

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 15**

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MUY PIZZA SOUTHEAST, LLC *

Respondent *

and *

Case No. 15-CA-174267

STEVEN GREGORY COLVIN *

an Individual *

* * * * *

**General Counsel’s Brief to the
Administrative Law Judge**

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At issue in this matter is whether MUY Pizza Southeast, LLC (Respondent), is violating the National Labor Relations Act (the Act), by requiring employees to adhere to its Agreement to Arbitrate.

I. Procedural Background

The charge in this matter was filed on April 18, 2016. On July 28, 2016, the Regional Director of Region 15 issued a Complaint alleging Respondent violated the Act by maintaining an unlawful Agreement to Arbitrate. On August 10, 2016, Respondent filed its Answer denying it violated the Act.

On October 14, 2016, the parties in this case submitted a Joint Motion and Stipulation of Facts and Exhibits to Susan A. Flynn, Administrative Law Judge (ALJ). On October 18, 2016, ALJ Flynn issued an Order Granting Joint Motion, Accepting Stipulated Record, and Setting

Date to File Briefs. Thus, the General Counsel, through the undersigned, files this General Counsel's Brief to the Administrative Law Judge.

II. Facts

Respondent is a Pizza Hut franchisee operating several restaurants, including restaurants in Gulf Breeze, Florida (SR paras. 1-3).¹ During the fall of 2014 (a more exact date being unknown), Steven Gregory Colvin (Charging Party) went to one of Respondent's restaurants in Gulf Breeze, Florida, to apply for a job (SR para. 7). There were no openings at the time so the Charging Party left his name and contact information. In early March of 2015 (a more exact date being unknown), Respondent's Store Manager, Becky Anderson, called the Charging Party and invited him to apply for a job as a delivery driver (SR para. 8). He was instructed to submit an application online, which he did on March 3, 2015.

As part of the application process, the Charging Party was required to sign a one page Agreement to Arbitrate, which the Charging Party electronically signed on March 3, 2015 (Stipulated Exhibit D, SR para. 9).

Since at least March 3, 2015, Respondent has been requiring employees, as a term and condition of employment, to sign the Agreement to Arbitrate (SR para. 10). The Agreement to Arbitrate is as follows (Stipulated Exhibit D):

Because of the delay and expense of the court systems, MUY Pizza Southeast on behalf of itself and its parents and affiliates, officers and directors (collectively, "Pizza Hut") and I agree to use confidential binding arbitration, instead of going to court, for any claims, including any claims now in existence or that may exist in the future (a) that I may have against Pizza Hut and/or its current or former employees or (b) that Pizza Hut may have against me. Without limitation, such claims include any concerning wages, expense reimbursement, compensation, leave, employment (including, but not limited to, any claims concerning harassment, discrimination, or retaliation), conversion, breach of fiduciary duty,

¹ All references are to the numbered paragraphs in the Stipulated Record.

and/or termination of employment. This Agreement to Arbitrate shall be governed by the Federal Arbitration Act, 9 U.S.C. Section 1 *et seq.* Nothing in this Agreement to Arbitrate shall prohibit me from filing, participating in, or pursuing action with an administrative agency in accordance with applicable law, including the filing of charges or claims with the National Labor Relations Board or the Equal Employment Opportunity Commission, or the filing of a workers' compensation claim or unemployment claim with an applicable state agency. In any arbitration, the then prevailing employment dispute resolution rules of the American Arbitration Association will apply, except that (a) Pizza Hut will pay the arbitrator's fees; (b) if I am the one filing the claim, Pizza Hut will pay that portion of the arbitration filing fee in excess of the similar court filing fee had I gone to court; and (c) as discussed below, the arbitration shall occur only as an individual action and not as a class, collective, representative, or consolidated action. The rules are available for review at [URL redacted to preserve formatting] or can be sent to you by the Human Resources Department.

Pizza Hut and I agree that any and all claims subject to arbitration under this Agreement to Arbitrate may be instituted and arbitrated only in an individual capacity, and not on behalf of or as a part of any purported class, collective, representative, or consolidated action (collectively referred to in this Agreement to Arbitrate as a "Class Action"). Furthermore, Pizza Hut and I agree that neither party can initiate a Class Action in court or in arbitration in order to pursue any claims that are subject to arbitration under this Agreement to Arbitrate. Moreover, neither party can join a Class Action or participate as a member of a Class Action instituted by someone else in court or in arbitration in order to pursue any claims that are subject to arbitration under this Agreement to Arbitrate. It is the parties' intent to the fullest extent permitted by law to waive any and all rights to the application of Class Action procedures or remedies with respect to all claims subject to this Agreement to Arbitrate. It is expressly agreed between Pizza Hut and me that any arbitrator adjudicating claims under this Agreement to Arbitrate shall have no power or authority to adjudicate Class Action claims and proceedings or to rule on the validity and enforceability of the class action waiver provided for herein. The waiver of Class Action claims and proceedings is an essential and material term of this Agreement to Arbitrate, and Pizza Hut and I agree that if it is determined that it is prohibited or invalid under applicable law, then this entire Agreement to Arbitrate is unenforceable.

I acknowledge and agree that this Agreement to Arbitrate is made in exchange for my employment or continued employment, as well as the mutual promises contained in this Agreement. This Agreement to Arbitrate is not and shall not be construed to create any contract of employment, express or implied. This Agreement to Arbitrate does not in any way alter the "at-will" status of employment with Pizza Hut, meaning that either I or Pizza Hut may terminate the employment relationship at any time, with or without advance notice, and with or without cause. This Agreement to Arbitrate supersedes any and all prior agreements to arbitrate entered into between me and Pizza Hut.

On March 9, 2015, the Charging Party began working for Respondent as a delivery driver (SR para. 11).

On February 5, 2016, the Charging Party, on behalf of himself and other employees similarly situated, filed a complaint in the United States District Court for the Northern District of Florida (Pensacola Division), asserting that Respondent has been failing to pay employees the minimum wage required by the Fair Labor Standards Act (“FLSA,” the proceeding is referred to herein as “FLSA Claim,” and a copy of the complaint is attached as Stipulated Exhibit E, SR para. 12). On March 14, 2016, Respondent filed its answer in the FLSA Claim denying it was violating the FLSA (Stipulated Exhibit F).

On April 11, 2016, the attorney for Respondent in the FLSA Claim sent an email to the attorney for the Charging Party in the FLSA Claim (Stipulated Exhibit G, SR para. 13). The email contained, as an attachment, a copy of the Agreement to Arbitrate. Respondent’s attorney indicated that it appeared the Agreement to Arbitrate was enforceable in the United States 11th Circuit Court of Appeals and wrote that “it changes things quite a bit.” Consequently, on April 15, 2016, based on the Agreement to Arbitrate, Respondent and the Charging Party filed a Stipulation of Dismissal Without Prejudice in the FLSA Claim (Stipulated Exhibit H, SR para. 14). On April 18, 2016, the FLSA Claim was dismissed by the Court (Stipulated Exhibit I).

On April 21, 2016, the Charging Party filed a Statement of Claim with the American Arbitration Association identical to the FLSA Claim (Stipulated Exhibit J, herein referred to as the “AAA Claim,” SR para. 15). On May 31, 2016, Respondent filed its answer in the AAA Claim denying it was violating the FLSA (Stipulated Exhibit K). Additionally, in Paragraph 2 of

its answer, Respondent stated, “MUY... denies that this arbitration can proceed as a collective action.”

As of this date, the AAA Claim is pending.

III. Argument

A. The Agreement to Arbitrate Violates the Act by Limiting Collective Claims.

Respondent violated Section 8(a)(1) of the Act by requiring employees covered by the Act, as a condition of their employment, to sign the Agreement to Arbitrate, which expressly and repeatedly precluded employees from filing joint, class, or collective claims addressing their wages, hours or other working conditions. *D.R. Horton*, 357 NLRB No. 184 (2012), *rev'd in relevant part*, *D.R. Horton v. N.L.R.B.*, 737 F.3d 344 (5th Cir. 2013); *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016) (upholding Board's decision in *D.R. Horton*). The Board noted that, “an individual who files a class or collective action regarding wages, hours or working conditions, whether in court or before an arbitrator, seeks to initiate or induce group activity and is engaged in conduct protected by Section 7.” *Id.* at 2279. To hold otherwise “could frustrate the policy of the Act to protect the right of workers to act together to better their working conditions.” *Id.* at 2280, quoting *Eastex v. NLRB*, 437 US 556, 567 (1978). The Board clearly stated that the “right to engage in collective action – including collective legal action – is the core substantive right protected by the NLRA” and, because the Act does not conflict with the Federal Arbitration Act, a ban on an employee's right to pursue class actions interferes with the employee's rights under Section 7. *D.R. Horton*, 357 NLRB at 2286. *See also RPM Pizza*, 363 NLRB No. 82 (2015) (upholding *DR Horton* finding arbitration agreement unlawful because the agreement required that “all employment-related disputes with its employees be resolved as

individual claims.”); *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014) (reaffirming *D.R. Horton* holding), *rev'd in relevant part, Murphy Oil USA, Inc. v. N.L.R.B.*, No. 14-60800, 2015 WL 6457613 (5th Cir. Oct. 26, 2015) and *Amex Card Serv. Co.*, 363 NLRB No. 40 (2015) (*DR Horton* ruling applied to find mandatory arbitration agreement violated Act because it precluded employees from accessing Board and precluded collective employment-related actions). *Cf. On Assignment Staffing Serv., Inc.*, 362 NLRB No. 189 (2015) (*D.R. Horton* ruling applied to arbitration agreements that were not conditions of employment).

B. The Savings Clause Does Not Save Respondent's Agreement to Arbitrate.

In its Short Statement and Summary of Arguments, Respondent contends the Agreement is not unlawful because it expressly excludes certain claims from its application, including claims with the Board. Respondent's provision is unlawful despite its inclusion of what is generally called a “savings clause,” excepting NLRB actions from its mandatory arbitration provision. Savings clauses do not protect an otherwise unlawful policy and, in fact, can be a separate violation if they are not a “sufficiently clear statement that all claims arising under the [Act], without limitation or qualification, are excluded from the policy's coverage.” *Prof'l Janitorial Serv. of Houston, Inc.*, 363 NLRB No. 35 (2015). Here, the Agreement to Arbitrate allows employees to file claims with the Board and other agencies “in accordance with applicable law” but fails to provide further explanation. In *Solarcity Corp.*, the Board noted that that most rank and file employees do not have the legal expertise necessary to analyze the employer's rules and determine the “precise nature of the rights supposedly preserved” by the savings clause. 363 NLRB No. 83 (2015) (employer's agreement allowed charges with administrative agencies “only if, and to the extent, applicable law permits”). As such, the Board will not require employees to decipher their rights and what may or may not be allowed under

“applicable law” when the plain language of the Agreement states that employees are foreclosed from initiating or participating in *any* (thus employment-related) collective action against Respondent. The Agreement to Arbitrate repeatedly tells employees they have to individually arbitrate any dispute they have with Respondent but then states employees may have a right to file a claim with the Board “in accordance with applicable law.” *See id.* (agreement vague as it state all disputes must be individually arbitrated but then informs employees they may bring Board charges if “applicable law permits”). The Agreement to Arbitrate also fails to explain that Board charges could be brought collectively or as a group. Because a reasonable employee could interpret the saving clause to prohibit employees from filing charges with the Board, especially those filed with or otherwise involving multiple employees, the Agreement to Arbitrate runs further afoul of the Act.

Based on the above, Respondent’s maintenance of the Agreement to Arbitrate infringes on employees’ Section 7 rights and Respondent’s actions described herein violate Section 8(a)(1) of the Act.

C. The Relevant Board Law is *DR Horton*.

Respondent asserts that *DR Horton* is inconsistent with United States Supreme Court precedent and should thus be disregarded. Although the Fifth Circuit and other Courts of Appeals have disagreed with *D.R. Horton*, in this forum the Board’s ruling must be followed unless and until the Board changes course or the Supreme Court overturns the Board’s decision. *See RPM Pizza, supra*, quoting *Waco, Inc.*, 273 NLRB 746, 749 n.14 (1984) (citing *Iowa Beef Packers*, 144 NLRB 615, 616 (1963)) (“it is a judge’s duty to apply established Board precedent which the Supreme Court has not reversed” and “for the Board, not the judge, to determine

whether precedent should be varied”); see also *Murphy Oil*, 361 NLRB No. 72 (2014) (Board notes circuit courts that rejected *DR Horton* erred).

IV. Conclusion

Respondent’s maintenance and enforcement of the Agreement to Arbitrate violated the Act. Respondent required its employees, including the Charging Party, to sign the Agreement as a condition of employment. The Agreement prohibited employees from pursuing employment-related claims against Respondent in a collective manner. Respondent enforced the Agreement when it compelled the dismissal of the Charging Party’s FLSA Claim and when it asserted he could not more forward in a collective manner with his arbitration claim. Therefore, because the Respondent’s maintenance of the Agreement to Arbitrate deprived employees of their right to engage in protected concerted activity, Respondent violated Section 8(a)(1) of the Act.

Respectfully Submitted on the 16th day of November, 2016.

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Certificate of Service

I hereby certify that, on November 16, 2016, I have sent the above General Counsel's Brief to the Administrative Law Judge to the following individuals by email:

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