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7-27-2006

## EEOC and Yolanda E. Washington and Subrena L. Tarver v. Kroger Texas, L.P.

Judge Keith P. Ellison

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## EEOC and Yolanda E. Washington and Subrena L. Tarver v. Kroger Texas, L.P.

### Keywords

EEOC, Yolanda E. Washington, Subrena L. Tarver, Kroger Texas L.P., H-05-1768, Consent Decree, Disparate Impact, Hiring, Female, Retail, Employment Law, Title VII



Charging Parties and other qualified women, as a class, because of their sex by failing to hire them as order selectors while hiring less qualified men at its Houston Distribution Center in violation of Section 703 (a) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-1-17 and 42 U.S.C. § 1981. The lawsuit also alleged that Kroger had failed to preserve certain applications for the order selector position in violation of Section 709(c) of Title VII, 42 U.S.C. § 2000e-8. Charging Parties intervened in the action and alleged Kroger discriminated against them when it failed to hire them as order selectors in violation of Chapter 21 of the Texas Labor Code. The Commission and Charging Parties subsequently filed a motion to amend the pleadings to allege that Kroger's selection procedures for the order selector position had a discriminatory impact on women in violation of Section 703 (k) of Title VII, 42 U.S.C. § 2000e-2(k).

C. In response to the Complaints filed by the EEOC and Charging Parties, Kroger filed Answers in which it categorically denied each and every claim for relief.

D. The parties wish to avoid the risks, uncertainties and expenses of continued litigation. Accordingly, the parties have agreed to settle this lawsuit. Neither Kroger's consent to the entry of this Consent Decree nor any of the terms set forth in it shall constitute or be construed as an admission of liability or of any violation of the law or of the rights of any person. The parties agree that this Consent Decree (hereinafter sometimes referred to as the "Decree") is being entered into for the sole purpose of compromising disputed claims without the necessity for protracted litigation.

E. The Commission, Intervenors and Kroger stipulate to the jurisdiction of the Court and waive their right to a jury trial and the entry of findings of fact and conclusions of

law on all issues.

## **II. Definitions**

F. The claims made the subject of this Consent Decree were made by the EEOC on behalf of a class of female applicants for order selector positions in Kroger's Houston distribution center. The class includes: (1) all identified members of the class; and (2) all unidentified females who applied for the order selector position on or before December 31, 2005.

G. The payment class shall consist of two subclasses, collectively representing female applicants to the order selector position who applied during the period September 1, 2003 through December 31, 2005, who were not hired and who were identified by the Commission on or before May 15, 2006, hereinafter referred to as the "payment class." The payment class shall receive monetary relief pursuant to the terms of the Decree.

- (1) The following individuals constitute the Charging Party payment subclass: Yolanda E. Washington and Subrena L. Tarver. Kroger has separately agreed to pay \$35,000 to Ms. Tarver and \$35,000 to Ms. Washington in full and final settlement of their claims. The terms of settlement are set forth in a separate confidential settlement agreement and release.
- (2) The following individuals constitute the non-party payment subclass: Vivian Britton, Lisa L. Edwards, Cynthia Franco, Angela H. Johnson, Beverly A. Joseph, Kimberly A. Murphy, Sue A. Perdue, Eteshia L. Pointer, Permita D. Pointer, Darlene Perez, Elda Rodriguez, and

Sylvia S. Sanchez. Members of the non-party payment subclass may also be qualified for membership in other classes defined by this Decree.

H. The hiring class shall consist of certain females who applied for the order selector position between September 1, 2003 and December 31, 2005, were not hired, and have been or will be offered employment by Kroger, hereinafter referred to as the "hiring class." The following individuals belong to the hiring class: Lisa L. Edwards, Cynthia Franco, Angela H. Johnson, Beverly A. Joseph, Permita D. Pointer, Darlene Perez, Elda Rodriguez, Kimberly A. Murphy and Sylvia S. Sanchez. Ms. Edwards, Ms. Franco, Ms. Joseph, Ms. Pointer, Ms. Rodriguez and Ms. Murphy have already received offers of employment from Kroger. Ms. Johnson, Ms. Perez and Ms. Sanchez will receive job offers pursuant to this Decree. Each member of the hiring class will be hired if she passes the physical ability test, drug and alcohol test, and physical. Members of the hiring class may also be qualified for membership in other classes defined by this Decree. Each member of the hiring class may reject any offer of employment that has been made by Kroger, or will be made pursuant to this Decree.

I. The term "physical ability test" refers to the ergonomics test used by Kroger to determine whether an applicant to the order selector position can perform the physical requirements of the order selector position.

J. The term "acceptance" as used in the Decree refers to the Commission's approval of the physical ability testing program at Kroger's Houston distribution center at 701 Gelhorn Drive and to no other facility. No endorsement is implied for the utilization of

the test or its being properly validated in any context or setting other than for the purposes of settling this particular lawsuit at this particular distribution center.

IT IS ORDERED, ADJUDGED AND DECREED:

III. **General Provisions**

1. This Consent Decree is entered in full and complete settlement of any and all claims asserted by the Commission in Civil Action No. H-05-1768 and the above-referenced Charges on behalf of Yolanda Washington and Subrena Tarver and the class of women the Commission represents, including but not limited to back pay, front pay, compensatory damages, exemplary damages, pre-judgment and post-judgment interest, injunctive and declaratory relief, attorneys' fees and costs of court.
2. Kroger agrees that, for the duration of this Decree, the managers and employees responsible for screening applications, interviewing and hiring order selectors in its Houston distribution center will not discriminate against any individual with respect to hiring, compensation, terms, conditions or privileges of employment because of such individual's sex.

IV. **Monetary Relief**

3. Kroger has agreed to pay \$35,000 to Ms. Tarver and \$35,000 to Ms. Washington in full and final settlement of their claims. Kroger and Charging Parties have agreed to other terms that are set out in a separate settlement agreement and release.
4. Without admitting liability, Kroger shall pay the sum of SIXTY SEVEN THOUSAND FIVE HUNDRED DOLLARS (\$67,500.00), in full and final settlement of the

Commission's lawsuit to provide monetary relief to the non-party payment subclass identified by the Commission. The Commission shall determine in its sole discretion whether or not a member of the non-party payment subclass is eligible for monetary relief under the terms of the Decree and if so, how much money that qualified claimant will receive from the non-party payment subclass settlement fund. The Commission has provided counsel for Kroger with the names, social security numbers, dates of birth and last-known addresses of each class-member who will receive a portion of the class settlement fund and the amounts to be paid to each. Each class-member has executed a separate and confidential settlement agreement and release. Kroger shall mail or deliver a settlement check to each identified non-party payment subclass member at the address provided to it by the Commission either ten (10) calendar days after all of the class-members execute (and do not revoke) their settlement agreements, or ten (10) calendar days after the Court's entry of the Consent Decree, whichever is later. Within three (3) days of the issuance of the checks to Charging Parties and the class-members, a copy of each check shall be mailed to the Commission's counsel of record.

5. In the event that the check payable to any non-party payment subclass member is not cashed or deposited within thirty (30) days of its mailing to a non-party payment subclass member, Kroger will notify the Commission within ten (10) days. Within ten (10) days thereafter, the Commission will provide an updated address, if available, to Kroger. Kroger will stop payment on the original check and re-issue and mail a replacement check to the class member. In the event that the reissued



settlement check is not cashed or deposited within thirty (30) days of its mailing, Kroger will notify the Commission within ten (10) days. At the direction of the Commission, Kroger will issue second checks to those class members who timely cashed their checks, on a pro-rata basis, in an amount in the aggregate that fully depletes the total amount of the settlement check(s) that have not been cashed by the other class members. None of the non-party payment subclass settlement fund shall revert back to Kroger.

6. The sums payable to the non-party payment subclass members may be subject to federal income tax. Not later than January 31, 2007, Kroger will issue Internal Revenue Service ("IRS") Forms 1099 to each non-party payment subclass member for all sums paid pursuant to this Decree.

**V. Training**

7. Annually, for the duration of the Decree, Kroger will provide, using either an attorney or an independent experienced training person or group, an anti-harassment and discrimination training program for all managers and employees who are involved in the application and hiring process at Kroger's Houston distribution center. Specifically, the training attendees will be Tim Mack, Dave Gigli, Cody Camp, Jerry O'Driscoll, Scott Christy, and other managers, supervisors or employees who replace these individuals or separately become involved in the application and hiring process during the period of time covered by the Decree. The training shall also specifically address compliance with all aspects of the Consent Decree, including a summary of the allegations in the Complaint and Amended Complaint and the terms

of the Consent Decree. The training will address Kroger's record-retention obligations under federal law. The minimum duration of each annual training session shall be two (2) hours. The first such training shall be completed within six (6) months from the date the Decree is entered. Kroger shall submit to the EEOC, at least forty-five days in advance of each year's training session, the name of the program provider and a curriculum outline indicating the information to be addressed during the program and copies of all agendas and materials to be distributed at the training seminar. Kroger intends to use either in-house labor and employment counsel or counsel from the law firm of Littler Mendelson, P.C. as their consultant/lecturer for purposes of each annual training session, and the assigned consultant/lecturer shall have at least five (5) years of experience practicing employment law. Should Kroger elect to use any other consultant/lecturer, it shall notify the EEOC of the identity of the consultant/lecturer in writing at least sixty (60) days prior to each seminar, subject to the approval of the Commission, which will not be unreasonably withheld. Written acknowledgment of attendance at each training session shall be obtained by Kroger from all individuals attending the training, and retained by Kroger for the duration of this Decree. A copy of the attendance list shall be forwarded to the EEOC within thirty (30) days of each training session. Should the Commission elect to send a representative to any training session, it shall designate its representative and notify Kroger of this election in writing no less than ten (10) business days before the training session.

**VI. Updated Validation Study of the Physical Ability Test**

8. Within forty-five (45) days from the entry of this Decree, Kroger will retain a company to perform an updated validation study on its physical ability test using current data addressing the physical demands and requirements of the order selector position in the Houston distribution center. The determination of a passing score for the physical ability test may be revised based upon the outcome of the validation study. In any event, however, the parties agree that the passing score for the aerobics portion of the test will not exceed  $164.8 \text{ ml}\cdot\text{kg}^{-2/3} \cdot \text{min}^{-1}$ . The results of the updated validation study and the determination of a passing score for the physical ability test will be subject to acceptance by the Commission, which will not be unreasonably withheld. Within seventy-five (75) days from the entry of this Decree, Kroger will provide the Commission with a copy of the updated validation study and all supporting documentation, electronic or otherwise, including technical details and appendices, including documentation and data relating to the job analyses and passing scores for each component of the test, subject to the Agreed Protective Order in place in this litigation.
9. Within one hundred twenty (120) days from the entry of this Decree, the Commission will inform Kroger whether it accepts the results of the updated validation study. Kroger will implement the revised physical ability testing program no later than thirty (30) days after receipt of the Commission's approval.
10. After submission of the updated validation study for the Commission's acceptance, Kroger and the Commission will engage in an interactive process involving their

counsel and experts and use their best efforts to resolve any issues raised as a result of the validation study. The interactive process will consist of two steps: (1) counsel for the Commission and Kroger, and the parties' expert witnesses, will confer via telephone conference; and if the parties cannot reach an agreement then (2) the parties will submit the issue to the Court for determination, or at the Court's preference, a Special Master to be appointed with input from the parties.

11. During the term of this Decree, the Commission shall be provided with written notice of any revision to the passing score for the physical ability test and shall be given written notice of any further change in the score and the reasons for such change. Such notice shall be given no later than ten (10) calendar days after such change is made.

**VII. Hiring**

12. Kroger has made job offers to certain members of the hiring class and pursuant to this Decree, offers for employment are hereby extended to Ms. Johnson, Ms. Perez and Ms. Sanchez (the remaining members of the hiring class). Each offer is contingent upon the class member passing the physical ability test, drug and alcohol test and physical. Within ten (10) days of the Commission's approval of the updated validation study and passing score, Kroger will send a letter to each member of the hiring class advising that they have twenty (20) days to accept Kroger's offer of employment. Kroger shall notify the Commission of the results of the physical ability test taken by any class member at the time it provides the Commission with the applicant flow log referenced in paragraph seventeen (17).

Each member of the hiring class who passes the physical ability test, drug and alcohol test and physical will be hired as an order selector.

13. Within sixty (60) days after the validation study is accepted by the Commission, Kroger will offer all women who were offered employment as order selectors at the Houston distribution center between September 1, 2003 and December 31, 2005, but who failed the physical ability test, the opportunity to re-take the test. The EEOC will provide Kroger, within sixty (60) days of the entry of the decree, with the last-known addresses of the women. All offers to re-test will be rescinded if not accepted within twenty-one (21) days from the date on the offer letter. All women who re-take and pass the physical ability test, drug and alcohol test, and physical will be hired as order selectors.

**VIII. Notice and Recruitment**

14. Within ten days after entry of this Decree, Kroger will conspicuously post the attached notice (Exhibit "A") in a location which is accessible to all employees and applicants at the Houston distribution center. Kroger will assure that the notice remains posted for the duration of the Decree. Kroger will advise the Commission of the location(s) of the notice along with its first applicant flow log pursuant to Paragraph 17, and provide the Commission with a signed copy of the notice.
15. Kroger will engage in active recruitment of female applicants for order selector positions at the Houston distribution center. To further this objective, and for the duration of this Decree, Kroger will utilize the following approaches:
  - i). when placing job advertisements for the position of order selector,

Kroger's advertisements shall contain language indicating that Kroger seeks qualified male and female applicants;

- ii). pictorial ads shall feature a female;
- iii). an advertisement compliant with items i) and ii) herein will be placed at least once per month in the *Sunday Houston Chronicle* ;
- iv). Kroger will also place advertisements with all paper and web based publications of *The Work Source* and the *Greensheet*;
- v). Kroger will continue to hold weekly job fairs which seek both female and male applicants; and
- vi). the banner advertisement conspicuously placed on the Houston distribution center fence shall include a photograph of a female.

16. During the pendency of this Decree, Kroger shall maintain the applications of qualified male and female applicants to the order selector position in an active status for a period of 60 days from the application date. During the active period, the otherwise qualified male and female applicants shall be considered for vacancies which arise in the order selector position.

**IX. Record-keeping**

17. Kroger will develop and maintain an applicant flow log to document all persons seeking employment at the Houston distribution center. The information to be recorded shall include the name, date of application, address, telephone number, and gender of all applicants and whether a conditional offer of employment was extended to the applicant. In the event that a conditional offer is made, the

applicant flow log shall also indicate the applicant's score on each component of the physical ability test. Kroger will provide this information to the Commission on a quarterly basis for the duration of the Decree.

18. Pursuant to 29 C.F.R. § 1602.14, all Kroger's personnel or employment records concerning hiring, promotion, demotion, transfer, lay-off or termination will be preserved for a period of one year from the date of making of the record or the personnel action involved, whichever occurs later. Also, pursuant to 29 C.F.R. § 1602.14, where a charge of discrimination or a lawsuit has been filed against Kroger under Title VII or the Americans with Disabilities Act, Kroger will preserve all personnel records relevant to the charge or action until the later of the following events: final disposition of the charge or final disposition of the action including the period during which a judgment, consent decree or other resolution is pending.

**X. Reporting Requirements**

19. Reports required pursuant to the Decree shall be in writing and mailed to the following address: Equal Employment Opportunity Commission, Attention: Rose Adewale-Mendes, Supervisory Trial Attorney, 1919 Smith Street, 6<sup>th</sup> Floor, Houston, TX, 77002.

**XI. Monitoring Inspection**

20. At the EEOC's option, its representatives may undertake an annual monitoring inspection at Kroger's Houston distribution center. The EEOC shall provide to Kroger's counsel, J. Bradley Spalding, at least ten (10) days written notice of any such inspection, and counsel may attend. At a monitoring inspection, the EEOC

representatives shall be permitted to speak with any of Kroger's employees in a group and/or individually and shall be permitted to contact any employee who is present as well as any who are not present on the day the EEOC representatives conduct the monitoring inspection. Within three (3) business days of the completion of an inspection, Kroger will, at the Commission's request, provide the Commission's counsel of record with the names, job titles, gender, and home telephone numbers of any employees who were not present on the occasion of the monitoring inspection so that the EEOC may, at its option, unilaterally contact any non-managers who were not at work during the monitoring visit. In the event that the EEOC intends to interview any management official who was not then present, the EEOC will contact Kroger's counsel, who may participate in any resulting interview. If the EEOC chooses to forego a monitoring inspection in any twelve month period succeeding the entry of this Decree, that shall not be deemed to waive its right to arrange subsequent monitoring inspections in successive twelve month periods during the period up to the date of the expiration of the Decree.

**XII. Miscellaneous Provisions**

21. Each party to this action shall bear their own costs and attorney's fees.
22. This Decree shall be binding on each party. Kroger will notify any successor-in-interest of the existence and terms of this Decree, and shall simultaneously notify the Commission by copying it with the referenced correspondence.
23. This Decree shall remain in effect for 30 months from the date of its entry by the Court. During the effective period of this Decree, the Court shall retain jurisdiction



to assure compliance with this Decree and to permit entry of such further orders or modifications as may be appropriate. The parties to the Decree are specifically authorized to seek Court-ordered enforcement of this Decree in the event of a breach of any of the provisions herein.

24. In the event either party to the Decree believes the other has breached any provision of this Decree, counsel for the non-breaching party shall notify counsel for the breaching party, in writing, of such breach. In that event, unless irreparable injury would be caused by a delay, before instituting any legal action to enforce such provision(s), the non-breaching party will afford the breaching party the opportunity to remedy as may be appropriate any such alleged violation within 30 days of such notice. In the event the parties disagree whether or not a fully satisfactory cure has been effected, the non-breaching party retains the right to seek Court enforcement of the terms of the Decree.
25. Nothing in this Decree shall be construed to preclude the Commission from investigating a timely charge and filing a separate action under Title VII or any other statute which the Commission enforces in the future for any alleged violation by Kroger which is not the subject of this Decree.
26. No waiver of any of the terms of this Decree shall be valid unless made in writing and signed by the parties.
27. No modification or alternation to the terms of this Decree shall be valid unless made in writing and signed by the parties.

28. If one or more provisions of this Decree are rendered unlawful or unenforceable by an Act of Congress, or otherwise, all other provisions of the Decree shall remain in full force and effect.
29. Each signatory certifies that s/he has authority to execute this document on behalf of its client.
30. This Consent Decree may be signed in counterparts.
31. This Decree shall expire by its own terms at the end of 30 months from date of entry, without further action by the parties.
32. The parties agree to entry of this Decree and judgment subject to final approval by this Court.
33. The provisions of the Decree are the product of negotiation between the parties to this litigation and are not intended as precedent in other cases involving claims of discrimination being asserted by the Commission against any other employer, or against Kroger by any plaintiff.

Signed this 27<sup>th</sup> day of July, 2006 at Houston,  
Texas.

  
\_\_\_\_\_  
Keith P. Ellison  
United States District Judge

**AGREED AND CONSENTED TO:**

Lynne Gellenbeck  
Lynne Gellenbeck  
Senior Attorney  
The Kroger Co.

ATTORNEY FOR PLAINTIFF  
EQUAL EMPLOYMENT OPPORTUNITY  
COMMISSION

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**“EXHIBIT A”**



**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**  
**Houston District Office**

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1919 Smith Street, 7<sup>th</sup> Floor  
Houston, TX 77002-8049  
(713) 209-3320  
TTY (713) 209-3439  
FAX (713) 209-3381

**NOTICE TO THE EMPLOYEES AND APPLICANTS OF  
KROGER TEXAS, L.P.**

1. Federal law requires that there be no discrimination against any employee or applicant for employment because of the employee's sex, race, color, religion, national origin, age or disability with respect to recruitment, hiring, compensation, assignment or other terms, conditions or privileges of employment.
2. KROGER TEXAS, L.P. supports and will comply with such Federal law in all respects and will not retaliate or take any action against applicants, current or former employees because they have exercised their rights under the law by filing charges with the Equal Employment Opportunity Commission (EEOC), providing information to the EEOC, and/or participating in any manner with an EEOC investigation or lawsuit or provided information during the company's investigation of any discrimination complaint.
3. KROGER TEXAS, L.P. expressly prohibits sex discrimination and will not engage in any employment practices that have the effect of creating or tolerating discrimination against applicants or employees because of their sex. At KROGER TEXAS, L.P., such discriminatory employment practices will not be tolerated. KROGER TEXAS, L.P. will promptly investigate any claim of unlawful discrimination and will take appropriate action as indicated by the results of its investigation.
4. Any applicant or employee who feels s/he has been the target of such discrimination, retaliation or harassment is advised to report this action promptly to Paul Glenn, Human Resources Manager, at (713) 507-4876 or Bill Breetz, President, at (713) 507 4803.

SIGNED this \_\_\_\_\_ day of \_\_\_\_\_, 2006.

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Bill Breetz, President  
KROGER TEXAS, L.P.

This notice shall remain posted for thirty (30) months to \_\_\_\_\_, 2009.