UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

TARLTON AND SON, INC.
and
ROBERT MUNOZ, an Individual

Cases 32-CA-119054
32-CA-126896

THE GENERAL COUNSEL'S ANSWERING BRIEF

The General Counsel files this brief pursuant to the Board's Order of February 12, 2019, which granted the parties permission to file responsive briefs to the *Amicus Curie* brief filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) in support of the Charging Party.

A. Section 7 Does Not Protect Litigation Activities

In its brief, the AFL-CIO broadly asserts that employee action in filing a class or collective legal action should be construed as protected concerted activity under Section 7 of the Act. However, in light of the Supreme Court's recent decision in *Epic Systems*, 138 S. Ct. 1612 (2018), which effectively overruled *D.R. Horton* and reversed *Murphy Oil USA, Inc.,* the precedent upon which the AFL-CIO relies is no longer viable law.[1] While the Board has held that the filing of a lawsuit by a *group* of employees is protected activity,[2] the Supreme Court's

[1] *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012); *Murphy Oil*, 361 NLRB No. 72 (2014).

[2] *See, e.g.*, *Spandsco Oil & Royalty Co.*, 42 NLRB 942, 948-49 (1942) (the filing of a FLSA suit by three employees was protected concerted activity); *Trinity Trucking & Materials Corp.*, 221 NLRB 364, 365 (1975) (the filing of a civil action by a group of employees is protected activity unless done with malice or bad faith), *enfd. mem.* 567 F.2d 391 (7th Cir. 1977), *cert. denied* 438 U.S. 914 (1978); *United Parcel Service*, 252 NLRB 1015, 1018, 1022 n.26 (1980) (filing a class action state lawsuit regarding rest periods was protected concerted activity), *enfd.* 677 F.2d 421 (6th Cir. 1982); *Mojave Electric Coop.,* 327 NLRB 13, 13 (1998) (two employees petitioning for an injunction was protected concerted activity), *enfd.* 206 F.3d 1183, 1188 (D.C. Cir. 2000).

recent decision in *Epic Systems*, where the majority concluded that Section 7 of the NLRA does not include the right to engage in class or collective arbitration or other legal proceedings regarding employment-related claims, casts severe doubt on the Board's decisions previously finding joint or individual filing of a class or collective legal action to be protected. The Court held that where employees have signed arbitration agreements concerning employment claims, the Federal Arbitration Act ("FAA") requires courts to enforce those agreements according to their terms, including those mandating only individualized proceedings. 138 S. Ct. at 1619. The majority thus held that arbitration agreements prohibiting class or collective legal proceedings were not illegal under Section 7's protection of concerted activities. *Id.*

In so holding, the Court also rejected the argument that the NLRA created a right to engage in class or collective legal action. *Id.* at 1624. Indeed, the Court found that "Section 7 does nothing to address the question of class and collective actions" and that Section 7 protects "other concerted activities" rather than "the highly regulated court room "activities" of class and joint litigation." *Id.* at 1625 and 1626. The Court reasoned that Congress included in Section 7 the phrase "other concerted activities for the purpose of . . . mutual aid or protection" to refer back to the other terms previously listed in the provision, which discuss pursuing representation by a labor organization and collective bargaining, rather than as a catch-all term for activities that are not subsumed by the first two types of activity.[3] *Id.* at 1625.

Given the Court's view that Section 7 does not protect litigation activities, it is doubtful that the Court would view the mere filing of a lawsuit, whether individually or in concert with

[3] In making this point, however, the majority opinion relies on, among other cases, *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962), which did not involve organizing or collective bargaining but rather involved unrepresented employees engaging in a work stoppage to protest workplace conditions. *See Epic Systems*, 138 S. Ct. at 1628.

others, as protected concerted activity under Section 7. Therefore, the group filing of a class or collective legal action, such as the lawsuit filed by the employees at issue in this case, can no longer be considered protected under the Act and, as such, the complaint in this matter should be dismissed.

B. The Board Should Overturn its Decision in *Beyoglu*

Cases in which the Board has previously held that a single individual's filing of a class or collective legal action constituted protected concerted activity under the Act, like its decision in *Beyoglu,* are even less supportable and should be overturned. *Beyoglu*, 362 NLRB No. 152, slip op. at 1. Thus, in 2015, the Board for the first time extended protection for group legal filings, such as that involved here, and held that an *individual* employee who files a lawsuit ostensibly on behalf of himself, but benefitting other employees is engaged in protected concerted activity. *Id.* In *Beyoglu*, the Board determined that the individual, in filing a FLSA collective action lawsuit, engaged in protected concerted activity, despite the fact that no other employees participated in filing the lawsuit. The Board based this holding on "principles of *Meyers II*, as articulated in both *D.R. Horton* and *Murphy Oil"* -- "that the filing of an employment-related class or collective action by an individual employee is an attempt to initiate, to induce or to prepare for group action and is therefore conduct protected by Section 7." *Id.*, slip op. at 2 (quoting *Meyers Industries*, 281 NLRB 882, 887 (1986) *(Meyers II)*, *affd. sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C.Cir. 1987), *cert. denied* 487 U.S. 1205 (1988)).

In determining whether an employee's activity is protected concerted activity under the Act, the Board has said it "depends on the manner in which the employee's actions may be linked to those of his coworkers." *Fresh & Easy Neighborhood Market, Inc.,* 361 NLRB 151, 153 (2014). Activity of an individual is concerted when it seeks "to initiate or to induce or to prepare for group action" or to bring group complaints to management's attention. *Meyers Industries (Meyers II),* 281 NLRB at 885, 887. An

individual acts on the authority of other employees even if not directly told to take a specific action if the concerns expressed by the individual employee to management are a "logical outgrowth of the concerns expressed by the group." *Mike Yurosek & Son, Inc.,* 306 NLRB 1037, 1038-39 (1992) (finding four employees' individual decisions to refuse overtime work were logical outgrowth of concerns they expressed as a group over new scheduling policy), *supplemented by* 310 NLRB 831 (1993), *enfd*. 53 F.3d 261 (9th Cir. 1995). Employees' discussion of shared concerns about terms and conditions of employment can be concerted, even when the discussion "in its inception involves only a speaker and a listener, for such activity is an indispensable preliminary step to employee self-organization." *Meyers Industries (Meyers II)*, 281 NLRB at 887 (quoting *Root-Carlin, Inc.,* 92 NLRB 1313, 1314 (1951)). However, in light of the Court's finding in *Epic Systems*, the mere filing of a class or collective legal action should not in itself be considered an effort to induce others to participate in group action.

The Board's decision in *Pikes Peak Pain Program* is consistent with that conclusion. There, the Board held that an individual employee who had filed a wage claim on her own behalf after the employer docked her for four hours of pay had not engaged in concerted activity. *Myth, Inc., d/b/a Pikes Peak Pain Program*, 326 NLRB 136, 148-49 (1998) (recognizing the Board in *Meyers II* specifically overturned the per se or constructive standard of concerted activity set forth in *Alleluia Cushion Co.,* 221 NLRB 999, 1000 (1975), where the Board previously had held that an individual employee seeking to enforce employment-related statutory rights had engaged in concerted activity). The General Counsel had argued that her claim filing constituted concerted activity because a favorable resolution of the issue would have benefitted her coworkers, most of whom were also salaried employees. *Id.* at 148. However, because there was no evidence either that the employee had discussed the wage issue with her coworkers before filing the claim or that coworkers had a similar complaint, the Board affirmed the ALJ's conclusion that the employee did not engage in concerted activity. *Id.* at 149. In short, the facts failed to support any inference that the employee sought to either initiate group action or present management with a group complaint. In cases like *Beyoglu* and its progeny, where there is no evidence that any co-workers share the concern of the filing party, it is clear that an individual filing a class or collective legal action is

acting to seek redress for a personal work complaint. The fact that a personal claim may also benefit ones coworkers, because a lawyer styled the lawsuit as a "class action," fails to transform the personal nature of such an individual claim. Focusing on whether an individual's complaint may yield favorable consequences for coworkers should not be used to define what constitutes "concerted activities" because that would effectively convert any individual's workplace complaint into a group-held complaint, thereby rendering Section 7's limiting language void. *See, e.g., Media General Operations, Inc., d/b/a The Tampa Tribune*, 346 NLRB 369, 371-72 (2006) (an employee who raised a concern about his supervisor's favoritism spoke "only for himself" and there was no evidence that his coworkers shared his belief that favoritism existed, so his complaint was "a personal gripe" and not protected concerted activity.)

An individual's filing of a class or collective legal action is also distinguishable from cases where individual concerns were raised in a meeting between a group of employees and their employer. In *Whittaker Corp.,* for example, the Board held that the spontaneous remarks of an employee during a group meeting where the employer announced it would not grant the annual wage increase constituted protected concerted activity because the employee's conduct was an inherent appeal to his coworkers to join him in protesting the employer's changes. 289 NLRB 933, 934 (1988) ("His statements implicitly elicited support from his fellow employees against the announced change."). *See also Caval Tool Div.*, 331 NLRB 858, 863 (2000) (finding the speech of an individual employee at a group meeting questioning the employer's change to breaks, which impacted other employees as well, to be protected concerted activity), *enfd.* 262 F.3d 184 (2d Cir. 2001). The Board noted that under the circumstances, the employee did not have the opportunity to meet and discuss the employer's announcement with his coworkers before he spoke. *See Whittaker Corp.*, 289 NLRB at 934. The Board then held that it was irrelevant whether any other employee actually responded to the employee's appeal and accepted the invitation to engage in group action for the original remarks to be considered concerted. *Id.*

at 934 ("An employee does not have to engage in further concerted activity to ensure that his initial call for group action retains its concertedness. In addition, employees do not have to accept the individual's invitation to group action before the invitation itself is considered concerted."). The group meeting cases are distinguishable because such meetings necessarily involve the presence of other employees when an individual speaks out about working conditions. In cases like *Beyoglu*, there is no reason to presume that any other employee will even know that a coworker has filed a lawsuit over working conditions.

Styling a claim as a class or collective action does not convert the filing of the lawsuit into concerted or group action. As Member Miscimarra reasoned in his dissenting opinion in *Beyoglu,* concerted activity requires some involvement by two or more employees and that cannot be established by how an employment-related legal claim is pled or whether it is styled as a class or collective action proceeding. *See Beyoglu*, 362 NLRB No. 152, slip op. at 4 (Member Miscimarra, dissenting). There is no reason to think that any other employee will actually *participate* in a lawsuit simply because it is styled as a class action. *Id.* (quoting *Murphy Oil*, 361 NLRB 774, 779 fn.28 (2014) (Member Miscimarra, dissenting), *enf. denied in relevant part* 808 F.3d 1013 (5th Cir. 2015)*, affd. sub nom. Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018)). Section 7 protects a broad range of employee activity, but that protection stems from the concerted conduct of employees; an individual pursuing a legal claim as a class action does not demonstrate the existence of concerted employee conduct.[4]

[4] *See Murphy Oil*, 361 NLRB at 798 (dissenting opinion of Member Miscimarra). See also *Meyers Industries, (Meyers I)*, 268 NLRB 493, 496 (1984), and *Meyers II*, 281 NLRB at 885, 887 (overturning the per se or constructive standard of concerted activity from *Alleluia Cushion Co.,* 221 NLRB at 1000, and subsequently requiring a case-by-case analysis of the allegedly concerted employee conduct and its connection to group activity).

In sum, here, the Board has the opportunity to clarify that in cases of an individually filed class or collective legal action, where there is no evidence that individual filer sought to either initiate and induce group action or bring a group complaint to management's attention, discussed the filing of the lawsuit with any coworker, or represented a commonly held workplace complaint, amount to a personal complaint over employment terms that falls outside the protections of Section 7.

C. The Charging Party's Conduct in Jointly Filing a Class or Collective Legal Action Is Not a Protected Activity and the Complaint Should Be Dismissed.

Finally, and most important, the Supreme Court's implicit holding in *Epic Systems* that Section 7 protection does not include the filing of a legal proceeding, whether or not filed individually or as a group, undercuts the continued viability of *Beyoglu.* Under the reasoning of *Epic Systems*, while the Charging Party's activities in this case may have been concerted he had filed the lawsuit with two other employees, his conduct would nonetheless not be protected by Section 7 because the "activity" of filing a class or collective legal action, even concertedly, is not among the enumerated or catchall protected activities described in Section 7.

Indeed, the Court's discussion in *Epic Systems* suggests that the joint filing of a legal claim is not protected by the Act. In holding that waivers of collective or class action arbitrations were not unlawful under the NLRA, the Supreme Court did not make its determination based on balancing employer interests with the Section 7 rights of employees. Rather, the Court concluded that collective arbitration and waivers of such arbitrations do not even implicate employees' Section 7 rights. Indeed, the Court held that Section 7 protections do not include the filing of class or collective legal actions, but rather "other concerted activities" that "employees 'just do' for themselves in the course of exercising their right to free association in the workplace." The activities protected by Section 7 are those engaged in by employees to further collective

organizing and bargaining, not the filing of legal claims. According to this reasoning, it would thus appear that the joint filing of a lawsuit, such as that at issue here, is not protected activity under Section 7.

Moreover, even if *Epic Systems* has left some discretion in the Board to extend Section 7 protection to employees' joint filing of non-NLRA civil actions, the Board should decline to exercise that discretion for prudential reasons. In virtually every similar circumstance in which employees might enforce statutory or common law employment rights through administrative or judicial action -- employees are already protected by processes and procedures external to the NLRA. All of these non-NLRA claims are subject to independent rules and due process considerations deriving from their state or federal constitutional, statutory or judicial origins, and administration of such matters is better left to those agencies and courts that preside over them. This conclusion does not leave employees, like the Charging Party, who file legal actions against their employer without protection from retaliation. For example, the FLSA and the California Labor Code prohibit retaliation against employees who assert FLSA claims or California Labor Code violations. As Member Miscimarra noted in his dissent in *Beyoglu,* the NLRB had no jurisdiction over the charging party's claim because the administrative law judge found that the charging party was discharged in retaliation for filing an FLSA action, which is not prohibited under the NLRA. "The NLRB has no jurisdiction over alleged violations of FLSA Section 15(a)(3)." *Beyoglu,* 362 NLRB No. 152, slip op. at 5. Where employees have effective remedies and protections under other statutes, any remedy under the NLRA would be duplicative and would require the Board to interpret a statute other than the NLRA.

Section 8(a)(4) of the NLRA prohibits retaliation for exercising Section 7 rights and for filing claims to vindicate NLRA protections. It does not provide a cause of action for retaliation

for the exercise of non-NLRA protected activities. Recognition of this principle in conjunction with the required application of *Epic Systems* warrants the overruling of not only *Beyoglu* but also other cases that have held that the joint filing of a lawsuit to vindicate a non-NLRA claim is protected concerted activity under the Act.[5]

D. Conclusion

For the above reasons, the General Counsel urges the Board to overturn *Beyoglu* and conclude that neither a jointly filed nor individual filed class or collective legal action, on its own, is sufficient to constitute protected concerted activity; to find that the Charging Party's conduct in filing the joint lawsuit in this case is not a protected activity under the Act; and, to dismiss the complaint in this matter.

DATED AT Oakland, California, this 26th day of February, 2019.

Respectfully Submitted,

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[5] See, e.g., *Spandsco Oil & Royalty Co.,* 42 NLRB at 948-49; *Trinity Trucking & Materials Corp*., 221 NLRB at 365; *United Parcel Service*, 252 NLRB at 1018, 1022 & n.26; *Mojave Electric Coop.,* 327 NLRB at 13.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32

TARLTON AND SON, INC. **and** **ROBERT MUÑOZ, an Individual**	**Cases** **32-CA-119054** **32-CA-126896** **Date:** **February 26, 2019**

AFFIDAVIT OF SERVICE OF THE GENERAL COUNSEL'S ANSWERING BRIEF

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) upon the persons at the addresses and in the manner indicated below. Persons listed below under "E-Service" have voluntarily consented to receive service electronically, and such service has been effected on the same date indicated above.

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