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PUBLICATIONS

Allegro
Volume 112 No. 3
March, 2012

Walmart women will not be denied

Legal Corner

by Harvey Mars,

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March is Women's History Month, and the women of Walmart will not be denied justice. You will remember from my October 2011 column that women workers had sued Walmart , asserting that they had been systematically denied promotions and paid less than male counterparts. They had attempted to form a class action lawsuit, which the Supreme Court ultimately denied in Walmart v. Dukes.

What's left for these women?

They can sue Walmart individually and pay for their own lawyers out of pocket. This is discouraging, but it's the result of the Supreme Court's decision.

On the other hand, these workers can also file a claim with the Equal Employment Opportunity Commission – which is exactly what they've done.

Five hundred female Walmart employees from Alabama, Arkansas, Georgia, Mississippi and North Carolina filed discrimination charges with the EEOC in late January.

The thrust of their charge is that Walmart has still systematically favored male employees over women when granting raises and promotions.

These new charges counter Walmart's claim that it has engaged in corrective action and that the case was finally over.

If the EEOC finds that there is probable cause that Walmart breached federal discrimination laws, it may be able to initiate a comprehensive lawsuit against Walmart on behalf of the U.S. government, which would have the same scope as a class action but without having to request class standing from the court.

In addition to the EEOC charges, some workers have commenced new class actions on more limited grounds in California and Texas. Hopefully, this will be easier to do on a regional basis than a national one.

Before the class claims proceed, plaintiffs' counsel expect Walmart to again challenge their class standing.

Woman who potentially have discrimination claims against Walmart are encouraged to examine www.WalmartClass.com, a Web site created by plaintiffs lawyers who intend to pursue discrimination claims on a regional basis. I applaud claimants for their tenacity.

Some good news?

If discrimination claims have been hampered by Walmart v. Dukes, the blow has been softened somewhat by the National Labor Relations Board's recent decision in D.R. Horton, 357 NLRB No. 184 (2012).

D.R. Horton is a company that builds homes. If you worked for D.R. Horton, you were required to sign an agreement that prohibited you from suing your employer in court. Instead, the agreement required you to take any dispute to arbitration.

This deserves a mention. Arbitration may sound like a good thing, and Local 802 uses it as part of its agreements all the time, but there are reasons why it may be bad for individual workers.

Arbitrators' bills are usually huge. Their decisions are binding and cannot normally be appealed. You can't request a jury. Arbitrators – who don't have to be lawyers – can make up their own rules and limitations in a hearing. Statistics have shown that arbitrators rule more often in favor of the employer. Arbitrator awards are often smaller than what you might get from a jury.

It's become customary for employers to force workers to sign away their rights to sue and instead use arbitration. This is apparently legal for the time being and it's not what caught the attention of the NLRB in this case.

Here was the rub. Workers at D.R. Horton were also prohibited from ever participating in a class action against their employer. This was the sticking point.

The NRLB found that this "agreement" actually violated Section 7 of the National Labor Relations Act.

Section 7 permits employees to engage in concerted activity for their mutual aid and protection.

Since employees were totally prohibited from pursuing class claims either through litigation or arbitration, the NLRB determined that the employment agreement was illegal.

It is very encouraging to see that the NLRB has deemed pursuit of class action claims to be protected activity under Section 7.

However, the NLRB specifically stated that the problem with this agreement was with the prohibition on class action. But requiring workers to use arbitration would be O.K., according to the labor board.

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