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NLRB Ruling Clarifies Class Waivers For Employers

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Employers wishing to implement class waivers in response to class claims and threaten employees with discharge if they refuse to sign them just got some very good news from the National Labor Relations Board in its Cordua Restaurants Inc.[i] decision.

By way of background, in Epic Systems Corp. v. Lewis[ii] five U.S. Supreme Court justices, including now retired Justice Anthony Kennedy, held that Section 7 of the National Labor Relations Act does not preclude an employer from enforcing an arbitration agreement it has with its employees requiring them to individually arbitrate federal and state wage-and-hour claims and to not litigate or arbitrate those claims on a class or collective basis.

In route to reaching that conclusion, the majority made a number of sweeping and narrowing observations about Section 7. Refusing to infer that class and collective actions qualify as "protected concerted activities" within the meaning of Section 7, the Epic majority noted that the section's text focused on employees' right to self-organize and to form unions and to bargain collectively. It also noted its complete silence as to class or collective actions, leading the majority to conclude that it was unlikely that Congress meant to confer a right to class or collective actions in Section 7, especially since those procedures were hardly known when the NLRA and Section 7 were adopted in 1935.

Based on this textual reading, the court reasoned that Section 7's concluding reference to "other concerted activities for the purpose of other mutual aid and protection" was understood and meant to apply only to those subjects previously enumerated in the section, and that it embraced only those things that employees do for themselves in the course of exercising their right to free association in the workplace and not what they might choose to do in class or joint litigation.

Countering the majority's Section 7 observations was a strongly worded four-member dissent penned by Justice Ruth Bader Ginsburg who cited the NLRB's 75-year history of safeguarding employees against employer interference when employees pursue joint, collective and class suits related to employment and observed that firmly rooted in the NLRA's design and subsumed within employees' freedom of association was the right to engage in collective employment litigation.

In Cordua, the NLRB recently acted on the court's observations and picked up where the Epic court left off. The two important questions of first impression addressed by Cordua were: (1) Whether the act prohibits employers from promulgating individual arbitration agreements containing class/collective action waivers in response to employees opting in to a collective action; and (2) Whether the act prohibits employers

from threatening to discharge an employee who refuses to sign such agreements.

Consistent with its reading of Epic, the board found that the act contained no such prohibitions. However, perhaps out of sync with the Epic majority's comments as to Section 7's limited scope, but consistent with the Epic dissenters' views, the board also concluded that Section 7 still prohibits employers from disciplining or discharging employees for filing a class or collective action with fellow employees over wages, hours, working conditions, and other terms and conditions of employment.

The material facts that led to these rulings in Cordua are as follows: In January 2015, seven employees, including a food server named Steven Ramirez, filed a federal collective action against Cordua, a nonunion operator of Latin-themed restaurants and a caterer in the Houston area, alleging violations of the Fair Labor Standards Act and the Texas Minimum Wage Act. Roughly nine months later, Cordua terminated Ramirez because, as found by the board, he discussed wage issues with his coworkers, requested a copy of his personnel file as an outgrowth of his protected discussions, and filed the FLSA suit against the employer.

Further, in response to its employees opting in to the federal suit, Cordua issued a revised individual arbitration agreement containing a waiver of collective/class claims and required its employees to enter into that new agreement as a condition of their hire/continued employment. During the distribution and explanation of the new agreement to Cordua employees, a company supervisor told workers that they ought "not bite the hand" that fed them and threatened that those who declined to sign the new agreement would be removed from their restaurant's schedule.

The board found Cordua's promulgation of the new arbitration agreement lawful even though it assumed, arguendo, that employees engage in protected concerted activity when they opt in to a collective action, and notwithstanding prior board law holding that an employer violates Section 8(a)(1) when it promulgates an otherwise lawful rule in response to protected concerted activity. This is because under Epic, a requirement that employees resolve their employment-related claims through individual arbitration neither restricts nor chills employees in the exercise of their Section 7 rights, and because nothing in the revised agreement suggested that employees would be disciplined for failing to abide by its provisions. Indeed, to find that the promulgation of the new arbitration agreement violated the act because it was in response to opt-in activity would be inconsistent with the Supreme Court's Epic holding that such individual arbitration agreements do not violate the act and must be enforced according to their terms.

Further, because the board found that Cordua lawfully promulgated the new arbitration agreement, the board also concluded that the employer's supervisor was lawfully free to make coercive statements to employees who expressed concerns about signing the new arbitration agreement. Indeed, because the board read Epic as permitting an employer to condition an employee's employment on their entry into an arbitration agreement that contained a class or collective action waiver, the board found the supervisor's coercive statements to be nothing more than an explanation of the lawful

consequences of failing to sign the agreement and an expression of the view that it would be preferable not to be removed from the schedule.

However, as to the Ramirez discharge, the board found that Ramirez had been engaged in protected concerted activity when he spoke to coworkers about working conditions and sought a copy of his personnel file because such conduct was what "employees 'just do' for themselves in the course of exercising their right to free association in the workplace." Accordingly, his discharge for engaging in such protected concerted activity was a violation of Section 8(a)(1).

Likewise, hewing to the view of the Epic dissenters, the board noted that Section 7 has long been held to protect employees when they pursue legal claims concertedly and that nothing in Epic called this precedent into question. Indeed, Epic did not address whether it was permissible under the act to discipline a worker for filing a class or collective action. Accordingly, even though under Epic, Cordua had been free to promulgate a new arbitration agreement containing a class/collective action waiver, the court's decision did not necessarily entitle the employer to discharge Ramirez for joining coworkers in a collective action to pursue claims against their employer.

Cordua's Important Takeaways

The current NLRB seems to accept the theoretical notion that requiring employees to individually waive their right to participate in class/collective claims as a condition of their hire/continued employment is permissible under the NLRA. However, Cordua did not concern the actual discharge of a recalcitrant worker. Likewise, even though Cordua sanctioned the particular threat made in that case to workers, its decision appears to be limited to the particular facts of the case.

Accordingly, whether an employer may actually refuse to hire an applicant or to discharge a worker for refusing to enter into an arbitration agreement containing a class/collective action waiver or threaten workers with such discipline or rejection without Section 7 liability probably remain open questions, Epic and Cordua notwithstanding. Nevertheless, although neither case presented a case of actual discipline, a plain reading of those cases and their reliance on an employer's right to condition employment on an employee's entry into an individual arbitration agreement containing class waivers, it is a good bet that an employer's taking adverse action on a nondiscriminatory basis against a recalcitrant worker because they refuse to sign such an agreement will not be found to violate the NLRA.

Likewise, in light of Epic, the current board now accepts the proposition that an employer's attempted enforcement of such waivers in litigation or arbitration is also lawful under the act.

However, despite the Epic majority's narrowing comments as to Section 7's reach, the board continues to view the filing of such collective actions as protected concerted activity, meaning that an employer who fires an employee for such conduct is likely to

be on the receiving end of an unfair labor practice complaint and may face Section 8(a)(1) liability.

What remains potentially unanswered in light of Epic and notwithstanding Cordua is whether employees who elect to opt in to a class/collective action in violation of their class claim waivers can be disciplined and/or terminated. Based on the Epic majority's narrowing Section 7 observations, one can argue that such conduct is not protected by the act. However, in Cordua, the board assumed — but found it unnecessary to decide — whether such conduct is protected concerted activity within the meaning of Section 7.

On a tangential but important note, the board's willingness to allow Cordua's promulgation of a revised arbitration agreement containing a class/collective action waiver may signal the board's movement away from its 2004 holding in Lutheran Heritage Village - Livonia,[iii] where it held an employer's promulgation of an otherwise lawful rule in response to protected concerted activity to be unlawful. Indeed, the board's rationale for exempting Cordua's arbitration agreement from this doctrine was less than convincing, unless it can be justified by either the specific mandate of the Federal Arbitration Act to enforce arbitration agreements or it is a precursor of things to come. On this point, we can only wait and see what happens.

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[i] Cordua Restaurants, Inc., 368 NLRB No. 43
[ii] Epic Systems Corp. v. Lewis, 138 S. Ct. 1612 (2018)
[iii] Lutheran Heritage Village - Livonia, 343 NLRB 646 (2004)