific notation that the policy has been rescinded.

(ALJD 14:6-11.)

III. ARGUMENT

The Board should deny the GC's Cross-Exceptions because the Proposed Remedy is not supported by Board precedent, seeks to remedy conduct that is not alleged to be unlawful, and violates Respondent's First Amendment right to petition the courts and Respondent's right to due process.

A. The Proposed Remedy Not Supported by Board Precedent.

The GC argues that the Proposed Remedy is reasonable in light of the ALJ's finding that the Agreement violates Section 8(a)(1) of the Act. It is on this basis alone, without citing supporting Board or other legal authority, that the GC asserts that the ALJ erred by failing to include it in his remedy and recommended order.

On the contrary, the GC's Proposed Remedy goes well beyond what the Board has ordered in *D. R. Horton* cases, and the ALJ's failure to order such an extraordinary remedy is entirely consistent with the Board's remedial orders in *D. R. Horton* and *Supply Technologies*, the only two cases in which the Board ordered a remedy for a *D. R. Horton* violation. *D. R. Horton, Inc.*, 357 NLRB No. 184, slip op. at *13-14 (Jan. 3, 2012) (ordering respondent to "rescind or revise the [arbitration agreement]...and notify employees of the rescinded or revised agreement"); *Supply Technologies, LLC*, 359 NLRB No. 38, slip op. at *4 (Dec. 4, 2012) (same).

Because the GC failed to demonstrate any reason why this case necessitates a more expansive remedy, the GC's Cross-Exceptions should be denied.

B. The Proposed Remedy Seeks to Remedy Conduct That Is Beyond the Scope of the Complaint.

The Board may not remedy conduct that is beyond the scope of the allegations in the complaint. *NLRB v. Builders Supply Co.*, 410 F.2d 606, 610 (5th Cir. 1969); *NLRB v. Century Broadcasting Corp.*, 419 F.2d 771 (8th Cir. 1969); *NLRB v. Milco*, 388 F.2d 133 (2d Cir. 1968).

Here, the complaint alleged that the Agreement itself violated the Act, but the complaint did not allege, and the ALJ did not find, that the Respondent violated the Act by seeking to enforce the Agreement in state or federal court.

Therefore, the Proposed Remedy is inappropriate because it seeks to remedy conduct that was not alleged or found to be unlawful in this case.

C. The Proposed Remedy Is Barred by the First Amendment.

The GC's Proposed Remedy violates Respondent's First Amendment right to petition the courts. As the Supreme Court recognized in *Bill Johnson's*, "the right of access to the courts is an aspect of the First Amendment right to petition..." *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741 (1983). The right to petition applies equally to litigation in state and federal courts. *Bill Johnson's*, 461 U.S. at 734 (describing the right to petition in the context of litigation in a state court); *see also BE & K Construction Co. v. NLRB*, 536 U.S. 516, 520 (2002) (applying *Bill Johnson's* in the context of federal litigation).

Under *Bill Johnson's*, litigation does not lose the protection of the First Amendment unless the litigation lacks a reasonable basis and was undertaken with a retaliatory motive. *Bill Johnson's*, 461 U.S. at 747 ("[T]he filing of a meritorious lawsuit, even for a retaliatory motive, is not an unfair labor practice"); *see also BE & K Construction Co.*, 351 NLRB 451, 457 (2007), *on remand from* 536 U.S. 516 (2002). A lawsuit lacks a reasonable basis only if "no reasonable litigant could realistically expect success on the merits." *BE & K*, 351 NLRB at 457 (citing *Professional Real Estate Investors v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60 (1993)).

A lawsuit may also fall outside the scope of the First Amendment's protection if the lawsuit has an "unlawful objective" under federal law. *See Bill Johnson's*, 461 U.S. at 737 n.5 (a lawsuit "that has an objective that is illegal under the federal law" may be enjoined by the Board). To the extent the GC argues that the Proposed Remedy addresses hypothetical lawsuits

that have an “unlawful objective” under the Act, such an argument directly conflicts with the many federal courts that have rejected *D. R. Horton* and held that arbitration agreements containing a class or collective action waiver are lawful and enforceable under the FAA. *See, e.g., Am. Express Co. v. Italian Colors Res.*, 133 S.Ct. 2304, 2312 (2013); *D. R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013); *Raniere v. Citigroup, Inc.*, 533 F. App’x 11 (2d Cir. 2013) (summary order); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013); *Owen v. Bristol Care*, 702 F.3d 1050 (8th Cir. 2013).

In these circumstances, the issue of whether the Agreement is valid and enforceable raises a genuine legal issue of federal law that is appropriately resolved in the federal courts and is entitled to First Amendment protection under *Bill Johnson’s*. *See Bill Johnson’s*, 461 U.S. at 746 (holding that the Board “must not deprive a litigant of his right to have genuine state law legal questions decided by the state judiciary”); *see also, BASF Wyandotte Corp.*, 278 NLRB 173, 181 (1986) (applying *Bill Johnson’s* to protect the charged party’s First Amendment right to petition the court in the context of action in federal court to decide issue of federal law).

D. The Proposed Remedy Violates Respondent’s Right to Due Process.

By seeking to compel the Respondent to withdraw from future efforts to enforce the Agreement in court and to forfeit widely accepted legal arguments regarding the validity and enforceability of such agreements, the GC’s Proposed Remedy violates Respondent’s right to due process. It is well established that “[t]he fundamental requisite of due process of law is the opportunity to be heard.” *See, e.g., Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)). To the extent that the Proposed Remedy would require Respondent to withdraw from any effort to enforce the Agreement in court, the Proposed Remedy deprives Respondent of its due process right to be heard on the issue of the enforceability of the Agreement.

IV. CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that the Board deny the GC's Cross-Exceptions.

Respectfully submitted,

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Dated: January 16, 2014

Counsel for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of January, 2014, a true and correct copy of the foregoing Respondent's Answering Brief in Response to Counsel for the General Counsel's Limited Cross-Exceptions to the Decision of the Administrative Law Judge was filed via the Board's electronic filing system and served by electronic mail upon the following:

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