

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

GREAT LAKES RESTAURANT MANAGEMENT, LLC

and

Case 03-CA-143685

FAST FOOD WORKERS COMMITTEE

**MEMORANDUM OF LAW IN SUPPORT OF COUNSEL FOR THE GENERAL
COUNSEL’S MOTION FOR SUMMARY JUDGMENT AND ISSUANCE OF BOARD’S
DECISION AND ORDER**

I. Introduction

Respondent operates a number of Wendy’s fast food restaurants in the Buffalo, New York area. Respondent maintains a Dispute Resolution Program (Program) containing a mandatory arbitration provision that violates the National Labor Relations Act (Act). Respondent admitted in its Answer that it maintains the Program and that the document speaks for itself. The Program states that it is a condition of employment for employee-applicants. Accordingly, as Respondent has admitted the factual allegations contained in the Complaint and Notice of Hearing (Complaint), no issue of material fact is in dispute.

II. Standard

As there is no issue of material fact in dispute, pursuant to Section 102.24 and Section 102.50 of the National Labor Relations Board’s Rules and Regulations and Statement of Procedures, Series 8, as amended, (Rules and Regulations), the National Labor Relations Board (Board) may deem all matters alleged in the Complaint as true and grant summary judgment and issue an appropriate Decision and Order.

III. Argument

General Counsel has alleged that Respondent violated Section 8(a)(1) of the Act by: maintaining and enforcing a mandatory arbitration agreement that prohibits employees from engaging in protected concerted activities, including class or collective action, and by requiring applicants to sign the agreement that leads employee applicants to believe that they are prohibited from filing and pursuing to conclusion, charges with the Board.

In evaluating the merits of similar complaint allegations, the Board has found that “a mandatory arbitration policy...constitutes a work rule that is properly analyzed under the test set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), to determine whether it violates Section 8(a)(1). Under this test, a work rule may be found unlawful if it explicitly restricts activities protected by Section 7 or, alternatively, upon a showing of one of the following: (1) employees would reasonably construe the rule as prohibiting Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.” *Chesapeake Energy Corp.*, 362 NLRB No. 80, slip op. at 2 (April 30, 2015), citing *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013) and *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014). In the instant matter, an examination of Respondent’s Program shows that the rule explicitly restricts employees from engaging in protected concerted activity and would be reasonably construed by employees to prohibit them from engaging in Section 7 activity.

Respondent admits that it maintains the Program and the document speaks for itself. The Program states on the first page that the Program is a four-step process: Communication, Executive Review, Mediation, and Arbitration for resolving workplace disputes. The Program further states:

THIS PROGRAM IS A CONDITION OF YOUR EMPLOYMENT AND IS THE MANDATORY AND EXCLUSIVE MEANS BY WHICH THOSE PROBLEMS MAY BE RESOLVED, SO READ THE INFORMATION IN THIS PROGRAM BOOKLET CAREFULLY. (emphasis in original document).

The last page of the Program is a signature sheet which directs the employee-applicant to sign the “binding promise” to arbitrate all claims in dispute described in the Program.

Step 4 of the Program, Arbitration, provides “if you have a work-related problem that involves one of your legally protected rights shown on page 4, which has not been resolved through the earlier steps, you must request arbitration.” Page 4 sets forth the Claims Subject to Arbitration which include “discrimination ... whether under federal, state or local law”; “claims for a violation of any other non-criminal federal, state or other governmental law, statute, regulation or ordinance; and claims of retaliation under any law, statute, regulation or ordinance... .” There are four enumerated disputes listed as the *only* claims or disputes not subject to arbitration – any claim for benefits under a plan that provides its own binding arbitration, statutory workers compensation claims, unemployment insurance claims and claims under the Dodd Frank Act. A paragraph on page four provides “The employee and company each agree, that there shall be no class or collective action arising from any employee’s claim(s), and each employee may only maintain a claim under this plan on an individual basis and may not participate in class or collective action.”

Based on the existing case law, the rule is unlawful as it prohibits employees from engaging in protected concerted activities, including class or collective action. In addition, by requiring applicants to sign the agreement, Respondent leads employee applicants to believe that they are prohibited from filing and pursuing to conclusion, charges with the Board. In *D.R. Horton* and *Murphy Oil*, the Board found that the mandatory arbitration policies in those cases

violated Section 8(a)(1) because: (1) the language reasonably would lead employees to believe that they were prohibited from filing unfair labor practice charges with the Board, and (2) the policies expressly required employees, as a condition of their employment, to waive their right to collectively pursue employment-related claims in all forums, judicial and arbitral. See *Chesapeake Energy*, supra, slip op. at 2.

Similarly here, while the Program does not explicitly prohibit employees from filing charges with the Board, employees would reasonably construe the Program's language set forth above to prohibit them from doing so. Page four of the Arbitration clause states that claims for violations of federal law must be handled through individual arbitration including those involving discrimination. Read as a whole, the Program encompasses all employment claims, including those within the Board's jurisdiction. Accordingly, because employees would reasonably construe the Program to prohibit them from filing Board charges, Respondent's maintenance of the Agreement violates Section 8(a)(1) of the Act. *Chesapeake Energy*, supra, slip op. at 2.

With regard to the maintenance of the Program and its language explicitly prohibiting employees from pursuing employment-related claims on a collective or class basis in all forums, this further violates Section 8(a)(1) of the Act. *Id.*, citing *D.R. Horton* and *Murphy Oil*. Such a total proscription of class or collective actions is a core right protected by the Act. *Id.* at slip op. 3. Here, the Program explicitly prohibits Section 7 activity by removing employees' right to concertedly pursue employment claims. Further, employees are required to sign the Program as a condition of employment.¹ Thus, as in *Murphy Oil* and *D.R. Horton*, Respondent has violated

¹ While it is unclear from Respondent's answer whether it is denying this requirement, nonetheless Respondent admits the document speaks for itself. As the Program requires employee-applicants to sign the Program as a condition of employment and the Program contains a signature sheet, there is no material issue of fact. See *D.R. Horton*, 357 NLRB No. 184, slip op. 17 (2012).

Section 8(a)(1) of the Act by maintaining an arbitration agreement, which employees were required to sign as a condition of employment, that bars them from litigating employment claims against Respondent on a class or collective basis in all forums, arbitral or judicial. *Chesapeake Energy*, supra, slip op. at 3.

IV. Conclusion

Wherefore, Counsel for the General Counsel respectfully requests that, in accordance with Section 102.24 and 102.50 of the Board's Rules and Regulations, the Board deem all matters alleged in the Complaint to be admitted to be true, and so be found, and that forthwith, a Board Decision and Order be issued containing findings of fact, conclusions of law, and an appropriate remedy for violations herein.

DATED at Buffalo, New York this 4th day of May, 2015.

Respectfully submitted,

/s/ Claire T. Sellers

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT on May 4, 2015, the following document was electronically filed with the National Labor Relations Board and copies were served on the following parties by electronic mail:

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Dated May 4, 2015

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