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Kneeling in Protest The NFL's National Anthem Policy and Political Activity in the Workplace

By Deidra B. Demps, St. Petersburg

In August 2016, Colin Kaepernick—then quarterback for the San Francisco 49ers—first sat on the bench while the national anthem played before kickoff. Later in the season, he proceeded to kneel during the singing of the anthem. These actions, designed to draw attention to the problems of police brutality and racial injustice in America, triggered a series of events that have raised significant questions regarding social justice in America and the legality of protesting while employed by a private organization under a collective bargaining agreement. Issues of First Amendment rights, violations of the National Labor Relations Act (NLRA), and workplace disciplinary procedures have come to a head because of Kaepernick's actions and those of other NFL players across the country.

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SCOTUS: Waivers of Collective Actions in Employment Arbitration Are Enforceable

By Christopher Shulman, Tampa

In this era of seemingly ubiquitous employment arbitration agreements, the United States Supreme Court has weighed in on the validity of waivers of class (or collective) actions contained in such agreements. In *Epic Systems Corp. v. Lewis*,[1] the Court resolved a conflict among several circuits and found such waivers enforceable, specifically holding that the National Labor Relations Act's Section 7 "concerted activities" language does not—contrary to the National Labor Relations Board's decision in *D.R. Horton, Inc.*[2]—prohibit such waivers.[3]

Background

In *Epic Systems*, the Court consolidated appeals from three circuit cases involving essentially the same issue: whether the National Labor Relations Act (NLRA) prohibits class (or

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[3] Press Release, NFL Players Association, Joint Statement on Anthem Policy (July 20, 2018), https://www.nflpa.com/news/joint-statement-on-anthem-policy.

[4] U.S. Const. amend. I.

[5] Cal. Lab. Code §§ 98.6(a)(2016); Cal. Lab. Code § 1102 (West 2018). Similar laws exist in Colorado, Louisiana, New York, South Carolina, and Utah.

[6] Conn. Gen. Stat. Ann. § 31–51q (West 2018).

[7] *Id*.

[8] 29 U.S.C. § 157 (1947).

[9] *See Eastex, Inc. v. NLRB*, 437 U.S. 556, 564–65 (1978) (indicating that the NLRB and the courts have long held that the mutual aid or protection clause of Section 7 encompasses political activity).

[10] *Id*. at 567–68 (stating that the relationship between concerted activity and employee interests can become so attenuated that an activity cannot fairly be deemed to come within the mutual aid or protection clause).

SCOTUS, *continued from page 1*

collective) action waivers in otherwise valid arbitration agreements. In delivering the 5-4 opinion for the Court, Justice Gorsuch provided this background:

> Although the [Federal] Arbitration Act and the NLRA have long coexisted—they date from 1925 and 1935, respectively—the suggestion they might conflict is something quite new. Until a couple of years ago, courts more or less agreed that arbitration agreements like those before us must be enforced according to their terms. [citations omitted].
>
> The National Labor Relations Board's general counsel expressed much the same view in 2010. Remarking that employees and employers "can benefit from the relative simplicity and informality of resolving claims before arbitrators," the general counsel opined that the validity of such agreements "does not involve consideration of the policies of the National Labor Relations Act." Memorandum GC 10–06, pp. 2, 5 (June 16, 2010).
>
> But recently things have shifted. In 2012, the Board—for the first time in the 77 years since the NLRA's adoption—asserted that the NLRA effectively nullifies the Arbitration Act in cases like ours. *D.R. Horton, Inc.*, 357 N.L.R.B. 2277. Initially, this agency decision received a cool reception in court. *See D.R. Horton*, 737 F.3d, at 355–62. In the last two years, though, some circuits have either agreed with the Board's conclusion or thought themselves obliged to defer to it under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). . . .[4]

The Court's Rationale

In ruling the collective waivers valid, the Court explained that the Federal Arbitration Act (FAA) arose out of the perception that courts had been "unduly hostile to arbitration."[5] Thus, the FAA specifically provided that agreements to arbitrate were enforceable, and it required federal courts to enforce arbitration clauses as written, subject only to the usual defenses against enforcement of any contract.[6] Consequently, the Court reasoned, since parties are free to enter into arbitration agreements and to specify the procedures of such arbitration in their agreements, parties should likewise be able to bargain away their right to proceed in a class or collective action format.[7]

In reaching this conclusion, the Court rejected "the employees"[8] various arguments. First, the Court held the FAA's savings clause—i.e., that arbitration agreements "shall be valid, irrevocable, and enforceable, ***save upon such grounds as exist at law or in equity for the revocation of any contract***"[9]—did not provide an independent basis to override a collective action waiver. Instead, the savings clause merely required arbitration agreements to meet the same enforcement standards as any other kind of contract.[10]

Second, the Court determined the NLRA's "concerted activities" language does not reveal the required specific congressional intent to invalidate FAA-permissible waivers of collective action procedures:

> [M]issing entirely from this careful regime [i.e., the NLRA] is any hint about what rules should govern the adjudication of class or collective actions in court or arbitration. Without some comparably specific guidance, it's not at all obvious what procedures Section 7 might protect. Would opt-out class action procedures suffice? Or would opt-in procedures be necessary? What notice might be owed to absent class members? What standards would govern class certification? Should the same rules always apply or should they vary based on the nature of the suit? Nothing in the NLRA even whispers to us on any of these essential questions. And it is hard to fathom why Congress would take such care to regulate all the other matters mentioned in Section 7 yet remain mute about this matter alone—unless, of course, Section 7 doesn't speak to class and collective action procedures in the first place.[11]

Third, the Court observed that the collective action rights at issue here arise from the Fair Labor Standards Act (FLSA), rather than the NLRA. This is significant, the Court explained, because claims involving the FLSA's enforcement mechanism have been held arbitrable under the FAA since at least the Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*,[12] and "'every circuit to consider the question' has held that the FLSA allows agreements for individualized arbitration."[13] Consequently, the Court observed, the employees' NLRA vitiation-of-waivers argument is too attenuated from the substance of the dispute to prevail over the FAA.[14] Instead, the Court found that the various statutory "textual and contextual clues" corroborate the Court's long-standing position that absent an express congressional abrogation, there is no conflict between the FAA and other federal statutes that prevents arbitration of claims that could otherwise be brought in court.[15]

Finally, the Court determined the

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NLRB was not entitled to *Chevron* deference in this matter because in *D.R. Horton* "the Board ha[d]n't just sought to interpret its statute, the NLRA, in isolation; it ha[d] sought to interpret this statute in a way that limits the work of a second statute, the Arbitration Act."[16] In doing so, the Board exceeded "[o]ne of *Chevron*'s essential premises": that the agency to which the courts were considering deferring was construing solely the statutory scheme that Congress charged the agency to enforce.[17]

Dissent

Epic contained a vigorous dissent by Justice Ginsburg, in which Justices Breyer, Sotomayor, and Kagan joined. The dissent discussed the history of the NLRA and its intent to address the inequality of bargaining power inherent in the employee-employer relationship.[18] The dissent noted that the FLSA's collective action procedure was established for much the same reasons, predicated on the assumption that employees may be better able to retain counsel and to pursue recovery for violations of the FLSA if they are able to aggregate their claims and avail themselves of the economies of scale inherent in "collective litigation" against their employer.[19] And in response to the Court's argument that "[n]othing in the NLRA even whispers" about arbitration rules, Justice Ginsburg countered that the NLRA establishes "the right to act in concert using existing, generally available procedures."[20]

Since the NLRA makes it an unfair labor practice for an employer to interfere with employees' Section 7 rights to engage in concerted action for their mutual protection, the dissent would adopt the *D.R. Horton* rationale, holding waivers of FLSA collective actions in otherwise enforceable arbitration clauses invalid as unlawful infringements on employees' rights under both the FLSA and the NLRA.[21] Especially in this post-*Circuit City*[22] era of employer-dictated arbitration clauses—the terms of which employees have no meaningful ability to negotiate with their employers, argued the dissent—statutory rights to collective action should be protected, and employers should not be able to force employees to waive such rights.[23]

Impact on Employees and Employers in Florida

In reality, *Epic Systems* does little to change the law in Florida. Since at least 2014, the Eleventh Circuit has allowed waivers of FLSA collective action rights in arbitration agreements.[24] Other than remove the possibility the Supreme Court might adopt the NLRB's *D.R. Horton* approach to such waivers, *Epic Systems* has not affected the employee-employer playing field.

While there is still the possibility that employees, in groups or unions, may be able to persuade their employers to allow such collective actions in arbitration (and there are financial arguments to be made that could persuade some employers[25]), it remains likely that many employers will continue to require their employees to sign agreements that not only mandate arbitration of most employment law claims but also waive the employees' right to proceed as part of a class or collective action.


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Endnotes

1 138 S. Ct. 1612 (2018).

2 357 N.L.R.B. 2277 (2012).

3 Prior to *Epic Systems*, the Second, Fifth, Eighth, and Eleventh Circuits all held collective action waivers were valid, notwithstanding *D.R. Horton, Inc.*, 357 N.L.R.B. 2277: *Sutherland v. Ernst & Young*, 726 F.3d 290 (2d Cir. 2013); *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013); and *Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326 (11th Cir. 2014). By contrast, the Sixth, Seventh, and Ninth Circuits followed *D.R. Horton, Inc.: NLRB v. Alt. Entm't., Inc.*, 858 F.3d 393 (6th Cir. 2017); *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016); and *Morris v. Ernst & Young*, 834 F.3d 975 (9th Cir. 2016).

4 *Epic Sys.*, 138 S. Ct. at 1620–21.

5 *Id.* at 1621.

6 *Id.* (quoting *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013)).

7 *Id.* (citing, *inter alia, AT & T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011)).

8 This is how the Court referred to the groups advocating in favor of NLRB-*D.R. Horton* invalidation of collective action waivers.

9 9 U.S.C. § 2 (emphasis added).

10 138 S. Ct. at 1622–23 (discussing *Concepcion*).

11 *Id.* at 1625–26.

12 500 U.S. 20, 32 (1991). While *Gilmer* involved the arbitrability of a claim under the Age Discrimination in Employment Act (ADEA), the Court noted that the ADEA expressly incorporates the FLSA enforcement mechanism. *Epic Sys.*, 138 S. Ct. at 1626.

13 138 S. Ct. at 1626 (quoting *Alt. Entm't, Inc.*, 858 F.3d at 413).

14 *Id.*

15 *Id.* at 1627–28 (discussing cases involving several other federal statutes, including "the Norris–LaGuardia Act, a precursor of the NLRA").

16 *Id.* at 1629.

17 *Id.* at 1629–30.

18 *Id.* at 1633–49 (Ginsburg, J., dissenting).

19 *Id.* at 1637.

20 *Id.* at 1640.

21 *Id.* at 1641.

22 *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122–24 (2001) (holding that an offer to consider an application for employment was adequate consideration to support an agreement to arbitrate any employment claims between the applicant and the employer, whether the claims are predicated on federal or state law and whether the applicant was hired by the employer). Many authorities have extended *Circuit City* to mean that continuation of at-will employment is likewise adequate consideration to support an arbitration clause. *See, e.g., Hernandez v Acosta Tractors, Inc.*, Case No. 15-23486-CIV-MORENO, 2015 WL 12778790 (S.D. Fla. Nov. 12, 2015); *Johnston v. Dillard's Inc.*, Case No: 8:05-cv-916-T-26TBM, 2005 WL 8154165 (M.D. Fla. June 8, 2005).

23 138 S. Ct. at 1644.

24 *Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326, 1335–36 (11th Cir. 2014), *cert. denied*, 134 S. Ct. 2886 (2014). S*ee Hernandez v. Acosta Tractors, Inc.*, --F.3d--, 2018 WL 3761126 (11th Cir. 2018) ("We are aware that the inclusion of arbitration agreements in employment contracts is becoming increasingly widespread.") (citing *Epic Sys.*, 138 S. Ct. 1612, 1644 (2018) (Ginsburg, J., dissenting).

25 For example, I have served as an arbitrator where five employees had retained the same counsel to represent them against their common employer for FLSA violations. The arbitration agreements contained waivers of collective actions and, following *Walthour*, I ruled the waivers were valid. Notwithstanding the employer's insistence on individual arbitrations, as a practical matter the parties agreed that material discovered in any of the five cases would be admissible in all the other cases before me. Likewise, *to minimize cost—both in attorneys' fees and arbitrator fees*—the parties agreed to consolidate the hearings of all five cases, obviating the need for repeat testimony and argument, although the parties still had me prepare separate awards for each of the five employees' claims. In retrospect, the employer may not have gained much advantage by insisting on enforcement of the collective action waivers in that particular matter and likely incurred substantial increased litigation expense by doing so. Of course, by retaining the individual nature of each employee's FLSA claims, the employers avoided the FLSA collective action notice and opt-in process, with its substantial attendant cost.