United States Government

NATIONAL LABOR RELATIONS BOARD

OFFICE OF THE GENERAL COUNSEL

Washington, D.C. 20570

June 6, 2018

David J. Smith, Clerk of Court
U.S. Court of Appeals
for the Eleventh Circuit
56 Forsyth St. N.W.
Atlanta, GA 30303

Re: *Samsung Electronics Am., Inc. v. NLRB*, No. 16-10788;
consolidated with *Jorgie Franks v. NLRB*, No. 16-10644

Dear Mr. Smith:

The National Labor Relations Board submits this letter pursuant to the Court's May 23 Order directing the parties to file letter briefs regarding the effect of the Supreme Court's decision in *Epic Systems Corp. v. Lewis*, No. 16-285, 2018 WL 2292444 (U.S. May 21, 2018) on the issues presented in the consolidated proceedings *Jorgie Franks v. NLRB*, No. 16-10644, and *Samsung Electronics America, Inc.*, Nos. 16-10788, 16-10341.

In the Board's Decision and Order under review, the Board found that Samsung Electronics America, Inc., violated the National Labor Relations Act by maintaining an agreement barring employees from concertedly pursuing work-related claims in any forum, arbitral or judicial. 363 NLRB No. 72, 2015 WL 9460023, at *1 (Dec. 23, 2015). In doing so, the Board applied the rule set forth in *Murphy Oil, USA, Inc.*, 361 NLRB 774 (2014), *enforcement denied in relevant part*, 808 F.3d 1013 (5th Cir. 2015), *affirmed*, No. 16-307, 2018 WL 2292444 (U.S. May 21, 2018). The Board separately found that Samsung violated the NLRA by coercively interrogating Petitioner Jorgie Franks, the charging party before the Board, about her protected concerted activities. *Samsung Electronics*, 2016 WL 453584, at *4-5. And it dismissed an allegation by Franks alleging that Samsung instructed her not to discuss any lawsuit or potential lawsuit against Samsung with other employees. *Id*.

Samsung petitioned for review of the Board's Order, the Board cross-applied for enforcement of its Order, and Franks petitioned for review of the Board's dismissal of

the unlawful-instruction allegation. The parties briefed the case and, on January 24, 2017, presented oral argument.

As described below, the Board asks the Court, in light of *Epic Systems*, to summarily grant Samsung's petition for review, and deny the Board's cross-application for enforcement, of the portion of the Board's Order finding that Samsung unlawfully maintained an agreement requiring that employees individually arbitrate work-related disputes. Moreover, the Board asks the Court to sever and remand the portion of the Board's Order finding that Samsung unlawfully interrogated Franks, and to deny Franks' petition seeking review of the Board's dismissal of the unlawful-instruction allegation.

Maintenance of an Individual-Arbitration Agreement

On May 21, 2018, the Supreme Court issued its decision in *Epic Systems*, together with *Murphy Oil* and *Ernst & Young LLP v. Morris*, No. 16-300. 2018 WL 2292444. The Court held that employers may lawfully maintain arbitration agreements that bar employees from concertedly pursuing work-related legal claims. The Board agrees with Samsung's conclusion (Letter Br. 3) that under *Epic Systems* the Board's finding that Samsung unlawfully maintained an individual-arbitration agreement cannot be sustained. Accordingly, the Board requests that the Court summarily grant Samsung's petition for review, and deny the Board's cross-application for enforcement, of the relevant portion of its Order.

Interrogations of Employees about Protected-Concerted Activities

The Supreme Court, in *Epic Systems*, held that the NLRA does not mandate employee access to class-action procedures waived in arbitration agreements subject to the Federal Arbitration Act. The consolidated cases did not present to the Court the distinct question of whether the NLRA continues to protect an employee who, like Franks, speaks "to other employees about whether they were being adequately compensated for the number of hours they were working and . . . whether they would be interested in joining . . . in a lawsuit against [their employer]." *Samsung Electronics*, 2016 WL 453584, at *1. Whether the analysis in *Epic Systems* affects that issue is appropriate for the Board to address in the first instance. Accordingly, the Board requests that the Court sever and remand the portion of its Order finding that Samsung unlawfully interrogated Franks.[*]

[*] Samsung argues in the alternative (Letter Br. 3) that the Court should broadly

Board's Dismissal of Franks' Allegation

Epic Systems has no bearing on Petitioner Franks' argument that the Board abused its discretion by dismissing her allegation that Samsung unlawfully instructed her not to discuss with other employees a lawsuit against Samsung. As discussed in the Board's brief (pp. 48-49), the Board's determination was based on its finding that there was no credible evidence that Samsung instructed Franks not to discuss a lawsuit with others. The Board therefore asks the Court to deny Franks' petition to review the Board's dismissal on the merits.

Very truly yours,

s/ Linda Dreeben

Linda Dreeben
National Labor Relations Board
(202) 273-2989

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presume that any employer who "looks into an employee grievance that might give rise to a lawsuit is attempting to resolve the underlying grievance, not just to gather intelligence on the lawsuit." As explained by the Board, however, Samsung never claimed that it was conducting an investigation into Franks' complaint. *Samsung Electronics*, 2016 WL 453584, at *5 n.5.

CERTIFICATE OF SERVICE

I certify that on June 6, 2018, the foregoing letter brief was filed with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system, and that all counsel are registered CM/ECF users.

s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570