Docket No. 12-55578

In The United States Court of Appeals

For The Ninth Circuit

FATEMEH JOHNMOHAMMADI
Plaintiff-Appellant,

v.

BLOOMINGDALE'S, INC.,
Defendant – Appellee,

On Appeal from the United States District Court Central District of California
No. 2:cv-06434-GW-AJW – Honorable George H. Wu

BRIEF OF APPELLANT

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I. STATEMENT OF JURISDICTION

Pursuant to Ninth Circuit Rule 28-2.2, Plaintiff-Appellant Fatemeh Johnmohammadi ("Johnmohammadi") submits the following statement of jurisdiction:

a. The United States District Court for the Central District of California ("The District Court") had subject matter jurisdiction over this action against Defendant – Appellee Bloomingdale's, Inc. ("Bloomingdale's) pursuant to 28 U.S.C. §§ 1441, 1446, 1453 and 1332. Bloomingdale's removed the case to the District Court pursuant to the Class Action Fairness Act of 2005.

b. On February 29, 2012, the District Court entered an Order precluding Johnmohammadi from pursuing class wage claims, granting Bloomingdale's Motion to Compel Arbitration of her individual claims only, and dismissing the action without prejudice. This Court's jurisdiction is a function of 9 U.S.C. § 16(a)(3). See *Interactive Flight Technologies, Inc. v. Swissair* (9th Cir. 2001) 249 F.3d 1179; and *Shroyer v. New Cingular Wireless Services, Inc.* (9th Cir. 2007) 498 F.3d 976, 981.

c. Johnmohammadi appeals from the District Court's Order of Dismissal and the finding therein "that in voluntarily entering into the mutual agreement to arbitrate, Plaintiff explicitly waived her right to bring claims on behalf of other

employees as class or representative actions; and that the subject class action waiver is enforceable and does not violate or interfere with sections 7 or 8 of the National Labor Relations Act." Johnmohammadi's Notice of Appeal was filed on March 29, 2012, and is timely pursuant to 28 U.S.C. § 2107(a) and Federal Rule of Appellate Procedure 4(a)(1).

II. ISSUE PRESENTED

Did the District Court commit legal error when it found that Johnmohammadi waived her right to bring claims on behalf of other employees as class or representative actions, that Bloomingdale's class action waiver is enforceable and that it does not violate or interfere with Johnmohammadi's rights under Sections 7 and 8 of the National Labor Relations Act and the Norris La Guardia Act?

III. STANDARD OF REVIEW

Review of the District Court's Order compelling arbitration on an individual basis is de novo. *Shroyer v. New Cingular Wireless Services, Inc.* (9th Cir. 2007) 498 F.3d 976, 981. *Davis v. O'Melveny & Meyers* (9th Cir. 2007) 485 F.3d 1066, 1072. Reviewability – The issues before this Court were raised by Bloomingdale's Motion, and denied ultimately in the Court's Order of Dismissal.

IV. STATEMENT OF THE CASE

On August 2, 2011, Johnmohammadi filed a Class Action against Bloomingdale's in Los Angeles Superior Court claiming her overtime rights and those of her colleagues were violated on account of a failure by Bloomingdale's to factor all incentive payments into the calculation of overtime under California law. Bloomingdale's removed the case to the United States District Court (Docket No. 1; 2 ER 229; Complaint at ER 248).

On August 12, 2011, Bloomingdale's answered (Docket No. 6; 2 ER 216), alleging in part that Plaintiff's Complaint should be dismissed or stayed because of an arbitration agreement that precludes collective actions (ER 224). Thereafter, Bloomingdale's moved to compel arbitration of Plaintiff's claims on an individual basis. (Docket No. 21; 2 ER 213).

Prior to the hearing on the motion, Johnmohammadi filed an Unfair Labor Practice Charge with the NLRB claiming Bloomingdale's assertion of a class action waivers violated 29 U.S.C. §§ 157 and 158(a)(1) (Docket No. 28; 2 ER 54).

Bloomingdale's Motion was heard by the Court on January 26, 2012 and February 23, 2012. The "tentative" ruling of the Court on January 26, 2012 (Docket No. 31; 1 ER 25) was incorporated into the Final Ruling on Motion to Compel Arbitration (Docket No. 38; 1 ER 3), issued on February 23, 2012.

Consistent with the Court's representation on the record on February 23, 2012 (Docket No. 46; 1 ER23:16-23) that it will dismiss the case by Order dated February 29, 2012 the Court dismissed the case and ordered Johnmohammadi to arbitrate individual claims only, finding that she entered into a mutual agreement to arbitrate, waived her right to bring claims on behalf of others, and finding that the class action waiver Johnmohammadi agreed to is enforceable and does not violate the NLRA (Docket No. 40; 1 ER 1).

Pursuant to 29 U.S.C. § 16(a)(3), Johnmohammadi appealed the District Court Order. The Notice of Appeal was filed on March 29, 2012 (Docket No. 44; 2 ER 51).

V. STATEMENT OF FACTS

Johnmohammadi was hired by Bloomingdale's in November 2005 (Docket No. 24, 24-1, 24-3; 2 ER 81, and ER 147). By accepting and continuing employment with Bloomingdale's, Bloomingdale's policy provides that employees agree to be bound by Solution INSTORE ("SIS"), a dispute resolution program, unless, within 30 days, they complete and mail a form that indicates that they choose not to participate in Step 4, the arbitration step of the "SIS." Per the Plan Document, "'all newly hired associates' will be deemed to have voluntarily elected the benefits of arbitration' unless they have returned the Opt-Out form opting out

of Step 4 – Arbitration 'within the prescribed time limits.'" (Docket No. 23 Par. 8; 2 ER 164; Docket No. 23-1, 23-3; 2 ER 181 and 211)

None of the following documents – Johnmohammadi's application, the employee handbook she received, the brochure that she was given describing the SIS, and postings about SIS at the Sherman Oaks store where she worked, mentioned that by failing to exercise the right to opt out within 30 days, she could not participate in or initiate class arbitration (See Exhibits at Docket No. 24-1, 24-2, 24-4, 24-5; 2 ER 81, 83, 148, 161)

The SIS "Plan Document" (Docket No. 23-1; 2 ER 175), which was available to Johnmohammadi if she requested it or went online, set forth the dispute resolution process in detail. In the "Arbitration Rules and Procedures" section, at Article 11 Section F Consolidation ii, the Plan Document Provides:

> The Arbitrator shall not consolidate claims of different Associates into one (1) proceeding, nor shall the Arbitrator have the power to hear an arbitration as a class action (a class action involves representative members of a large group, who claim to share a common interest, seeking relief on behalf of the group). (ER 190)

Johnmohammadi did not take the affirmative step of mailing in the form opting out of arbitration (Docket No. 25, 25-1; 2 ER 63, 72). Johnmohammadi worked for Bloomingdale's until November 22, 2010 (Docket No. 28 Par. 3; 2 ER 55).

On July 5, 2011, Johnmohammadi filed a complaint, under California law,

for unpaid overtime and claims that derive therefrom, in the Los Angeles Superior Court. (Docket No. 1, 2 ER 55). The case was then removed to the District Court. (Docket No. 1; 2 ER 229)

Bloomingdale's Answer to the Complaint included the Affirmative Defense — Arbitration: "Plaintiff s Complaint should be dismissed or stayed because Plaintiff entered into a voluntary arbitration agreement that requires her to submit any employment-related dispute to final and binding arbitration. The voluntary arbitration agreement precludes collective actions." (Docket No. 6; 2 ER 224)

On November 30, 2011, Defendant filed a motion to compel arbitration of Johnmohammadi's individual claims and dismiss her representative claims (Docket No. 21; 2 ER 213).

On December 21, 2011, Johnmohammadi filed an Unfair Labor Practice Charge with Region 31 of the National Labor Relations Board indicating that Bloomingdale's invocation of the contract provision barring class/collective actions violates the rights of current and former employees to engage in concerted activity under the National Labor Relations Act (Docket No. 28; 2 ER 54).

The first hearing on the Motion to Compel was held on January 26, 2012. The Court issued a tentative ruling (Docket No. 31; 1 ER 25) which was ultimately incorporated in the Court's final decision (Docket No. 38; 1 ER 3). In the January 26, 2012 ruling, the Court found that arbitration should be compelled, and that

because Johnmohammadi voluntarily entered into the arbitration agreement, the class action waiver did not run afoul of her rights under the National Labor Relations Act (1 ER 26-33).

On February 29, 2012, the District Court issued its final Order granting Bloomingdale's Motion to Compel arbitration and dismissed the action. The Honorable George H. Wu presiding ruled, inter alia:

> 1. That Plaintiff FATEMEH JOHNMOHAMMADI voluntarily entered into an agreement with Defendant Bloomingdale's, Inc. to submit any and all employment related claims, including the claims encompassed in Plaintiff's Complaint, to binding arbitration;
>
> 2. [T]hat in voluntarily entering into the mutual agreement to arbitrate, Plaintiff explicitly waived her right to bring claims on behalf of other employees as class or representative actions; and
>
> 3. [T]hat the subject class action waiver is enforceable and does not violate or interfere with Sections 7 or 8 of the National Labor Relations Act,
>
> IT IS HEREBY ORDERED that Defendant's Motion to Compel Arbitration is granted; and, pursuant to Federal Rules of Civil Procedure, Rule 41(a)(2), this action is hereby dismissed without prejudice. (ER 1-2)

VI. SUMMARY OF ARGUMENT

In enacting the Norris La Guardia Act ("NLGA") and the National Labor Relations Act ("NLRA"), Congress guaranteed certain unwaivable associational rights to working men and women, protecting not only union-related activities but

also employees' fundamental, substantive right to act concertedly through litigation.

Bloomingdale's maintenance of a class action ban violates 29 U.S.C. § 8(a)(1) and 29 U.S.C. § 102-103 because it bars workers from exercising their right to engage in the concerted activity of petitioning Courts or arbitral bodies for redress of grievances on behalf of a group. Consumers, whose interests were addressed in *AT&T Mobility, LLC v. Concepcion* (2011) 131 S.Ct. 1740 do not have anything that comes close to the rights workers enjoy by operation of the NLGA and NLRA.

Johnmohammadi's conduct in seeking redress of her overtime claim on behalf of herself and others, has long been recognized by the Courts and National Labor Relations Board ("NLRB") as a form of concerted activity protected by Federal Labor Law. *Salt River Valley Water User's Ass'n v. National Labor Relations Board* (9th Cir. 1953) 206 F.2d 325. *Eastex, Inc. v. NLRB* (1978) 437 U.S. 565-566; *52nd St. Hotel Associates* 321 NLRB 624, 633.

Employee rights to engage in concerted activity is a substantive right, on par with the right to be free from discrimination, or to be paid overtime in accordance with the law.

Because Bloomingdale's dispute resolution process prospectively barred the substantive right of employees to bring class actions to vindicate employment law

violations for those employees who did not opt out of the process, it is illegal. Under the NLGA, the District Court lacked authority to dismiss Johnmohammadi's claims.

The Federal Arbitration Act does not abrogate the substantive right of an employee to seek redress of employment disputes on behalf of a group. While the Federal Arbitration Act ("FAA") 9 U.S.C. § 1 et seq. may compel use of an agreed upon arbitral forum without running afoul of the NLGA and NLRA, it does not compel repeal of the substantive protections of the NLGA and NLRA when it comes to the right to bring class actions.

The FAA mandate that private arbitration agreements be enforced to the same extent as other private contracts does not conflict with the NLGA or NLRA because the FAA allows for the invalidation of class action waivers like that in Bloomingdale's SIS policy that are illegal, impair substantive rights, or otherwise undermine established public policy.

On January 3, 2012, during the pendency of Bloomingdale's Motion to Compel Arbitration, the NLRB, in *D.R. Horton, Inc.* ("Horton") 357 NLRB No. 184 (2012)[1] held that Horton's contract, with its arbitration agreement containing a class action ban, "unlawfully restricts employees' Section 7 right to engage in

[1] **Page citations to the *Horton* decision will be to the page numbers at the top right of the Westlaw Publication of 357 NLRB No. 184 (2012).**

concerted action for mutual aid or protection." *Id*, at 1. The Board further held that the concerted action ban was unenforceable "notwithstanding the Federal Arbitration Act..." because the right to engage in concerted activity is a substantive right. *Id*, at 1.[2]

There is a critical exception to the FAA's enforcement mandate, consistently reaffirmed by the Supreme Court: An arbitration agreement must not eliminate parties' substantive statutory rights. *E.g.*, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985). Thus, where the parties would be unable to vindicate their federal statutory claims in arbitration—or where, as here, a term in the arbitration clause *itself* eliminates substantive rights guaranteed by another federal statute—the clause (or term) is unenforceable.

Bloomingdale's concerted action ban falls squarely within this exception to the FAA's enforcement mandate, because the ban eliminates the substantive right to engage in concerted activity guaranteed by the NLGA and NLRA. The FAA cannot require enforcement here, and it is easily reconciled with Federal Labor Law.

The unlawful waiver of a substantive right to engage in concerted activity is not salvaged by the argument that Johnmohammadi agreed to it. Just as an employee cannot waive the right to seek union representation in the future (a form

[2] T.R. Horton has appealed the decision. 5th Circuit No. 12-60031.

of concerted activity) for a $1000/month raise, an employee cannot waive the right to initiate or participate in future group litigation (concerted activity) in exchange for the "benefits" of Bloomingdale's arbitration policy.

Even if the FAA were improperly construed as requiring enforcement of Bloomingdale's clause, which it does not, the NLRA's guarantee of the substantive right to engage in concerted legal action would take precedence and preclude enforcement of Bloomingdale's concerted action ban. The Supreme Court has acknowledged that, "[l]ike any statutory directive, the Arbitration Act's mandate may be overridden by a contrary congressional command." *Shearson/American Express Inc. v. McMahon*, (1987) 482 U.S. 220, 226-27. Congress' clear statement in Section 7, derived from the NLGA, that employees have the "right to engage in . . . concerted activities for . . . mutual aid and protection" is precisely such a command.

VII. ARGUMENT

A. CONCERTED ACTIVITY BY WORKERS FOR WORKERS INVOKES A CORE RIGHT AT THE HEART OF AMERICAN LABOR LAW.

The fundamental right of employees to advance their workplace interests concertedly is at the heart of the Norris La Guardia Act 29 U.S.C. § 102-103, and the National Labor Relations Act 29 U.S.C. § 157-158.

Bloomingdale's class action ban strips employees of this fundamental right by precluding them from prosecuting their wage claims collectively in any forum, arbitral or judicial.

The NLGA goes so far as to bar Courts from doing precisely what the District Court did here – enforcing an illegal agreement which purports to prospectively bar employees from engaging in the concerted activity of pursuing class wage and hour claims in a Judicial or Arbitral forum. In the NLGA, the United States has declared:

> In the interpretation of this Act [29 USCS §§ 101 et seq.] and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are herein defined and limited, the public policy of the United States is hereby declared as follows:
>
> Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization *or in other concerted activities for the purpose of* collective bargaining or *other mutual aid or protection;* therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the courts of the United States are hereby enacted. 29 USCS § 102 (emphasis added).

Providing teeth to this declaration of policy, the NLGA provides that contracts interfering with this express declaration of public policy are unenforceable. 29 U.S.C. § 103 states, in part:

> Any undertaking or promise, such as is described in this section, or any other undertaking or promise in conflict with the public policy declared in section 2 of this Act [29 USCS § 102], is hereby declared to be contrary to the public policy of the United States, shall not be enforceable in any court of the United States and shall not afford any basis for the granting of legal or equitable relief by any such court…

Here, the District Court, in upholding the class action ban, ignored the limit on its authority explicitly set forth in 29 U.S.C. § 103.

The absolute right of employees to be free from the restraint of employers in the exercise of their rights to engage in concerted activity was reaffirmed in the NLRA. The NLGA was enacted in 1932. In 1935 § 7 of the NLRA was enacted. Section 7 of the NLRA, 29 U.S.C. § 157, provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in *other concerted activities* for the purpose of collective bargaining or *other mutual aid or protection,* and shall also have the right to refrain from any or all of such activities…. (emphasis added)

It is an unfair labor practice to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157…" 29 U.S.C. § 158(a)(1).

The right to engage in the non-exclusive set of "concerted activities" listed

in Section 7 is a substantive one described by the Supreme Court as "fundamental." *NLRB v. Jones & Laughlin Steel Corp.* 301 U.S. 1, 33 (1937). "The guarantees and protection of Section 7 are afforded equally to non union employees and union employees…" *NLRB v. McEver Engineering* 784 F.2d 634, 639 (5th Cir. 1986). See also: *NLRB v. Wash. Aluminum Co.* (1962) 370 U.S. 9, 14-15.

After recounting the origins of Section 7, the United States Supreme Court, made important observations applicable to all forms of concerted activity:

> Against this background, it is evident that, in enacting § 7 of the NLRA, Congress sought generally to equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting an employer regarding the terms and conditions of their employment. *There is no indication that Congress intended to limit this protection to situations in which an employee's activity and that of his fellow employees combine with one another in any particular way. Nor, more specifically, does it appear that Congress intended to have this general protection withdrawn in situations in which a single employee, acting alone, participates in an integral aspect of a collective process.*

N.L.R.B. v. City Disposal Sys. Inc., 465 U.S. 822, 834-35, 104 S. Ct. 1505, 1513 (1984) (emphasis added).

B. THE INITIATION AND PROSECUTION OF CLASS ACTIONS CONSTITUTE FORMS OF PROTECTED CONCERTED ACTIVITY FOR MUTUAL AID AND PROTECTION

The NLRA protects all forms of concerted activity by employees to improve wages or working conditions:

> Section 7 of the Act extends to employee efforts "to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship." *Eastex, Inc. v. NLRB,* 437 U.S. 556, 565 (1978).

Section 7 thus specifically affords protection to employees "when they seek to improve working conditions through resort to administrative and judicial forums." *Id.* at 566.

The broad rights conferred by Section 7, as declared by the Supreme Court in *Eastex*, encompass pursuit of civil lawsuits and arbitrations. "It is well settled that the filing of a civil action by employees is protected activity unless done with malice or in bad faith." *In Re 127 Rest. Corp.,* 331 NLRB 269, 275 (2000), citing *Trinity Trucking & Materials Corp.,* 221 NLRB 364, 365 (1975) enfd. mem. 567 F.2d 391 (7th Cir. 1977), cert. denied 438 U.S. 914 (1978); and *Host International,* 290 NLRB 442, 443 (1988).

The Ninth Circuit in a case in which an employee was engaged in efforts to enforce his wage rights and those of his co-workers, held:

> Concerted activity may take place where one person is seeking to induce action from a group…Further, 'concerted activities for the purpose of mutual aid or protection' are not limited to union activities. *Salt River, supra* 206 F.2d at 328.

The Court in *Salt River* went on to point out that the concerted activity of legal actions to seek enforcement of overtime rights can put pressure on the

employer in connection with settlement and negotiation, and facilitate financing of litigation, all concepts consistent with the purpose of 29 U.S.C. § 157. *Id*, 206 F.2d at 328.

The Court finally held, in *Salt River*, "[T]he Association [employer] ignores the fact that concerted activity for the purpose of mutual aid or protection is often an effective weapon for obtaining that to which the participants, as individuals, are already legally entitled." *Id*, 206 F.2d at 328.

Suits or arbitrations for overtime are one type of concerted activity recognized as protected by the NLRA:

> The Board and the courts have long held that conduct of employees to vindicate rights to payment for overtime work, and availing themselves of the safeguards of the Fair Labor Standards Act, is protected, concerted activity under Section 7 of the Act. See, e.g., *Moss Planing Mill Co.,* 103 NLRB 414, 418-419 (1953), enfd. 206 F.2d 557 (4th Cir. 1953); *Poultrymen's Service Corp.,* 41 NLRB 444, 462-463 (1942), enfd. 138 F.2d 204, 210 (3d Cir. 1943); *Lion Brand Mfg. Co.,* 55 NLRB 798, 799 (1944), enfd. 146 F.2d 773 (5th Cir. 1945); *Cristy Janitorial Service,* 271 NLRB 857 (1984); *Triangle Tool & Engineering,* 226 NLRB 1354, 1357 fn. 5 (1976); *Joseph De Rario, DMD, P.A.,* 283 NLRB 592, 594 (1987); and *Nu Dawn Homes,* 289 NLRB 554, 558 (1988).

52nd St. Hotel Associates, 321 NLRB No. 93, at 633.

For the purposes of Section 7, class actions arising under State wage laws are no different than collective actions under the FLSA. *Harco Trucking, LLC and Scott Wood,* 344 NLRB 478 (2005). In *Harco*, just as in this case, a former

employee was pursuing a class action under California Wage and Hour Laws. The Board found such conduct protected activity. *Harco Trucking,* 344 NLRB at 483.

In *Le Madri Restaurant,* 331 NLRB 269, 275-276 (2000), the NLRB found that an employer unlawfully discharged employees for engaging in Section 7 activity, including filing a lawsuit alleging violations of federal *and* state labor laws in federal court on behalf of other employees. In *Mohave Electric Cooperative,* 327 NLRB 13 (1998), enfd. 206 F.3d 1183 (D.C. Cir. 2000), the NLRB determined that two employees were engaged in protected concerted activity when, pursuant to a common concern for workplace safety, they both petitioned for injunctive relief against harassment. In *United Parcel Service,* 252 NLRB 1015, 1018, 1022, fn.26 (1980), enfd. 677 F.2d 421 (6th Cir. 1982), the NLRB found that the employer violated the Act by discharging an employee for filing a class action lawsuit regarding rest breaks. In *Saigon Gourmet,* 353 NLRB 1063, 1064 (2009), the Board found that concertedly asserting wage and hour claims is protected concerted activity. The overwhelming body of NLRB decisions leaves no doubt that wage related class actions constitute a form of protected concerted activity. *See also Brady v. Nat'l Football League*, 644 F.3d 661, 673 (8th Cir. 2011)

The foundational purpose of the NLRA is to guarantee that employees are empowered to band together to advance their work-related interests on a collective

basis.

"Protection for joint employee action," the NLRB has explained, "lies at the heart of the [NLRA]." *Meyers Industries, Inc.*, 281 NLRB 882, 883 (1986). Section 7 and the limits on Court interference articulated in the NLGA breathes life into the congressional vision of leveling the playing field for employees in relation to their employers.

An arbitration agreement that effectively prohibits all class, collective and/or joint employee efforts to obtain redress for violation of employment law necessarily inhibits protected concerted activity in violation of the NLGA and Section 7 of the NLRA.

The right to initiate concerted legal action is no less substantive than any other Section 7 right. Initiating a union organizing drive, or initiating class claims in litigation (or arbitration) allow workers to act in concert to advance their economic interests, and they are both forms of concerted activity within the meaning of Section 7.

A concerted legal action is not simply a procedural device used to vindicate a substantive right—the NLGA and NLRA establish that the right to participate in concerted legal actions *is itself* a substantive right. "The right to engage in collective action – including collective *legal* action – is the core *substantive* right protected by the NLRA and is the foundation on which the Act

and Federal Labor policy rest." *Horton, supra*. 357 NLRB No. 184, at 9.

Unlike the requirements for certification of class actions under Federal Rule of Civil Procedure 23 and other procedural devices that specify *how* specific kinds of concerted legal actions must proceed, the NLGA and NLRA provide a *substantive* guarantee to employees that their employers cannot interfere with their ability to engage in concerted legal action in an arbitral or judicial forum.

C. THE DISTRICT COURT WAS WITHOUT AUTHORITY TO ENFORCE BLOOMINGDALE'S CLASS ACTION WAIVER

As set forth above, the NLGA prohibited the District Court here from enforcing any contract provision that conflicts with the concerted activity public policy articulated in 29 U.S.C. § 102. As pointed out in *Horton*, 29 U.S.C. § 103 does not, by its terms, only apply to "yellow dog contracts." *Id*, at 5.

Furthermore, the NLRA prohibits enforcement of contract terms that violate the Act. *E.g.*, *J.I. Case Co. v. NLRB*, 321 U.S. 332, 337 (1944) ("Wherever private contracts conflict with [the Board's function of preventing unfair labor practices], they obviously must yield or the [NLRA] would be reduced to a futility."). It has long been the law that no court may enforce a contract term that violates the NLRA. *See Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 83-86 (1982). The fact that the contract term at issue here is contained within an arbitration clause does not change this conclusion. Arbitration clauses can violate the NLRA if they interfere

with the right of employees to act concertedly to improve working conditions. *National Licorice Co. v. NLRB*, 309 U.S. 350, 360 (1940) (arbitration clause prohibiting all forms of collective activity, including arbitration of claims of discharged employees, was Unfair Labor Practice); *NLRB v. Stone*, 125 F.2d 752, 755 (7th Cir. 1942) (individual contracts requiring employees to arbitrate grievances individually were *per se* violations of the NLRA's right to concerted action); *NLRB v. Superior Tanning Co.*, 117 F.2d 881, 892 (7th Cir. 1940) (Board properly ordered employer to cease and desist from giving effect to an arbitration clause, which had the "obvious effect of restraining the employees in the exercise of their rights under Section 7 of the [NLRA]").

D. THE SUPREME COURT HAS REPEATEDLY HELD THAT AGREEMENTS TO ARBITRATE ARE ENFORCEABLE ONLY WHERE THEY DO NOT ELIMINATE PARTIES' SUBSTANTIVE STATUTORY RIGHTS

The Supreme Court has directed that courts must ensure that arbitration clauses do not require parties to "forgo . . . substantive [statutory] rights," *Mitsubishi Motors, supra,* 473 U.S. at 628. This gatekeeping function acts as a critical check on companies' use of arbitration provisions to ensure that such agreements alter only the forum in which a dispute is resolved, not the availability of the parties' substantive statutory rights. *See EEOC v. Waffle House, Inc.,* 534 U.S. 279, 295 n.10 (2002) ("[F]ederal statutory claims may be the subject of

arbitration agreements that are enforceable pursuant to the FAA because the agreement only determines the choice of forum."); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 482-83 (1989) (arbitration agreements "are in effect, a specialized kind of forum-selection clause") (internal quotations and citation omitted).

In the seminal case on this point *Mitsubishi Motors*, 473 U.S. at 616, the Court emphasized that if the arbitration agreement would operate "as a prospective waiver" of a party's statutory rights it "would have little hesitation in condemning the agreement as against public policy." *Id.* at 637 n.19.

The Supreme Court has continued to endorse this key principle of *Mitsubishi Motors*, holding repeatedly that where an arbitration provision would eliminate a substantive statutory right, a court must not enforce it. In its most recent statement on the FAA, the Court reaffirmed that arbitration clauses can be enforced only so long as any right that is statutorily "*guarantee[d]*" "is preserved." *CompuCredit v. Greenwood*, __ U.S. __, 132 S. Ct. 665, 671 (2012); *see also Preston v. Ferrer*, 552 U.S. 346, 352 (2008) (enforcing an agreement to arbitrate based on a finding that, by agreeing to arbitrate, the parties would "relinquish no substantive rights"); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (parties to arbitration do not "forgo the substantive rights afforded by the statute") (quoting *Mitsubishi*, 473 U.S. at 678); and *Waffle House, supra,* 534 U.S. at 295 n.10.

In this case, as set forth above, Bloomingdale's contract term precluding those employees who did not opt out of arbitration from engaging in future concerted legal action, *clearly* operates as a prospective waiver of a core substantive provision of the NLRA. Indeed, the contract term denies substantive rights much more directly than would a term that merely raised barriers to the pursuit of a particular type of substantive claim; it directly negates the substantive right to engage in concerted legal action. Because the FAA as interpreted by the Supreme Court does not permit the use of arbitration clauses to eliminate statutory rights, the FAA cannot compel enforcement of Bloomingdale's concerted action ban.

E. *CONCEPCION* DOES NOT REQUIRE THAT COURTS ENFORCE ARBITRATION CLAUSES WHEN THEY ELIMINATE PARTIES' SUBSTANTIVE FEDERAL STATUTORY RIGHTS

The District Court ruling embraced the position that *AT&T Mobility, LLC v. Concepcion* (2011) 131 S.Ct. 1740 requires the conclusion that Bloomingdale's class action ban, purportedly agreed to by Johnmohammadi's failure to opt out within 30 days after her hire date, is enforceable under the FAA even though it forces employees to prospectively waive their substantive rights under the NLRA. This strained reading of *Concepcion* cannot be squared with the decision's language or the Supreme Court's FAA jurisprudence before and after the decision.

Concepcion arose in a consumer context. The Court in *Concepcion* was not confronted with a congressional mandate protecting the rights of consumers to engage in concerted activity, as is the case here.

For the District Court to be right, that *Concepcion* mandates enforcement of an arbitration clause that would eliminate workers' substantive federal rights, *Concepcion* would have had to implicitly overturn *Mitsubishi Motors*, *Gilmer*, and their progeny. But *Concepcion* did not undermine—let alone overrule—these precedents. Instead, both *Mitsubishi Motors* and *Gilmer* were cited as authority by the majority in *Concepcion*.[3] *Concepcion*, 131 S. Ct. at 1748. And in the very next term after it decided *Concepcion*, the Court reaffirmed that an arbitration clause was enforceable only "so long as" consumer plaintiffs could keep their substantive rights under the statute at issue. *CompuCredit Corp. supra,* 132 S. Ct. at 671.

The fallacy of the District Court's position is also evident from the *Concepcion* decision itself. In *Concepcion*, the Supreme Court assumed that AT&T's arbitration clause did not deprive the plaintiffs of any substantive rights, that the substantive claims were likely to be resolved in individual arbitration. 131 S. Ct. at 1748, 1753. Here, the substantive right workers have to engage in concerted legal activity cannot be saved by the arbitration of an individual claim.

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[3] *See Agostini v. Felton*, 521 U.S. 203, 237 (1997) (Lower courts may not conclude that recent cases, by implication, overruled earlier Supreme Court precedent).

Even more importantly for this Court's purposes here, there was no suggestion in *Concepcion* that the *arbitration clause itself* eliminated statutory rights. Here, in contrast, Bloomingdale's concerted action ban *per se* strips its employees of the substantive statutory right to engage in the protected concerted activity of pursuing a class claim in Court or in Arbitration.

Second, *Concepcion*'s holding—that the FAA preempts California state unconscionability law—cannot possibly be construed as a rule that particular features of arbitration clauses are enforceable even when they would eliminate *substantive rights guaranteed by a federal statute*. The Court took great care to emphasize that its reasoning and holding are limited to state law. *See*, *e.g.*, 131 S. Ct. at 1744 ("We consider whether the FAA prohibits *States* from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures."); *id.* at 1749 (FAA embodies "a liberal federal policy favoring arbitration agreements, notwithstanding any *state* substantive or procedural policies to the contrary.") (emphasis added); *id.* at 1747 ("When *state* law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA.") (emphasis added); *id.* at 1748 (FAA § 2 does not "preserve *state*-law rules that stand as an obstacle to the accomplishment of the FAA's objectives.") (emphasis added); *id.* at 1753

("*States* cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons.") (emphasis added).

A state law that requires "classwide procedures" that are "not necessary" to prevent the loss of substantive rights is a far cry from a federal statute that guarantees a substantive right. Here, even if the NLGA and NLRA's protection of the right to concerted legal action is inconsistent with the way the FAA might be construed "standing alone," that does not mean the FAA cannot be read to give effect to that right. *McMahon*, 482 U.S. at 226. When a policy held to be implicit in one federal statute is in tension with rights expressly granted by another, the court's duty is to reconcile the two, recognizing that, "[w]here two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974).

Furthermore, the "classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute." *United States v. Fausto,* 484 U.S. 439, 453 (1988). Here, it is possible to reconcile the statutes in a way that gives effect to both: Employers are free to require arbitration, consistent with the FAA, as long as they do not extinguish the right to concerted action that is expressly granted by the NLGA and NLRA.

Although this reading limits the enforceability of arbitration clause provisions that, absent the NLRA, and NLGA, would be given effect, that limitation is necessary to preserve the ban on such clauses contemplated by the NLGA and NLRA, to avoid the abrogation of Section 7 rights and to preserve the FAA's pro-arbitration policies to their maximum extent consistent with those rights.

F. IF THE STATUTES COULD NOT BE RECONCILED, THE NLRA WOULD PREVAIL OVER THE FAA

As explained above, the best interpretation of the FAA is that it does not mandate enforcement of an arbitration clause that eliminates workers' substantive statutory rights. However, even if the FAA's enforcement mandate could not be construed to be in harmony with the NLGA's and NLRA's protection of the right to concerted legal action, the NLRA would override the FAA's mandate here.

1. The FAA's Enforcement Mandate May be Overridden By a "Contrary Congressional Command"

The Supreme Court has repeatedly held that, "[l]ike any statutory directive," the FAA's general mandate that arbitration clauses are enforceable "may be overridden by a contrary congressional command." *McMahon*, 482 U.S. at 226. Likewise, an arbitration clause is not enforceable where "legal constraints external to the parties' agreement foreclose arbitration." *Mitsubishi*, 473 U.S. at 628. Thus, where Congress acts to preclude enforcement of an arbitration clause, or (as here) of a particular feature of an arbitration clause, that action takes precedence— even

if the FAA, "standing alone," would otherwise require that the clause be enforced. *McMahon*, 482 U.S. at 226. Here, the NLGA expressly precludes enforcement of the clause at issue, precluding Courts from enforcing terms which interfere with concerted activity. 29 U.S.C. 102 and 103.

In *Mitsubishi Motors*, the Supreme Court acknowledged that the FAA does not require arbitration at all if congressional intent that a statute "include protection against waiver of the right to a judicial forum" is "deducible from the text or legislative history." *Mitsubishi Motors*, 473 U.S. at 628. Similarly, in *Rodriguez de Quijas, supra*, the Court made clear that even absent an express command in statutory text, an agreement to arbitrate would be unenforceable where arbitration would "inherently conflict with the underlying purposes of that other statute." *Rodriguez de Quijas, supra* 490 U.S. 477 483 (1989); *see also McMahon*, 482 U.S. at 227.

Mitsubishi Motors and its progeny make clear that the central question for purposes of the congressional command inquiry is what "Congress intended." *McMahon*, 482 U.S. at 227. Congressional intent sufficient to override enforcement of a provision of an arbitration clause may be found in a competing statute's text or legislative history, or an inherent conflict with the statute's underlying purposes. *Id*. Therefore, since the breadth of the NLGA and Section 7 so clearly reflect a Congressional intent to protect the right of workers to join

together to pursue their economic interests vis a vis their employers, through an expansive range of concerted activities, including class actions, and since Congress intended the NLGA and Section 7 to guarantee a right that is inconsistent with enforcing Bloomingdale's concerted action ban, that intent must override the FAA in this context, even if the FAA would otherwise require enforcement of the ban.

2. NLRA Section 7 Evinces a "Congressional Command" That Precludes Enforcement of an Arbitration Clause That Eliminates An Employee's Right to Engage in Concerted Action.

The question presented here is whether, by enacting the NLGA and NLRA, after the FAA, Congress intended to preclude enforcement of a contractual ban on concerted efforts to seek redress against employers through class actions in Court or arbitration—*not* whether it intended to preclude arbitration agreements generally. To answer that question, one need look no further than the language of the NLGA and NLRA itself. As set out, supra, the NLGA prohibits District Courts from enforcing the clause at issue, and Section 7 of the NLRA guarantees workers covered by the Act a substantive right to engage in "concerted activities," which encompasses a right to join together in a joint, class, or collective action in order to seek redress for workplace grievances, through any procedure available to them. 29 U.S.C. § 158(a)(1) of the NLRA, in turn, makes it an Unfair Labor Practice for employers "to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in" Section 7. Bloomingdale's concerted action ban does not merely

"interfere with" or "restrain" employees' Section 7 rights, it eliminates them outright, in clear contravention of the NLGA and Section 8.

G. THE PURPORTED CONSENT TO A WAIVER OF CLASS ACTION RIGHTS DOES NOT UNDERMINE THE UNENFORCEABILITY OF THE CONTRACT.

It is clear that the illegality of a contract prohibiting the concerted activity of initiating a class action to enforce wage laws on behalf of a group of workers is not dependent on whether or not the consideration for the agreement was a job (condition of employment), as in *D.R. Horton*, a raise in pay, or the "benefits" of arbitration.

Obviously, a voluntary agreement between and employer and an employee, wherein the employee agrees not to join a union in the future for $1,000, would run afoul of the NLGA and NLRA. There is no analytical reason to hold otherwise if, in exchange for the "benefits" of arbitration, instead of $1,000, an employee agrees not to engage in the future in a concerted activity other than joining a union; agrees, for example, not to pursue concerted litigation, not to join with others in a judicial forum, or other forum to litigate wage claims.

A case directly on point is *National Licorice Co, supra,* 309 U.S. 350 (1940). In that case, the employer encouraged employees to enter into individual contracts through, among other things, the incentive of raises, in exchange for an agreement that they would not present grievances through their own chosen

representatives or labor organizations. Significantly, a reading of the case makes clear that it was not a condition of employment, and that there were several employees who did not sign the agreement, and were not discharged over their refusal.

> "The Court agreed that the contracts 'were a continuing means of thwarting the policy of the Act *Id. [National Licorice]* at 361. 'Obviously,' the Court concluded, 'employers cannot set at naught the National Labor Relations Act by inducing their workmen to agree not to demand performance of the duties which it [the NLRA] imposes [on employers]: *Id* at 364" *D.R. Horton* at pg. 4.

National Licorice did not indicate that its "inducing" reference only applied to the inducement of employment. In fact, a "raise" was an inducement for the waiver of Section 7 rights in that case. Here, the inducement was "arbitration". Such inducement is not immune from the *National Licorice* analysis. Consistent with that principle, the Seventh Circuit recognized long ago that individual agreements requiring employees to adjust their grievances with their employer individually, rather than concertedly, "constitutes a violation of the [NLRA] per se, even when they were entered into without coercion." *NLRB v. Stone, supra, 125* F.2d at 756 (emphasis added). See also: *NLRB v. Superior Tanning Co*. 117 F.2d 881, 892 (7th Cir. 1940). After *National Licorice*, in 1944, the Supreme Court in *J.I. Case Co. v. NLRB,* 321 U.S. 332 (1944) observed that:

> Individual contracts *no matter what the circumstances that justify their execution or what their terms,* may not be availed of to defeat or

> delay the procedures prescribed in the [NLRA].....Wherever private contracts conflict with [the board's] functions [of preventing of unfair labor practices], they obviously must yield or the act would be reduced to a futility. *Id.* at 337
> [Emphasis added]

The "no matter what the circumstances" language of *J.I. Case* makes the voluntariness of the waiver herein irrelevant. Bloomingdales cannot take the position that because of the waiver, it can engage in the unfair labor practice of prohibiting employees from engaging in the "core" concerted activity of bringing group actions. Under *J.I. Case, NLRB v. Stone,* and *National Licorice*, the right at issue here, to pursue class claims, cannot be waived by a voluntarily entered into contract.

VIII. CONCLUSION

A contract that precludes workers from banding together to pursue vindication of their rights as workers in judicial or arbitral forums is unenforceable under the rights created by and public policy of the NLGA, NLRA and FAA. This Court should overturn the District Court decision, and permit working men and women to pursue class claims on behalf of themselves and their co-workers in Court and Arbitration proceedings.

IX. CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. This brief uses a proportional typeface and 14-point font, and contains 7222 words.

X. STATEMENT OF RELATED CASES

Johnmohammadi is not aware of any cases pending in this Court that would be deemed related pursuant to Ninth Circuit Rule 28-2.6.

Dated: October 26, 2012

Respectfully Submitted,

_____s/_____
Dennis F. Moss, Attorney for
Appellant Fatemeh Jonmohammadi

ADDENDUM

29 U.S.C.A. § 102

In the interpretation of this chapter and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are defined and limited in this chapter, the public policy of the United States is declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted.

29 U.S.C.A. § 103

Any undertaking or promise, such as is described in this section, or any other undertaking or promise in conflict with the public policy declared in section 102 of this title, is declared to be contrary to the public policy of the United States, shall not be enforceable in any court of the United States and shall not afford any basis for the granting of legal or equitable relief by any such court, including specifically the following:

Every undertaking or promise hereafter made, whether written or oral, express or implied, constituting or contained in any contract or agreement of hiring or employment between any individual, firm, company, association, or corporation, and any employee or prospective employee of the same, whereby

(a) Either party to such contract or agreement undertakes or promises not to join, become, or remain a member of any labor organization or of any employer organization; or

(b) Either party to such contract or agreement undertakes or promises that he will withdraw from an employment relation in the event that he joins, becomes, or remains a member of any labor organization or of any employer organization.

29 U.S.C.A. § 157

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C.A. § 158

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title…

9 U.S.C.A. § 2

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9th Circuit Case Number(s) 12-55578

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Signature (use "s/" format) s/Lea Garbe