

**NEW YORK LAW SCHOOL MOOT COURT ASSOCIATION
THE 36TH ANNUAL ROBERT F. WAGNER
NATIONAL LABOR & EMPLOYMENT LAW MOOT COURT COMPETITION**

In the

Supreme Court of the United States

**SPRING TERM, 2012
Docket No. 12-0201**

MARY LOU COSTANZA, ET. AL.,

Petitioners/Cross-Respondents,

- against -

FLY ABOVE WAREHOUSES, INC.,

Respondent/Cross-Petitioner.

On Writ of Certiorari to the
United States Court of Appeals for the Thirteenth Circuit

THE FACT PATTERN

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WAGNER

-----X
MARY LOU COSTANZA, et. al.,

Plaintiffs,

-against-

FLY ABOVE WAREHOUSES, INC.,

Defendant.

-----X
A.J. Ross, U.S. District Judge:

Docket No. 11-2481

MEMORANDUM
AND ORDER

This matter involves a lawsuit brought by Mary Lou Costanza on behalf of herself and all former employees and members of Froessel Union, Local 87 (“the Union”) similarly situated pursuant to the Americans with Disabilities Act, as amended (“ADA” and “ADAAA”), 122 Stat. 3552 (2009)¹, against her former employer, Fly Above Warehouses, Inc., for wrongful termination and discrimination due to their obesity. Defendant moved to dismiss for failure to state a claim upon which relief can be granted, and alternatively, moved to compel arbitration of each individual plaintiff’s claim. After considering the claim in a light most favorable to the non-moving party, this Court concludes that Plaintiffs have satisfied the pleading standard to survive the motion to dismiss. Therefore, we deny Defendant’s motion to dismiss as well as the motion to compel individual arbitration. We order Plaintiffs’ claims be arbitrated as a group.

I. Factual Background.

The following facts in this case are undisputed: Plaintiffs were longstanding employees of Defendant Fly Above Warehouses Inc. and allege that, on or about December 1, 2010, they were terminated because of their obesity in violation of the ADA.

¹ All references to the ADA include the 2008 amendments, otherwise referred to as the ADAAA.

Defendant operates one of the largest warehouse storage facilities in the State of Wagner, with over 2,000 employees in ten regional offices. Costanza is a forty-three year-old single mother of two teenaged sons. She was employed by Defendant as a full-time warehouse worker (“Warehouse Person” was her official title) from 2001 until her termination in 2010. She was assigned to Defendant’s Wagner City Regional warehouse facility. Typical duties of a warehouse worker include: using the company’s computer system to organize boxes, placing boxes on shelves in an organized manner, and operating a forklift truck when necessary to move larger boxes across the warehouse. During the course of her employment, Costanza received satisfactory performance reviews and had an unblemished disciplinary record. When Costanza was hired in 2001, she weighed 230 pounds and gained nearly 100 more over the next ten years. At the time of her termination, Costanza was 5’4” tall and had a body mass index of 56.6.²

In November 2010, Costanza experienced discomfort in her knees and back because she frequently walked from the Company’s computer center to various locations in the warehouse and lifted boxes onto shelves. She discussed these physical problems with Jerry Kramer, her supervisor, and asked permission to use a forklift more often in an effort to ameliorate her knee and back pain. Generally, employees were permitted to use a forklift only to place particularly heavy boxes on upper level shelves, or when recovering from surgery or experiencing other physical ailments. Kramer denied her request, explaining that the Company could not provide her with regular use of a forklift because “all the other complainers” would seek to do so as well. Kramer explained that the forklift was only for employees who “actually needed the forklift, not for lazy people who like to make things more difficult for everyone, especially themselves.”

² BMI (body mass index) was calculated using the Centers for Disease Control and Prevention Adult BMI Calculator: (www.cdc.gov/healthyweight/assessing/bmi/adult_bmi/english_bmi_calculator/bmi_calculator.html)

After the denial, Costanza suggested to other warehouse workers that they demand to use a forklift if they experienced pain associated with walking across the warehouse or lifting boxes. Shortly before Thanksgiving 2010, a group of obese employees signed a petition demanding more frequent use of forklifts. See App. B. The Company denied their request.

On December 1, 2010, Costanza and thirty other warehouse workers in her regional office, all of whom had signed the petition, were fired for failure to meet daily quota requirements in the warehouse. Costanza and her co-workers immediately went to the Union to grieve their discharges. At all times material herein, the Union and the Company have been parties to a collective bargaining agreement (“CBA”) covering the wages, hours and other terms and conditions of the Plaintiffs’ employment. The warehouse worker’s base rate was \$14.00/hour. See App. A. Under the contractual grievance procedure in Article V of the CBA, the Union must submit discharge grievances at the final step of the grievance procedure.

The Union timely filed a group grievance protesting the thirty-one discharges at the final step of the grievance procedure. The group grievance alleged that the discharges violated both Article IV, Just Cause for Discipline and Discharge, and Article XX, No Discrimination, of the CBA.³

ARTICLE IV. JUST CAUSE FOR DISCIPLINE AND DISCHARGE: No employee will be discharged, suspended or given a written warning notice except for just cause.

ARTICLE XX. NO DISCRIMINATION: There shall be no discrimination against any present or future employee by reason of race, creed, color, age, disability, national origin, sex, union membership, or any other characteristic protected by law, including, but not limited to, claims made pursuant to Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Wagner State Human Rights Law, the Wagner City Human

³ Article V and VI establish the grievance process, which applies to all claims regardless of whether they are subject to arbitration under the CBA. Article VI establishes the procedures for arbitration and post arbitration judicial review, and, in particular, provides that the arbitrator “shall...decide all differences arising between the parties as to interpretation, application or performance of any part of this Agreement and such other issues as the parties are expressly required to arbitrate before him under the terms of this Agreement. The parties will share equally the costs of arbitration.”

Rights Code . . . or any other similar laws, rules, or regulations. All such individual claims shall be subject to the grievance and arbitration procedures (Articles V and VI) as the sole and exclusive remedy for violations. Arbitrators shall apply appropriate law in rendering decisions based upon individual claims of discrimination only and shall have no authority to hear and decide class action claims.

The Company denied the group grievance, stating that neither Article was violated. The Union demanded arbitration of the group grievance under the CBA. The Company refused to arbitrate, asserting that only individual grievances could be arbitrated under Article XX. The Union's Executive Board considered the matter and determined that the Union could not afford to pay the costs of thirty-one individual arbitration cases, but would allow each employee to proceed to arbitration under the CBA if the employee paid the cost of his or her arbitration.⁴ All thirty-one plaintiffs filed discrimination charges with the local Wagner field office of the Equal Employment Opportunity Commission ("EEOC") alleging that their discharges violated the ADA. The EEOC commenced an investigation, but was unable to complete it within 180 days. Plaintiffs requested and received Notices of Right-to-Sue from the Director of the Wagner field office. Costanza and the thirty other discharged union members timely filed a class action in Wagner District Court within ninety days of receipt of the right-to-sue letters in which they allege a pattern and practice of unlawful discrimination based on disability in violation of the ADA, as amended

II. Motion to Dismiss.

In considering a motion to dismiss, the court must accept as true all material factual allegations in the complaint. Pyett v. Pa. Bldg. Co., 2006 U.S. Dist. LEXIS 35952 (S.D.N.Y. June 1, 2006). However, "conclusory allegations or legal conclusions masquerading as factual

⁴ Plaintiffs originally sued the Union in this litigation for a Duty of Fair Representation violation but withdrew that part of the lawsuit because the Union agreed to allow individual grievants access to arbitration so long as the individual grievant paid his or her share of the costs of the individual arbitration in accordance with Article VI.

conclusions will not suffice to prevent a motion to dismiss.” Smith v. Local 819 I.B.T. Pension Plan, 291 F.3d 236, 240 (2d Cir. 2002). A motion to dismiss may be granted only where “it appears beyond doubt that the plaintiff can prove no set of facts in support his claim which would entitle him to relief.” Still v. DeBuono, 101 F.3d 888, 891 (2d Cir. 1996) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).

Because McDonnell Douglas is “an evidentiary standard, not a pleading requirement” Swierkiewicz v. Sorema N.A., 534 U.S. 506, 510 (2002), the Supreme Court has unanimously held that an employment discrimination complaint need not include specific facts establishing a prima facie case of discrimination and instead need only contain a short and plain statement of the claim showing that the pleader is entitled to relief. Leibowitz v. Cornell University, 445 F.3d 586, 591 (2d Cir. 2006) (quoting Swierkiewicz v. Sorema N.A., 534 U.S. at 508).

Therefore, our inquiry at this stage in the litigation is limited to whether the Complaint provides Defendant with fair notice of what the Plaintiffs’ claims are and the grounds upon which they rest. See Swierkiewicz, 534 U.S. at 512. Under this “simplified standard for pleading, a court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.” Id. at 514 (quoting Hishon v. King & Spalding, 467 U.S. 69, 73 (1984)). The court relies on liberal discovery rules and simple pleading standards, as well as summary judgment motions to define disputed facts and issues and to determine whether disputed claims have merit. Swierkiewicz, 534 U.S. at 512.

Under the ADAAA, an individual must show only that they have been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity. 42 U.S.C.S § 12101 et seq. Thus, a plaintiff might be considered disabled due to obesity under the

ADA if her employer perceived her weight as an impairment. Plaintiff must also show that she was qualified for the job and that an adverse employment decision was made because of her disability to establish a discrimination claim under the ADA. 42 U.S.C. § 12101 et seq.

Plaintiffs claim they were terminated due to their disability in violation of the ADA. Under the ADAAA, a disability is “a physical or mental impairment that substantially limits one or more major life activities of such individual, having a record of such impairment, or being regarded as having such an impairment.” 42 U.S.C. § 12102(1). A “qualified individual with a disability” is “an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.” 42 U.S.C.S § 12111(8).

Plaintiffs allege that they are disabled due to their morbid obesity. In response, Defendant contends that obesity, morbid or otherwise, is not a disability under the ADA. Prior to the ADAAA, the Interpretive Guidance created by the EEOC on Title I of the ADA provided that, except in "rare circumstances," obesity was not considered a disabling impairment. See Melson v. Chetofield, 2009 U.S. Dist. LEXIS 19025, at *9 (E.D. La. Mar. 4, 2009) (citing 29 C.F.R. § 1630.2(j)). In a 1993 decision, the Court of Appeals for the First Circuit held that obesity was a disability under the ADA. See Cook v. State of Rhode Island, Dep't of Mental Health, Retardation, and Hosp., 10 F.3d 17 (1st Cir. 1993). However, other courts subsequently denied obese employees the protections of the ADA. See, e.g., Merker v. Miami-Dade Cnty Fla., 485 F. Supp. 2d 1349, 1353 (S.D. Fla. 2007) (citing EEOC v. Watkins Motor Lines, Inc., 463 F.3d 436, 440-443 (6th Cir. 2007) ("we hold that to constitute an ADA impairment, a person's obesity, even morbid obesity, must be the result of a physiological condition.")); Francis v. City of Meriden, 129 F.3d 281, 286 (2d Cir. 1997) ("obesity, except in special cases where the

obesity relates to a physiological disorder, is not 'physical impairment' within the meaning of the [ADA] statutes."); Marsh v. Sunoco, Inc., 2006 U.S. Dist. LEXIS 88887 (E.D. Pa. Dec. 6, 2006) (finding that Plaintiff is overweight—unless it is the result of a physiological disorder—would not bring him under the protection of the ADA).

Despite Defendant's blanket contention, given the 2008 amendments that broadened the definition of what qualifies as a disability, this Court will not hold that obesity is never a disability under the ADA. The ADA, as amended, expanded the phrases "substantially limits" and "major life activities," explicitly overruling the prior narrow definitions of these phrases. The ADAAA rejected the Supreme Court's reasoning in Sutton v. United Air Lines Inc., 527 U.S. 471 (1999), and the standards enunciated by the Court in Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002). See 122 Stat. 3553 § 2 (b)(2)(4). The ADAAA makes clear that the Supreme Court's prior interpretations of "substantially limits" were too strict, and that a "substantial limitation" should be more broadly interpreted. 122 Stat. 3552, § 2(a)(8); 42 U.S.C.A. § 12101. Accordingly, the ADAAA details a non-exhaustive list of what constitutes a major life activity, providing that, in general, such activities include, but are not limited to: "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." 42 U.S.C.A. § 12102(2)(A). Further, under the ADAAA, bodily function limitations are now considered a major life activity. 42 U.S.C.A. § 12102(2)(B). Here, Plaintiffs assert that their weight affects the major life activities of walking, standing, lifting, bending, and breathing.

The language of the ADAAA also modifies the "regarded as" having a "disability" prong of the ADA. In this case, Plaintiffs assert that Defendant was informed of their inability to walk

long distances across the warehouse. The Court reads this as Plaintiffs' attempt to show that Defendant acknowledged that they have such a disability. Under the ADAAA, an individual is not required to demonstrate that the disability she is regarded as having is an actual qualified disability under the ADA or that it substantially limits a major life activity. See 42 U.S.C.A. § 12102(1)(C)(3). The ADAAA requires plaintiffs to show only "that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity." Id. Thus, a plaintiff might be considered disabled under the ADA if her employer perceived her weight as an impairment.

Based on the substantial expansion of the ADA by the ADAAA, Defendant's assertion that Plaintiffs' weight cannot be considered a disability is not persuasive. The EEOC's March 25, 2011 Final Regulations and Interpretive Guidance implementing the ADAAA do not contain the "rare circumstances" language concerning obesity as a disability. 29 C.F.R. § 1630.2(j). In fact, the EEOC has taken the position that "[m]orbid obesity is a disability under the ADAAA." See Compl. ¶ 12 in EEOC v. BAE Systems, Civil Action No. 4:11-cv-03497 (S.D.Tex. Sept. 28, 2011).⁵

Since the ADAAA took effect, two federal district courts have recognized that morbid obesity could be a disability under the ADA. See Lowe v. Am. Eurocopter, LLC, 2010 U.S. Dist. LEXIS 133343 (N.D. Miss. Dec. 16, 2010) (the Court is unable to say that obesity can never be a disability under the ADA due to the expansion of what "substantially limits" and "major life activities" mean under the ADAAA). More recently, the District Court for the

⁵ The EEOC filed a complaint on behalf of a former employee of Defendant BAE Systems who claims he was wrongfully terminated due to his obesity, that the Defendant refused to make proper reasonable accommodations, and that the former employee was willing and physically able to perform his job duties as he had for over ten years while employed by Defendant. The complaint falls under the March 2011 Interpretive Guidance standards.

Eastern District of Louisiana found that if a party's weight is outside the normal range, i.e. if the party is severely obese, there is no explicit requirement that obesity be based on a physiological impairment in order to be considered protected as a disability. See EEOC v. Resources for Human Development, 2011 WL 6091560 (E.D.La. Dec. 7, 2011)

Relying on the pre-ADAAA legal theory of the Second and Sixth Circuits denying disability protection to obese workers, Defendant argues that Plaintiffs have not shown that physiological conditions have caused their obesity. We decline to adopt this standard. Instead, we defer to the EEOC's position in BAE that morbid obesity is a disability under the ADAAA. Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 844 (U.S. 1984) (the principle of deference to administrative interpretations has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies). We find that Plaintiffs satisfied the lenient pleading standards; Plaintiffs alleged they were terminated because of their disability, morbid obesity; and that Defendant regarded Plaintiffs as disabled. BAE, supra; Cook, 10 F.3d at 17. Plaintiffs allege that they were qualified to perform the essential functions of their jobs and that the Defendant replaced them with employees who were not morbidly obese. Therefore, Plaintiffs suffered an adverse employment decision due to their perceived disability. Although Plaintiffs will need further evidence supporting these allegations to survive summary judgment, we cannot say that they have failed to meet the notice pleading standard required at this stage. Therefore, Defendant's motion to dismiss is DENIED.

III. Motion to Compel Individual Arbitration.

The Defendant alternatively moves to compel individual arbitration in this matter, contending that Plaintiffs and the Union are bound by the class action waiver in Article XX to arbitrate each claim individually. Specifically, Defendant claims that the Supreme Court's decisions in 14 Penn Plaza LLC v. Pyett, 556 U.S. 247 (2009) and AT&T Mobility LLC v.

Concepcion, 131 S. Ct. 1740 (2011) have established that courts must honor parties' agreements to arbitrate and to exclude class actions from arbitration. Plaintiffs contend that requiring individual grievance arbitration would effectively deny them the right to vindicate their federal statutory rights under the ADA because the costs of individual arbitration are prohibitive. Plaintiffs also argue that Defendant's insistence on individual arbitration interferes with their right to engage in protected Section 7 activity under the National Labor Relations Act ("NLRA"), 29 U.S.C. § 157. We agree with Plaintiffs' contentions, and therefore DENY Defendant's motion to compel individual arbitration.

A. Vindication of Statutory Rights: Mandatory Arbitration and Class Action Waivers.

1. Mandatory Arbitration.

The Supreme Court has held that a provision in a collective bargaining agreement that clearly and unmistakably requires union members to arbitrate claims under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 et seq., is enforceable as a matter of federal law. Pyett, 556 U.S. 247. In so holding, the Court relied on Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) to find that by agreeing to arbitrate a claim under the ADEA, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. Gilmer, 500 U.S. at 29 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)). Therefore, to the extent that the language of Article XX "clearly and unmistakably" requires union members to arbitrate their ADA claims, we will enforce the parties' agreement to arbitrate. At the heart of this matter is the parties' disagreement over whether the class action waiver in Article XX should be enforced.

2. Class Action Waiver.

Defendant relies on the Supreme Court's decision in Concepcion to argue that the class action waiver in Article XX is enforceable. In particular, Defendant argues that "[R]equiring the availability of class-wide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." Concepcion, 131 S.Ct. at 1748. However, Defendant's reliance on Concepcion is misplaced because the inability of Plaintiffs to arbitrate discrimination claims as a group is not comparable to a class action waiver in the consumer context. Here, the class action waiver effectively waives Union members' right to arbitrate their discrimination claims as a group. The Court has acknowledged that federal antidiscrimination rights may not be prospectively waived and that a waiver of any rights conferred by federal anti-discrimination rights would defeat the paramount congressional purpose behind them. See Pyett, 556 U.S. at 414.

Concepcion is distinguishable from the case at bar on a number of grounds. In Concepcion, the Court held that the FAA preempted a California state law unconscionability statute, the so-called Discover Bank rule. The Discover Bank rule comes from Discover Bank v. Superior Court, 36 Cal.4th 148 (2005), a California Supreme Court decision that, in effect, held most class action waivers in consumer contracts to be unconscionable. It provided that,

[w]hen the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then...the waiver becomes in practice the exemption of the party 'from responsibility for [its] own fraud, or willful injury to the person or property of another.' Under these circumstances, such waivers are

unconscionable under California law and should not be enforced. Discover Bank, 36 Cal.4th at 162-63.

Concepcion involved a class action by consumers asserting claims of fraud and false advertising stemming from their purchase of cellular telephone service from AT&T. The consumer phone service agreement included an arbitration provision that required any disputes between AT&T and the customer be submitted to arbitration and prohibited customers from bringing any claims in a class action or other representative proceeding. The district court denied AT&T's motion to compel arbitration, and the Ninth Circuit affirmed. Both courts relied on § 2 of the FAA, which permits arbitration agreements to be invalidated "upon such grounds as exist at law or equity for the revocation of any contract," quoting 9 U.S.C. § 2 and the Discover Bank rule. Concepcion, 131 S. Ct. at 1744. The Supreme Court reversed, holding that the FAA preempts the Discover Bank rule. The Court emphasized that "[t]he overarching purpose of the FAA...is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings," and that the FAA reflects a "liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." Id. at 1748.

The instant case involves a class action waiver negotiated in a CBA pursuant to the NLRA, 29 U.S.C. § 151 et seq. Plaintiffs are unionized employees who alleged they were wrongfully terminated due to disability discrimination by their former employer. We agree with Plaintiffs that Concepcion should be limited to its specific holding. Here, there is no state law issue. Plaintiffs assert rights under a federal statute, the ADA, that cannot be waived, procedurally or substantively. See Stolt-Nielsen v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758 (2009). We find that the class action waiver in Article XX undermines the ability of the individual Plaintiffs to vindicate these statutory rights.

Furthermore, federal courts have carved out exceptions to Concepcion. See Chen-Oster v. Goldman Sachs, 785 F. Supp. 2d 394 (S.D.N.Y. 2011) (denying enforcement of a class action waiver in an individual employment contract because it would prevent plaintiff from effectively vindicating her statutory pattern or practice gender discrimination claim is an exception to FAA preemption); Raniere v. Citigroup Inc., 2011 WL 5881926 (S.D.N.Y. Nov. 22, 2011) (denying employer's motion to compel individual arbitration because right to bring an FLSA collective action in court would not be vindicated).

3. Vindicating Statutory Rights: The Costs of Individual Arbitration.

Plaintiffs claim that Defendant's refusal to arbitrate their group grievance prevents them from effectively vindicating their federal statutory rights because they are blocked from arbitrating their claims under the CBA unless they pay the cost of their individual arbitrations. See Pyett, 556 U.S. at 420. Plaintiffs argued that they are discharged employees who are unable to pay filing fees to the American Arbitration Association ("AAA"), plus half the cost of an arbitrator's fees that may be as much as \$2,000/day, plus attorneys fees. We agree with Plaintiffs' assertion that mandating individual arbitration would prevent them from vindicating their statutory rights due to the prohibitive costs each Plaintiff would be forced to bear. The prohibitive costs may force Plaintiffs to forgo any discrimination claims they have against Defendant. See Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79 (2000).

Unlike Green Tree, the risk that Plaintiffs will be saddled with prohibitive costs is not speculative. The Union cited the high costs of arbitration as the reason it could not pay its share of the costs of thirty-one individual grievance arbitrations. Furthermore, Plaintiffs have made a factual showing that under the Labor Rules of the AAA, each Plaintiff would be required to pay

a \$225 filing fee, half of an arbitrator's fees averaging \$4,000 per case and attorneys' fees in the range of \$15,000 to \$25,000. It is indeed likely that the total cost paid by each Plaintiff would well exceed his or her potential recovery.

Enforcing the class action waiver in Article XX will prevent Plaintiffs from vindicating federal statutory rights because they have demonstrated that it would be prohibitively expensive to arbitrate their claims on an individual basis. See Sutherland v. Ernst & Young LLP, 768 F. Supp. 2d 547 (S.D.N.Y. 2011) (denying the defendant's motion to compel individual arbitration on the ground that it prevented the employee from vindicating her statutory rights since the maximum potential recovery would be too meager to justify the required expenses for individual prosecution of her claim, and thus would prevent the plaintiff from obtaining legal representation). The requirement in Article XX that discrimination claims be brought in an individual capacity is unenforceable due to the prohibitive cost of individual arbitration, which thereby deprives Plaintiffs of anti-discrimination law protections. American Express II, 634 F.3d 187, 199 (2d Cir. 2011) (finding that plaintiffs would incur prohibitive costs if compelled to arbitrate under the class action waiver). Furthermore, Plaintiffs demonstrated that any potential recovery by an individual plaintiff would be too small to justify the expense of bringing an individual action. Id. at 199. This Court will not compel individual arbitration of Plaintiffs' claims because doing so would grant Defendant immunity from liability by removing Plaintiffs' only reasonably feasible means of recovery. See Id. at 320. Therefore, Plaintiffs should not be barred from bringing their discrimination claims to arbitration as a group.

a. Clear and Unmistakable Waiver.

A party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758 (2010). Plaintiffs contend that the grievance and arbitration provisions do not clearly and unmistakably waive their right to arbitrate a group grievance. Defendant, relying on the analysis in Pyett, contends that the language of Article XX clearly and unmistakably waives Plaintiffs' right to class action arbitration of discrimination claims. See Pyett, supra. An agreement should not be considered "clear and unmistakable" if there is any "silence or ambiguity." First Options of Chi., Inc. v. Kaplan, 514 U.S. 938 (1995). Nothing in Articles V, VI and XX expressly prohibits group grievances of discharge cases alleging unlawful discrimination. This Court finds that the language of Article XX does not clearly and unmistakably waive Plaintiffs' right to arbitrate their discharge grievances as a group.

B. National Labor Relations Act.

Unlike the consumer plaintiffs in Concepcion, Plaintiffs here are unionized employees who are afforded the protections of the NLRA, 29 U.S.C. § 151 et seq. Enforcement of the class action waiver of Article XX of the CBA would strip Plaintiffs of their rights under § 7 of the NLRA, to bring joint, collective, and class legal actions for their mutual aid and protection. 29 U.S.C. § 157; DECISION AND ORDER OF THE NLRB, D. R. Horton, Inc. and Michael Cuda. Case 12–CA– 25764 (January 3, 2012, Chairman Pearce and Member Becker; Member Hayes recused)⁶. As the National Labor Relations Board (NLRB) held in D.R. Horton v. Cuda, employer's reliance on a class action waiver to deprive employees of their right to engage in

⁶ National Labor Relations Board, (January 6, 2012), available at, <http://www.nlr.gov/404.htm>.

protected Section 7 activities affecting their conditions of employment violates § 8(a)(1) of the Act. 29 U.S.C. § 158(a)(1). Id. The class action waiver here, therefore, is unenforceable.

As noted above, the Supreme Court has held that a class action waiver that deprives employees of their substantive statutory rights is unenforceable. See Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991); Pyett, 556 U.S. 247 (2009); Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 90 (2000); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 628 (1985). Because the class action waiver in Article XX deprives Plaintiffs of their substantive rights under the ADAAA and under § 7 of the NLRA to engage in concerted activity, the FAA, 9 U.S.C. § 1, et seq., does not spare the class action waiver from invalidation.

The NLRA provides employees with a substantive legal right to bring collective and class actions to redress the conditions of their employment. Class actions allow employees to pool their claims and resources for the greater collective good. General Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 155 (1982). In the instant matter, Plaintiffs engaged in concerted activity protected under § 7 well before the commencement of this action. Costanza discussed with her supervisor the use of a forklift due to her physical condition and encouraged other warehouse workers to request to use a forklift if they experienced pain associated with walking across the warehouse or lifting boxes. On November 22, 2010, a group of obese employees signed a petition to management demanding more frequent use of forklifts. A class action ban inevitably chills the effective protection of interests common to employees as a group. Ingle v. Circuit City, 328 F.3d 1165, 1176 (9th Cir. 2003).

VI. Conclusion.

There are instances in which an arbitration agreement is deemed unenforceable because it prevents a prospective litigant from vindicating his or her rights in an arbitral forum. See Mitsubishi Motors Corp., 473 U.S. at 637. This Court finds the agreement to arbitrate enforceable and Plaintiffs are bound to arbitrate their claims. However, Plaintiff's statutory rights are not capable of vindication through *individual* arbitration. The "federal substantive law of arbitrability," grounded in the FAA, allows federal courts to declare otherwise operative arbitration clauses unenforceable through a "vindication of statutory rights analysis." Chen-Oster, 785 F. Supp. 2d 394 (quoting American Express II, 634 F.3d at 199); see also Sutherland, 768 F. Supp. 2d 547 (finding that class action waivers that prevent a plaintiff from vindicating statutory rights are unenforceable). Given the great expense of arbitrating claims individually, Plaintiffs will be prevented from vindicating their federal statutory rights under the ADA if compelled to proceed individually.

Despite the pro-arbitration policy of the FAA, numerous federal circuit courts have struck down workplace arbitration provisions that limit an employee's substantive statutory rights. See, e.g., Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 670 (6th Cir. 2003) (accord American Express II, 634 F.3d at 199). Despite Defendant's contention to the contrary, nothing in Concepcion alters this well-established law. In Concepcion, the Court held that the FAA preempted application of California unconscionability law to invalidate an arbitration agreement that prohibited consumers from pursuing their claims as a class action. Concepcion was not an employment case and the consumer plaintiffs had no right under federal law to engage in concerted legal activity for their mutual aid and protection under the § 7 of the NLRA. 29 U.S.C. § 157. Recognizing this, the District Court for the Southern District of New York

recently held that Concepcion has no application to an arbitration challenge based on the deprivation of a substantive federal workplace right. See Chen-Oster v. Goldman, Sachs & Co., 2011 U.S. Dist. LEXIS 112294 (S.D.N.Y. Sept. 29, 2011).

V. Order.

Defendant's Motion to Dismiss is DENIED. Defendant's Motion to Compel Individual Arbitration pursuant to Article XX is also DENIED. The class action waiver in Article XX is invalid and it is hereby ordered that this case be submitted to arbitration pursuant to this decision. See Morrison, 317 F.3d 646 (intent of the parties and policy in favor of arbitration dictate that the balance of the agreement should be held enforceable upon the decision to sever any terms determined to be invalid and to allow all claims to proceed to arbitration under the remaining provisions of the agreement).

UNITED STATES COURT OF APPEALS
THIRTEENTH CIRCUIT

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FLY ABOVE WAREHOUSES, INC.,

Docket No. 06-3087

Appellant,

-against-

MARY LOU COSTANZA, et. al.,

Respondent.

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Majority opinion delivered by Chief Judge Hagan, joined by Judges Costello and Binns:

This matter is on appeal from a decision of the United States District Court for the District of Wagner denying Fly Above Warehouses, Inc.’s (the Company’s) motion to dismiss for failure to state a claim upon which relief can be obtained and motion to compel individual arbitration of the claims of Costanza et al. (the employees, or Costanza). The Company appeals pursuant to § 16 of the Federal Arbitration Act (“FAA”), 9 U.S.C. § 16, which authorizes an interlocutory appeal of an order refusing a stay of any action under section 3 of this title or denying a petition under section 4 of this title to order arbitration to proceed. 9 U.S.C. §§ 16(a)(1)(A)-(B). In denying relief, the District Court held that: (a) Respondents have met the notice pleading standard to survive Appellant’s motion to dismiss; and (b) the class action waiver in the arbitration provision is unenforceable. We now affirm the District Court’s decision denying Appellant’s motion to dismiss. However, we reverse the District Court’s denial of Appellant’s motion to compel individual arbitration, and compel individual arbitration of Respondents’ claims according to the terms of the collective bargaining agreement.

I. Motion to Dismiss.

For the reasons set forth by the District Court, we affirm the denial of Appellant's motion to dismiss for failure to state a claim upon which relief can be granted.

II. Motion to Compel Individual Arbitration.

A. The Federal Arbitration Act.

It is clear that the Supreme Court favors the use of arbitration under the FAA. Congress enacted the FAA in 1925, 9 U.S.C. § 1, to reverse the longstanding judicial hostility to arbitration as a method of dispute resolution, and to place arbitration agreements on the same footing as other contracts. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) (citing Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 219-220, n. 6 (1985)). Section 2 of the FAA provides that written agreements to arbitrate controversies arising out of an existing contract "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. § 3. Courts must stay litigation of arbitral claims pending arbitration of those claims "in accordance with the terms of the agreement"; and § 4 requires courts to compel arbitration "in accordance with the terms of the agreement" upon the motion of either party to the agreement. 9 U.S.C. §§ 2, 3, 4. By its terms, the Act leaves no place for the exercise of discretion by a district court; rather it mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed. See Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213 (1985) (concluding that agreements to arbitrate must be enforced, absent a ground for revocation of the contractual agreement).

In light of sections 2, 3, and 4 of the FAA, the Supreme Court has held that parties may agree to limit the issues subject to arbitration, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985); to arbitrate according to specific rules, Volt Info. Sciences, Inc. v. Bd. of Tr. of Leland Stanford Junior Univ., 489 U.S. at 479 (1989); and to limit with whom a party will arbitrate its disputes, Stolt-Nieslen v. AnimalFeeds Int’l Corp., 130 S. Ct. 1758 (2010).

The Supreme Court has demonstrated a marked predisposition in favor of arbitration where such agreements exist. In Gilmer, a 62-year-old employee was terminated in 1987 after six years of employment. He filed a charge of age discrimination under the Age Discrimination in Employment Act of 1967 (“ADEA”), 29 U.S.C. § 621 et seq., with the Equal Employment Opportunity Commission (“EEOC”) and subsequently sued in district court, alleging wrongful discharge in violation of the ADEA. Gilmer, 500 U.S. 20. The employer moved to compel arbitration of Gilmer’s age discrimination case pursuant to an arbitration agreement in his securities registration application. Id. at 20. The Supreme Court affirmed the Fourth Circuit’s decision enforcing the arbitration agreement. According to the Court, “questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.” Id. at 25 (quoting Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)). The Court held that having agreed to arbitrate statutory claims, a party should be required to do so unless Congress has evinced an intent to preclude a waiver of judicial remedies for the statutory rights at issue. Gilmer, 500 U.S. at 26. Nothing in the ADEA precluded arbitration of ADEA claims. Id. Arbitration agreements may be enforced under the FAA without contravening Congressional enactments affording employees protection against discrimination. As the Court noted in Gilmer, “by agreeing to arbitrate a statutory claim, a party does not forgo the substantive

rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.” Id. at 26 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985)).

The Supreme Court’s sweeping endorsement of arbitration agreements under the FAA was extended to mandatory arbitration of statutory claims under collective bargaining agreements (“CBAs”). In 14 Penn Plaza LLC v. Pyett, the Court enforced a provision in a CBA that clearly and unmistakably requires union members to arbitrate claims arising under the ADEA. 14 Penn Plaza LLC v. Pyett, 556 U.S. 247 (2009). In so holding, the Court relied on its decision in Gilmer that the interpretation of the ADEA fully applies in the collective-bargaining context and that nothing in the law suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative. See Pyett, 556 U.S. 247 (2009).

The holding in Gilmer requires this Court to analyze whether Congress intended to preclude the use of individual arbitration to vindicate rights under the Americans with Disabilities Act of 1990 (“ADA”), 42 U.S.C. § 121, as amended by the Americans with Disabilities Act Amendments Act of 2008 (“ADAAA”), 42 U.S.C. § 12102. As the Court found in Gilmer with respect to claims under the ADEA, 29 U.S.C. § 621 et seq., we find nothing in the text or legislative history of the ADAAA that expressly precludes arbitration. Gilmer, 500 U.S. at 26-27. It is significant that Congress, in enacting the ADAAA 17 years after the decision in Gilmer, did not preclude arbitration of claims to vindicate the right to be free of disability discrimination. See Gilmer. Because there is no evidence that Congress intended to preclude arbitration of ADA claims, Respondents’ generalized attacks on the adequacy of arbitration procedures are insufficient to preclude arbitration. See Gilmer, 500 U.S. at 30, 35. As the Court

in Pyett stated, “Congress has chosen to allow arbitration of ADEA claims. The Judiciary must respect that choice.” Pyett, 556 U.S. 247, 129 S. Ct. at 1466. The District Court erred when it failed to examine the text of the ADAAA.

The Supreme Court recently held that class action waivers are enforceable. In AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011), the Court found that the FAA prohibits states from conditioning the enforceability of arbitration agreements in consumer contracts on the availability of class-wide arbitration procedures. The Court found that the overarching purpose of the FAA is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings. Id. at 1748. Furthermore, the Court found that requiring the availability of class-wide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA. Id. Agreements to arbitrate allow parties to streamline the proceedings and achieve expeditious results. Permitting class actions in arbitration would frustrate these objectives. See Id. at 1740, 1749.

The District Court declined to apply Concepcion to this matter because the agreement to arbitrate is set forth in a CBA rather than in a consumer contract. We disagree with the District Court’s finding that the facts of Concepcion are distinguishable from the instant facts in this regard. Concepcion is applicable here because the arbitration agreement in Article XX contains a class action waiver and is subject to the FAA.

One year before deciding Concepcion, the Court found in Stolt-Nielsen that a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so. Non-consensual class arbitration is inconsistent with the FAA. Concepcion, 131 S. Ct. at 1750. First, the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—informality—because the process

becomes slower and more costly. Id. at 1751. Second, class arbitration requires procedural formality, such as class certification, and more time-consuming and complex discovery. Id.

The Company did not agree to arbitration of class actions under Article XX. To the contrary, Article XX provides only for individual arbitration claims. In collective bargaining, the Union and the Company agreed to arbitrate discrimination claims solely in an individual capacity. Article XX waives the employees' right to arbitrate their discrimination claims as a group. Where a mandatory arbitration clause is silent on group and class arbitration, a party cannot be forced to submit to either form of arbitration. Stolt-Nielsen, 130 S. Ct. at 1758. The FAA does not require a party to an arbitration agreement to proceed on a class action basis where the arbitration agreement is silent on the issue. Id. at 1764. Rather, § 4 of the FAA requires courts to compel arbitration "in accordance with the terms of the agreement" upon the motion of either party to the agreement. 9 U.S.C. § 4. Because "arbitration is a matter of consent, not coercion," id. at 1773, parties cannot be compelled to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so. Stolt-Nielsen, 130 S. Ct. at 1775.

The District Court wrongly concluded that Article XX does not clearly and unmistakably waive the employees' right to group arbitration. The language mandating claims be brought in an individual capacity acts as a waiver of the employees' right to arbitrate their claims as a group. Following the Court's ruling in Stolt-Nielsen, the Company cannot be forced to submit to class wide arbitration. See Stolt-Nielsen, 130 S. Ct. at 1758.

The District Court also erred in finding that the employees would be unable to vindicate their statutory rights if compelled to arbitrate individually because the costs would be prohibitive. The Union allowed the employees access to the grievance arbitration machinery if

they were willing to assume the costs of their arbitrations. A party seeking to invalidate a class action waiver in an arbitration agreement due to prohibitive cost bears the burden of showing the likelihood of incurring such costs. Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 92 (2000).

Like the Court in Green Tree, this Court lacks sufficient information about how, and the extent to which, these employees will be saddled with prohibitive costs, id. at 91, and the information provided by the employees is too speculative to justify the invalidation of the arbitration agreement. Respondents assert the costs associated with individual arbitration are too high, and that they do not have the financial resources to arbitrate their claims individually. However, they have neglected to support this assertion with actual costs, rather than estimates, of individual arbitration. Id. at n. 6. Unless Respondents submit evidence beyond mere speculation of costs associated with individual arbitration, we cannot find that they are prevented from arbitrating their claims.

B. The National Labor Relations Act.

The National Labor Relations Act (“NLRA”), 49 Stat. 449, governs federal labor-relations law. Under the Act, the Union, as the “exclusive representative...for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment,” bargained in good faith with the Employer and agreed that discrimination claims, including those under the ADA, would be resolved individually in arbitration. Pyett, 556 U.S. 247, 129 S. Ct. at 1463 (quoting 29 U.S.C. § 159(a)). The District Court, however, found that the class action waiver in Article XX interfered with the exercise of protected § 7 activity rights under the NLRA. We disagree. The decision to fashion a CBA to require individual

arbitration of discrimination claims is no different from the many other decisions made by parties in designing contractual grievance machinery. See Id., 556 U.S. 247, 129 S. Ct. at 1464.

The Gilmer Court’s interpretation of the ADEA that “nothing in the text of the ADEA or its legislative history explicitly precludes arbitration” fully applies in the collective-bargaining context. Id., 556 U.S. 247, 129 S. Ct. at 1465 (quoting Gilmer, 500 U.S. at 26-27). Furthermore, as the Court stated in Pyett, “judicial nullification of contractual concessions is contrary to what the Court has recognized as one of the fundamental policies of the National Labor Relations Act—freedom of contract.” Id., 556 U.S. 247, 129 S. Ct. at 1464 (quoting NLRB v. Magnavox Co., 415 U.S. 322, 328 (1974) (Stewart, J., concurring in part and dissenting in part)). Simply put, the District Court cannot interfere with the bargained-for exchange between the parties.

We decline to apply the holding of a recent case decided by the National Labor Relations Board (“NLRB”) invalidating class action waivers in mandatory arbitration agreements on the ground they violated employees’ Section 7 rights to engage in protected concerted activity. DECISION AND ORDER OF THE NLRB, D. R. Horton, Inc. and Michael Cuda. Case 12–CA–25764 (January 3, 2012, Chairman Pearce and Member Becker; Member Hayes recused). As the NLRB pointed out, an arbitration clause freely and collectively bargained between a union and employer does not stand on the same footing as the “Mutual Arbitration Agreement” between an individual employee and his employer. Id. Here, Article XX was negotiated in good faith by the Union and the Company, parties of relatively equal bargaining power. Neither party coerced the other with respect to the agreement waiving class action arbitrations of statutory claims under Article XX. We find further that the Board’s decision is inconsistent with the Supreme Court’s favorable view of class action waivers in arbitration agreements in Concepcion. As noted above, we hold that Concepcion is applicable to the instant matter.

III. Conclusion.

Accordingly, we affirm the District Court's decision denying Appellant's motion to dismiss, and reverse the District Court's denial of Appellant's motion to compel individual arbitration, and compel individual arbitration of Respondents' claims according to the terms of the CBA.

APPENDIX "A"

**Hourly Wages
Fly Above Warehouses, Inc. Employees**

	02/01/10	02/01/11	02/01/12	02/01/13
Sales Person	\$13.75	\$14.09	\$14.44	\$14.80
Receiving Clerk	\$13.50	\$13.84	\$14.19	\$14.54
Warehouse Person	\$14.00	\$14.35	\$14.71	\$15.08
Receiver Helper	\$14.38	\$14.73	\$15.10	\$15.48
Forklift Operator	\$14.30	\$14.66	\$15.03	\$15.41
Loader	\$10.60	\$10.87	\$11.14	\$11.42

**Appendix “B”
Employee Petition**

Monday, November 22, 2010

Dear Mr. Kramer,

We, the warehouse employees of Fly Above Warehouses, Inc., respectfully request the use of forklifts on a regular basis. It is difficult for us to get around the warehouse on a daily basis due to persistent and chronic aches and pain, and we request the same forklift privileges as others employees who have medical reasons for the regular use of forklifts.

cc: Rick Matasar, Business Agent, Froessel Union, Local 87.

Signed,

Mary Lou Costanza

Judy Wine

Ian Michael

Ethan Hope

Oliver Wendell Bakst

Sandra Day Ross

Maggie Hagan

Donny Costello

Asha Foy

Alexis Silverman

Jack Fiegelbaum

Gaurav Patel

Topher Binns

Ruth Ginsburg

Matthew Anslow

Aaron Cohen

Demitri Geller

Rich Tambone

Caitlyn Cho

Belinda Chou

Alana Young

Farah Garrod

Julian Dubois

Jay Schneiderman

Adam Lund

Jim Mancino

Daniel Storz

Patty Leibowitz

Sally Abraham

Elaine Benes

M. Newman

