

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

\* \* \* \* \*

**MUY PIZZA SOUTHEAST, LLC** \*

**Respondent** \*

**and** \*

**Case No. 15-CA-174267**

**STEVEN GREGORY COLVIN** \*

**an Individual** \*

\* \* \* \* \*

**General Counsel’s Brief in Response to Respondent’s Exception**

By: Joseph A. Hoffmann, Jr.  
Counsel for General Counsel  
National Labor Relations Board, Region 15  
600 South Maestri Place, 7<sup>th</sup> Floor  
New Orleans, LA 70130  
Telephone: 504-321-9494  
Facsimile: 504-589-4069  
Email: joseph.hoffmann@nlrb.gov

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## **I. Introduction**

At issue in this matter is whether MUY Pizza Southeast, LLC (Respondent), violated the Act by seeking to enforce a mandatory arbitration agreement prohibiting Steven Gregory Colvin (Charging Party) from pursuing an employment-related claim against Respondent in a collective (i.e., concerted ) manner.

The ALJ in this matter found that Respondent violated the Act and Respondent filed an Exception asserting the Board cases on which she based her Decision are contrary to federal law. The General Counsel, through the undersigned, files this Response Brief to assert that they are not.

## **II. 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 enforcing an arbitration agreement prohibiting the Charging Party from filing employment-related claim against Respondent in a collective manner. On August 10, 2016, Respondent filed its Answer denying they 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, the ALJ issued an Order Granting Joint Motion, Accepting Stipulated Record, and Setting Date to File Briefs.

On December 15, 2016, the ALJ issued her Decision finding that Respondent violated the Act as alleged.

On January 12, 2017, Respondent filed its Exception to the ALJ's Decision.

Consequently, the General Counsel, through the undersigned, files this Response to Respondent's Exception.

### **III. Facts**

Respondent is a Pizza Hut franchisee operating several restaurants, including restaurants in Gulf Breeze, Florida. During the fall of 2014 (a more exact date being unknown), the Charging Party went to one of Respondent's restaurants in Gulf Breeze, Florida, to apply for a job. 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. He was instructed to submit an application online. On March 3, 2015, the Charging Party filled out an online application.

As part of the application process, the Charging Party was required to sign an Agreement to Arbitrate, which the Charging Party electronically signed on March 3, 2015 (Stipulated Exhibit D). The Agreement states, in part:

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 of the class action waiver provided for herein.

Since at least March 3, 2015, Respondent has been requiring employees, as a term and condition of employment, to sign the Agreement to Arbitrate.

On March 9, 2015, the Charging Party began working for Respondent as a delivery driver.

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). 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). 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 11<sup>th</sup> 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). 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”). 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.”

To the best knowledge of the undersigned, the AAA Claim is still pending as of this date.

#### **IV. ALJ Decision**

The ALJ found that the Agreement to Arbitrate violates the Act. In doing so, the ALJ looked primarily to the Board’s decision in *DR Horton*, 357 NLRB 2277 (2012) granted in part, reversed in part, by *DR Horton v. NLRB*, 737 F3d 344 (5th Cir. 2013)), which holds that employers violate the Act by requiring employees, as a condition of employment, to agree to an arbitration agreement that prohibits its employees from filing joint, class, or collective employment-related claims in any forum, arbitral or judicial.

#### **V. Exception**

Respondent’s sole exception to the ALJ Decision is:

The ALJ’s decision is contrary to law because MUY’s arbitration agreement and the collective action waiver contained therein fully comport with the National Labor Relations Act, the Fair Labor Standards Act, and the Federal Arbitration Act, as established by controlling federal case law.

However, the exception is without merit. While there is a split among the federal circuits as to whether such waivers are a violation of the Act, the Supreme Court has not ruled on the matter and, when it does, will likely rule that such waivers violate the Act.

## **VI. Argument**

### **A. Correctness of the AL Decision**

The ALJ was correct in finding that the Agreement to Arbitrate violated the Act pursuant to *DR Horton, et al.* Respondent does not argue the ALJ erred in making any particular determinations, or that she misapplied Board precedent. Respondent claims only that the Board cases on which she was required to make her determinations are contrary to federal law. Consequently, the facts of the current matter will not be relitigated herein.

### **B. Correctness of *DR Horton***

*DR Horton* correctly interprets the Act. It was in *DR Horton* that the Board first held that an employer violates Section 8(a)(1) of the Act by requiring employees, as a condition of employment, to agree to an arbitration agreement that prohibits its employees from filing joint, class, or collective employment-related claims in any forum, arbitral or judicial. Since its decision in *DR Horton*, and the Fifth Circuit's contrary holding on the matter, the Board has had several opportunities to reconsider its position and has repeatedly declined to alter it. See, e.g., *Murphy Oil*, 361 NLRB No. 72 (2014), and *RPM Pizza*, 363 NLRB No. 82 (2015). Nothing about the facts of the current matter suggests the Board should reconsider its position first articulated in *DR Horton* because the pertinent facts of this matter are not substantially different from prior cases.

As for Respondent's arguments herein, they are not persuasive. Essentially, Respondent argues that, based on certain Supreme Court cases and certain holdings by federal appellate circuit courts, the right of employees to file lawsuits collectively is merely a procedural right of the Act, not a substantive right. Consequently, argues Respondent, the Federal Arbitration Act (FAA)<sup>1</sup> requires that any waiver of that right in an arbitration agreement must be enforced. However, Respondent,

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<sup>1</sup> 9 USC §§ 1 - 16

as well as the circuit courts holding thusly, is incorrect. The right of employees to file law suits against their employers is a substantive right protected by Section 7 of the Act and cannot be waived.

As for the Supreme Court, the cases cited by Respondent – involving the Age Discrimination in Employment Act (ADEA), anti-trust laws, and a state’s consumer protection laws – are of little use in this matter because they do not deal with the Act. Instead, they stand only for the principal that the FAA favors enforcement of arbitration agreements. However, the *general* favorability of arbitration agreements is not at issue. Moreover, the FAA itself notes arbitration agreements are enforceable “save upon such grounds as exist at law or in equity for the revocation on any contract.” 9 U.S.C. §2 (the “savings clause”). As noted above, the issue herein is whether the Section 7 right of employees to collectively file a lawsuit is a substantive right or a procedural right. “The difference is key, because substantive rights cannot be waived in arbitration agreements.” *Morris v. Ernst & Young*, 834 F3d 975, 986 (9<sup>th</sup> Cir. 2016), citing *Mitsubishi v. Soler Chrysler-Plymouth*, 473 US 614, 628 (1985). Thus, if the right is merely procedural, the FAA requires that employees be allowed to waive it. If, however, the right is substantive, it cannot be waived and the FAA does not require its enforcement (by way of the “savings clause”).

While some circuits, including the Fifth Circuit, have held that the right is procedural and thus waivable, the Seventh and Ninth Circuits have held that they are substantive rights and are thus not waivable. See *Morris v. Ernst & Young*, *supra*, and *Lewis v. Epic Systems Corporation*, 823 F3d 1147 (7<sup>th</sup> Cir. 2016). Rights that are essential, operative protections of a statute are substantive rights of the statute while procedural rights are the ancillary, remedial tools that help secure the substantive right. *Gilmer v. Interstate/Johnson Lane*, 500 US 20 (1991).

The Act is unique among employment statutes as it pertains to collective actions. Not all classes, or groups of complainants, are created equal. Through the enactment of the Act, Congress created a right for groups of certain individuals – employees – to engage in collective actions for a common goal. No other federal employment statute establishes a group or class of individuals who have rights based *solely* on the fact that they are acting as a group. Under the Act, a *group* of employees has rights that no other individual or group has (*e.g.*, a single employee who asks for a raise may be fired; two employees who similarly ask for a raise may not be). This is the substantive right of the Act, for employees to act in a collective manner. See *NLRB v. Ernst & Young*, 834 F3d at 986. The ADEA and the Fair Labor Standards Act (FLSA), for example, merely acknowledge that a group of employees may be similarly situated and may wish to pursue the substantive rights protected by those statutes as a group. If employees must, as a condition of employment, waive their right to act in a collective manner under the ADEA or FLSA, the purpose of the ADEA and the FLSA are not frustrated; employees are merely trading one procedure for another. See, *e.g.*, *Mitsubishi v. Soler Chrysler-Plymouth*, 473 US at 628 (1985) (“by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum.”). Thus, acting collectively is merely a procedural right under the ADEA and FLSA. However, that the Supreme Court found that acting collectively is a procedural right under those statutes does not *a fortiori* mean that the Supreme Court will similarly find that it is also a procedural right under the Act, as Respondent asserts.

There can be little disagreement that the right of employees to act collectively is not only *a*, but *the*, substantive right of Section 7 of the Act. There can also be little disagreement that, if employees are required, as a condition of employment, to surrender their rights under Section 7, then Section 7 is meaningless. Respondent, however, seeks to minimize this obviously devastating

effect on Section 7 by simply removing lawsuits from the panoply of collective actions otherwise protected by Section 7. In other words, when it comes to Section 7, this particular form of collective action is merely a procedural right. While a review of the Supreme Court's entire jurisprudence is not practical, it is unlikely the Supreme Court has ever held that an otherwise substantive right of a statute is merely a procedural right in certain circumstances. Further, if Congress intended for Section 7 to be enforced in such a limited way, excluding class action lawsuits from the protection of Section 7, Congress would have indicated such. See, *e.g.*, *US v. Ron Pair Enterprises*, 489 US 235, 242 (1989) ("The plain meaning of legislation should be conclusive, except in the 'rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters' [internal citation removed]."). Still further, the FAA includes language (the savings clause) exempting from its applicability those arbitration agreements that are otherwise contrary to law. Because the plain language of Section 7 reasonably includes, and certainly does not exclude, the collective filing of a lawsuit among the collective actions protected by Section 7, filing a collective law suit is a substantive right of Section 7 of the Act. Nowhere in any act of Congress is it said otherwise. Thus, the FAA, by way of the savings clause, does not require that a waiver of a Section 7 right be enforced. Therefore, the Board should not overturn *DR Horton* and should adopt the ALJ's findings.

## **VII. Conclusion**

The Board should let the ALJ Decision stand and overrule Respondent's exception. Congress enacted Section 7 to protect the substantive right of employees to engage in collective action. In this way, it is unique among employment statutes. That Congress (through Federal Rule of Civil Procedure 23) fashioned a mechanism through which individuals who are similarly

situated may pursue legal claims in a collective manner does not transform the substantive Section 7 right of employees to engage in a collective action into a mere procedural right. That the Supreme Court held that seeking the enforcement of the rights granted by other employment statutes collectively to be a procedural right does not transform Section 7 into a mere procedural right. Finally, that Congress sought to ensure the enforcement of otherwise lawful arbitration agreements through the enactment of the FAA does not transform Section 7, or any part of it, into a mere procedural right.

Respondent required the Charging Party to sign the Agreement, which prohibited him (and employees) from pursuing employment-related claims against Respondent in a collective manner. Respondent enforced the Agreement when it compelled the dismissal of the FLSA Claim and, in the AAA Claim, asserted it could not move forward in a collective manner. Therefore, because these actions deprived employees of their right to engage in protected concerted activity, Respondent violated Section 7 and, thus, Section 8(a)(1) of the Act, as found by the ALJ.

Respectfully Submitted on the 26<sup>th</sup> day of January, 2017.

By: /s/ Joseph A. Hoffmann, Jr.  
Counsel for the General Counsel  
National Labor Relations Board, Region 15  
600 South Maestri Place, 7<sup>th</sup> Floor  
New Orleans, Louisiana 70130  
504-321-9494  
joseph.hoffmann@nlrb.gov

**Certificate of Service**

I hereby certify that, on January 26, 2017, I have sent the above General Counsel's Brief in Response to Respondent's Exception to the following individuals by email:

**Mark A. Potashnick**  
Counsel for Charging Party  
markp@wp-attorneys.com

**William McNab**  
Counsel for Respondent  
wmcnab@winthrop.com

/s/ Joseph A. Hoffmann, Jr.