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NLRB's *24 Hour Fitness* ruling consistent with precedent

By Eli Kantor

In *24 Hour Fitness USA, Inc and Alton J. Sanders*, NLRB Case 20-CA-035419 (Nov. 6, 2012), Administrative Law Judge William L. Schmidt found that 24 Hour Fitness maintained and enforced an unlawful arbitration policy that required employees to give up their federally protected right to take concerted action by including a class action waiver in its arbitration policy and by prohibiting employees from discussing their claims with their co-workers.

The dispute began when Alton Sanders, an exercise instructor, tried to join in a race and sex discrimination class action that another employee had brought against the company in Alameda County Superior Court. He was told that he would have to proceed individually because he waived his right to participate in a class action by failing to opt out of the mandatory arbitration policy contained in the employee handbook within 30 days after he was hired.

24 Hour Fitness required all new employees to agree in writing to submit all employment related claims to individual arbitration. The employee handbook advised employees that they could opt out of the policy by taking a series of steps, (e.g. obtaining the employee "opt-out" form by calling the employee hotline; signing it and returning it through interoffice mail to human resources). In his far reaching decision, Judge Schmidt found the employer's "opt-out provision" to be an "illusion" because the process was "convoluted" and also because employees would be unable to identify others who had also opted out with whom they could discuss the case.

He relied heavily upon the National Labor Relations Board's recent decision in *D.R. Horton*, 357 NLRB No. 184 (2012), which held that an arbitration policy containing a class action ban as a mandatory condition of employment violates employees' Section 7 rights, because it expressly restricts protected activity by requiring employees to "refrain from bringing collective or class claims *in any forum*." In pertinent part, Section 7 protects the rights of employees to "engage in other concerted activities for the purpose of collective bargaining or *other mutual aid or protection*." (Emphasis added). Thus, the class action ban was determined to prevent employees from acting together for their mutual aid or protection, and, therefore, violates the National Labor Relations Act because it is an unfair labor practice for an employer to "interfere with, restrain or coerce" employees in the exercise of their Section 7 rights. Indeed, the NLRB has recently used these principles to regulate employee Internet usage and social media policies, at-will employment policies and confidentiality policies.

> "[D]ecisions dating back to the 1940s ... reaffirm[] the principle that 'employers cannot enter into individual agreements with employees in which the employees cede their statutory rights to act collectively.'"

In *24 Hour Fitness*, the employer contended that it had properly balanced its arbitration policy with the policies contained in the NLRA and the Federal Arbitration Act based upon the Supreme Court's policy of enforcing arbitration agreements. In response, Judge Schmidt focused on appellate and Supreme Court decisions dating back to the 1940s cited in *D.R. Horton*, which reaffirmed the principle that "employers cannot enter into individual agreements with employees in which the employees cede their statutory rights to act collectively." He cited the Supreme Court's decision in *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-66 (1978), where Justice Lewis Powell, writing for the majority, noted: "it has been held that the 'mutual protection' clause protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums." He rejected 24 Hour Fitness' argument that the right to engage in class or collective action is not a protected concerted activity under Section 7. Further, he dismissed their argument that its arbitration policy was distinguishable from *D.R. Horton* because its 30-day opt-out opportunity made the agreement voluntary.

The ALJ framed the main issue as "whether an employer may design and enforce an arbitration policy that prevents its workers from acting in concert for their mutual aid and benefit by initiating and prosecuting a good-faith legal action against their employer." In holding that such a policy was unlawful, he distinguished recent Supreme Court decisions enforcing arbitration clauses such as *AT&T Mobility LLC v. Conception*, 131 S. Ct. 1740 (2011) and *CompuCredit v. Greenwood*, 132 S. Ct. 665 (2012), relied upon by 24 Hour Fitness, finding that they "have little if anything to do with arbitration in the context of the employer-employee relationship." He cited a long line of cases that protect employees' rights to file civil litigation to protect their Section 7 rights.

Significantly, the ALJ ordered 24 Hour Fitness to remove the prohibition against class or collective actions from the employee handbook and to notify all eight arbitral or judicial tribunals where it had pursued enforcement of the clause that it desired to withdraw the arbitration request.

It is unclear whether 24 Hour Fitness intends to "shape-up" or to file an appeal of the ALJ's decision to the NLRB. However, if it does, the Obama board will certainly deny it based upon its prior decision in *D.R. Horton*. Then 24 Hour Fitness can appeal the decision to the 9th Circuit or the D.C. Circuit. Ultimately, these issues, including *D.R. Horton*, involving the tensions between the NLRA and the FAA will have to be resolved by the U.S. Supreme Court. In the meantime, the state of the law regarding class action waivers is uncertain, and employers who use them are doing so at their own peril. It appears that mandatory arbitration policies for individual claims are still lawful, provided that employees are given an opportunity to opt out and that certain procedural safeguards are met. However, employers and their counsel should review their arbitration policies in light of this decision. They would be well advised to delete any prohibition on discussion of employment related claims with co-workers, and to make the opt-out provisions clearer and simpler for employees to use, to give them a better chance of being upheld.

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