Everglades College, Inc. d/b/a Keiser University and Everglades University *and* Lisa K. Fikki. Case 12–CA–096026

November 27, 2019

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN, KAPLAN, AND EMANUEL

On December 23, 2015, the National Labor Relations Board issued a Decision and Order finding that the Respondent violated Section 8(a)(1) of the National Labor Relations Act by maintaining its Employee Arbitration Agreement (EAA). *Keiser University*, 363 NLRB No. 73 (2015). Applying *D. R. Horton, Inc.*, 357 NLRB 2277 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013), and *Murphy Oil USA, Inc*., 361 NLRB 774 (2014), enf. denied in relevant part 808 F.3d 1013 (5th Cir. 2015), the Board found that the EAA unlawfully required employees, as a condition of their employment, to waive their rights to pursue class or collective actions involving employment-related claims in all forums, whether arbitral or judicial. *Keiser University*, above, slip op. at 1. The Board also found that the EAA violated the Act on the basis that employees reasonably would construe it to restrict their access to the Board's processes. Id., slip op. at 1 and fn. 2. Based on these violations, the Board further found that the Respondent violated Section 8(a)(1) by discharging Charging Party Lisa K. Fikki for failing to sign the EAA.

The Respondent filed a petition for review with the United States Court of Appeals for the Eleventh Circuit. The Board filed a cross-application for enforcement and, subsequently, the Charging Party filed a motion to intervene in the case, which the court granted. On May 21, 2018, the Supreme Court held that employer-employee agreements that contain class- and collective-action waivers and require individualized arbitration do not violate Section 8(a)(1) of the Act and should be enforced as written pursuant to the Federal Arbitration Act (FAA). *Epic Systems Corp. v. Lewis*, 584 U.S. __, 138 S. Ct. 1612, 1632 (2018).

On June 26, 2018, the Eleventh Circuit granted the Respondent's petition for review and denied the cross-application for enforcement with respect to the portion of the Board's Order governed by *Epic Systems* and remanded the remainder of the case for further proceedings before the Board. *Everglades College v. NLRB*, 893 F.3d 1290 (11th Cir. 2018). On November 29, 2018, the Board issued a Notice to Show Cause why this case should not be remanded to the administrative law judge for application of the *Boeing*[1] standard, discussed below. The parties filed statements of position, with the Respondent favoring remand and the General Counsel and Charging Party opposing it.

The Board has considered its previous decision and the record in light of the statements of position filed by the parties regarding the necessity of remanding the case to the administrative law judge. For the reasons that follow, we conclude that no remand is necessary, and, under the standard set forth in *Boeing* and its progeny, we find that the EAA unlawfully restricts access to the Board and its processes. Accordingly, we find that the Respondent violated Section 8(a)(1) of the Act by maintaining the EAA and by discharging Fikki for failing to sign it.

I. FACTS

On July 13, 2008, Lisa K. Fikki began working as a graduate admissions counselor for the Respondent, a private, non-profit university in Fort Lauderdale, Florida. In early 2009, the Respondent decided to implement mandatory arbitration as part of its personnel policies and procedures and required its existing employees, including Fikki, to sign a document titled, "Confidentiality, Non-Solicitation, and Arbitration Agreement." Fikki signed this agreement in 2010.

In late 2011, the Respondent did away with its paper employment agreements and adopted electronic personnel records for all employees. On June 15, 2012,[2] the Respondent sent an email to all employees requiring them to complete a "re-boarding" process for the Respondent to move all its personnel files to an electronic format. The Respondent's e-mail asked all existing employees to complete the reboarding process by June 22. The reboarding process required employees, among other things, to electronically sign a document titled "Employee Arbitration Agreement" (EAA). The EAA included the following class- or collective-action waiver and requirement that employment disputes be resolved exclusively through individualized arbitration rather than court litigation:

> Arbitration of Claims. Any controversy or claim arising out of or relating to Employee's employment, Employee's separation from employment, and this Agreement, including but not limited to, claims or actions brought pursuant to federal, state or local laws regarding payment of wages, tort, discrimination, harassment and retaliation, except where specifically prohibited by law, shall be referred to and finally resolved exclusively by

[1] *Boeing Co.*, 365 NLRB No. 154 (2017).

[2] All dates hereinafter refer to 2012 unless otherwise indicated.

> binding arbitration in Fort Lauderdale, Florida, in accordance with the Employment Law Arbitration Rules of the American Arbitration Association, and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof. Notwithstanding the above, Employee agrees that there will be no right or authority, and hereby waives any right or authority, for any claims within the scope of this Agreement to be brought, heard or arbitrated as a class or collective action, or in a representative or private attorney general capacity on behalf of a class of persons or the general public. Filing and arbitration fees shall be in accordance with the arbitration rules and any applicable laws. The arbitrator shall have the authority to apportion the filing fee and costs of arbitration with the presumption that the prevailing party shall be entitled to recover all legitimate costs. Unless provided by statute to the contrary, each party shall bear its/his/her own attorneys' fees.

The EAA also contained a provision acknowledging that each party has had "ample opportunity to seek independent legal counsel . . . with respect to the negotiation and execution of this Agreement."

On June 21, Fikki responded to the Respondent's e-mail, asking if she could print the re-boarding documents and have them reviewed by an attorney. The Respondent agreed to Fikki's request but reminded her of the June 22 re-boarding deadline and asked her to notify the Respondent if she needed more time. On June 26, the Respondent sent Fikki (and two other employees) an e-mail, asking them again to complete the reboarding process given the June 22 deadline. Fikki replied that she needed more time to review the documents.

On June 27, the Respondent held mandatory meetings for those employees who had not yet completed the reboarding process. During the meeting she attended, Fikki told the Respondent's officials that she wanted to obtain legal advice regarding the documents. The Respondent's Chancellor told Fikki that she could have more time to complete the re-boarding process if she could verify by June 29 that she had scheduled an appointment with an attorney. Fikki contacted an attorney seeking review of the re-boarding documents. On June 29, Fikki provided the Respondent with a letter from the attorney stating that Fikki was scheduled to meet with the attorney, but that the attorney could not meet until July 18. That same day, the Respondent sent an e-mail to Fikki and other employees who had not finished the re-boarding process, notifying them that the re-boarding deadline had been extended to July 10. Fikki, however, failed to complete the re-boarding process by July 10 given that her attorney was unavailable to meet until July 18. Finally, on July 12, the Respondent discharged Fikki for her failure to complete the reboarding process.

II. DISCUSSION

The Eleventh Circuit's June 26, 2018 order having disposed of all allegations controlled by the Supreme Court's decision in *Epic Systems*, above, the remaining issues for decision are whether the EAA unlawfully restricts access to the Board and its processes and, if so, whether the Respondent violated the Act by discharging Fikki for failing to sign the EAA. In its prior decision, the Board resolved this issue under the analytical framework set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). See *Keiser University*, 363 NLRB No. 73, slip op. at 1. In *Lutheran Heritage*, the Board held, among other things, that an employer violates Section 8(a)(1) of the Act if it maintains a facially neutral work rule that employees "would reasonably construe . . . to prohibit Section 7 activity." 343 NLRB at 647.

Recently, the Board issued a decision in *Boeing*, above, overruling the "reasonably construe" prong of *Lutheran Heritage*. Under *Boeing*, facially neutral rules must be evaluated in such a way to strike a proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policies, viewing the rule or policy from the employees' perspective. Id., slip op. at 3. The Board also decided to apply its new standard retroactively to all pending cases in whatever stage. Id., slip op. at 16-17.

Subsequently, in *Prime Healthcare Paradise Valley, LLC*, 368 NLRB No. 10, slip op. at 5 (2019), the Board held that, notwithstanding the Supreme Court's decision in *Epic Systems* upholding individual arbitration agreements containing class- and collective-action waivers, the Federal Arbitration Act "does not authorize the maintenance or enforcement of agreements that interfere with an employee's right to file charges with the Board" (citations omitted). This is so because the FAA's requirement that arbitration agreements be enforced as written may be "overridden by a contrary congressional command," which the Board found to be established in Section 10 of the Act. Id. (citations omitted). Indeed, "[u]nder Section 10(b) of the Act, the Board has no power to issue [a] complaint unless an unfair labor practice charge is filed, and Section 10(a) of the Act relevantly provides that the Board's power to prevent unfair labor practices 'shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise.'" Id. at 5. Consistent with *Lutheran Heritage*, 343 NLRB at 646, the Board held that an arbitration agreement that "explicitly prohibits the filing of claims with the Board or, more generally, with administrative agencies must be found

unlawful." *Prime Healthcare*, above, slip op. at 5. The Board further found that where an arbitration agreement does not contain such an express prohibition—i.e., where the arbitration agreement in question is facially neutral—the *Boeing* standard applies. Id. Applying *Boeing*, the Board in *Prime Healthcare* concluded that "as a matter of law, there is not and cannot be any legitimate justification for provisions, in an arbitration agreement or otherwise, that restrict employees' access to the Board or its processes." Id. at 6. Finally, the Board placed provisions that restrict employees' access to the Board by making arbitration the exclusive forum for the resolution of all claims in *Boeing* Category 3, which designates rules and policies that are unlawful to maintain. Id. at 7.

Applying these principles, the Board in *Prime Healthcare* found that the arbitration agreement at issue there violated the Act because, although it did not explicitly prohibit charge filing (or the exercise of other Section 7 rights), it did, when reasonably interpreted, interfere with employees' right to file charges with the Board. *Prime Healthcare*, above, slip op. at 6. The arbitration provision at issue in that case required "all claims or controversies for which a federal or state court would be authorized to grant relief"—"includ[ing], but . . . not limited to" claims under a long list of employment-related statutes and "claims for violation of any federal, state, or other governmental constitution, statute, ordinance, regulation, or public policy"—to be resolved by binding arbitration. Id. That agreement contained no exception for filing charges with the Board or other administrative agencies and stated that "[t]he purpose and effect of this Agreement is to substitute arbitration as the forum for resolution of the Claims." Id. The Board found that, when reasonably interpreted, the foregoing language made arbitration the exclusive forum for the resolution of all claims, including federal statutory claims under the National Labor Relations Act, thereby restricting charge filing with the Board, and that "there is not and cannot be any legitimate justification" for such a restriction. Id.

Here, the EAA provides that "[a]ny controversy or claim arising out of or relating to Employee's employment, Employee's separation from employment, and this Agreement, including but not limited to, claims or actions brought pursuant to federal, state or local laws regarding payment of wages, tort, discrimination, harassment and retaliation, except where specifically prohibited by law, shall be referred to and finally resolved exclusively by binding arbitration." As in *Prime Healthcare*, the Respondent maintained a mandatory arbitration agreement that, when reasonably interpreted, plainly makes arbitration the exclusive forum for the resolution of all claims, including statutory claims under the Act. Accordingly, a reasonable employee would understand that agreement to restrict access to the Board.

Further, as in *Prime Healthcare*, the EAA contains no specific exception for filing charges with the Board. The EAA makes no mention of this protected activity, the Board, or the Act. Rather, the EAA merely purports to except from its arbitration mandate claims or actions "where specifically prohibited by law." As recounted in *Prime Healthcare*, above, slip op. at 3-4, the General Counsel has distilled six principles for analyzing arbitration agreements in light of *Boeing*, with the fourth such principle stating as follows:

> Vague savings clauses that would require employees to "meticulously determine the state of the law" themselves are likely to interfere with the exercise of NLRA rights. Such clauses include, for example, those stating that "nothing in this agreement shall be construed to require any claim to be arbitrated if an agreement to arbitrate such claim is prohibited by law," or that exclusively require arbitration but limit that requirement to circumstances where a claim "may lawfully be resolved by arbitration."

We agree with this principle and conclude that it applies here.[3] Vague, generalized language like that in the EAA purporting to exclude claims for which arbitration is "prohibited by law" would undoubtedly require employees to meticulously determine the state of the law themselves. See *Prime Healthcare*, above, slip op. at 3; see also *Ingram Book Co.*, 315 NLRB 515, 516 fn. 2 (1994) ("Rank-and-file employees do not generally carry lawbooks to work or ap-

[3] The analysis and result are the same here, notwithstanding that the clause in the EAA is an exclusion clause as opposed to a savings clause. An exclusion clause in an arbitration agreement carves out or excludes certain claims or types of claims from the scope of the agreement. By contrast, a savings clause in an arbitration agreement provides that employees retain the right to file charges with the Board, even if the agreement otherwise includes claims arising under the Act within its scope. The Board recently considered whether an arbitration agreement that contained a savings clause interfered with access to the Board and its processes. See *Briad Wenco, LLC d/b/a Wendy's Restaurant*, 368 NLRB No. 72 (2019). Like the agreement in *Prime Healthcare*, the agreement in *Briad Wenco* included claims arising under the Act within the scope of the agreement. Id., slip op. at 2 (referring to paragraph 11 of the agreement "as excluding certain claims from arbitration," but observing that "[p]aragraph 11 [did] not expressly exclude claims arising under the Act from covered claims subject to arbitration"). Unlike the agreement in *Prime Healthcare*, however, the arbitration agreement in *Briad Wenco* contained a savings clause providing that nothing in the agreement was to be construed to prohibit employees from filing charges with, or participating in any investigation or proceeding conducted by, an administrative agency, including the National Labor Relations Board. Id. Based on this savings clause and its sufficiently prominent placement, the Board found the agreement in *Briad Wenco* lawful.

ply legal analysis to company rules as do lawyers, and cannot be expected to have the expertise to examine company rules from a legal standpoint."). A reasonable employee interpreting the EAA cannot be expected to divine any intent to exclude from its coverage claims arising under the Act. See *Prime Healthcare*, above, slip op. at 6 fn. 12 (quoting *Boeing*, above, slip op. at 3) ("*Boeing* requires the Board to interpret disputed provisions from 'the perspective of the employees.'"); see also *Trailmobile*, 221 NLRB 1088, 1089 (1975) ("It is equally well established that [an overbroad] rule is not validated by the qualification, 'except as provided by law,' as an employer is not entitled to place upon its employees the burden of determining their legal rights in this manner.") (citing *Fasco Industries, Inc.*, 173 NLRB 522 (1968), enfd. 412 F.2d 589 (4th Cir. 1969)).

We readily concede that an objectively reasonable employee would understand that the arbitration agreement does not apply where "specifically prohibited by law," but we find that language leaves that reasonable employee in the dark as to *what* is "specifically prohibited by law." For the reasons stated above, the language remains impermissibly vague and ambiguous as to whether it applies to claims that the NLRA has been violated.

There is no disagreement with our dissenting colleague about the interplay between the FAA and the NLRA as was set out by the Supreme Court in *Epic Systems Corp. v. Lewis*, 584 U.S. ____, 138 S. Ct. 1612, 1621, 1632 (2018). We are in agreement that Section 10 of the NLRA represents a contrary congressional command that overrides the FAA's requirement that arbitration agreements be enforced according to their terms if a mandatory arbitration agreement precludes access to the Board's processes, as we unanimously held in *Prime Healthcare*. Where we see things differently is that our dissenting colleague does not believe that an objectively reasonable employee would read "where specifically prohibited by law" as creating the same conflict with the FAA that was present in *Prime Healthcare*. In his view, this EAA clause creates an exception to the exclusivity of the arbitration provision. In our view, this clause is unavailing because a reasonable employee cannot be expected to understand its import.

The FAA does not preempt the Act's mandate under Section 10(a) to protect employees' Section 7 rights by the filing of unfair labor practice charges, a prerequisite to the exercise of Board jurisdiction. Indeed, as summarized above, the unanimous *Prime Healthcare* Board concluded that, consistent with Supreme Court precedent, the FAA's requirement that arbitration agreements be enforced as written may be "overridden by a contrary congressional command," which the Board found to be established in Section 10 of the Act. 368 NLRB No. 10, slip op. at 5. And we view the objective reasonable employee perspective standard to be an essential safeguard in fulfillment of that command.

In sum, the language of the EAA, when reasonably interpreted under *Boeing*, makes arbitration the exclusive forum for resolution of claims arising under the Act, and the EAA's exclusion clause is legally insufficient. The EAA restricts employee access to the Board and such restriction of Section 7 rights cannot be supported by any legitimate business justification; therefore, the EAA is a *Boeing* Category 3 policy. Accordingly, we find that the Respondent violated Section 8(a)(1) of the Act by maintaining, and requiring that employees sign, the EAA and that Fikki's discharge for failing to sign the EAA likewise violated Section 8(a)(1).[4]

AMENDED REMEDY

In addition to the remedies provided in the judge's Order as amended, we shall order the Respondent to compensate Lisa K. Fikki for reasonable search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings, in accordance with our decision in *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enfd. in relevant part 859 F.3d 23 (D.C. Cir. 2017). Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

[4] Member McFerran joins her colleagues in finding that the Respondent violated Sec. 8(a)(1) by maintaining the EAA and by discharging Fikki for failing to sign the EAA. In doing so, Member McFerran acknowledges that *Boeing Co.*, 365 NLRB No. 154 (2017), is currently governing law, and she joins the majority for institutional reasons, but adheres to and reiterates her dissent in that case. That said, Member McFerran agrees with her colleagues that *Boeing* did not disturb prior precedent holding that arbitration agreements that explicitly prohibit filing claims with the Board or with administrative agencies are unlawful. Further, Member McFerran observes that the EAA arguably does explicitly prohibit filing Board charges. See *Prime Healthcare*, 368 NLRB No. 10, slip op. at 6 fn. 11 (Member McFerran observing the same regarding the respondent's mandatory arbitration agreement). Although the Board is not specifically named, the EAA's prohibition on filing charges is explicit because, subject only to a vague savings clause, the EAA broadly states that "[a]ny controversy or claim arising out of or relating to Employee's employment . . . shall be referred to and finally resolved exclusively by binding arbitration." Member McFerran nonetheless agrees with her colleagues' conclusions, above, that the only reasonable interpretation of the EAA from employees' perspective is that it does prohibit the filing of charges and that no legitimate employer justification could outweigh this core statutory right. Further, Member McFerran agrees that the EAA's attempt to exclude claims "where specifically prohibited by law" is wholly inadequate.

ORDER

The National Labor Relations Board orders that the Respondent, Everglades College, Inc. d/b/a Keiser University and Everglades University, Daytona Beach, Fort Lauderdale, Fort Myers, Jacksonville, Lakeland, Melbourne, Miami, Orlando, Pembroke Pines, Port St. Lucie, Sarasota, Tallahassee, Tampa, and West Palm Beach, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a mandatory arbitration agreement that employees reasonably would believe bars or restricts the right of employees to file charges with the National Labor Relations Board.

(b) Discharging an employee for failing or refusing to sign a mandatory arbitration agreement that employees reasonably would believe bars or restricts the right to file charges with the National Labor Relations Board.

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

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

(a) Rescind the Employee Arbitration Agreement in all of its forms, or revise it in all of its forms to make clear to employees that the Employee Arbitration Agreement does not bar or restrict employees' right to file charges with the National Labor Relations Board.

(b) Notify all applicants and current and former employees who were required to sign or otherwise become bound to the Employee Arbitration Agreement in any form that the Employee Arbitration Agreement has been rescinded or revised and, if revised, provide them a copy of the revised agreement.

(c) Within 14 days from the date of this Order, offer Lisa K. Fikki full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(d) Make Lisa K. Fikki whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, plus reasonable search-for-work and interim employment expenses, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(e) Compensate Lisa K. Fikki for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 12, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

(f) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Lisa K. Fikki, and within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its Fort Lauderdale, Florida facility copies of the attached notice marked "Appendix A," and at all other facilities where the unlawful arbitration agreement is or has been in effect, copies of the attached notice marked "Appendix B."[5] Copies of the notices, on forms provided by the Regional Director for Region 12, 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, and/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. If 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 July 9, 2012.

(i) Within 21 days after service by the Region, file with the Regional Director for Region 12 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. November 27, 2019

John F. Ring, Chairman

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notices reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Lauren McFerran, Member

Marvin E. Kaplan, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER EMANUEL, dissenting in part and concurring in part.

Contrary to my colleagues, I would find that the Respondent's maintenance of its Employee Arbitration Agreement (EAA) was lawful. However, because the Respondent denied Lisa K. Fikki the opportunity to consult an attorney before signing the agreement, and then discharged her because she refused to sign the agreement, I concur that her discharge was unlawful.

Section 2 of the Federal Arbitration Act (FAA) states that an arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Thus, the Supreme Court has decided that federal courts must "enforce arbitration agreements according to their terms"; that the FAA establishes a "liberal federal policy favoring arbitration agreements"; and that such agreements must be "enforced as written." *Epic Systems Corp. v. Lewis*, 584 U.S. ____, 138 S. Ct. 1612, 1621, 1632 (2018).

However, Section 10(a) of the National Labor Relations Act (NLRA) empowers the Board "to prevent any person from engaging in any unfair labor practice," and it provides that this power "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise." Thus, there is a conflict between the FAA and the NLRA in this case. But the Supreme Court has also held that it is "this court's duty to interpret Congress's statutes as a harmonious whole rather than at war with one another." Id. at 1619. Thus, when there is a conflict between the NLRA and the FAA, the Board must consider the Supreme Court's objective of interpreting the two statutes as a "harmonious whole" and not in a way that will result in a "war" between them. I believe that in this case, the only way to harmonize the two statutes in view of the Supreme Court precedent is to find that the arbitration agreement is lawful. Otherwise the Board's decision will completely override the FAA, a result not acceptable under Supreme Court precedent.

The Supreme Court explained in *Epic Systems* that an argument that another federal statute overrides the FAA and thus invalidates an arbitration agreement "faces a stout uphill climb." Id. at 1624. The Court also stated that when confronted with two Acts of Congress allegedly touching on the same topic, it is "not at liberty to pick and choose among congressional enactments," and it "must instead strive to give effect to both." Id. (citations omitted). In addition, the Court stated that a party that suggests that two statutes cannot be harmonized, and that one displaces the other, bears a "heavy burden" of showing a "clearly expressed congressional intention that such a result should follow," and that this intention must be "clear and manifest." Id. (citations omitted). Moreover, the Court stated that there is a strong presumption that repeals by implication are disfavored, and that Congress will specifically address preexisting law when it wishes to suspend its normal operations in a later statute. Id. (citations omitted). Furthermore, the Court stated that the NLRA "does not even hint at a wish to displace" the FAA, let alone accomplish that much "clearly and manifestly." Id. These statements by the Court indicate that the Board is very likely to be overruled if it does not attempt to harmonize the conflict between the FAA and the NLRA in this case.

In cases where an arbitration agreement prevents employees from filing charges with the Board, as in *Prime Healthcare Paradise Valley, LLC*, 368 NLRB No. 10 (2019), the Board is justified in invalidating the agreement; and when a savings clause expressly provides that employees retain the right to file charges with the Board, the agreement is valid, as the Board held in *Briad Wenco, LLC d/b/a Wendy's Restaurant*, 368 NLRB No. 72 (2019). But when a savings or exclusion clause is otherwise legally sufficient but does not expressly refer to the NLRA or the NLRB, as in this case, the Board must strive to give effect to both the FAA and the NLRA.[1] Otherwise the result will be a "war" between the two statutes, which is contrary to the Supreme Court precedent discussed above.

[1] Here, the EAA excludes claims "where specifically prohibited by law." Because the NLRA prohibits interference with an employee's right to file charges with the Board, the NLRA falls squarely within the EAA's exclusion.

The majority's reliance on *Trailmobile*, 221 NLRB 1088 (1975), is unavailing. *Trailmobile* holds that the phrase "except as provided by law" is insufficient to render a no-solicitation, no-distribution rule lawful. Unlike the EAA, that rule is not subject to the Supreme Court's mandate, expressed in the FAA, that arbitration agreements must be enforced as written. This crucial difference, in my view, requires that the Board find the EAA lawful as written. In addition, the majority's reliance on the General Counsel's guidelines for analyzing arbitration agreements under *Boeing* is equally misplaced. These guidelines are merely advisory, and the Board is not bound by them.

Finally, the Board should consider the fact that several previous Board members have found in dissenting opinions that arbitration agreements with clauses that were similar to the exclusion clause in this case were lawful to maintain under the NLRA. See, e.g., *Countrywide Financial Corp.*, 362 NLRB 1331, 1338 fn. 2 (2015) (Member Johnson, dissenting) (finding lawful arbitration agreement excluding any claim where "an agreement to arbitrat[e] . . . is prohibited by law"); *2 Sisters Food Group*, 357 NLRB 1816, 1829–1830 (2011) (Member Hayes, dissenting) (finding lawful arbitration agreement limited to claims "that may be lawfully [] resolve[d] by arbitration"); see also *U-Haul Co. of California*, 347 NLRB 375 (2006) (Chairman Battista dissenting).

In sum, I would find that the Respondent lawfully maintained the EAA, but violated Section 8(a)(1) by discharging Fikki for failing to sign the EAA because the Respondent prevented her from consulting with an attorney.

Dated, Washington, D.C. November 27, 2019

William J. Emanuel, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX A

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 maintain a mandatory arbitration agreement that our employees reasonably would believe bars or restricts the right of our employees to file charges with the National Labor Relations Board.

WE WILL NOT discharge you for engaging in protected activities, including for failing or refusing to sign a mandatory arbitration agreement that our employees reasonably would believe bars or restricts the right to file charges with the National Labor Relations Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind our mandatory Employee Arbitration Agreement in all of its forms, or revise it in all of its forms to make clear that the Employee Arbitration Agreement does not restrict your right to file charges with the National Labor Relations Board.

WE WILL notify all applicants and current and former employees who were required to sign or otherwise become bound to the Employee Arbitration Agreement in all of its forms that the Employee Arbitration Agreement has been rescinded or revised and, if revised, WE WILL provide them a copy of the revised agreement.

WE WILL, within 14 days from the date of the Board's Order, offer Lisa K. Fikki full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Lisa K. Fikki whole for any loss of earnings and other benefits resulting from the discrimination against her, less any net interim earnings, plus interest, and WE WILL also make her whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Lisa K. Fikki for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 12, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Lisa K. Fikki, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

EVERGLADES COLLEGE, INC., D/B/A KEISER UNIVERSITY AND EVERGLADES UNIVERSITY

The Board's decision can be found at www.nlrb.gov/case/12-CA-096026 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

APPENDIX B

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 maintain a mandatory arbitration agreement that our employees reasonably would believe bars or restricts the right of our employees to file charges with the National Labor Relations Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind our mandatory Employee Arbitration Agreement in all of its forms, or revise it in all of its forms to make clear that the Employee Arbitration Agreement does not restrict your right to file charges with the National Labor Relations Board.

WE WILL notify all applicants and current and former employees who were required to sign or otherwise become bound to the mandatory Employee Arbitration Agreement in all of its forms that the Employee Arbitration Agreement has been rescinded or revised and, if revised, WE WILL provide them a copy of the revised agreement.

EVERGLADES COLLEGE, INC. D/B/A KEISER UNIVERSITY AND EVERGLADES UNIVERSITY

The Board's decision can be found at www.nlrb.gov/case/12-CA-096026 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.