UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

EMPLOYERS RESOURCE

and Case 31–CA–097189

TALINA TORRES, an Individual

Amanda W. Dixon, Esq., for the General Counsel.
Jennifer L. Santa Maria, Esq. (Ogletree, Deakins, Nash, Smoak & Steward, P.C), for the Respondent.
Shayna E. Dickstein, Esq. (Matern Law Group), for the Charging Party.

DECISION

Statement of the Case

JEFFREY D. WEDEKIND, Administrative Law Judge. This is another case involving an alleged unlawful mandatory arbitration clause. The Charging Party is Talina Torres, who was employed as a server by Beth's Kitchen, Inc. (BK) from September 2009 until she was laid off for lack of work in June 2011, and who subsequently filed a wage and hour suit in California superior court "on behalf of herself and all other persons similarly situated" in July 2012. The Respondent is Employers Resource (ER), a self-described "professional employer organization" (PEO) that provided payroll and other personnel services to BK and other employers during the relevant period, and was named along with BK as a defendant in Torres' class action suit.[1]

The subject mandatory arbitration clause is contained in the standard "Employment Agreement" that ER provided to BK and other California clients to use in hiring new employees. The provision is silent about whether such wage and hour claims could be arbitrated on a

[1] BK and its alleged successor in interest Freshlunches, Inc. were also named respondents in the original complaint that issued in this matter on January 30, 2014 (GC Exh. 1(j)). However, the allegations against BK and Freshlunches were subsequently settled (GC Exh. 1(q); Tr. 14). Accordingly, the amended complaint names only ER as a respondent (GC Exh. 1(aa)).

collective or class basis.[2] Nevertheless, it is undisputed that, on January 8, 2013, ER moved the State court to compel individual arbitration of Torres' class-action suit against it pursuant to that provision, citing the Supreme Court's holding in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662 (2010) that an implicit agreement to authorize class arbitration may not be inferred from the contract's silence on the matter.

The instant complaint alleges that, by filing the foregoing motion (which the court granted), ER unlawfully maintained and enforced the mandatory arbitration provision to restrict the right of employees under the National Labor Relations Act to engage in concerted legal action. In support, the General Counsel cites the Board's recent decision in *Murphy Oil USA, Inc*., 361 NLRB No. 72 (2014). The Board in that case reaffirmed its prior decision in *D.R. Horton, Inc*., 357 NLRB No. 184 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013), and held that the respondent employer violated Section 8(a)(1) of the Act by requiring its employees to sign an agreement, as a condition of employment, that expressly barred them from pursuing collective or class claims either in court or in arbitration, and by seeking to enforce that agreement in court by moving to compel individual arbitration of the employees' pending collective and class wage and hour claims.

ER contends that the Board lacks jurisdiction over the matter because BK was Torres "true employer" and because Torres was no longer an "employee" within the meaning of the Act at the time she filed her lawsuit.[3] Alternatively, ER argues that the allegations are without merit

[2] In relevant part, the arbitration provision states:

> Employee agrees that any claim, dispute and/or controversy (including, but not limited to any claims of discrimination and harassment) that either Employee or Employers Resource (or its owners, directors, officers, managers, employees, agents, and parties affiliated with its employee benefit and health plans) may have against the other, or which Employee would have against the Worksite Employer (or its owners, directors, officers, managers, employees, agents, and parties affiliated with its employee benefit and health plans) which would otherwise require or allow resort to any court or other governmental dispute resolution forum arising from, related to, or having any relationship or connection whatsoever with Employers Resource and/or the Worksite Employer, whether based on tort, contract, statutory, or equitable law, or otherwise, (with the sole exception of claims arising under the National Labor Relations Act which are brought before the National Labor Relations Board, claims for medical and disability benefits under the California Workers' Compensation Act, and Employment Development Department claims) shall be submitted to and determined exclusively by binding arbitration under the Federal Arbitration Act . . . . [Jt. Exh. 5.]

[3] ER does not dispute, and the record establishes, that the Board's commerce standards for asserting jurisdiction are satisfied. See Tr. 58. Although ER contends that the underlying unfair labor practice charge was untimely filed by Torres more than 6 months after she signed the employment agreement, the contention is without merit. It is well established that an 8(a)(1) violation may be found when an unlawful rule or policy is maintained or enforced within 6 months of the charge, regardless of when the rule or policy became effective. See *Cellular Sales of Missouri, LLC*, 362 NLRB No. 27, slip op. at 1 (2015), and cases cited there. Here, the original charge was filed and served on ER on January 24 and 29, 2013, respectively (GC Exh.

because, unlike in *Murphy Oil* and *D.R. Horton*, Torres and other employees were not required to sign the employment agreement as a condition of employment, the arbitration provision does not expressly bar class or collective arbitration, and Torres filed her lawsuit by herself, without the support or authorization of any other employees, and was therefore not engaged in protected "concerted" activity under the Act.[4]

A hearing to address the foregoing issues was held on April 6 in Los Angeles. Thereafter, on May 11, the General Counsel, Charging Party Torres, and Respondent ER filed posthearing briefs.[5] After carefully considering those briefs and the entire record, for the reasons set forth below, I find that ER violated the Act as alleged.

I. WHETHER ER IS AN "EMPLOYER" LIABLE UNDER THE ACT

The record supports ER's contention that BK was Torres' primary or worksite employer. Although the employment agreement stated that ER was a party to the agreement and that Torres was a "co-employee" of both BK and ER,[6] BK alone interviewed, hired, trained, scheduled, and supervised Torres, and determined her wages and benefits (GC Exh. 2; Tr. 25–27, 31–32, 55–56). Indeed, there is no evidence that Torres ever had any direct contact with any ER personnel.

However, the General Counsel's theory of violation does not turn on whether or to what extent ER was an employer of Torres. Indeed, the General Counsel made clear at the hearing that this is not the theory. Rather, the General Counsel's theory is that ER is liable under the Act because it is an employer engaged in commerce generally and because of its particular actions with respect to the mandatory arbitration employment agreement—specifically, preparing the agreement and providing it to BK, making itself a party to the agreement, and asserting to the State court that the agreement barred class or collective arbitration of Torres' wage and hour claims against it. See Tr. 12–13, 27–31, 43; and GC Br. at 11–15.[7]

The General Counsel's theory is well supported by Board and court precedent. See *New York New York Hotel & Casino*, 356 NLRB No. 119, slip op. at 6–7 (2011), enfd. 676 F.3d 193 (D.C. Cir. 2012), cert. denied 133 S.Ct. 1580 (2013), and cases cited there (holding, in a wide variety of circumstances, that an employer may properly be held accountable for restricting or interfering with the protected rights of employees regardless of whether it is an employer of those employees). Contrary to ER's contention, there is no rational basis to conclude that this

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1(g), (i)), less than a month after ER filed the alleged unlawful motion to compel individual arbitration.

[4] ER also argues that the Board's decisions in *Murphy Oil* and *D.R. Horton* are wrong. However, this is an argument for the Board and the reviewing courts to address. See *D.L. Baker, Inc*., 351 NLRB 515, 529 fn. 42 (2007); and *Pathmark Stores*, 342 NLRB 378 fn. 1 (2004).

[5] In evaluating the issues presented in this case, I have not considered or relied on any of the nonrecord exhibits attached to the Charging Party's brief.

[6] Jt. Exh. 5. See also GC Exh. 3, Torres' June 15, 2011 termination notice, which states that she was being "terminated from . . . employment with Employers Resource" for lack of work.

[7] The General Counsel asserts (Br. 14) that ER was actually the *sole* party to the agreement with Torres. However, the first line of the agreement states that it "is entered into by and between the undersigned employee (Employee), Employers Resource, and the entity to whom Employee regularly reports (hereinafter the 'Worksite Employer')."

precedent is inapplicable to the particular circumstances here. Accordingly, I find that ER is properly named as a respondent employer in the complaint.

II. WHETHER TORRES IS AN "EMPLOYEE" COVERED BY THE ACT

ER contends that Torres is not an "employee" covered by the Act because she was not terminated by BK "as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice," as provided in Section 2(3) of the Act. However, Section 2(3) of the Act does not state that former employees of an employer are only covered by the Act in such circumstances. Further, it states that the term "employee" shall include "any employee, and shall not be limited to the employees of a particular employer, unless [the Act] explicitly states otherwise."[8] The Board has therefore interpreted the term broadly to encompass members of the working class generally, including individuals in circumstances similar to those here. See *Cellular Sales of Missouri, LLC*, 362 NLRB No. 27, slip op. at 1 fn. 3 & JD. at 6–7 (2015) (finding that the charging party was an "employee" notwithstanding that he filed his class action FLSA suit against the employer after being terminated for unrelated reasons). Accordingly, I find that Torres is an "employee" covered by the Act.

III. WHETHER THE EMPLOYMENT AGREEMENT WAS A CONDITION OF EMPLOYMENT

ER's chief operations officer, Keith Kuznitz, testified that ER's clients, including BK, were not required to use the employment agreement, and that BK's employees did not actually sign the employment agreement until after their employment commenced. However, the record as a whole clearly establishes otherwise. ER's "Client Service Agreement" with BK specifically stated that "no employee of [BK] will be covered by this Agreement, or will become a co-employee of [ER], until [BK] has completed and delivered to [ER], an enrollment packet for that individual." It also prohibited BK from altering the terms of the employment agreement without ER's written authorization. (GC Exh. 2, secs. 1, 8.b.) Further, it is undisputed that the employment agreement was included in the "New Employee Hiring Information Packet" ER provided to BK. Also included in the new-hire packet were a W-4 tax withholding form and an I-9 employment eligibility verification form. The cover page to the packet "instruct[ed]" the employee to "sign" the "employment agreement" and W-4 and I-9 forms "prior to starting work," and stated that the company would be "unable to process payroll unless these forms are

[8] In full, Section 2(3) states:

> The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C. § 151 et seq.], as amended from time to time, or by any other person who is not an employer as herein defined.

properly completed." Consistent with these written instructions, Torres credibly testified that a BK manager told her she had to sign the documents, including the employment agreement, in order to get paid, and that she did, in fact, sign the employment agreement before she started working. (Jt. Exhs 1–5; Tr. 19–20, 23–24, 37.)[9] Accordingly, in agreement with the General Counsel, I find that, like the employees in *Murphy Oil* and *D.R. Horton*, Torres was required by ER and BK to sign the employment agreement containing the mandatory arbitration provision as a condition of employment.[10]

IV. WHETHER THE EMPLOYMENT AGREEMENT BARS CLASS OR COLLECTIVE ARBITRATION

As discussed above, unlike in *Murphy Oil* and *D.R. Horton*, the mandatory arbitration provision here does not expressly bar class or collective arbitration. However, ER argued in its successful January 2013 motion to the State court that, under *Stolt-Nielsen*, the provision implicitly or effectively does so. See Jt. Exhs. 8 and 10. Accordingly, in agreement with the General Counsel, I find that *Murphy Oil* and *D.R. Horton* are not materially distinguishable, and that the mandatory arbitration provision here likewise violates Section 8(a)(1) of the Act. See *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004) (a rule that does not expressly restrict protected activity is nevertheless unlawful if it has been applied to restrict protected activity); and *Chesapeake Energy Corp*., 362 NLRB No. 80 (2015) (*Lutheran Heritage* test is properly applied in evaluating whether an employer's mandatory arbitration policy unlawfully bars employees from pursuing employment-related claims on a class or collective basis in any forum).[11]

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[9] Torres' testimony was uncontroverted; no managers, supervisors, or other employees of BK were called to testify.

[10] In light of this finding (which is consistent with the State court's finding that the agreement was presented to Torres "on a take it or leave it basis," Jt. Exh. 10, p. 9), it is unnecessary to address the General Counsel's alternative argument that the mandatory arbitration provision violated Section 8(a)(1) even if Torres was not required to sign it as a condition of employment.

[11] Under *Lutheran Heritage*, a rule that does not expressly restrict protected activity may also be found unlawful if employees would reasonably construe it as restricting such activity. However, the General Counsel does not contend that employees would reasonably construe ER's mandatory arbitration provision to bar class or collective arbitration. Rather, the General Counsel contends that the mandatory arbitration provision is unlawful only because ER applied it to bar class or collective arbitration by filing a motion in State court to compel individual arbitration of Torres' claims against it. See GC Br. at 9–10.

As indicated by ER, the record indicates that Torres has not been precluded from litigating the classwide wage and hour claims against BK in court. However, the State court denied BK's motion to compel arbitration because it found that the mandatory arbitration provision was both procedurally and substantively unconscionable with respect to BK. Thus, the court did not reach whether the provision barred class or collective arbitration against BK. See Jt. Exh. 10, pp. 13–16. In any event, whether ER violated the Act as alleged turns on its own actions, not BK's actions or the State court's rulings.

V. WHETHER TORRES' LAWSUIT CONSTITUTED PROTECTED CONCERTED ACTIVITY

As indicated above, ER also contends that Torres' class action wage and hour suit did not constitute "concerted activity" within the meaning of Section 7 of the Act because Torres was the sole named plaintiff and she admitted that she never discussed either the employment agreement or the lawsuit with her coworkers (Tr. 33–34). However, in *D.R. Horton*, the Board specifically held 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 action and is engaged in conduct protected by Section 7." 357 NLRB No. 184, slip op. at 3. The Board subsequently reaffirmed this holding in *Murphy Oil*, rejecting the argument that such a lawsuit is not "concerted" within the meaning of the Act. 361 NLRB No. 72, slip op. at 12–13. I therefore likewise reject ER's argument here, and find that Torres' class action wage and hour suit constituted protected concerted activity. Accordingly, as ER's motion to the State court sought to restrict that activity, it violated Section 8(a)(1) of the Act. See also *Cellular Sales,* above (finding a similar violation on similar facts).

CONCLUSIONS OF LAW

1. ER is an "employer" within the meaning of Section 2(2), (6), and (7) of the Act.

2. Torres is an "employee" within the meaning of Section 2(3) of the Act.

3. By filing a motion in January 2013 to compel individual arbitration of Torres' State court class action wage and hour claims against it pursuant to its mandatory arbitration employment agreement with Torres, ER has maintained and enforced that agreement to restrict the right of employees under the Act to engage in protected concerted activities, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

REMEDY

The appropriate remedy for the violations found is an order requiring ER to cease and desist from its unlawful conduct and to take certain affirmative action to effectuate the policies of the Act. Specifically, ER must rescind or revise the mandatory arbitration employment agreement, notify Torres, other current and former employees who executed the agreement, and the State court that it has done so, and inform the State court that it no longer opposes Torres' class action wage and hour suit on the basis of the agreement. ER must also reimburse Torres for all reasonable expenses and legal fees incurred in opposing ER's unlawful January 8, 2013 motion to compel individual arbitration of her class action suit, with interest computed and compounded daily in the manner prescribed in *New Horizons*, 283 NLRB 1173 (1987), and *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). See *Murphy Oil* and *Cellular Sales*, above.[12]

[12] See also *Good Samaritan Medical Center*, 361 NLRB No. 145 (2014) (ordering rescission of a workplace civility policy that was unlawful because it had been applied to restrict the exercise of Section 7 rights).

The appropriate remedy normally also includes a requirement that the respondent employer post a notice to employees at its facilities. However, as discussed above, the record indicates that the employees covered by ER's employment agreement do not work at ER's facilities, but at facilities owned and/or operated by ER's clients. Therefore, ER must instead duplicate and mail the notice to all employees who have been covered by its employment agreement and performed work for its clients at any time since January 8, 2013. See, e.g., *Dr. Pepper Snapple Group*, 357 NLRB No. 167, slip op. at 1 fn. 1 & JD. fn. 28 (2011), and cases cited there.

Accordingly, based on the foregoing findings of fact and conclusions of law and on the entire record, I issue the following recommended[13]

ORDER

The Respondent, Employers Resource, San Marcos and Tustin, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining and/or enforcing a mandatory arbitration employment agreement to require employees, as a condition of employment, to waive the right to pursue or maintain employment-related class or collective claims in all forums, whether arbitral or judicial.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the mandatory arbitration employment agreement or revise it to make clear that the agreement does not constitute a waiver of the right to pursue or maintain employment-related class or collective actions in any forum.

(b) Notify Talina Torres and other current and former employees who signed the mandatory arbitration employment agreement that the agreement has been rescinded or revised and, if revised, provide them with a copy of the revised agreement.

(c) Notify the Superior Court of California, County of Los Angeles, LASC Case No. BC488455, that it has rescinded or revised the mandatory arbitration employment agreement upon which it based its January 8, 2013 motion to compel individual arbitration of Torres' class action wage and hour claims, and inform the court that it no longer opposes the class action on the basis of that agreement.

[13] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) Reimburse Torres for any reasonable attorneys' fees and litigation expenses that she may have incurred in opposing its motion to compel individual arbitration of her class action wage and hour claims against it.

(e) Within 14 days after service by the Region, duplicate and mail, at its own expense, the attached notice marked "Appendix" to all employees who have been covered by its employment agreement and performed work for its clients at any time since January 8, 2013.[14]

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. May 18, 2015

Jeffrey D. Wedekind
Administrative Law Judge

[14] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT maintain and/or enforce a mandatory arbitration employment agreement to require you, as a condition of employment, to waive the right to pursue or maintain employment-related class or collective claims in all forums, whether arbitral or judicial.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind our mandatory arbitration employment agreement or revise it to make clear that the agreement does not constitute a waiver of the right to pursue or maintain employment-related class or collective claims in any forum.

WE WILL notify Talina Torres and all other current and former employees who signed our mandatory arbitration employment agreement that the agreement has been rescinded or revised and, if revised, provide them with a copy of the revised agreement.

WE WILL notify the Superior Court of California, County of Los Angeles, LASC Case No. BC488455, that we have rescinded or revised the mandatory arbitration employment agreement upon which we based our January 8, 2013 motion to compel individual arbitration of Torres' class action wage and hour claims against us, and inform the court that we no longer oppose the class action on the basis of that agreement.

WE WILL reimburse Torres for any reasonable attorneys' fees and litigation expenses that she may have incurred in opposing our motion to compel individual arbitration of her class action wage and hour claims against us.

EMPLOYERS RESOURCE

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

11500 West Olympic Boulevard, Suite 600, Los Angeles, CA 90064
(310) 235-7352, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/31-CA-097189 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (310) 235-7424.