UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PFIZER INC.	)	
AND	)	**CASES 10-CA-175850**
	)	**07-CA-176035**
REBECCA LYNN OLVEY MARTIN, an individual	)	
AND	)	
JEFFREY J. REBENSTORF, an individual	)	

EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION

Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the Respondent, Pfizer Inc. ("Pfizer" or "Respondent") hereby files the following Exceptions to the Administrative Law Judge's ("ALJ") Decision dated January 10, 2017.[1]

1. The Respondent excepts to the ALJ's characterization, on p. 2, lines 5-8, that "[t]he Respondent labeled the document an 'agreement' but I am concerned that if I use that term it might incorrectly suggest that I have reached some conclusion on whether it legally binds the employee. Therefore, I place the word 'agreement' in quotes."
2. The Respondent excepts to the ALJ's conclusion, on p. 2, lines 24-32, that "[t]he injury to employees' Section 7 rights will not begin at some future time when the Respondent attempts to enforce the 'agreement' by invoking the Federal Arbitration Act, but already has occurred, when the Respondent notified employees that if they continued to work for

[1] The case was placed on hold pending the Supreme Court's decision in *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (May 21, 2018). On July 11, 2018, the Board's Executive Secretary set an August 8, 2018 deadline for filing exceptions in this case.

the Respondent, they would be deemed to have waived their right to file a join or collective complaint about working conditions, regardless of whether they sought relief from a judge or an arbitrator. The 'agreement' thus began its chilling effect on the exercise of Section 7 rights when the employees learned about it and that chilling effect continues regardless of whether the Respondent ever seeks to enforce the 'agreement.'"

3. The Respondent excepts to the ALJ's conclusion, on p. 2, lines 39-42, that "the 'agreement' deprived employees of their Section 7 right to engage in concerted activity for their mutual aid or protection" and "violated Section 8(a)(1) of the Act . . . because its terms precluded employees from coming together to file a joint grievance concerning one or more working conditions they shared in common."
4. The Respondent excepts to the ALJ's conclusion, on p. 3, lines 16-17, that "the employees' right to petition the arbitrator to consolidate their individual grievances is an unsatisfactory substitute for the right to file a joint grievance."
5. The Respondent excepts to the ALJ's conclusion, on p. 3, lines 21-25, that "[c]onsidering the fee each employee must pay to file an individual grievance, there is an enormous practical difference between, on the one hand, allowing employees to file a single grievance and split the cost of the filing fee, and, on the other hand, requiring each employee to file a separate expensive grievance and then moving for the arbitrator to consolidate them. This burden clearly, and unlawfully, interferes with the exercise of Section 7 rights."
6. The Respondent excepts to the ALJ's characterization, on p. 3, lines 27-30, that "Respondent's 'agreement' is but an old, old serpent in a new skin. It represents simply the latest version of a recurring challenge to a principle implicit in the Act, the principle

that employees have a legitimate interest in how their fellow workers are treated and may make common cause with them to improve working conditions."

7. The Respondent excepts to the ALJ's characterization, on p. 4, lines 6-9, that "[t]he present conduct, imposing an 'agreement' prohibiting employees from filing a joint grievance, causes the same harm as the earlier 'yellow dog' contracts, isolating the individual employee from the mutual aid of his or her coworkers. The superficial stripes may vary but the venom is the same."
8. The Respondent excepts to the ALJ's conclusion, on p. 4, lines 11-15, that "[a] procedural rule allowing for the consolidation of individual grievances at the arbitrator's discretion does not create any kind of right to be heard jointly. Even assuming, without proof, that the arbitrator inevitably would grant the employees' motion to consolidate, the significant additional expense of filing an individual grievance for each employee greatly diminishes the Section 7 right of employees to act in concert for their mutual aid or protection."
9. The Respondent excepts to the ALJ's conclusion, on p. 4, lines 22-24, that "the confidentiality provision in the 'agreement' violates Section 7 of the Act."
10. The Respondent excepts to the ALJ's conclusion, on p. 4, that after reading the disclaimer contained in the confidentiality clause, a typical employee "would not believe that employees were allowed to disclose information about an arbitration to the public."
11. The Respondent excepts to the ALJ's finding, on p. 5, lines 1-2, that "the confidentiality rule and the disclaimer both appear in the same block of text but appear to refer to different matters."

12. The Respondent excepts to the ALJ's finding, on p. 5, lines 8-9, that "the disclaimer language does not include the word 'arbitration,' and does not appear to concern information related to an arbitration."
13. The Respondent excepts to the ALJ's conclusion, on p. 5, lines 10-15, that "[a] labor lawyer possibly would construe these words to include discussions about the arbitration process or a particular arbitration, but I do not believe an employee who was not an attorney would do so. To the contrary, the way a nonlawyer reasonably would interpret the confidentiality provision would be to assume that the prohibitory language at the top of the paragraph referred to information about arbitration, and that the later disclaimer language did not concern arbitration but rather everyday work matters."
14. The Respondent excepts to the ALJ's conclusions, on p. 5, lines 17-22, that "an employee reasonably would consider litigation (whether before an arbitrator or judge) to be fundamentally different from what the employee did everyday on the job" and that "the disclaimer language itself fosters this impression because, right after stating that the prohibition did not apply to 'discussions or activity relating to the workplace' it explained what those words meant by adding 'such as discussions of wages, hours, or other terms and conditions of employment.'"
15. The Respondent excepts to the ALJ's conclusion, on p. 5, lines 33-36, that "I do not believe an employee reasonably would apply the syllogism and conclude that employees had the right to discuss an arbitration" since "[l]itigation, whether before a judge or arbitrator, is out of the ordinary to all except the professional participants, and only attorneys, judges, and arbitrators would think of the courtroom as their 'workplace.'"

16. The Respondent excepts to the ALJ's finding, on p. 5, line 38 through p. 6, line 2, that "even though the Respondent called its mandated arbitration process a 'condition of employment,' it is not obvious that the details of a particular arbitration also would constitute 'conditions of employment' which employees were free to discuss. To the contrary, the confidentiality provision specifically identified arbitration as the subject which employees were *not* to discuss, with certain explicit exceptions. Thus, the entire thrust of the paragraph was to put arbitration off limits as a subject of discussion. The fact that the 'such as' examples did not include arbitration reinforced this impression."
17. The Respondent excepts to the ALJ's conclusion, on p. 6, lines 4-8, that "[e]ven assuming that an employee . . . saw a possibility that it might be permissible to discuss an arbitration, the express prohibition barring the disclosure of information about arbitration casts a shadow of doubt. Because of this doubt, discussing an arbitration carried a risk of discipline or discharge which would discourage such discussions."
18. The Respondent excepts to the ALJ's conclusion, on p. 6, lines 16-20, that "[t[he Respondent has denied them the right to make a concerted complaint in court, a public forum, and instead has required them to use a substitute, a private arbitration service. Employees certainly have the right, when acting in concert, to protest this scheme and to seek the public's support by providing the public with detailed information illustrating its perceived deficiencies."
19. The Respondent excepts to the ALJ's conclusion, on p. 6, lines 22-27, that "if employees believe that the arbitration procedure tilts towards one side, or that the decision-maker is biased or that the arbitrator's decision itself is unfair, they have the right, acting in concert, to inform the public not just that they have been treated unfairly but also to

present specific facts supporting their argument that the arbitration scheme . . . falls short of rendering the impartial justice typically available in a court of law."

20. The Respondent excepts to the ALJ's conclusion, on p. 6, lines 28-29, that "[t]he Respondent, after imposing on employees the condition that they must give up access to the courts and instead use a substitute system of its own design, may not then gag the employees to smother their concerted complaints."

21. The Respondent excepts to the ALJ's conclusion, on p. 6, lines 31-34, that "[t]he 'agreement' which the Respondent forced on its employees not only deprives them of the right to trial before a judge whose fairness and integrity have been tested by the rigors of an election of through the confirmation process in the United States Senate, but also has limited them solely to an arbitrator furnished by an organization the Respondent itself selected."

22. The Respondent excepts to the ALJ's conclusions, on p. 7, lines 8-13, that "[b]ecause the Respondent alone selected the source of the arbitrator, because a governmental body such as the United States Senate or the FMCS has not vetted the decision-maker, and because the Respondent pays the arbitrator's fee, employees reasonably might have concerns about the impartiality of the process. Accordingly, the employees have a particularly clear interest in their Section 7 right to complain concertedly to the public about this condition of employment."

23. The Respondent excepts to the ALJ's finding and conclusion, on p. 7, lines 15-19, that "[j]ust as the Respondent's 'agreement' denies employees the right to make a concerted complaint in court or before an arbitrator, its confidentiality provision denies employees the ability to make a concerted protest to the public about irregularities and unfairness in

the arbitration system the Respondent forced them to use. Considering its inherent toxicity to Section 7 rights, I conclude that the confidentiality provision violates Section 8(a)(1) of the Act."

24. The The Respondent excepts to the ALJ's conclusion of law, on p. 8, lines 30-33, that "[t]he Respondent violated Section 8(1)(1) of the Act by requiring job applicants to waive, as a condition of being hired, and by requiring its employees to waive, as a condition of continued employment, their Section 7 right to file joint, collective, or class complaints, grievances or lawsuits against it in any forum, whether judicial or arbitral."
25. The Respondent excepts to the ALJ's conclusion of law, on p. 8, lines 35-40, that "[t]he Employer violated Section 7 of the Act by imposing on job applicants and employees, as a condition of hire or of continued employment, a requirement that they could not disclose, and must keep confidential, information about an arbitration process which the Respondent required them to use, and information about individual arbitrations, thereby subjecting them to possible discipline or discharge if they made a concerted public protest concerning these terms and conditions of employment."
26. The Respondent excepts to the ALJ's conclusion, on p. 9, lines 1-2, that "[t]he aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act."
27. The Respondent excepts to the entire Remedy on pp. 7–8 and the entire Order on pp. 9–11.

Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board, Pfizer hereby files the following Exceptions to the ALJ's Bench Decision, attached to the written decision as Appendix A.

28. The Respondent excepts to the ALJ's finding, at Appendix A, p. 1,[2] that "[t]he Respondent imposed, as a condition of employment, an arbitration procedure which it required employees to use, waiving their rights to bring a collective lawsuit against the Respondent and their rights to bring a collective or class action grievance against the Respondent. I find that the Respondent thereby violated Section 8(a)(1) of the Act."
29. The Respondent excepts to the ALJ's characterization, at Appendix A, p. 5, that "[t]his take-it-or-leave language has the flavor of what the law calls a 'contract of adhesion' but the word 'contract' gives me pause."
30. The Respondent excepts to the ALJ's conclusion, at Appendix A, p. 5, that "[o]f particular significance here is the right to 'engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.' This phrase covers many different types of action, including activity unimagined when Congress passed the Act in 1935."
31. The Respondent excepts to the ALJ's conclusion, at Appendix A, p. 6, that "[t]he words 'non-collective and non-representative' raise a red flag because Section 7 specifically protects employees' concerted action for their mutual aid and protection."

[2] Because the ALJ's bench decision, located at Appendix A, does not have page numbers, Respondent cites to the decision as if the first page of the bench decision, titled "APPENDIX A Bench Decision," is numbered page 1.

32. The Respondent excepts to the ALJ's conclusion, at Appendix A, p. 6, that "[t]he Respondent argues that this case is not governed by the Boards decision in *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014). Contrary to the Respondent, I believe that this case is on point and consistent with the conclusions I reach here."

33. The Respondent excepts to the ALJ's conclusion, at Appendix A, p. 7, that "[t]o the extent that the Respondent's agreement prohibits two or more employees from acting together to file a lawsuit in court, or prohibits a lawsuit seeking relief on behalf of one employee, I certainly find that prohibition unlawful for the reasons stated by the Board in *Murphy Oil*."

34. The Respondent excepts to the ALJ's conclusion, at Appendix A, p. 7, that "[l]ikewise, when an employer establishes an arbitration procedure, it cannot lawfully require employees to give up the right to concertedly seek relief before the arbitrator."

35. The Respondent excepts to the ALJ's conclusion, at Appendix A, p. 7, that "[a]ny other conclusion would ignore the realities of the workplace" since "[r]equiring each employee to pay $250 to file a grievance, and not allowing them to act concertedly in filing a grievance, sharing the cost, imposes a substantial burden on employees seeking redress."

36. The Respondent excepts to the ALJ's finding, at Appendix A, p. 7, that "[r]equiring each employee to go alone, seeking relief only or himself or herself, increases the risk that similarly situated employees will be treated differently."

37. The Respondent excepts to the ALJ's finding, at Appendix A, p. 7, that "[i]n any event, the Respondent's 'agreement' prohibits employees from going together to the arbitrator with their common grievance and therefore interferes with their Section 7 right to act in

concert for their mutual aid or protection. Therefore, I conclude that the Respondent's 'agreement' violates Section 8(1)(1) of the Act."

38. The Respondent excepts to the ALJ's reliance, at Appendix A, p. 8, on various Board decisions for the standards for determining when a work rule interferes with the employees' exercise of Section 7 rights. The standard against which the ALJ measured the confidentiality clause no longer constitutes the applicable standard, which was modified by *The Boeing Company*, 365 NLRB No. 154 (2017).

39. The Respondent excepts to the ALJ's statements, at Appendix A, p. 8, that "[u]nder Board precedent, if employees reasonably would understand a work rule to prohibit them from discussing wages or other terms and conditions with each other, the rule interferes with the employees' exercise of Section 7 rights" and "[i]n determining whether a work rule violates the Act, the appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights. Where the rules are likely to have a chilling effect on Section 7 rights, the Board may conclude that their maintenance is an unfair labor practice, even absent evidence of enforcement."

40. The Respondent excepts to the ALJ's conclusion, at Appendix A, p. 9, that the NLRA disclaimers in the confidentiality clause "clearly inform employees that they may engage in some of the activities protected by Section 7" but "do not cover all protected activities."

41. The Respondent excepts to the ALJ's conclusions, at Appendix A, p. 9, that "the employees have the right to call the public's attention to whatever they consider unfair about the 'agreement' or the procedure established. If they believe the arbitration or the arbitrator acted unfairly, they have the right, acting in concert, to tell whoever will listen,

whether it be a governmental body or the public itself. And they have the right, acting in concert, to provide specific information."

42. The Respondent excepts to the ALJ's conclusions, at Appendix A, p. 9, that the confidentiality clause "interferes with the exercise of Section 7 rights, and thereby violates Section 8(a)(1) of the Act" because "it prohibits employees from providing information to the public about an arbitration proceeding, which is a condition of employment."

Date: August 8, 2018

Respectfully submitted,

By: /s/ Jonathan C. Fritts

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of Pfizer's Exceptions to the Administrative Law Judge's Decision have been served upon the following this 8th day of August 2018 by e-mail:

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