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Equal Employment Opportunity Commission v. Tobacco Superstores, Inc.

Judge William R. Wilson

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Equal Employment Opportunity Commission v. Tobacco Superstores, Inc.

Keywords

Equal Employment Opportunity Commission, E.E.O.C., EEOC, Tobacco Superstores Inc., 3:05-cv-00218-WRW, Consent Decree, Disparate Treatment, Constructive Discharge, Promotion, Race, African American, Retail, Employment Law, Title VII

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION**

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT ARKANSAS

AUG 04 2008

EQUAL EMPLOYMENT OPPORTUNITY)
COMMISSION,)
)
Plaintiff,)
)
v.)
)
TOBACCO SUPERSTORES, INC.)
)
Defendant.)

JAMES W. McCORMACK, CLERK
By: *Jean Surman*)
DEP CLERK

CIVIL ACTION NO.
3:05-cv-00218 WRW

CONSENT DECREE

Introduction

For purposes of settlement and compromise only, the parties advise the Court that they wish to resolve the instant controversy without the expense, delay, and burden of further litigation.

Plaintiff, Equal Employment Opportunity Commission (hereinafter the "Commission"), has instituted this action on behalf of Theresa Sharkey and a class of African Americans, alleging that Defendant Tobacco Superstores, Inc. (hereinafter "TSS"), failed to promote Ms. Sharkey and other African American employees to management positions because of their race, African American, and constructively discharged Ms. Sharkey because of her race, African American, in violation of Title VII of the Civil Rights Act of 1964 (hereinafter "Title VII").

The Defendant has consistently denied and continues to deny that it engaged in any unlawful employment practices as alleged by the Commission or that it otherwise violated Title VII.

In the event this proposed Consent Decree is not approved or does not become final, then it shall not be admissible in evidence in any subsequent proceeding in this action. Further, this Consent Decree shall not be admissible in any other action now pending or which may be filed in the future, except as to enforcement proceedings.

This Consent Decree constitutes the complete and exclusive agreement between the parties with respect to the matters referred to herein.¹ No waiver, modification or amendment of any provision of this Consent Decree shall be effective unless made in writing and signed by both parties. No representations or inducements to compromise this action have been made, other than those recited or referenced in this Consent Decree.

The Court has reviewed the terms of the proposed Consent Decree in light of the applicable laws and regulations the statements and representations of counsel for all parties, and hereby approves the Consent Decree.

I. JURISDICTION

The United States District Court for the Eastern District of Arkansas, Jonesboro Division, has jurisdiction over the parties and subject matter of this litigation.

II. GENERAL PROVISIONS

This Consent Decree, being entered with the consent of the parties for purposes of settlement, shall not constitute an adjudication on the merits of this lawsuit and shall not be construed as an admission by Defendant of any violation of Title VII or any

¹ During the course of this action, the Commission filed for partial summary judgment to have Defendant and all other corporations owning Tobacco Superstore retail stores determined as an integrated enterprise. As the Court had not ruled on that Motion as of the date of this Decree, this Consent Decree applies only to Defendant, Tobacco Superstore, Inc.

executive order, law, rule or regulation dealing with or in connection with discrimination, harassment, or retaliation in employment.

III. SCOPE AND DURATION OF DECREE

1. By entering into this Consent Decree, the parties do not intend to resolve any charge of discrimination currently pending before the Commission other than Charge No. 250-A2-00710, filed by Theresa Sharkey, that created the procedural foundation for the complaint in this case.

2. This Consent Decree constitutes the complete and exclusive agreement between the Commission and Defendant, with respect to the matters referred to herein and arising out of Charge No. 250-A2-00710. This Decree shall not be considered in any manner to be dispositive of any other charges now pending before any office of the Commission, or other lawsuits, if any, pending against TSS located in Forrest City, Arkansas, other than this lawsuit and the above-mentioned charge. Further, this Decree shall not be used as precedent in the event of any future charges that may be filed against TSS alleging race discrimination.

3. The terms of this Decree shall be three years from the date of entry, which shall be considered as the effective date of this Decree.

4. The Court shall retain jurisdiction over the parties and this Consent Decree until the expiration of three years or satisfaction of all provisions of the Decree, whichever is later.

IV. INJUNCTIVE RELIEF

1. Defendant, its officers, agents, management, (including supervisory employees), successors and assigns, are hereby enjoined from failing to promote

African American employees of TSS on the basis of race.

2. Defendant, its officers, agents, employees, and all persons acting in concert with TSS are hereby enjoined from retaliating against any employee or applicant for employment.

V. GENERAL RELIEF

1. Within 30 days of entry of this Decree, Defendant shall create and distribute to all employees with hiring authority written job descriptions for assistant manager and manager positions that clearly define the knowledge, skills, and abilities required by each position and the qualifications required for each position. The written job descriptions shall become effective immediately upon issuance.

2. Within 30 days of entry of this Decree, Defendant shall create a written promotion policy that is disseminated to all employees and posted at each location at which TSS does business. The policy shall include procedures by which employees shall be notified of promotional opportunities, procedures for application, and procedures for selecting the successful candidate.

3. Defendant shall require each employee to read and sign a copy of its non-discrimination policy and its promotion policy, and each employee shall be given copies of both policies. Thereafter, whenever a new employee is hired, he or she will be required to read and sign copies of the non-discrimination policy and the promotion policy and will be given copies of these policies.

4. David Cohn and Larry Cobb shall personally advise management employees that TSS has a strong and clear commitment to a workplace free of race discrimination and that race discrimination by any person, including any management

official, supervisor, vendor, supplier, third party or customer, against any TSS employee is prohibited and will not be tolerated.

VI. TRAINING

1. TSS shall conduct race discrimination awareness training to all supervisory and management personnel employed by TSS in Arkansas, Mississippi and Missouri. This training shall be mandatory for all management-level employees, including but not limited to managers and supervisors; shall be no less than three hours in duration; and shall be conducted within 90 days of entry of this Decree.

2. The training topics shall include, at a minimum, (i) Title VII's prohibition of race discrimination and retaliation with respect to any term, condition, or privilege of employment; (ii) TSS policies and procedures for the prevention of race discrimination in general and as they relate to its promotion policy specifically; and (iii) TSS procedures for reporting, investigating, and remedying race discrimination or retaliation complaints in the workplace.

3. Within 120 days after the date of entry of this Consent Decree by the Court, TSS shall provide the Commission with copies of the training materials and related documentation evidencing the accomplishment of training compliance for all supervisory and management personnel. The aforementioned documentation shall include the names and position of the individuals attending the training and the time each individual spent at the training.

4. Defendant shall maintain in its Corporate Office a record of each person trained pursuant to paragraph 1.

VII. EQUAL EMPLOYMENT OPPORTUNITY POLICY

Defendant shall adopt as an Equal Employment Opportunity Policy the statement attached as Exhibit A. A copy of this policy shall be distributed to each employee with his/her first paycheck issued in August 2008.

VIII. MONETARY RELIEF

1. TSS shall pay total monetary relief in the amount of \$425,000.00 to resolve this lawsuit. TSS will place \$425,000 in escrow within 10 days of the entry of this Decree. TSS will notify the Commission within 2 days after the money has been deposited into escrow. This amount will constitute TSS's total liability regarding monetary relief.

2. As soon as reasonably possible, the Commission shall provide TSS with a distribution list setting forth the names and amounts of back pay and compensatory damage allocations to be made to Ms. Sharkey and class members. All applicable withholdings shall be deducted from the back pay award. Within 15 days of forwarding this distribution list to Defendant, the Commission will send to each person on the list a copy of the Release of Claims form attached as Exhibit B.

3. Upon receipt of a fully-executed Release from Charging Party Sharkey and/or any class members, the Commission will then forward the releases to the attorneys for TSS. TSS shall have 10 business days to forward, via certified mail, a check to the individual in the amount shown on the distribution list.

4. TSS shall prepare and distribute W-2 and 1099 tax reporting forms to Charging Party Sharkey and class members and shall make appropriate reports to the Internal Revenue Service.

5. Late payment of the checks will be subject to the accrual of interest on the amount unpaid, calculated pursuant to 28 U.S.C. sec. 1961.

6. A photocopy of the checks shall be sent to the attention of Celia S. Liner, Senior Trial Attorney, Equal Employment Opportunity Commission, Memphis District Office, 1407 Union Avenue, Suite 901, Memphis, Tennessee 38104.

IX. POSTING AND POLICIES

1. Within 30 days of the entry of this Consent Decree, TSS shall post and keep posted for three years, in conspicuous places upon their premises, where notices to employees are customarily posted, Exhibit C, and shall report in writing to the Commission upon compliance with this paragraph, to the attention of Celia Liner, Senior Trial Attorney, Memphis District Office, 1407 Union Avenue, Suite 901, Memphis, TN 38104, with a statement that identifies the date of the postings and locations of the posted notices.

2. TSS shall post and cause to remain displayed the poster required by Section 711 of Title VII, 42 U.S.C. § 2000e-10(a).

3. TSS shall also post and keep posted in a location where notices to employees are customarily posted, a copy of its policy and procedures for reporting or preventing discrimination in the workplace.

X. REPORTING

1. TSS shall, for periods indicated below, submit to the Commission semi-annual reports listing:

- (1) each vacancy in an assistant manager or manager position occurring within the prior six months;

- (2) the name, address, home telephone number, and races of all employees who applied for the promotion;
- (3) the name and race of the successful candidate;
- (4) each African American employee either hired or promoted to an assistant manager or manager position during the six month period;
- (5) the location for which the person was hired or promoted and the date of the hire or promotion;
- (6) a description of all complaints of race discrimination from any TSS store location during the six month period; and
- (7) the investigation conducted by TSS in response to each complaint, and the resolution of the complaint.

The first report shall be submitted six months after entry of the Decree. Each subsequent report shall follow at six month intervals as long as this Consent Decree remains in effect. These reports shall be sent to Celia S. Liner, Senior Trial Attorney, at the Memphis District Office address, with a statement that identifies such reports as being submitted consistent with this Decree. With the submission of its first report, TSS shall indicate the date of completion of each requirement under Section V (General Relief) was satisfied.

2. All other reporting required by any other Section of this Decree shall likewise be made to Celia S. Liner at the Memphis District Office address.

XI. REFERENCES

1. If any potential employer of Theresa Sharkey requests a job reference, the request shall be forwarded to the attention of Larry Cobb, Retail Operations Manager, at

TSS Corporate headquarters. The reference from TSS shall be identical to Exhibit D and shall be signed by Larry Cobb. No mention of Ms. Sharkey's charge of discrimination or this lawsuit shall be made as part of any reference.

2. No mention of this lawsuit shall be made as part of a reference given for any class member in this case.

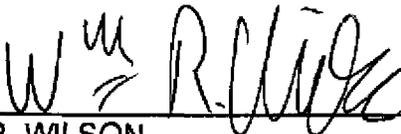
XII. RECORD KEEPING

1. TSS shall maintain race and gender identifies of employees so as to satisfy all reporting obligations under 29 C.F.R. §1602.7, "Employee Information Report EEO-1."

2. TSS shall file its Employee Information Report EEO-1 on a yearly basis, pursuant to 29 C.F.R. §1602.7.

XIII. COSTS

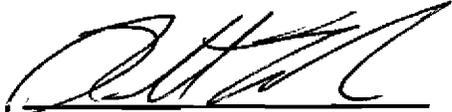
Each party shall bear that party's own costs, attorneys' fees, and expenses.



WILLIAM R. WILSON
UNITED STATES DISTRICT JUDGE

DATE: 8/4/08

FOR DEFENDANT:



HENRY P. JULIEN, JR.
ROBERT P. LOMBARDI
The Kullman Firm
1100 Poydras Street,
1600 Energy Centre
New Orleans, Louisiana 70163
(504) 524-4162 telephone
(504) 596-4789 fax

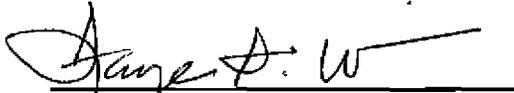
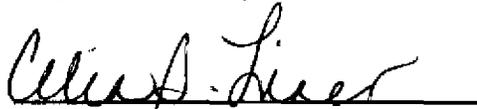

DAVID COHN

FOR THE COMMISSION:

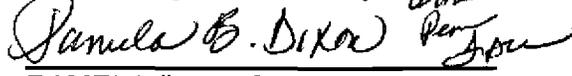
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Regional Attorney
CELIA S. LINER
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WILLIAM A. CASH, JR.
Supervisory Trial Attorney
PAMELA B. DIXON
Senior Trial Attorney

Little Rock Area Office
820 Louisiana, Suite 200
Little Rock, AR 72201
(501) 324-5065 telephone
(501) 324-5991 fax

EXHIBIT A

EQUAL EMPLOYMENT OPPORTUNITY

Tobacco Superstore, Inc. is committed to a policy of equal employment opportunity with respect to all employees and applicants for employment. This policy prohibits discrimination on all legally-protected bases, including, but not limited to, race, color, sex, age, disability, religion, and national origin.

This policy will be observed in the recruitment, hiring, and on-the-job treatment of individuals. Decisions regarding terms and conditions of employment, including promotions, transfers, wages, discipline and discharge, will be made in accordance with this policy.

Supervisors, managers, and assistant managers are responsible for setting the appropriate tone in the workplace, providing direction on implementation of this policy, and fully complying with this policy. All employees, and in particular, officers, managers, and supervisors, are responsible for conducting themselves in a manner that does not violate this policy and shall immediately report known, suspected, or potential violations of this policy. Failure to immediately report discrimination or harassment in violation of this policy can result in discipline.

If you believe you have been discriminated against or harassed, or if you are a witness to discrimination or harassment, you should report it immediately to any manager or supervisor or to Larry Cobb at Corporate Office, at larryc@tobaccosuper.com or at 870-633-0099, regardless of whether the person who engaged in the discrimination or harassment is a co-worker, supervisor, customer, vendor, or other non-employee. All complaints and/or reports will be promptly and thoroughly investigated in as impartial and confidential manner as possible. A timely resolution of each complaint will be reached and communicated to the parties. If a complaint of discrimination and/or harassment is found to be valid, immediate and appropriate corrective action will be taken, which may include discipline up to and including termination from employment.

LARRY COBB, OPERATIONS MANAGER

EXHIBIT B

RELEASE

In consideration of the payment to me by Tobacco Superstore, Inc. ("TSS") of \$_____, I (name), hereby fully and forever release and discharge TSS, its successors, and assigns, including its present officers, employees and agents, from any claim or obligation based on alleged race discrimination, retaliation, or any other unlawful practice in violation of Title VII of the Civil Rights Act of 1964, which was or could have been raised in *EEOC v. Tobacco Superstore, Inc.*, Civil Action No. 3:05-cv-00218 (E.D. Ark.).

I have read this Release and I execute it voluntarily, without coercion or threat of reprisal.

IN WITNESS WHEREOF, this Release is signed and executed by me on the ____ day of _____, 2008.



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

1407 Union Avenue, Suite 901
Memphis, TN 38104
National Contact Center: (800) 669-4000
National Contact Center TTY: (800) 669-6820
Memphis Status Line: (856) 408-8075
Memphis Direct Dial: (901) 544-0119
TTY (901) 544-0112
FAX (901) 544-0111

EXHIBIT C

NOTICE

1. This Notice to all employees of Tobacco Superstores, Inc. ("TSS") is being posted as part of an agreement between TSS and the Equal Employment Opportunity Commission.
2. Title VII of the Civil Rights Act of 1964, as amended, is a federal law that provides that it shall be an unlawful employment practice for an employer to fail or refuse to hire, to promote or to discharge any individual or otherwise to discriminate against any individual because of such individual's race or color.
3. TSS supports and will comply with Title VII in all respects and will not take any action against employees because they have opposed employment practices made illegal by Title VII or exercised their rights under the law by filing charges with the Equal Employment Opportunity Commission, or because they testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under Title VII.
4. If you believe that you have been discriminated against because of your race, you may contact the Equal Employment Opportunity Commission (EEOC) at the following national toll-free number: 1-800-669-4000. If you have a TTY device for hearing impaired: TTY number is 1-800-669-6820. You may also contact the EEOC's Little Rock Area Office and the Memphis District Office at the following numbers: (501) 324-5014 TTY; (501) 324-5081; and (901)544-0119; TTY (901) 544-0112.
5. **THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

This Notice must remain posted for 3 years from the date below and must not be altered, defaced, or covered by any other material.

Tobacco Superstores, Inc.

Date

EXHIBIT D

REFERENCE LETTER

To Whom It May Concern:

This letter is in response to your inquiry regarding the employment of Ms. Theresa Sharkey while employed at Tobacco Superstores, Inc. Ms. Sharkey worked at Tobacco Superstores, Inc. as a Clerk from February 2, 2001 through October 22, 2001. Company policy does not permit us to give out any other information concerning Ms. Sharkey's employment.

Very truly yours,

LARRY COBB
Tobacco Superstores, Inc.