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Fair Labor Standards Act Collective Action Provision Too Does Not Make Agreement to Mandatory Bilateral Arbitration Unenforceable

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When the Supreme Court ruled recently that the "concerted activities" provision of the National Labor Relations Act ("NLRA") did not make a contractual waiver of "class arbitration" unenforceable, it provided an extensive analysis that included comments regarding the interaction of the Federal Arbitration Act ("FAA"), the NLRA, and the Fair Labor Standards Act ("FLSA"). See *Epic Systems Corp. v. Lewis*, 584 U.S. ___, 138 S.Ct. 1612 (2018). The Sixth Circuit Court of Appeals has now had an opportunity to rule, not unexpectedly, that the "collective action" provision of the FLSA does not render unenforceable an agreement to dispute resolution exclusively by bilateral arbitration. *See Gaffers v. Kelly Services, Inc.*, No. 16-2210 (6th Cir. Aug. 15, 2018).

And the appellate court made short work of that decision. After noting that SCOTUS had held that the NLRA did not invalidate individual (i.e., bilateral) arbitration agreements, *see Epic Systems,* 138 S.Ct. at 1632, the Court of Appeals held that the FLSA was not "an obstacle to the arbitration agreements" in the case before it. Slip Op. at 2.

Furthermore, the Sixth Circuit echoed SCOTUS's opinion that arbitration as envisioned in the Federal Arbitration Act ("FAA") is fundamentally bilateral in nature. See Slip Op. at 5.

Bottom line: this decision confirms that an employment contract arbitration provision that excludes "class arbitration" (a) by waiver, or (b) by mandating bilateral arbitration exclusively, should be judicially enforced as written.

The plaintiff was a former employee of Kelly Services "(KSI") who worked from home, providing "virtual call center" support to KSI's clients. Gaffers commenced a class action suit against KSI, alleging underpayment by the company for his time spent logging into the company's network, logging out of that network, and fixing technical problems that arose on the job. Gaffers sought "back pay and liquidated damages under the collective action provision of the [FLSA]," citing 29 U.S.C §216(b).

The FLSA provides there that

"[a]n action to recover liability prescribed [in sections 206, 207, and 215(a)(3)] may be maintained

against any employer . . . in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated."

Furthermore,

"No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." *Id*.

More than 1600 "co-workers" had "signed on" to Gaffers' suit. But about half of them (not including Gaffers) had previously made an arbitration agreement with KSI, which provided that the "only forum" for employment claims, including wage claims, would be individual (bilateral) arbitration. Slip Op. at 2. KSI therefore moved to compel individual arbitrations under the FAA. The District Court denied that application, KSI appealed, and the Sixth Circuit reviewed the denial below *de novo*. Between the oral argument (Oct. 4, 2017) and the decision (Aug. 15, 2018) in the *Gaffers* appeal, the Supreme Court issued its *Epic Systems* decision (May 21, 2018)

Gaffers argued on appeal that the NLRA and FLSA provisions for "concerted activities" (NLRA) and "collective action" (FLSA) each (1) in effect superseded the FAA; and (2) at least made the arbitration agreements "illegal" and thus unenforceable under the FAA's "savings clause." The court noted that SCOTUS had rejected both of these arguments in *Epic* insofar as they concerned the NLRA, *see Epic*, 138 S.Ct. at 1623-30. The Sixth Circuit then turned to the arguments as they concerned the FLSA.

First, the Court indicated, since Congress did not expressly provide in the FLSA "that an arbitration agreement poses no obstacle to pursuing collective action," it did not clearly manifest a Congressional intent to make individual arbitration agreements unenforceable. Nor does the FLSA state that a bilateral arbitration agreement is nullified if an employee chooses to sue collectively after signing such an agreement. Therefore the FAA and FLSA are not irreconcilable. Furthermore, the FLSA language in question is permissive — it uses the word "may" — thus "giv[ing] employees the *option* to bring their claims together," Slip Op. at 3, but it does not require that.

The Sixth Circuit furthermore pointed out that the Supreme Court had already held that the Age Discrimination in Employment Act ("ADEA"), which incorporates by reference the FLSA's collective action language, did not displace the FAA. Slip Op. at 3, 4, *citing Gilmore v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 27 (1991). It also noted that "every other Circuit to have considered whether the FLSA overrides the [FAA] has said that it does not." Slip Op. at 4.

The Court of Appeals concluded that the FLSA does not clearly and manifestly make arbitration agreements unenforceable, and it therefore should enforce the KSI employees' arbitration agreements as written, in accordance with the FAA requirement. Id.

Second, Gaffers' argument regarding the FAA's "savings clause" (9 U.S.C.§ 2) was determined to be meritless, just as a similar argument had been found meritless by the Supreme Court in *Epic*. The savings clause enables a court to decline to enforce an arbitration agreement "upon such grounds as exist at law or in equity for the revocation of any contract." (There are typically matters of state contract law.) However, an attack on an agreement because it provides for arbitration, or even more tellingly because it requires bilateral arbitration (a fundamental attribute of arbitration) does <u>not</u> fall within the savings clause. Therefore, Gaffers' argument that the employee arbitration agreement should be deemed "illegal" and therefore unenforceable because it is inconsistent with the FLSA's authorization of collective action by employees, fails.

In the end, the Court of Appeals followed the *Epic* analysis to its natural conclusion concerning the similar relationship of the FLSA and the FAA. (The Court of Appeals did not seek to resolve matters with regard to the 800 or so employees, including Gaffers, who had not made an arbitration agreement with KSI. Rather, the Court remanded the action to the District Court for proceedings consistent with its opinion.)

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