IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
LONDON

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	
Plaintiff,	**CIVIL ACTION NO. 01-339-KKC**
v.	
WAL-MART STORES, INC.	
Defendant.	

EEOC'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO ENFORCE CONSENT DECREE

I. INTRODUCTION

Plaintiff Equal Employment Opportunity Commission ("EEOC") requests that the Court enforce the terms and intent of the Consent Decree entered in this case on March 1, 2010. The EEOC alleges the following breaches by Wal-Mart: (1) failure to provide instatement to female class members who have requested instatement at Wal-Mart Distribution Center 6097 ("DC 6097), in violation of Section 302 of the Decree; and (2) refusal to provide the EEOC with documentation upon reasonable notice, pursuant to Section 901 of the Decree.

II. BACKGROUND

On March 1, 2010, the Court entered a Consent Decree resolving this matter. (DE # 669.) The Consent Decree was negotiated and drafted by counsel for the EEOC and outside counsel for Wal-Mart (not trial counsel), as the parties prepared for a trial set to begin on March 1, 2010.

Section 302 of the Decree requires the instatement of class members who seek instatement. Specifically, the first 50 openings for orderfiller positions at DC 6097 were to be filled by Wal-Mart with class members who sought instatement. For the next 50 openings, Wal-Mart was required to fill every other position with a class member who sought instatement. Thereafter, the Consent Decree requires that every third orderfiller position be filled with a class member who seeks instatement until every class member who requested instatement has been hired or rejected the position.

In order to avoid the possibility of Wal-Mart having to hire an otherwise non-hirable individual, the Consent Decree stated that instatement would be "subject to the criteria that is applicable for all new hires in the orderfiller position." It was the intent of the parties that class members meet certain very minimal qualifications such as age (at least 18), legal right to work in the United States or any other uniformly enforced minimum criteria, such as the exclusion of persons with certain types of felonies, or those terminated by their most recent employer, if those were in fact uniformly enforced minimum criteria.

On July 19, 2010, pursuant to Section 301 of the Consent Decree, the EEOC provided counsel for Wal-Mart with an initial listing of 157 class members eligible for instatement. Before identifying class members and placing them on the instatement list, the settlement administrator confirmed that each person met the minimum criteria for hire at the time they sought employment at Wal-Mart, as determined by EEOC expert Dr. Burt Barnow.

The EEOC has recently learned that Wal-Mart has breached its obligation to instate the class members and is instead notifying the class members that they can apply for employment the same as any other outside applicant. Upon information and belief, shortly after receipt of the EEOC's reinstatement list, Wal-Mart began using additional screening

criteria, including a physical abilities test and Logistics Pre-Employment Assessment for orderfiller candidates. The parties never discussed or envisioned a physical abilities test or additional class member screening criteria at the time the Consent Decree was drafted since (1) no such tests were in place at that time and (2) the parties understood that instatement was unconditional, subject only to certain uniformly enforced minimal criteria.

On September 23, 2010, Wal-Mart provided the EEOC with its required reporting on the class members who had sought instatement. Of the first 90 women contacted by Wal-Mart, Wal-Mart reported that none of the women had been instated. It reported that 14 women took the physical abilities test and were not offered employment because they were "non-competitive." It reported that 4 women were not offered employment because they were "non-competitive" on the "Logistics Pre-Employment Assessment. It also reported 54 women opted out or failed to show for testing and 10 women were identified as "no show application" [1] (quite possibly as a result of learning of Wal-Mart's latest tactic for excluding women). (Exhibit 1.)

After waiting as many as ten years or longer, women who are both qualified for and interested in work at DC 6097 are being excluded, despite a Consent Decree which provided them with the equitable remedy of instatement. See Declarations of Odie Greene, Amy Smallwood and Margaret Gooden, attached as Exhibits 2, 3 and 4 to the EEOC's Motion.

In addition to altering its duties under Section 302 of the Decree, Wal-Mart is also altering its duties under Section 901 of the Decree. Section 901 is one of two sections under the Administration Section of the Decree. Section 901 is entitled "Role of the EEOC" and it relates to compliance reviews by the EEOC. This section permits the EEOC to inspect the

1 The EEOC recently notified Wal-Mart of additional breaches of the Consent Decree: incorrectly reporting that class members were "no show" or unreachable. Should these disputes not be resolved, Court intervention will be sought.

premises, interview employees and request, examine and copy documents upon "reasonable notice." It allows the EEOC the opportunity to review all, or a portion, of Wal-Mart's applications or applicant flow logs "from time to time."

The EEOC first requested documentation from Wal-Mart, pursuant to Section 901, on September 20, 2010. The EEOC asked that the documentation be produced by September 27. Wal-Mart then indicated that it believed it was entitled to 45 days to produce the documents. The EEOC advised that "reasonable notice" did not equate to 45 days. The EEOC offered a one week extension, to October 4, 2010. Wal-Mart has refused to produce the documentation in a timely manner. The EEOC requested additional documentation on October 1, 2010, to be produced within 7 days. That documentation has not been produced. Wal-Mart's unreasonable interpretation of "reasonable notice" as allowing it 45 days is interfering with the EEOC's ability to monitor compliance with the Decree in a timely manner.

III. ARGUMENT

A. Instatement Does Not Mean Offering the Class Members the Opportunity to Reapply, the Same as Any Other Outside Applicant.

One of the essential purposes of Title VII is "to make persons whole for injuries suffered on account of unlawful employment discrimination." Albemarle Paper v. Moody, 422 U.S. 405, pinpoint cite (1975). Instatement is a preferred equitable remedy used to compensate an aggrieved party for loss of future earnings due to illegal adverse employment actions. Bullen v. Chafinch, 336 F. Supp. 2d. 357, 359 (D. Del. 2004). Instatement is "the presumptive equitable remedy in an employment discrimination case." Cloke v. West Clermont Local School District Board of Education, 2006 WL 2873551 * 1 (S.D. Ohio June 29, 2006), citing Fuhr v. School District of Hazel Park, 364 F.3d 753, 761 2004). For that

reason, Section 302 of the March 1, 2010 Consent Decree provided instatement to the class members. It was the intent of those involved in drafting the Consent Decree, by using the term "instatement" that the class members be placed in the same position that they would have been, absent discrimination. Id.; .Albemarle, 442 U.S. at 418-419.

Wal-Mart's distortion of the right to "instatement" into nothing more than the right to apply at DC 6097 like any other outside applicant, based upon the Section 302 phrase, "subject to the criteria that is applicable for all new hires in the orderfiller position" is irrational since: (1) the class members already had the right to apply to DC 6097 before and after the Consent Decree so there would be no need for a special Consent Decree provision; (2) instatement is a legal term with a legal meaning which Wal-Mart chooses to ignore; and (3) the parties could never have intended that class members be subject to a physical abilities test before reinstatement because no such test was being used at DC 6097 at the time the Consent Decree was drafted. See Neely v. Miller Brewing Co., Inc., 25 Fed. Appx. 370, 372 (6th Cir. 2002) (interpretation of contract clause as giving party right it already had would make contract clause "superfluous; clause should be given a non-redundant meaning).

Wal-Mart's attempt to impose new conditions on instatement is a tactic that has already been rejected by other courts. See e.g. Bullen v. Chafinch, 336 F. Supp. 2d 357, 360 (D. Del. 2004) (because instatement is a remedy for illegal discrimination, there is the assumption that the aggrieved party is qualified for employment and so any attempt to subject the aggrieved party to new requirements or testing is rejected). "The remedy of instatement in this case will return Plaintiffs to the positions they would have occupied but for Defendants' illegal discrimination. Thus, Plaintiffs here are not receiving a windfall, but are being returned to what would have been the status quo had they not been victims of

Defendants' illegal discrimination" Id.

The parties resolved a lawsuit which alleged a pattern or practice of discrimination against women in hiring. Some class members have waited more than ten years for a remedy. Although a make whole remedy was envisioned by those who drafted the Consent Decree, Wal-Mart is violating the intent of the Consent Decree by denying instatement to class members. As each day passes without instatement, their damages accrue. Because this Court retained jurisdiction over the Decree it has the power not only to enforce the Decree, but to act, as needed, to effectuate the purposes of the Decree. See Brown v. Neeb, 644 F. 2d 551 (6th Cir. 1981)(court properly enjoined layoff which was be contrary to purposes of consent decree).

B. Wal-Mart is Impeding the EEOC's Ability to Monitor Compliance with the Consent Decree by Failing to Respond to Section 901 Requests in a Timely Manner.

Section 901 of the Consent Decree is entitled "Role of the EEOC" and it relates to compliance reviews by the EEOC. This section permits the EEOC to inspect the premises, interview employees and request, examine and copy documents upon "reasonable notice." It allows the EEOC the opportunity to review all, or a portion, of Wal-Mart's applications or applicant flow logs "from time to time." The intent of this provision is to allow the EEOC prompt access to investigate possible breaches and ensure that Wal-Mart is complying with the Consent Decree. The EEOC sought documents from Wal-Mart, requesting compliance within 7 days.

Because the Consent Decree does not define "reasonable notice," "reasonable notice" needs to be defined based upon the factual circumstances and the prejudice that results from

Wal-Mart's delay in providing access. See Western Kentucky Coca-Cola Bottling Co., Inc. v. Red Bull North America Inc., 2010 WL 65029* 6 (W.D. Ky. 1/5/10) (factual circumstances and harm must be evaluated in determination of "reasonable notice.")

It should be noted preliminarily that the Federal Rules of Civil Procedure allow a party 30 days to respond to a formal request for production. There is no reason why "reasonable notice" should be interpreted as giving Wal-Mart 50% more time than a formal Request for Production. Moreover, the urgency of the EEOC's requests is greater than a typical Request for Production because the EEOC makes requests when it believes that a breach of the Consent Decree may have occurred. Requiring the EEOC to wait 45 days or even 30 days to inspect the premises, interview employees and request, examine and copy documents is not "reasonable." Further adding to the need for a short response period is the fact that possible breaches relate to Wal-Mart's hiring process and additional breaches may be occurring on a daily basis. Finally, the records sought by the EEOC are neither voluminous nor difficult to gather. Wal-Mart's across the board demand for a 45 day response, regardless of the simplicity or nature of the request is by definition, not "reasonable." Accordingly, the EEOC respectfully requests that Wal-Mart be ordered to respond to Section 901 requests for information within 7 days

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that true and accurate copies of EEOC's Memorandum of Law in Support of Motion to Enforce Consent Decree was sent via first class mail on this 13th day of October, 2010 to:

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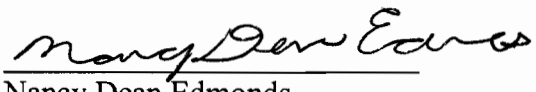

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