

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

WE WORK COMPANIES, INC.

and

Case 32-CA-173569

TARA ZOUMER

DECISION AND ORDER REMANDING¹

Pursuant to charges filed by Tara Zoumer, the General Counsel issued a complaint on June 30, 2016. The complaint alleges that the Respondent violated Section 8(a)(1) of the National Labor Relations Act by maintaining a mandatory arbitration agreement. The complaint also alleges that the arbitration agreement includes an overbroad provision prohibiting or restricting employee access to the Board in violation of Section 8(a)(1). The complaint further alleges that the arbitration agreement includes an overbroad confidentiality provision in violation of Section 8(a)(1). In addition, the complaint alleges that the Respondent violated Section 8(a)(1) by maintaining, as part of its separate non-disclosure agreement, an unlawful restriction on the disclosure of personnel data and an overbroad non-disparagement clause. Finally, the complaint alleges that the Respondent violated Section 8(a)(1) by discharging employee Charging Party Tara Zoumer for refusing to accept, as a condition of employment, the terms of the mandatory arbitration agreement and the non-disclosure agreement. On August 9, 2016, the General Counsel filed a motion to transfer the case

¹ The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

to the Board and a motion for summary judgment. Also on August 9, 2016, the Respondent filed a cross-motion for summary judgment.

On August 17, 2016, the National Labor Relations Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the General Counsel's motion for summary judgment should not be granted. On August 29, 2016, the Board issued a corrected Order and Supplemental Notice to Show Cause to reflect that the August 17, 2016, Order mistakenly failed to acknowledge the Respondent's cross-motion for summary judgment and to direct the parties to show cause why either the General Counsel's motion or the Respondent's cross-motion should not be granted. The General Counsel filed a brief in support of his motion for summary judgment and a response to the Respondent's cross-motion for summary judgment. The Respondent filed a response to the Supplemental Notice to Show Cause and to the General Counsel's cross-motion for summary judgment.

1. Recently, the Supreme Court issued its decision in *Epic Systems Corp. v. Lewis*, 584 U.S. ___, 138 S. Ct. 1612 (2018), a consolidated proceeding including review of court decisions below in *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016), *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016), and *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015). *Epic Systems* concerned the issue, common to all three cases, whether employer-employee agreements that contain class- and collective-action waivers and stipulate that employment disputes are to be resolved by individualized arbitration violate the National Labor Relations Act. *Id.* at ___, 138 S. Ct. at 1619–21, 1632. The Supreme Court held that such employment agreements do not violate this Act and that the agreements must be enforced as written pursuant to the

Federal Arbitration Act. Id. at ___, 138 S. Ct. at 1619, 1632. In light of the Supreme Court's decision in *Epic Systems*, which overrules the Board's holding in *Murphy Oil USA, Inc.*, we conclude that the complaint allegation that the mandatory arbitration agreement is unlawful based on *Murphy Oil* must be dismissed.

2. There remain the separate issues whether the arbitration agreement independently violates Section 8(a)(1) of the Act because it prohibits or restricts employee access to the Board and because it includes an unlawfully overbroad confidentiality provision. In addition, there remain the separate issues of whether the Respondent's non-disclosure agreement violates Section 8(a)(1) because of its non-disparagement clause and restrictions on the disclosure of personnel data, as part of its non-disclosure agreement. Finally, there remains the issue whether the discharge of Charging Party Tara Zoumer violates Section 8(a)(1) because she refused to sign the arbitration and non-disclosure agreements. When the parties filed their pending motions, the issue whether maintenance of a facially neutral work rule or policy violated Section 8(a)(1) would be resolved based on the "reasonably construe" prong of the standard set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). On December 14, 2017, the Board issued its decision in *The Boeing Company*, 365 NLRB No. 154, slip op. at 14-17 (2017), in which it overruled the *Lutheran Heritage* "reasonably construe" test and announced a new standard that applies retroactively to all pending cases. Under the standard announced in *Boeing*, the parties' motions do not establish that there are no genuine issues of material fact and that either party is entitled to judgment as a matter of law as to these complaint allegations.

Accordingly, we deny without prejudice the motions for summary judgment with respect to these complaint allegations, and we will remand this proceeding to the Regional Director for Region 32 for further action as she deems appropriate.

ORDER

The complaint allegation that the maintenance of the mandatory arbitration agreement unlawfully restricts employees' statutory rights to pursue class or collective actions is dismissed.

IT IS FURTHER ORDERED that the parties' motions for summary judgment are denied without prejudice in all other respects, and these proceedings are remanded to the Regional Director for Region 32 for further appropriate action.

Dated, Washington, D.C., March 1, 2019.

LAUREN McFERRAN, MEMBER

MARVIN E. KAPLAN, MEMBER

WILLIAM J. EMANUEL, MEMBER

(SEAL)

NATIONAL LABOR RELATIONS BOARD