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Beena Beauty Holding, Inc. d/b/a Planet Beauty and Michael Sanchez. Case 31–CA–144492

October 8, 2019

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN, KAPLAN, AND EMANUEL

On May 23, 2016, the National Labor Relations Board issued a Decision and Order finding that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) by maintaining and enforcing the Arbitration/Dispute Resolution provision in its Commission Agreement—Sales (the Agreement). *Beena Beauty Holding, Inc.*, 364 NLRB No. 3 (2016). Applying *D. R. Horton*, 357 NLRB 2277 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013), and *Murphy Oil USA, Inc.*, 361 NLRB 774 (2014), enf. denied in relevant part 808 F.3d 1013 (5th Cir. 2015), the Board found that the Agreement unlawfully required employees, as a condition of their employment, to waive their rights to pursue class or collective actions involving employment-related claims in all forums, whether arbitral or judicial. *Beena Beauty*, 364 NLRB No. 3, slip op. at 1. The Board also found that the Agreement violated the Act on the basis that employees reasonably would construe it to restrict their access to the Board’s processes. *Id.*, slip op. at 1, 4–5.

The Respondent filed a petition for review with the United States Court of Appeals for the Ninth Circuit. The Board filed a cross-application for enforcement. On May 21, 2018, the Supreme Court held that employer-employee agreements that contain class- and collective-action waivers and require individualized arbitration do not violate Section 8(a)(1) of the Act and should be enforced as written pursuant to the Federal Arbitration Act (FAA). *Epic Systems Corp. v. Lewis*, 584 U.S. ___, 138 S.Ct. 1612, 1632 (2018).

On June 29, 2018, the Ninth Circuit granted the Board’s motion to vacate the portion of the Board’s Order governed by *Epic Systems* and to remand the remainder of the case for further proceedings before the Board. On October 29, 2018, the Board issued a Notice to Show Cause why this case should not be remanded to the administrative law judge for application of the *Boeing*¹ standard, discussed below. The General Counsel filed a statement of position, opposing remand. The Respondent did not file a response.

The Board has considered its previous decision and the record in light of the statement of position filed by the General Counsel. For the reasons that follow, we conclude that no remand is necessary, and, under the standard set forth in *Boeing* and its progeny, we find that the Agreement unlawfully restricts access to the Board and its processes. Accordingly, we find that the Respondent violated Section 8(a)(1) of the Act by maintaining the Agreement.

I. FACTS

The Respondent is engaged in the retail sale of beauty supplies and related products in Studio City, California. Since at least April 2, 2013, the Respondent has maintained the Agreement. In relevant part, the Agreement states:

By accepting or continuing employment with the company, you agree and understand that you and the Company mutually agree to resolve and [sic] binding arbitration any claim that, in the absent [sic] of agreement, would be resolved in a court of law under applicable state or federal law. The claims governed by this agreement are those that you or the Company may have relating to your employment with, behavior during or termination from, the Company. Claims for workers compensation or unemployment compensation benefits are not subject to this agreement. By accepting or continuing employment with the company, you and the Company both agree to resolve such claims through final and binding arbitration. This includes, but is not limited to, claims of employment discrimination because of race, sex, religion, national origin, color, age, disability, medical condition, marital status, gender identity, sexual preference or any other characteristic protected by law. It also includes any claim that you might have under contract or tort law; any claims for wages, compensation or benefits; any claims for trade secret violations, unlawful competition or breach of fiduciary duty.

....

THE COMPANY AND YOU AGREE TO GIVE UP ANY RIGHT TO A TRIAL BY JURY AND RIGHT TO APPEAL AND TO SUBMIT ANY CLAIMS THAT EITHER HAS AGAINST THE OTHER TO FINAL AND BINDING ARBITRATION.

II. DISCUSSION

The Ninth Circuit’s June 29, 2018 order having disposed of all allegations controlled by the Supreme Court’s decision in *Epic Systems*, above, the remaining issue for decision is whether the Agreement unlawfully restricts

¹ *Boeing Co.*, 365 NLRB No. 154 (2017).

access to the Board and its processes. In its prior decision, the Board resolved this issue under the analytical framework set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). See *Beena Beauty*, 364 NLRB No. 3, slip op. at 1, 8. In *Lutheran Heritage*, the Board held, among other things, that an employer violates Section 8(a)(1) of the Act if it maintains a facially neutral work rule that employees “would reasonably construe . . . to prohibit Section 7 activity.” 343 NLRB at 647.

Recently, the Board issued a decision in *Boeing*, overruling the “reasonably construe” prong of *Lutheran Heritage*. 365 NLRB No. 154, slip op. at 2. Under *Boeing*, a facially neutral rule or policy must be evaluated in such a way as to strike a proper balance between the asserted business justifications for the rule and the invasion of employee rights in light of the Act and its policies, viewing the rule or policy from the employees’ perspective. *Id.*, slip op. at 3. The Board decided to apply its new standard retroactively to all pending cases in whatever stage. *Id.*, slip op. at 16–17.

Subsequently, in *Prime Healthcare Paradise Valley, LLC*, the Board held that the maintenance and enforcement of arbitration agreements that interfere with employees’ right to file charges with the Board remain unlawful following the Supreme Court’s decision in *Epic Systems*. 368 NLRB No. 10, slip op. at 5 (2019). Consistent with *Lutheran Heritage*, 343 NLRB at 646, the Board explained that an arbitration agreement that “explicitly prohibits the filing of claims with the Board or, more generally, with administrative agencies must be found unlawful.” 368 NLRB No. 10, slip op. at 5. The Board further held that where an arbitration agreement does not contain such an express prohibition—i.e., where the arbitration agreement in question is facially neutral—the *Boeing* standard applies. *Id.* Under that standard, the Board will first determine whether the agreement, when reasonably interpreted, would potentially interfere with the exercise of Section 7 rights. *Id.* If it does, *Boeing*’s balancing test comes into play, which would typically require the Board to weigh the agreement’s potential interference with Section 7 rights against the employer’s legitimate business justifications. However, the Board concluded that “as a matter of law, there is not and cannot be any legitimate justification for provisions, in an arbitration agreement or otherwise, that restrict employees’ access to the Board or its processes.” *Id.*, slip op. at 6. Finally, the Board placed arbitration agreements that restrict employees’ access to the Board by making arbitration the exclusive forum for the resolution of all claims in *Boeing* Category 3, which designates rules and policies that are unlawful to maintain. *Id.*, slip op. at 7.

Applying these principles, the Board in *Prime Healthcare* found that the arbitration agreement at issue there violated the Act because, although it did not explicitly prohibit charge filing or other access to the Board and its processes, it did, when reasonably interpreted, interfere with employees’ right to file charges with the Board. *Id.*, slip op. at 6. The arbitration provision at issue in that case required “all claims or controversies for which a federal or state court would be authorized to grant relief”—“includ[ing], but . . . not limited to” claims under a long list of employment-related statutes and “claims for violation of any federal, state, or other governmental constitution, statute, ordinance, regulation, or public policy”—to be resolved by binding arbitration. *Id.* That agreement contained no exception for filing charges with the Board or other administrative agencies and stated that “[t]he purpose and effect of this [a]greement is to substitute arbitration as the forum for the resolution of the Claims.” *Id.* The Board found that, when reasonably interpreted, the foregoing language made arbitration the exclusive forum for the resolution of all claims, including claims arising under the Act, thereby restricting charge filing with the Board, and that “there is not and cannot be any legitimate justification” for such a restriction. *Id.*

Here, as in *Prime Healthcare*, the Agreement does not explicitly prohibit charge filing, but it does, when reasonably interpreted, interfere with employees’ access to the Board and its processes. See *id.* The Agreement broadly states, in all capital letters and just before the signature lines, that “THE COMPANY AND [EMPLOYEES] AGREE . . . TO SUBMIT ANY CLAIMS THAT EITHER HAS AGAINST THE OTHER TO FINAL AND BINDING ARBTIRATION.” See *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d at 1019 (“The problem is that broad ‘any claims’ language can create ‘[t]he reasonable impression . . . that an employee is waiving not just [her] trial rights, but [her] administrative rights as well.’”) (quoting *D. R. Horton, Inc. v. NLRB*, 737 F.3d at 363–364).

Further, as in *Prime Healthcare*, the Agreement contains no exception for filing charges with the Board or administrative agencies generally. See 368 NLRB No. 10, slip op. at 6; compare *Briad Wenco, LLC d/b/a Wendy’s Restaurant*, 368 NLRB No. 72, slip op. at 2 (2019) (finding arbitration agreement lawful because it stated that “[n]othing in this [a]greement shall be construed to prohibit any current or former employee from filing any charge or complaint or participating in any investigation or proceeding conducted by an administrative agency, including but not limited to . . . the National Labor Relations Board”). Moreover, the Agreement specifically excludes only “[c]laims for workers compensation or unemployment compensation benefits.”

Taken as a whole, these provisions in the Agreement plainly make arbitration the exclusive forum for the resolution of all claims except for workers compensation and unemployment benefits, including claims arising under the Act. See *Prime Healthcare*, 368 NLRB No. 10, slip op. at 6 (same). As we noted in *Prime Healthcare*, provisions like these significantly impair employee rights, the free exercise of which is vital to the implementation of the statutory framework established by Congress in the National Labor Relations Act and cannot be legitimately justified. *Id.*, slip op. at 6–7. The Agreement therefore belongs in *Boeing* Category 3. *Id.* Accordingly, we find that the Respondent violated Section 8(a)(1) of the Act by maintaining the Agreement.²

ORDER

The National Labor Relations Board orders that the Respondent, Beena Beauty Holding, Inc. d/b/a Planet Beauty, Studio City, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a mandatory arbitration agreement that employees reasonably would believe bars or restricts the right of employees to file charges with the National Labor Relations Board.

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

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

(a) Rescind the Arbitration/Dispute Resolution provision in the Commission Agreement—Sales (the Agreement) in all its forms or revise it in all its forms to make clear to employees that the Agreement does not bar or restrict employees’ right to file charges with the National Labor Relations Board.

(b) Notify all current and former employees who were required to sign or otherwise became bound to the Agreement in any form that the Agreement has been rescinded

or revised and, if revised, provide them a copy of the revised agreement.

(c) Within 14 days after service by the Region, post at its Studio City, California facility copies of the attached notice marked “Appendix.”³ Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 2, 2013.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 31 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.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. October 8, 2019

John F. Ring,

Chairman

Lauren McFerran,

Member

² Member McFerran joins her colleagues in finding that the Respondent violated Sec. 8(a)(1) by maintaining the Agreement. In doing so, Member McFerran acknowledges that *Boeing Co.*, 365 NLRB No. 154 (2017), is currently governing law, and she joins the majority for institutional reasons, but adheres to and reiterates her dissent in that case. That said, Member McFerran agrees with her colleagues that *Boeing* did not disturb prior precedent holding that arbitration agreements that explicitly prohibit filing claims with the Board or with administrative agencies are unlawful. Further, Member McFerran observes that the Agreement arguably does explicitly prohibit filing Board charges. See *Prime Healthcare*, 368 NLRB No. 10, slip op. at 6 fn. 11 (Member McFerran observing the same regarding the respondent’s mandatory arbitration agreement). Although the Board is not specifically named, the Agreement’s prohibition on filing charges is explicit because the Agreement

broadly states that “THE COMPANY AND [EMPLOYEES] AGREE . . . TO SUBMIT ANY CLAIMS THAT EITHER HAS AGAINST THE OTHER TO FINAL AND BINDING ARBITRATION” and excludes only “[c]laims for workers compensation or unemployment compensation benefits.” Member McFerran nonetheless agrees with her colleagues’ conclusions, above, that the only reasonable interpretation of the Agreement from employees’ perspective is that it does prohibit the filing of charges and that no legitimate employer justification could outweigh this core statutory right.

³ 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.”

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) 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 a mandatory arbitration agreement that our employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the Arbitration/Dispute Resolution provision in the Commission Agreement—Sales (the Agreement) in all its forms or revise it in all its forms to make clear that the Agreement does not restrict your right to file charges with the National Labor Relations Board.

WE WILL notify all current and former employees who were required to sign or otherwise became bound to the Agreement in any form that the Agreement has been rescinded or revised, and, if revised, WE WILL provide them a copy of the revised agreement.

BEENA BEAUTY HOLDING , INC. D/B/A PLANET
BEAUTY

The Board's decision can be found at <https://www.nlr.gov/case/31-CA-144492> or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

