RGIS, LLC *and* Clara Harris. Case 28–CA–136313

February 23, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

Upon a charge filed September 8, 2014, by Clara Harris, the General Counsel issued a complaint and notice of hearing on March 9, 2015, alleging that the Respondent has been violating Section 8(a)(1) of the Act by maintaining the rules set forth in the documents entitled "RGIS Dispute Resolution Program" at all material times.

On June 15, 2015, the Respondent, the Charging Party, and the General Counsel filed a joint motion to waive a hearing and a decision by an administrative law judge and to transfer this proceeding to the Board for a decision based on a stipulated record. On October 8, 2015, the Board granted the parties' joint motion. Thereafter, the Respondent and the General Counsel filed briefs, and the Respondent filed an answering brief.

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

On the entire record and briefs, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a limited liability company with an office and place of business in Mesa, Arizona, has been engaged in providing inventory services. In conducting its operations during the 12-month period ending September 8, 2014, the Respondent performed services valued in excess of $50,000 in states outside the State of Arizona. The Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Stipulated Facts

At all material times, the Respondent has maintained the "RGIS Dispute Resolution Program" (the Program). The Program provides, in relevant part

> . . .[Y]ou and the Company mutually agree to be bound by its terms and to resolve all claims covered by the Program through mandatory, final and binding arbitration instead of through litigation in Court.
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> * * *
>
> Except as otherwise stated in this Program, all claims between you and the Company that involve legally protected rights are subject to arbitration. . . . This includes any claims . . . for compensation . . . termination, discrimination , retaliation under the Civil Rights Act of 1964, the Americans with Disabilities Act, Age Discrimination in Employment Act, Family Medical Leave Act, Fair Labor Standards Act, Genetic Information Non-Discrimination Act, and other federal . . . statutes.
>
> * * *
>
> The Program is not intended to limit or expand substantive legal rights that you are entitled to under the law. Nor does the Program limit or restrict in any way your legal right to file claims or charges with federal administrative agencies, such as the National Labor Relations Board ("NLRB") or the Equal Employment Opportunity Commission ("EEOC"), or other similar state or local administrative agencies.
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> * * *
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> **THE . . . PROGRAM IS THE SOLE MEANS OF RESOLVING EMPLOYMENT-RELATED DISPUTES BETWEEN YOU AND THE COMPANY OR YOU AND ANOTHER EMPLOYEE, INCLUDING DISPUTES FOR LEGALLY PROTECTED RIGHTS SUCH AS FREEDOM FROM DISCRIMINATION, RETALIATION OR HARASSMENT.**
>
> **You are still free to consult or file a complaint with any appropriate state or federal agency, such as the EEOC, regarding your legally protected rights. . . . If an employee files a lawsuit involving claims covered by the Program, the Company will ask the court to dismiss the lawsuit and refer it to arbitration.**
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> * * *
>
> **YOU AND RGIS AGREE TO BRING ANY DISPUTE IN ARBITRATION ON AN INDIVIDUAL BASIS ONLY, AND NOT ON A CLASS, COLLECTIVE, REPRESENTATIVE OR PRIVATE ATTORNEY GENERAL BASIS. THERE WILL BE NO RIGHT OR AUTHORITY FOR ANY DISPUTE TO BE BROUGHT, HEARD OR ARBITRATED AS A CLASS, COLLECTIVE, REPRESENTATIVE OR PRIVATE ATTORNEY GENERAL PROCEEDING, INCLUDING WITHOUT LIMITATION PENDING BUT NOT**

CERTIFIED CLASS ACTIONS ("CLASS ACTION WAIVER").[1]

Each employee is automatically enrolled in the Program as a condition of employment and remains subject to the Program unless the employee exercises the option to be excluded by submitting the "Dispute Resolution Program Exclusion Form" (Exclusion Form) within 60 days of hire.

The Program applies to all employees hired since December 24, 2011, who did not opt out of coverage.

B. Discussion

The Board held in *D. R. Horton*, 357 NLRB 2277 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013), and reaffirmed in *Murphy Oil USA, Inc.*, 361 NLRB No. 72, slip op. at 1 (2014), enf. denied in relevant part 808 F.3d 1013 (5th Cir., Oct. 26, 2015), that an employer violates Section 8(a)(1) "when it requires employees covered by the Act, as a condition of their employment, to sign an agreement that precludes them from filing joint, class, or collective claims addressing their wages, hours, or other working conditions against the employer in any forum, arbitral or judicial." 357 NLRB at 2277.[2]

Here, we find that the Respondent violated Section 8(a)(1) by maintaining the "RGIS Dispute Resolution Program." Like the policies in *D. R. Horton* and *Murphy Oil*, the Respondent's Program requires employees, as a condition of their employment, to submit their employment-related legal claims to individual arbitration, thereby compelling employees to waive their Section 7 right to pursue such claims through class or collective action in all forums, arbitral and judicial. See *Murphy Oil*, 361 NLRB No. 72, slip op. at 1; *D. R. Horton*, 357 NLRB at 2277.[3]

[1] Bolded and capitalized as in the Program.

[2] The Respondent argues that *D. R. Horton* and *Murphy Oil* were wrongly decided and should be overruled. We disagree and adhere to the findings and rationale in those cases.

[3] We reject the Respondent's argument that the Program is lawful to the extent that it prevents an individual employee from filing a class or collective action because that individual employee is not engaged in protected concerted activity. As the Board made clear in *Beyoglu*, 362 NLRB No. 152 (2015), "the filing of an employment-related class or collective action by an individual is an attempt to initiate, to induce, or to prepare for group action and is therefore conduct protected by Section 7." Id., slip op. at 2. See also *D. R. Horton*, 357 NLRB at 2279.

We also reject the Respondent's argument that the Exclusion Form makes the Program lawful. An opt-out procedure still imposes an unlawful mandatory condition of employment that falls squarely within the rule of *D. R. Horton* and affirmed in *Murphy Oil*. See *On Assignment Staffing Services*, 362 NLRB No. 189, slip. op. at 1, 4–5 (2015). Further, even assuming that an opt-provision renders the Program not a condition of employment (or nonmandatory), the Program remains unlawful because it requires employees to prospectively waive their Sec. 7 right to engage in concerted activity. Id., slip op. at 1, 5–8. See also *Bristol Farms*, 363 NLRB No. 45, slip op. at 1–2 (2015).

Our dissenting colleague, relying on his dissenting position in *Murphy Oil*, 361 NLRB No. 72, slip op. at 22–35 (2015), would find that the Respondent's Program does not violate Sec. 8(a)(1), especially because the Program contains an opt-out provision. He observes that the Act does not "dictate" any particular procedures for the litigation of non-NLRA claims, and "creates no substantive right for employees to insist on class-type treatment" of such claims. This is all surely correct, as the Board has previously explained in *Murphy Oil*, above, slip op. at 2, and *Bristol Farms*, 363 NLRB No. 45, slip op. at 2 & fn. 2 (2015). But what our colleague ignores is that the Act "does create a right to *pursue* joint, class, or collective claims if and as available, without the interference of an employer-imposed restraint." *Murphy Oil*, above, slip op. at 2 (emphasis in original). The Respondent's Program is just such an unlawful restraint even considering its opt-out provision. See *On Assignment Staffing Services*, 362 NLRB No. 189, slip op. at 4, 8–9 & fns. 28, 29, 31 (2015).

Likewise, for the reasons explained in *Murphy Oil* and *Bristol Farms*, there is no merit to our colleague's view that finding the Program unlawful runs afoul of employees' Sec. 7 right to "refrain from" engaging in protected concerted activity. See *Murphy Oil*, above, slip op. at 18; *Bristol Farms*, above, slip op. at 3. Nor is he correct in insisting that Sec. 9(a) of the Act requires the Board to permit individual employees to prospectively waive their Sec. 7 right to engage in concerted legal activity. See *Murphy Oil*, above, slip op. at 17–18; *Bristol Farms*, above, slip op. at 2.

Although the General Counsel's Statement of Position alludes to the Program's interference with employees' access to the Board and its processes, other than repeating that bare statement in its brief to the Board, the General Counsel offered no supporting argument. In its brief, the Respondent argued that the Program was not unlawful under this theory of a violation. The General Counsel did not file an answering brief responding to the Respondent's argument. In these circumstances, we find that the General Counsel did not litigate this theory of a violation, and we therefore do not determine whether the Program is independently unlawful because employees would reasonably believe that it bars or restricts their right to file charges with the Board. See *Citi Trends, Inc.*, 363 NLRB No. 74, slip op. at 1 (2015) (reversing judge's finding of violation under *U-Haul of California*, 347 NLRB 375 (2006), enfd. 255 Fed.Appx. 527 (D.C. Cir. 2007), where General Counsel did not litigate that theory of violation).

CONCLUSIONS OF LAW

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

2. By maintaining a "RGIS Dispute Resolution Program" under which employees are required, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act, and has violated Section 8(a)(1) of the Act.

REMEDY

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

Respondent to rescind or revise its Program and to notify employees that it has done so.

ORDER

The National Labor Relations Board orders that the Respondent, RGIS, LLC, Mesa, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a "RGIS Dispute Resolution Program" 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.

(b) 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 the "RGIS Dispute Resolution Program" in all of its forms, or revise it in all of its forms to make clear to employees that the Program does not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums.

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

(c) Within 14 days after service by the Region, post at its Mesa, Arizona facility copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 28, 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, 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 marked "Appendix" to all current employees and former employees employed by the Respondent at any time since March 8, 2014.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 28 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. February 23, 2016

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting in part.

In this case, my colleagues find that the Respondent's "RGIS Dispute Resolution Program" (Program) violates Section 8(a)(1) of the National Labor Relations Act (the Act or NLRA) because the Program 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]

I agree that an employee may engage in "concerted" activities for "mutual aid or protection" in relation to a claim asserted under a statute other than NLRA.[2] How-

[4] 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."

[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 denied enforcement by the Court of Appeals for the Fifth Circuit. *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015).

I agree with my colleagues that the issue of whether the Program interferes with the right to file charges with the Board is not presented here. The General Counsel's Statement of Position alluded to this theory of a violation by asserting that the Program "interferes with employees' access to the Board and its processes," and the General Counsel stated that this theory would "be expanded upon by brief." On brief, however, the General Counsel simply repeated this bare assertion and offered no supporting argument. In its brief, the Respondent argued that the Program did not interfere with Board charge filing, and the General Counsel did not file an answering brief. Accordingly, I agree that the General Counsel did not litigate this theory of a violation and it is not before us for decision. See *Citi Trends, Inc.*, 363 NLRB No. 74, slip op. at 1 (2015).

[2] I agree that non-NLRA claims can give rise to "concerted" activities engaged in by two or more employees for the "purpose" of "mutual aid or protection," which would come within the protection of NLRA Sec. 7. See *Murphy Oil*, 361 NLRB No. 72, slip op. at 23–25 (Member Miscimarra, dissenting in part). However, the existence or absence of Sec. 7 protection does not depend on whether non-NLRA claims are pursued as a class or collective action, but on whether Sec. 7's statutory requirements are met—an issue separate and distinct from whether an

ever, I disagree with my colleagues' finding that Section 8(a)(1) of the NLRA prohibits agreements that waive class and collective actions, and I especially disagree with the Board's finding here, similar to the Board majority's finding in *On Assignment Staffing Services*,[3] that class-waiver agreements violate the NLRA even when they contain an opt-out provision. In my view, Sections 7 and 9(a) of the NLRA render untenable both of these propositions. As discussed in my partial dissenting opinion in *Murphy Oil*, NLRA Section 9(a) protects the right of every employee as an "individual" to "present" and "adjust" grievances "at any time."[4] This aspect of Section 9(a) is reinforced by Section 7 of the Act, which protects each employee's right to "refrain from" exercising the collective rights enumerated in Section 7. Thus, I believe it is clear that (i) the NLRA creates no substantive right for employees to insist on class-type treatment of non-NLRA claims;[5] (ii) a class-waiver agreement pertaining to non-NLRA claims does not infringe on any NLRA rights or obligations, which has prompted the overwhelming majority of courts to reject the Board's position regarding class-waiver agreements;[6] (iii) enforcement of a class-action waiver as part of an arbitration agreement is also warranted by the Federal Arbitration Act (FAA);[7] and (iv) for the reasons stated in my dissenting opinion in *Nijjar Realty, Inc. d/b/a Pama Management,* 363 NLRB No. 38, slip op. at 3–5 (2015), the legality of such a waiver is even more self-evident when the agreement contains an opt-out provision, based on every employee's Section 9(a) right to present and adjust grievances on an "individual" basis and each employee's Section 7 right to "refrain from" engaging in protected concerted activities. Although questions may arise regarding the enforceability of particular agreements that waive class or collective litigation of non-NLRA claims, I believe these questions are exclusively within the province of the court or other tribunal that, unlike the NLRB, has jurisdiction over such claims.

Accordingly, with respect to this issue, I respectfully dissent.

Dated, Washington, D.C. February 23, 2016

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

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

individual employee chooses to pursue a claim as a class or collective action. Id.; see also *Beyoglu,* 362 NLRB No. 152, slip op. at 4–5 (2015) (Member Miscimarra, dissenting). Thus, I agree with the Respondent that an individual employee does not engage in protected concerted activity by filing a class or collective action. See my dissent in *Beyoglu*, above.

[3] 362 NLRB No. 189, slip op. at 1, 4–5 (2015).

[4] *Murphy Oil*, above, slip op. at 30–34 (Member Miscimarra, dissenting in part). Sec. 9(a) states: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That *any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted*, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment" (emphasis added). The Act's legislative history shows that Congress intended to preserve every individual employee's right to "adjust" any employment-related dispute with his or her employer. See *Murphy Oil*, above, slip op. at 31–32 (Member Miscimarra, dissenting in part).

[5] When courts have jurisdiction over non-NLRA claims that are potentially subject to class treatment, the availability of class-type procedures does not rise to the level of a substantive right. See *D. R. Horton, Inc. v. NLRB*, 737 F.3d 344, 362 (5th Cir. 2013) ("The use of class action procedures . . . is not a substantive right.") (citations omitted), petition for rehearing en banc denied No. 12-60031 (5th Cir. 2014); *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 332 (1980) ("[T]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims.").

[6] The Fifth Circuit has twice denied enforcement of Board orders invalidating a mandatory arbitration agreement that waived class-type treatment of non-NLRA claims. See *Murphy Oil, Inc., USA v. NLRB,* above; *D. R. Horton, Inc. v. NLRB,* above. The overwhelming majority of courts considering the Board's position have likewise rejected it. See *Murphy Oil,* 361 NLRB No. 72, slip op. at 34 (Member Miscimarra, dissenting in part); id., slip op. at 36 fn. 5 (Member Johnson, dissenting) (collecting cases); see also *Patterson v. Raymours Furniture Co., Inc*., 96 F. Supp. 3d 71 (S.D.N.Y. 2015); *Nanavati v. Adecco USA, Inc.*, 99 F. Supp. 3d 1072 (N.D. Cal. 2015), motion to certify for interlocutory appeal denied 2015 WL 4035072 (N.D. Cal. June 30, 2015); *Brown v. Citicorp Credit Services, Inc.,* No. 1:12-cv-00062-BLW, 2015 WL 1401604 (D. Idaho Mar. 25, 2015) (granting reconsideration of prior determination that class waiver in arbitration agreement violated NLRA); but see *Totten v. Kellogg Brown & Root, LLC*, No. ED CV 14-1766 DMG (DTBx), 2016 WL 316019 (C.D. Cal. Jan. 22, 2016).

[7] For the reasons expressed in my *Murphy Oil* partial dissent and those thoroughly explained in former Member Johnson's dissent in *Murphy Oil*, the FAA requires that the arbitration agreement be enforced according to its terms. *Murphy Oil,* above, slip op. at 34 (Member Miscimarra, dissenting in part); id., slip op. at 49–58 (Member Johnson, dissenting).

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 "RGIS Dispute Resolution Program" (the Program) that requires you, 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 the Program in all of its forms, or revise it in all of its forms to make clear that the Program does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums.

WE WILL notify all current and former employees who were required to sign or otherwise became bound to the Program in any form that it has been rescinded or revised and, if revised, WE WILL provide them a copy of the revised agreement.

RGIS, LLC

The Board's decision can be found at www.nlrb.gov/case/28-CA-136313 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.