UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

EVERGLADES COLLEGE, INC., d/b/a
KEISER UNIVERSITY and
EVERGLADES UNIVERSITY,

Petitioner,

and

NATIONAL LABOR RELATIONS BOARD,

Respondent.

_____/

U.S. COURT OF APPEALS
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Petition for Review
Docket No. _____

PETITION FOR REVIEW OF A FINAL ORDER
OF THE NATIONAL LABOR RELATIONS BOARD

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, 11th Cir. R. 26.1-1, 26.1-2, and 26.1-3, counsel for Petitioner certifies that the following listed persons and entities have an interest in the outcome of this case:

1. Cohen, David, Regional Attorney, Region 12, National Labor Relations Board
2. Diaz, Margaret J., Regional Director, Region 12, National Labor Relations Board
3. Everglades College, Inc. d/b/a Keiser University, Petitioner
4. Fikki, Lisa K., Charging Party
5. Griffin, Richard, General Counsel for National Labor Relations Board
6. King, John F., Counsel for Acting General Counsel, Region 12, National Labor Relations Board
7. Kunkel Miller & Hament, counsel for Petitioner
8. Hament, John M., counsel for Petitioner
9. McFerran, Lauren, National Labor Relations Board member
10. Miscimarra, Philip A., National Labor Relations Board member
11. National Labor Relations Board, Respondent
12. Olivero, Melissa M., Administrative Law Judge, National Labor Relations Board

13. Pearce, Mark Gaston, National Labor Relations Board Chairman
14. Poban-Lockley, Chastity, Field Examiner, National Labor Relations Board
15. Shinners, Gary, Executive Secretary, National Labor Relations Board

The undersigned further certifies, pursuant to Fed. R. App. P. 26.1(a), that Petitioner is not a publicly held corporation, does not have any parent corporation, and that no publicly held corporation owns 10% or more of its stock

PETITION FOR REVIEW

Pursuant to Fed. R. App. P. 15, 11th Cir. R. 15-2, and Section 10(f) of the National Labor Relations Act, 29 U.S.C. §160, Everglades College, Inc., d/b/a Keiser University and Everglades University, hereby petitions this Court for review of the Decision and Order issued by the National Labor Relations Board on December 23, 2015, in Case 12-CA-096026, a true and correct copy of which is attached hereto. The Decision and Order is captioned Everglades College, Inc. d/b/a Keiser University and Everglades University and Lisa K. Fikki and has been published at 363 NLRB No. 73 (Dec. 23, 2015).

Respectfully submitted,

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Counsel for Everglades
College, Inc.

CERTIFICATE OF SERVICE

Pursuant to Rule 15(c) of the Federal Rules of Appellate Procedure, I certify that on this 26th day of January 2016, the foregoing Petition for Review was served on all parties by serving a true and correct copy at the addresses listed below:

Lisa K. Fikki
7014 Cornell Ave.
Saint Louis, MO 63130-2304
Lisa@fikki.net

John M. Hament

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Everglades College, Inc. d/b/a Keiser University and Everglades University *and* Lisa K. Fikki. Case 12–CA–096026

December 23, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND MCFERRAN

On August 14, 2013, Administrative Law Judge Melissa M. Olivero issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions, and to adopt the recommended Order as modified and set forth in full below.[1]

The judge found, applying the Board's decision in *D. R. Horton, Inc.*, 357 NLRB No. 184 (2012), enf. denied in relevant part, 737 F.3d 344 (5th Cir. 2013), that the Respondent violated Section 8(a)(1) of the Act by maintaining an Employee Arbitration Agreement ("EAA") policy that requires employees, as a condition of employment, to waive their rights to pursue class or collective actions involving employment-related claims in all forums, whether arbitral or judicial. The judge also found, relying on *D. R. Horton* and *U-Haul Co. of California*, 347 NLRB 375, 377–378 (2006), enfd. 255 Fed. Appx. 527 (D.C. Cir. 2007), that maintaining the EAA violated Section 8(a)(1) because employees reasonably would believe that it bars or restricts their right to file unfair labor practice charges with the Board.

In *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), enf. denied in relevant part, __ F.3d __ (5th Cir., Oct. 26, 2015), the Board reaffirmed the relevant holdings of *D. R. Horton*, supra. Based on the judge's application of *D. R. Horton*, and on our subsequent decision in *Murphy Oil*, we affirm the judge's findings[2] and conclusions, and adopt the recommended Order as modified and set forth in full below.[3]

ORDER

The National Labor Relations Board orders that the Respondent, Everglades College, Inc. d/b/a Keiser University and Everglades University, Daytona Beach, Fort Lauderdale, Fort Myers, Jacksonville, Lakeland, Melbourne, Miami, Orlando, Pembroke Pines, Port St. Lucie, Sarasota, Tallahassee, Tampa, and West Palm Beach, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a mandatory arbitration policy that employees reasonably would believe bars or restricts the right to file charges with the National Labor Relations Board.

(b) Maintaining a mandatory arbitration policy that requires employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

(c) Discharging an employee for failing or refusing to sign a mandatory arbitration agreement that employees reasonably would believe bars or restricts the right to file charges with the National Labor Relations Board and/or that requires employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the Employee Arbitration Agreement ("EAA") in all of its forms, or revise it in all of its forms to make clear to employees that the EAA does not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums, and that it does not bar or restrict employees' right to file charges with the National Labor Relations Board.

(b) Notify all applicants and current and former employees who were required to sign or otherwise become bound to the EAA in any form that it has been rescinded or revised and, if revised, provide them a copy of the revised agreement.

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[1] In adopting par. 2(d) of the Order, we rely on *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014). We shall modify the Order to conform to the Board's standard remedial language for the violations found. We shall also substitute a new notice to conform to the Order as modified, and in accordance with our decision in *Durham School Services*, 360 NLRB No. 85 (2014).

[2] In affirming the judge's findings, we do not rely on *Supply Technologies, LLC*, 359 NLRB No. 38 (2012), or *Latino Express, Inc.*, 359 NLRB No. 44 (2012).

We agree with the judge, for the reasons she states, that employees would not reasonably view the Respondent's EAA as providing unrestricted access to the Board. To the extent that the Respondent argues that the EAA is lawful because it permits the filing of charges or claims with administrative agencies, we reject this argument for the reasons set forth in *SolarCity Corp.*, 363 NLRB No. 83 (2015).

[3] We disagree with our dissenting colleague's argument that mandatory arbitration agreements do not violate the Act for the reasons stated in *Murphy Oil*, 361 NLRB No. 72, slip op. at 1–21.

(c) Within 14 days from the date of this Order, offer Lisa K. Fikki full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(d) Make Lisa K. Fikki whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the judge's decision.

(e) Compensate Lisa K. Fikki for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

(f) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Lisa K. Fikki, and within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its Fort Lauderdale, Florida facility copies of the attached notice marked "Appendix A," and at all other facilities where the unlawful arbitration agreement is or has been in effect, copies of the attached notice marked "Appendix B."[4] Copies of the notices, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 9, 2012.

(i) Within 21 days after service by the Region, file with the Regional Director for Region 12 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., December 23, 2015

Mark Gaston Pearce, Chairman

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, concurring in part and dissenting in part.

In this case, my colleagues find that the Respondent's Employee Arbitration Agreement ("EAA") violates Section 8(a)(1) of the National Labor Relations Act ("the Act" or "NLRA") because the EAA waives the right to participate in class or collective actions regarding non-NLRA employment claims. I respectfully dissent from this finding for the reasons explained in my partial dissenting opinion in *Murphy Oil USA, Inc.*[1] However, I agree with my colleagues and the judge that the EAA violates Section 8(a)(1) by interfering with the filing of NLRB charges.[2] Because the EAA violates Section

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notices reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] 361 NLRB No. 72, slip op. at 22–35 (2014) (Member Miscimarra, dissenting in part). The Board majority's holding in *Murphy Oil* invalidating class-action waiver agreements was recently denied enforcement by the Court of Appeals for the Fifth Circuit. *Murphy Oil USA, Inc. v. NLRB*, No. 14–60800, 2015 WL 6457613 (5th Cir. Oct. 26, 2015).

Because I disagree with the Board's decisions in *Murphy Oil*, above, and *D. R. Horton, Inc.*, 357 NLRB No. 184 (2012), enf. denied in pert. part 737 F.3d 344, 362 (5th Cir. 2013), and I believe the NLRA does not render unlawful arbitration agreements that provide for the waiver of class-type litigation of non-NLRA claims, I find it unnecessary to reach whether such agreements should independently be deemed lawful to the extent they "leave[ ] open a judicial forum for class and collective claims," *D. R. Horton*, 357 NLRB No. 184, slip op. at 12, by permitting the filing of complaints with administrative agencies that, in turn, may file class or collective action lawsuits. See *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013).

[2] See *U-Haul Co. of California*, 347 NLRB 375, 377 (2006), enfd. mem. 255 Fed. Appx. 527 (D.C. Cir. 2007); *Murphy Oil*, above, slip op. at 23 fn. 4 (Member Miscimarra, dissenting in part).

8(a)(1) in this respect, I join my colleagues in finding that the Respondent violated the Act when it discharged Charging Party Lisa K. Fikki for refusing to sign the EAA.

For these reasons, as to the above issues, I respectfully concur in part and dissent in part.

Dated, Washington, D.C. December 23, 2015

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a mandatory arbitration agreement that our employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board.

WE WILL NOT maintain a mandatory arbitration agreement that requires our employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT discharge you for engaging in protected activities, including for failing or refusing to sign a mandatory arbitration agreement that employees reasonably would believe bars or restricts the right to file charges with the National Labor Relations Board and/or that requires employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind our mandatory Employee Arbitration Agreement in all of its forms, or revise it in all of its forms to make clear that the agreement does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums, and that it does not restrict your right to file charges with the National Labor Relations Board.

WE WILL notify all applicants and current and former employees who were required to sign or otherwise become bound to the mandatory arbitration agreement in all of its forms that the arbitration agreement has been rescinded or revised and, if revised, WE WILL provide them a copy of the revised agreement.

WE WILL, within 14 days from the date of the Board's Order, offer Lisa K. Fikki full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Lisa K. Fikki whole for any loss of earnings and other benefits resulting from the discrimination against her, less any net interim earnings, plus interest.

WE WILL compensate Lisa K. Fikki for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Lisa K. Fikki, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

EVERGLADES COLLEGE, INC., D/B/A KEISER UNIVERSITY AND EVERGLADES UNIVERSITY

The Board's decision can be found at www.nlrb.gov/case/12-CA-096026 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

APPENDIX B
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a mandatory arbitration agreement that our employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board.

WE WILL NOT maintain and/or enforce a mandatory arbitration agreement that requires our employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind our mandatory Employee Arbitration Agreement in all of its forms, or revise it in all of its forms to make clear that the agreement does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums, and that it does not restrict your right to file charges with the National Labor Relations Board.

WE WILL notify all applicants and current and former employees who were required to sign or otherwise become bound to the mandatory Employee Arbitration Agreement in all of its forms that the arbitration agreement has been rescinded or revised and, if revised, WE WILL provide them a copy of the revised agreement.

EVERGLADES COLLEGE, INC. D/B/A KEISER UNIVERSITY AND EVERGLADES UNIVERSITY

The Board's decision can be found at www.nlrb.gov/case/12-CA-096026 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

John F. King, Esq., for the Acting General Counsel.
John M. Hament, Esq. and *James W. Waldman, Esq.*, for the Respondent.

DECISION

STATEMENT OF THE CASE

MELISSA M. OLIVERO, Administrative Law Judge. This case was tried in Miami, Florida, on June 17, 2013. Lisa K. Fikki, an individual, filed the charge on January 9, 2013, and filed an amended charge on February 27, 2013, and the Acting General Counsel[1] issued the complaint on March 28, 2013. The complaint alleges that Everglades College, Inc., d/b/a Keiser University and Everglades University (Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by maintaining and requiring its employees to sign an Employee Arbitration Agreement that would lead employees to believe that they are barred or restricted from filing charges with the Board and that requires employees to waive their right to maintain class or collective actions.[2] (GC Exh. 1(g).) The complaint further alleges that Respondent violated Section 8(a)(1) of the Act by discharging Charging Party Lisa K. Fikki for refusing to sign the Employee Arbitration Agreement. (GC Exh. 1(g).) Respondent timely filed an answer denying the alleged violations in the complaint. (GC Exh. 1(i).) The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On the entire record, including my own observation of the demeanor of the witnesses,[3] and after considering the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, operates a private, not-for-profit university at its facility in Fort Lauderdale, Florida, where it annually derives gross income in excess of $1 million, and purchases and receives goods valued in excess of $50,000 directly from points outside the State of Florida. Respondent admits, and I find, that it is an employer engaged in commerce

[1] For purposes of brevity, the Acting General Counsel is referenced herein as the General Counsel.

[2] Abbreviations used in this decision are as follows: "Tr." for transcript; "R. Exh." for Respondent's Exhibit; "GC Exh." for General Counsel's Exhibit; "R. Br." for Respondent's Brief; and "GC Br." for the General Counsel's Brief.

[3] Although I have included citations to the record to highlight particular testimony or exhibits, I emphasize that my findings and conclusions are not based solely on those specific record citations, but rather on my review and consideration of the entire record for this case.

within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Overview of Respondent's Operations and Management Structure

Respondent employs approximately 3500 people at its numerous campuses throughout the State of Florida. (GC Exh. 14). Dr. Arthur Keiser is Respondent's chancellor and chief executive officer. Johanna Arnett and Bill Searle are associate vice chancellors of human resources. Don Montalvo is vice president of Respondent's Graduate School. Sherry Olsen is associate vice chancellor of online education. Respondent admits, and I find, that Keiser, Arnett, Searle, Montalvo, and Olsen are supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act. (GC Exh. 14.)

B. The On-Boarding/Re-Boarding Process

On-boarding is a process Respondent's new hires must complete upon acceptance of employment. In order to complete the process, new employees must review and electronically sign or initial numerous documents and policies. These documents include Respondent's drug and alcohol policy, medical emergency policy, IT security policy, and an Employee Arbitration Agreement. (GC Exh. 16.) Since 2009, Respondent's new employees have completed the on-boarding process electronically.

In late 2011, Respondent decided to eliminate paper records for its existing employees. In June 2012,[4] all of Respondent's current employees who had not electronically on-boarded were asked to complete the electronic process. This process has been called "re-boarding." Re-boarding is a "package deal;" employees much sign or initial each form in order to complete the process. Respondent's employees were given an initial deadline of June 29, a period of 2 weeks, to complete the re-boarding process.

The Employee Arbitration Agreement (EAA), a four-page document contained in the re-boarding package is at issue here. The EAA contains the following pertinent language:

> 6. *Arbitration of Claims.* Any controversy or claim arising out of or relating to Employee's employment, Employee's separation from employment, and this Agreement, including, but not limited to, claims or actions brought pursuant to federal, state, or local laws regarding payment of wages, tort, discrimination, harassment and retaliation, except where specifically prohibited by law, shall be referred to and finally resolved exclusively by binding arbitration . . . Employee agrees that there will be no right or authority, and hereby waives any right or authority, for any claims within the scope of this Agreement to be brought, heard or arbitrated as a class or collective action, or in a representative or private attorney general capacity on behalf of a class of persons or the general public.
>
> . . . .
>
> 11. *Independent Legal Counsel.* Each party hereby acknowledges that said party has had ample opportunity to seek independent legal counsel, and has been represented by, or has otherwise waived its right to be represented by, such independent legal counsel, with respect to the negotiation and execution of this Agreement.

(GC Exh. 4.) According to its terms, the EAA is executed, "in consideration of employment or continued employment" with Respondent. (GC Exh. 4, p. 1.) The EAA also states that its terms survive the termination of the employee's employment. (GC Exh. 4, p. 2.) Although the EAA invited employees to obtain legal counsel and negotiate over its terms, no employee actually did so. (Tr. 162.)[5]

It is undisputed that in order to complete the re-boarding process, Respondent's employees were required to sign the Employee Arbitration Agreement. It is also undisputed that signing each document, including the EAA, was a condition of continuing employment. Respondent does not dispute that it never undertook to explain to its employees what claims might be excluded from the EAA as "expressly excluded by law." (Tr. 169.)

C. Event Surrounding the Discharge of Lisa Fikki

Charging Party Lisa Fikki was employed by Respondent as a graduate admissions counselor from July 13, 2008, until July 12, 2012, when she was discharged for failing to complete Respondent's re-boarding process. While employed by Respondent, Fikki worked Sundays through Thursdays from 11 a.m. to 8 p.m.[6]

On Friday, June 15, Arnett sent Fikki and other employees an email advising them that Respondent was creating electronic personnel files and that all employees needed to review Respondent's policies and update their employee files.[7] (GC Exh. 2.) This email created a deadline of Friday, June 22 to complete the process. Fikki and other employees initially had difficulty accessing the documents. (GC Exh. 3; Tr. 109.) Therefore, Respondent gave all employees an extension of time, through June 29, to complete the process.[8] (Tr. 110–111.)

On June 27, Respondent held a mandatory meeting for all employees who had not yet completed the re-boarding process. (GC Exh. 8.) Olsen, Arnett, and Montalvo conducted the meeting, which was attended by about a dozen employees (Tr. 43.) During the meeting, Fikki asked Arnett if the documents needed to be signed as they were prepared or if the terms were nego-

[4] All dates are in 2012, unless otherwise indicated.

[5] Respondent maintained an earlier version of its EAA (GC Exh. 13), which the Charging Party had signed. The earlier version did not contain the prohibition on class or collective claims. The General Counsel does not claim that the earlier arbitration agreement violated the Act.

[6] Fikki's testimony regarding the meetings and events preceding her discharge is undisputed. Moreover, there is no real dispute regarding any of the material facts in this case.

[7] Fikki was not at work on the day that this email was sent by Arnett.

[8] Arnett sent Fikki copies of the re-boarding documents that she could print and review on June 21. (GC Exh. 5.) However, Fikki could not complete the re-boarding process using these printed documents.

tiable. Arnett replied that the documents needed to be signed electronically and that Dr. Keiser would be available later to answer employee questions. (Tr. 46.) Fikki asked if the documents were a condition of continuing employment and Arnett confirmed they were. (Tr. 46.) In response to a question, Arnett also told Fikki that she would have ample time to seek legal counsel.[9] (Tr. 46–47.)

Later that same day, Dr. Keiser held a meeting with employees; Arnett and Searle were also present for the meeting. During the meeting, Dr. Keiser explained his views on the benefits of arbitration. Dr. Keiser asked Fikki what her problem was with completing the re-boarding process. Fikki replied that she wanted legal advice. Dr. Keiser stated that there are millions of attorneys out there and they are easy to find. Fikki reiterated that she wanted more time. Dr. Keiser advised Fikki and the other employees that they would get more time if they provided a letter from an attorney verifying an appointment by the June 29 deadline. Fikki obtained and sent such a letter to Arnett on June 29. (GC Exh. 10.) The letter obtained by Fikki indicated that the attorney she had chosen could not meet with her until July 18. (Id.)

That same day, Arnett sent Fikki an email regarding her request for an extension of time. (GC Exh. 11.) Arnett stated that Respondent "has already decided to extend the deadline for everyone by eleven days through Tuesday, July 10 . . ." (Id.) Arnett further advised Fikki to make the necessary arrangements to have the re-boarding documents reviewed in tine to meet the new deadline. (Id.) Fikki did not meet with an attorney to have the re-boarding documents reviewed by the July 10 deadline.

Fikki worked her regular shift on July 10 without incident. However, when she reported to work on July 12 she was unable to log in to her computer. A short time later, Montalvo appeared at Fikki's workstation and escorted her to human resources. When Fikki arrived at human resources, Searle advised her that she was being discharged for failing to complete the re-boarding process. Fikki stated that she had an agreement with Dr. Keiser giving her more time to complete the process. Arnett stated that she [Fikki] had plenty of time. Montalvo then escorted Fikki off Respondent's property.

DISCUSSION AND ANALYSIS

A. Legal Standards

An employer violates Section 8(a)(1) of the Act by maintaining work rules that tend to chill employees in the exercise of their Section 7 rights. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd 203 F.3d 52 (D.C. Cir. 1999). Rules explicitly restricting the exercise of Section 7 rights violate Section 8(a)(1). *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). However, where a workplace rule does not explicitly restrict Section 7 activity, the General Counsel must establish by a preponderance of the evidence that: (1) employees would reasonably construe the rule to prohibit Section 7 activity; (2) the employer adopted the rule in response to union activity; or (3) the employer applied a rule to restrict employee Section 7 activity. 343 NLRB at 647. If a rule explicitly infringes on the Section 7 rights of employees, the mere maintenance of the rule violates the Act whether or not the employer ever applied the rule for that purpose. *Guardsmark, LLC v. NLRB*, 475 F.3d 369, 375–376 (D.C. Cir. 2007).

Relying on these principles, the Board held in *D. R. Horton, Inc.*, 357 NLRB No. 184 (2012), that employers may not compel employees to waive their NLRA right to collectively pursue litigation of employment claims in *all* forums, arbitral and judicial. (Emphasis in original.) 357 NLRB No. 184 slip op. at 12. Employers remain free to insist that arbitral proceedings be conducted on an individual basis, so long as employees may pursue class or collective claims in a judicial forum. Id.

B. Interference with Employee Rights to File Charges with the Board

The language in Respondent's EAA does not explicitly restrict employees from availing themselves of the Board's remedial procedures. In evaluating the impact of a rule on employees, the appropriate inquiry is whether a reasonable employee would read the rule as prohibiting Section 7 activity. *Lutheran Heritage Village-Livonia*, supra. The Board must give the rule under construction a reasonable reading and ambiguities in the rule must be construed against the promulgator of the rule. *Lafayette Park Hotel*, 326 NLRB at 828.

I find that the EAA's broad language, applying to all causes of action for discrimination or harassment under Federal, State, or local laws, would reasonably be read by employees to prohibit the filing of unfair labor practice charges with the Board. It is axiomatic that the National Labor Relations Act is a Federal law prohibiting discrimination based upon union or other protected, concerted activity. An employee could easily construe the EAA to require arbitration of claimed violations of the Act, a Federal law. Therefore, I find that that the language of the EAA is reasonably read to require employees to resort to Respondent's arbitration procedures instead of filing charges with the Board.

Buried within the EAA is an exception to the requirement that employees arbitrate all employment-related claims against Respondent. The EAA requires arbitration of all employment-related claims, including those brought pursuant to Federal law, "except where specifically prohibited by law." In this regard, the language of Respondent's EAA differs from that in *D. R. Horton*, supra. The inclusion of this exception does not cause me to reach a different result than that in *D. R. Horton*. The phrase "except where specifically prohibited by law" is ambiguous. Employees cannot be expected to possess a working knowledge of all Federal, State, and local laws which specifically prohibit mandatory arbitration of claims. Respondent made no effort to explain to its employees what is meant by this phrase. Consistent with established Board precedent, the ambiguity in the EAA must be held against Respondent. *Supply Technologies, LLC*, 359 NLRB No. 38 slip op. at 3 (2012); *Salon/Spa at Boro*, 356 NLRB No. 69, slip op. at 27 (2010).

The Board has previously held that an arbitration policy applying to causes of action under Federal law or regulation would reasonably be read by employees to prohibit the filing of unfair labor practice charges by the Board. *U-Haul Co. of California*, 347 NLRB 375, 377 (2006). In *U-Haul*, the company

[9] The phrase "ample time" appears in sec. 11 of the EAA, supra.

distributed an arbitration agreement to its employees requiring arbitration of all employment-related claims brought by employees, including claims for discrimination, harassment, or retaliation brought under local, State, or Federal law. 347 NLRB at 377. The Board found that the policy language, referencing its applicability to causes of action recognized under Federal law, would reasonably be read by employees to prohibit the filing of unfair labor practice charges with the Board.

Additionally, the Board has held unlawful an employee arbitration agreement containing an exception to similar to that in the instant case. In *2 Sisters Food Group, Inc.*, 357 NLRB No. 168 slip op. at 2 (2011), an employee arbitration agreement was limited to claims "that may be lawfully resolved by arbitration." The Board held this limitation was not effective because most nonlawyer employees would not be sufficiently familiar with the limitations the Act imposes on mandatory arbitration. Id. The language of Respondent's EAA is similarly vague and ineffective.

Therefore, I find that the language of Respondent's EAA would reasonably lead employees to believe that they are barred or restricted from exercising their right to file charges with the Board. As such, I find that Respondent violated Section 8(a)(1) of the Act by maintaining the Employee Arbitration Agreement.

C. Prohibition on Class or Collective Action

Respondent's EAA requires employees to waive having claims heard or arbitrated as a class or collective action. In this regard, this case is indistinguishable from *D. R. Horton*, 357 NLRB No. 184 (2012). In *D. R. Horton*, the Board held that "employers may not compel employees to waived their NLRA right to collectively pursue litigation of employment claims in all forums, arbitral and judicial." 357 NLRB No. 184 slip op. at 12–13. This is precisely what Respondent seeks to do here. Employees cannot seek judicial redress of any kind under the EAA and the EAA prohibits class or collective actions in arbitration.

Even if an employee were to understand which claims are excluded from Respondent's EAA, "where specifically prohibited by law," the employee would be forbidden from bringing such a collective or class claim in court. Under the terms of the EAA, an employee must bring all claims against Respondent before an arbitrator, except where expressly prohibited by law. Additionally, an employee is required under the EAA to reimburse Respondent for all costs and expenses arising out of a breach of the agreement. (GC Exh. 4, p. 1.) Thus, were an employee to bring a court action against Respondent, he or she could be ordered to pay damages to Respondent. This is a strong deterrent against employees bringing a cause of action in a forum other than arbitration. See *U-Haul Co. of California*, 347 NLRB at 378 fn. 10 (Finding a reasonable employee would be deterred from filing a charge with the Board after entering into an arbitration agreement with employer as a condition of employment, even when the agreement contained no sanction for a violation.).

Respondent's argument that its EAA does not fun afoul of the Act because it does not preclude an employee from bringing a claim with an administrative agency, and nothing would bar the agency from filing a class or collective claim, is flawed. The EAA does not explain that the filing a charge with an administrative agency is intended to be an exception to its broad list of claims that must be brought to arbitration pursuant to its terms. I have already found the "except where specifically prohibited by law" language of Respondent's EAA is vague and that a reasonable employee would not understand that he or she could bring charges to the Board instead of an arbitrator. By analogy, I reject Respondent's argument that the EAA would not prevent an employee from brining a charge to an administrative agency, which could then bring a class or collective action in court.

Therefore, I find that Respondent violated Section 8(a)(1) of the Act by requiring employees to waive their right to collectively pursue employment-related issues.

D. Respondent Violated the Act in Discharging Lisa Fikki

Respondent's stated reason for discharging Fikki was her failure to complete the re-boarding process in a timely fashion. (Tr. 142.) However, Respondent's argument that it lawfully discharged Fikki for this reason is without merit. It is undisputed that Fikki could not complete the re-boarding process without signing the EAA. Fikki made it abundantly clear to Respondent that she wanted legal advice before signing the EAA. Respondent chose to discharge her before she could obtain any such advice. Respondent also admitted that if Fikki were to have signed all of the documents except the EAA, she would not have completed the re-boarding process. (Tr. 121–122.) As such, Fikki was discharged for refusing to sign Respondent's EAA. Therefore, as I have found that the language of Respondent's EAA is unlawful, the discharge of Fikki was also unlawful.[10] See *Supply Technologies, LLC*, 359 NLRB No. 38 slip op. at 1 (2012) (Board agreed with the administrative law judge that the respondent violated Sec. 8(a)(1) of the Act by discharging employees because they refused to sign an unlawful arbitration agreement.).

As correctly noted by counsel for the General Counsel, it does not matter whether or not Respondent provided Fikki a reasonable amount of time to consult an attorney, because the Employee Arbitration Agreement is unlawful and the discharge of Fikki for failing to sign it is also unlawful. (GC Br. p. 9 fn. 10.) The Board has held that discharging employees for refusing to sign an unlawful employee arbitration agreement violates Section 8(a)(1) of the Act. *Supply Technologies, Inc.*, 359 NLRB No. 38 slip op. at 1. Accordingly, Respondent's discharge of Fikki for her failure to sign its unlawful Employee Arbitration Agreement violates Section 8(a)(1) of the Act.

Respondent's argument that its discharge of Fikki was somehow lawful under the framework of *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert.

[10] Whether or not Fikki understood that her rights were being violated by Respondent's maintenance of its unlawful Employee Arbitration Agreement is of no consequence. It is well established that an employer's actions may violate Sec. 8(a)(1)—because they have a reasonable tendency to interfere with, restrain, or coerce employees in the exercise of their Sec. 7 rights—even when employees are unaware of what the employer has done. See, e.g., *United States Service Industries*, 324 NLRB 834, 835 (1997).

denied 455 U.S. 989 (1982), is misplaced. A *Wright Line* analysis is appropriate where a respondent's motivation for an employee's discharge is in question. *Phoenix Transit System*, 337 NLRB 510, 510 (2002); see also *Saia Motor Freight Line*, 333 NLRB 784, 785 (2001) (discipline pursuant to an unlawful rule violated the Act without consideration of *Wright Line*). There is no question as to the reason for the Fikki's discharge. As I have found, Respondent discharged Fikki for her refusal to sign its unlawful Employee Arbitration Agreement.

In its brief, Respondent contends that *D. R. Horton, Inc.*, 357 NLRB No. 184 (2012), is wrongly decided as numerous courts have upheld class or collective action waivers in arbitration agreements. (R. Br. pp. 18–22). It is well settled that administrative law judges of the National Labor Relations Board are bound to follow Board precedent which neither the Board nor the Supreme Court has reversed, notwithstanding contrary decisions by courts of appeals or district courts. *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984); *Pathmark Stores, Inc.*, 342 NLRB 378 fn. 1 (2004). As such, I am bound to follow the Board's holding in *D. R. Horton*, and relevant cases cited therein.[11]

I similarly reject Respondent's contention on brief challenging *D. R. Horton* on the basis that the Board lacked a valid quorum when it was rendered, based upon the holding in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), cert. granted 81 U.S.L.W. 3629 (June 24, 2013). (R. Br. p. 18.) The Board does not accept the decision in *Noel Canning*, in part, because it is the decision of a circuit court and there is a conflict among the circuits regarding this issue. *Belgrove Post Acute Care Center*, 359 NLRB No. 77, slip op. at fn. 1 (2013). For this reason, and the reasons stated in *Bloomingdale's, Inc.*, 359 NLRB No. 113 (2013), Respondent's arguments are rejected.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By maintaining and requiring its employees to sign its Employee Arbitration Agreement, which requires employees to waive their rights to maintain class or collective actions and which employees reasonably would believe bars or restricts them from exercising their right to file charges with the Board, Respondent has violated Section 8(a)(1) of the Act.

3. By discharging Lisa K. Fikki for her refusal to sign the unlawful Employee Arbitration Agreement, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

4. Respondent's above-described unlawful conduct affects commerce within the meaning of Section 2(6) and (7) of the Act.

[11] Respondent's argument that the Board's ruling in *D. R. Horton* is wrongly decided as federal courts of appeals have found it conflicts with the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1 et seq., is also rejected. The Board considered this argument, and the authority cited by Respondent, in *D. R. Horton* to support its contrary conclusion, by which I am bound.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Regarding the Respondent's unlawful institution and maintenance of its Employee Arbitration Agreement, it shall rescind or revise the EAA to make it clear that the agreement does not constitute a waiver in all forums of employees' right to maintain employment-related class or collective actions and does not restrict the right of employees to file charges with the Board.

The General Counsel asks that I order revocation of Respondent's Employee Arbitration Agreement. I decline to do so. My recommended order requires Respondent to rescind or revise its policy. The offending language here is contained in discrete provisions of a single document, readily discernible, and thus amenable to revision. See *Bill's Electric, Inc.*, 350 NLRB 292, 296 (2007). In these circumstances, I find it appropriate to allow Respondent to decide whether it shall rescind or revise its Employee Arbitration Agreement to comply with this recommended order.

The Respondent shall further notify employees of the rescinded or revised agreement to include providing them a copy of the revised agreement or specific notification that the agreement has been rescinded.

The Respondent, having discriminatorily discharged employee Lisa K. Fikki for refusing to agree to its unlawful Employee Arbitration Agreement, must offer her reinstatement and make her whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

The Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate the discriminatee(s) for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Latino Express, Inc.*, 359 NLRB No. 44 (2012).

The Respondent shall also be ordered to remove from its files any reference to the unlawful discharge of Lisa K. Fikki, and to notify her in writing that it has done so, and that the discharge will not be used against her in any way.

Finally, the Respondent shall be required to post a notice to employees at all facilities at which employees were subject to its unlawful Employee Arbitration Agreement. See, e.g., *U-Haul Co. of California*, 347 NLRB 375 fn. 2 (2006), enfd 255 Fed. Appx. 527 (D.C. Cir. 2007); *D. R. Horton, Inc.*, 357 NLRB No. 184 slip op. at 13 (2012).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopt-

ORDER

The Respondent, Everglades College, Inc., d/b/a Keiser University and Everglades University, Daytona Beach, Fort Lauderdale, Fort Myers, Jacksonville, Lakeland, Melbourne, Miami, Orlando, Pembroke Pines, Port St. Lucie, Sarasota, Tallahassee, Tampa, and West Palm Beach, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining, implementing, or enforcing as a condition of employment any employee arbitration agreement or arbitration policy that interferes with employee rights under the Act or bars or restricts employees from accessing the Board's processes or to file charges with the Board.

(b) Maintaining, implementing, or enforcing as a condition of employment any employee arbitration agreement or arbitration policy that waives employees' rights to maintain class or collective actions, or actions in a representative or private attorney general capacity on behalf of a class of employees, in arbitral or judicial forums.

(c) Discharging or otherwise discriminating against any employee for refusing to sign any employee arbitration agreement which requires employees to waive their rights to maintain class or collective actions and which employees reasonably would believe bars or restricts them from exercising their right to file charges with the Board.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind or revise the Employee Arbitration Agreement to make it clear that the agreement does not constitute a waiver in all forums of their right to maintain employment-related class or collective actions and does not restrict the right of employees to access the Board's process or to file charges with the Board.

(b) Within 14 days from the date of the Board's Order, offer Lisa K. Fikki full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(c) Make Lisa K. Fikki whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the decision.

(d) File a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

(e) Compensate Lisa K. Fikki for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

(f) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against her in any way.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at all of its facilities, including its facilities located in Daytona Beach, Fort Lauderdale, Fort Myers, Jacksonville, Lakeland, Melbourne, Miami, Orlando, Pembroke Pines, Port St. Lucie, Sarasota, Tallahassee, Tampa, and West Palm Beach, Florida, copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 9, 2012.

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 14, 2013

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

ed by the Board and all objections to them shall be deemed waived for all purposes.

[13] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Choose not to engage in any of these protected activities.

WE WILL NOT implement, maintain, or enforce as a condition of employment any employee arbitration agreement or arbitration policy that interferes with your rights under the Act or bars or restricts your right to access the Board's processes or to file charges with the Board.

WE WILL NOT implement, maintain, or enforce as a condition of employment any employee arbitration agreement or arbitration policy that waives your rights to maintain class or collective actions, or actions in a representative or private attorney general capacity on behalf of a class of employees, in arbitral or judicial forums.

WE WILL NOT discharge or otherwise discriminate against you for refusing to sign our unlawful employee arbitration agreement, which required you to waive your rights to maintain class or collective actions and which employees reasonably would have believed barred or restricted them from exercising their right to access the Board's processes and to file charges with the Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind or revise our Employee Arbitration Agreement to make it clear to employees that the agreement does not constitute a waiver of their right in all forums to maintain class or collective actions and does not restrict the right of employees to access the processes of the Board or to file charges with the Board.

WE WILL notify employees of the rescinded or revised agreement, including providing them with a copy of the revised agreement or specific notification that the agreement has been rescinded.

WE WILL, within 14 days from the date of this Order, offer Lisa K. Fikki full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Lisa K. Fikki whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest compounded daily.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

WE WILL compensate Lisa K. Fikki for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Lisa K. Fikki, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

EVERGLADES COLLEGE, INC., D/B/A KEISER UNIVERSITY AND EVERGLADES UNIVERSITY

SCANNED

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KUNKEL MILLER & HAMENT