UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISON OF JUDGES

CONVERGYS CORPORATION

and CASE 14-CA-075249
14-CA-083936

HOPE GRANT, an individual

Rotimi Solanke, Esq.
for the General Counsel.
Raymond D. Neusch, Esq. (Frost Brown Todd, LLC)
Cincinnati, Ohio,
for the Respondent.
Mark A. Potashnick, Esq. (Weinhaus & Potashnick)
St. Louis, Missouri,
for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was submitted to me upon a stipulated record pursuant to the parties' joint motion. Hope Grant, the Charging Party, filed the charges giving rise to this case on February 23, and June 26, 2012. The General Counsel issued the complaint in this case on July 31, 2012.

On the entire record and after considering the briefs filed by the General Counsel, Respondent and the Charging Party, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is an Ohio corporation, with offices in Cincinnati, Ohio and places of business in many other states, including a call center in Hazelwood, Missouri.[1] Respondent performed services valued in excess of $50,000 in states other than Ohio in the year prior to the

[1] This case was consolidated with two charges filed by employees of the Valdosta, Georgia call center, which were withdrawn pursuant to a settlement agreement and then severed from the instant matter.

issuance of the complaint. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

On about September 16, 2011, Hope Grant completed and submitted an application for employment with Respondent at its Hazelwood, Missouri call center. The form she submitted contained a waiver of the right to a jury trial, a waiver of any statute of limitations longer than 6 months and the following clause:

> 9. I further agree that I will pursue my claim or lawsuit relating to my employment with Convergys (or any of its subsidiaries or related entities) as an individual, and will not lead, join, or serve as a member of a class or group of persons bringing such a claim or lawsuit.

Respondent has required all applicants for a job at Convergys to sign this waiver as a condition of their employment since at least August 2011. Respondent hired Grant as a customer service representative in September 2011.

On March 16, 2012, Grant, individually and on behalf of the employees at Respondent's Hazelwood call center, filed a civil suit against Respondent in the United States District Court, Eastern District of Missouri. The complaint alleged that Respondent was violating the Fair Labor Standards Act (FLSA), 29 U.S.C. section 201 et seq. The class action complaint alleges that Grant and other similarly situated customer service representatives perform preparatory activities and other related work activities that are integral and indispensable for them to perform their customer service duties. These include booting up computers, logging into and out of various computer programs and applications, and reading company communications. The complaint further alleges that Respondent does not pay employees for this time, in violation of the FLSA.

On June 22, 2012, Respondent filed a motion to strike the class and collective allegations in the FLSA suit. It argues that Grant and other employees had waived their right to bring any collective claims or suits pertaining to their employment. Grant's attorneys filed a memorandum in opposition to this motion to strike.

Analysis

The General Counsel alleges that Respondent is violating Section 8(a)(1) of the Act by requiring job applicants to waive their rights to file collective lawsuits, by enforcing these waivers by filing the motion to strike the class and collective allegations of Grant's suit and defending against the class and collective allegations of Grant's suit on the basis of the waiver she signed.

Administrative Law Judges of the National Labor Relations Board are bound to follow Board precedent which neither the Board nor the Supreme Court has reversed, notwithstanding contrary decisions by courts of appeals, *Waco, Inc.,* 273 NLRB 746, 749 fn.14 (1984).

The parties appear to recognize that I am bound by the Board's decision in *D. R. Horton, Inc.,* 357 NLRB No. 184 (2012), which is pending before the United States Court of Appeals for the Fifth Circuit. Respondent submits that the Board wrongly decided that case. However, unless it is materially distinguishable from the instant case, I am bound to conclude that Respondent violated the Act as alleged.[2]

In *D. R. Horton,* the Board held that, "employers may not compel employees to waive their NLRA right to collectively pursue litigation of employment claims in *all* forums, arbitral and judicial," (slip opinion page 12 and 13). Thus, despite the fact that the *D. R. Horton* decision concerned a mandatory arbitration agreement, rather than a lawsuit which waived the employees' rights to maintain a class or collective action, it is clearly dispositive of this case. Indeed, the Board's order specifically requires *D. R. Horton* to cease and desist from "maintaining a mandatory arbitration agreement that waives the right to maintain class or collective actions in all forums, whether arbitral or judicial."

In footnote 28 at page 13 of the decision, the Board stated that it was not reaching the more difficult question of whether an employer can require employees, as a condition of employment to waive their right to pursue class or collective action in court so long as the employees retain the right to pursue class claims in arbitration. Since Respondent's employees did not have recourse to arbitration of their grievances, this does not present an issue in this case.

Respondent argues that this case is distinguishable because Hope Grant was a job applicant, not an employee within the meaning of the Act, when she signed the waiver. However, that is simply incorrect. Applicants for employment are employees within the meaning of section 2(3) of the NLRA, *Phelps Dodge Corporation v NLRB,* 313 US 177 (1944); *NLRB v. Town & Country Electric, Inc.,* 516 US 85, 88 (1995). Moreover, Ms. Grant was working for Respondent when she exercised the right found by the Board in *D.R. Horton* to file a class action lawsuit.

Finally, Respondent argues that even assuming that employees may have a section 7 right to file or participate in a class action lawsuit, an employer does not violate the Act in seeking dismissal of the class action suit on the basis of a waiver such as the one it requires its job applicants to execute. The Board's discussion at page 6 of the *D.R. Horton* decision convinces me otherwise. The Board explicitly rejected the rationale of a General Counsel memo which indicated that while employees are free to bring employment-related class action lawsuits, the employer may seek to have the suit dismissed on the ground that the employees executed a valid waiver.

Respondent's brief at page 10 cites footnote 24 at page 10 of the Board's *D.R. Horton* decision in support of its argument that an employer does not commit an unfair labor practice by merely opposing a plaintiff's motion for class certification. I read footnote 24 as standing for the proposition that an employer remains free to assert arguments against certification other than those based on the kind of waiver Respondent required of job applicants in this case.[3]

[2] I also believe it is not within my authority to opine as to whether the *D.R. Horton* is procedurally infirm, as Respondent contends.

[3] *D.R. Horton* does not prevent an individual employee from a non-coercive waiver of his or her right

CONCLUSIONS OF LAW

By maintaining and enforcing a mandatory provision in its employment applications that waives the right to maintain class or collective actions in all forums, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and has violated Section 8(a)(1) of the Act.

REMEDY

Because the Respondent utilized the waiver herein on a corporate-wide basis, I shall recommend that the Respondent be ordered to post a notice at all locations where the waiver is in effect. See, e.g., *U-Haul Co. of California*, 347 NLRB 375 fn. 2 (2006), enfd. 255 Fed. Appx. 527 (D.C. Cir. 2007).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Respondent, Convergys, Cincinnati, Ohio and Hazelwood, Missouri, its officers, agents, successors, and assigns, shall:

1. Cease and desist from

(a) Maintaining a mandatory requirement in its employment applications that waives employees' right to maintain class or collective actions in all forums.

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

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

(a) Rescind or revise its employment applications to make it clear to employees that the application does not constitute a waiver in all forums of their right to maintain employment-related class or collective actions.

(b) Notify the employees of the rescinded or revised application to include providing them a copy of the revised application or specific notification that provisions waiving their right to maintain employment-related class or collective actions has been rescinded.

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to participate in a class action lawsuit. It does hold that a waiver obtained by the employer as a condition of employment to be a violation of the NLRA.

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Within 14 days after service by the Region, post at its facility at Hazelwood, Missouri, and any other facility where the waiver provisions have been in effect, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 14 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, 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. In the event that, during the pendency of these proceedings, 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 August 23, 2011.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 14 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.

Dated, Washington, D.C., October 25, 2012

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Arthur J. Amchan
Administrative Law Judge

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 require you as a condition of your employment to waive the right to maintain class or collective actions in all forums.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind or revise our employment application to make it clear to employees that the application and their acceptance of employment do not constitute a waiver of the right in all forums to maintain class or collective actions.

WE WILL notify all employees who were subject to these waivers that we are no longer maintaining and enforcing this waiver.

WE WILL provide these employees with either a revised employment application or specific notification that the waiver has been rescinded.

CONVERGYS CORPORATION

_____

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

1222 Spruce Street, Room 8.302, Saint Louis, MO 63103-2829
(314) 539-7770, Hours: 8 a.m. to 4:30 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (314) 539-7780.