UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 30

WATERSTONE MORTGAGE CORPORATION

and **Case 30-CA-073190**

PAMELA E. HERRINGTON, AN INDIVIDUAL

COUNSEL FOR ACTING GENERAL COUNSEL'S STATEMENT OF POSITION

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Jt. Stipulated Exh. W

ACTING GENERAL COUNSEL'S STATEMENT OF POSITION

It is undisputed that, on about April 7, 2011, Waterstone Mortgage Corporation (Respondent) required, as a condition of employment, that all employees, including the Charging Party, Pamela Herrington, enter into employment agreements containing a mandatory individual arbitration provision. In addition to prohibiting employees from filing legal claims in the judicial forum entirely, the individual arbitration provision prohibited joint, collective or class action in the arbitral forum. This is a clear limitation on employees' rights to engage in Section 7 activity in violation of Section 8(a)(1) of the Act, as this Board held in *D.R. Horton*, 357 NLRB No. 184 (Jan. 3, 2012).

On November 28, 2011, the Charging Party filed a class action lawsuit in the United States District Court for the Western District of Wisconsin. Respondent thereafter moved to dismiss or alternatively to compel arbitration. The Honorable District Court Judge Barbara B. Crabb agreed with the Charging Party that the arbitration agreement, under *D.R. Horton*, violates the Act by requiring the Charging Party to give up her right under the Act to bring claims collectively. Judge Crabb then severed the language prohibiting collective action from the individual arbitration provision and granted Respondent's motion to stay the civil case while pending arbitration. The Judge ordered, "[The Charging Party's] claims must be resolved through arbitration, but she must be allowed to join other employees to her case." (Exh. N at 18.)

However, when the Charging Party later filed her class action arbitration demand, Respondent argued the Charging Party "should only be allowed to join others to this arbitration exclusively by way of permissive joinder. . . ." (Exh. P at 3-4). The Arbitrator disagreed, and consistent with Judge Crabb's Order, held that the Charging Party's action could proceed on a class basis. (*Id.* at 8-9.) Despite the Arbitrator's finding, Judge Crabb's Order, and this Board's decision in *D.R. Horton*, Respondent filed an application for review of the Arbitrator's decision,

seeking to enforce the unlawful individual arbitration provision. In so doing, Respondent continues to attempt to circumvent the Act and prohibit the Charging Party and her similarly situated co-workers from engaging statutorily protected activity of class action. (*See, i.e.,* 357 NLRB No. 184, slip op. at 3 ("Thus, employees who join together to bring employment-related claims on a classwide or collective basis in court or before an arbitrator are exercising rights protected by Section 7 of the NLRA."))

More recently, Respondent has resorted to a different manner of circumventing the Act by giving employees the unlawful option to prospectively limit their rights to engage in protected concerted activity. On July 23, 2012, Respondent issued a letter to its employees, requiring them to, by July 31, 2012, choose one of two options to supplant the individual arbitration provision in their employment agreements. The first option (Option A) requires arbitration, permitting only joinder of claims and prohibiting class action arbitration entirely. (Exh. S.) The second option (Option B) permits joint, collective, and class claims in the judicial forum. (Exh. S.) Taken together, these options effectively prohibit employees from exercising their Section 7 rights by permitting employees to opt-out of pursuing prospective class action litigation in both the arbitral and judicial fora. (*See, i.e.*, 357 NLRB No. 184, slip op. at 4, n.7.)

Respondent wrongly asserts it is complying with this Board's statement in *D.R. Horton* that "employers may not compel employees to waive their NLRA right to collectively pursue litigation of employment claims in *all* forums, arbitral and judicial. So long as the employer leaves open a judicial forum for class and collective claims, employees' NLRA rights are preserved without requiring the availability of classwide arbitration." 357 NLRB No. 184, slip op. at 12-13 (emphasis in original). Respondent is not permitting employees to pursue individual claims in arbitration while contemporaneously leaving open the judicial forum for class actions.

Respondent's letter to employees introducing the two options is deceptive, describing the "main difference" between the two options as either one in which the employee could pursue claims in his or her home state against Respondent (Option A), or one in which the employee could pursue claims against Respondent in Wisconsin courts (Option B), and stating that either option would permit employees to "join" together with others. (Ex. R.) Through such phrasing, Respondent is at least implicitly coercing its employees to choose Option A, emphasizing it would permit them to file in their home state while failing to explain to employees that Option A would prohibit them from filing class arbitration or participating in class actions filed by those employees who chose Option B. By mandating that employees choose an option by July 31, 2012, Respondent imposes a prospective waiver in circumstances where employees are unlikely to have notice of employment issues that may require legal action or of other employees' efforts to act concertedly to redress issues of common concern.

Finally, Respondent's contention that Option A is lawful under *D.R. Horton* when it permits joinder but prohibits class action is incorrect. As this Board pointed out, unlike joinder, where each employee must bring his or her own claim which may then be joined to other similar pending claims, class actions allow named plaintiff-employees to protect the *unnamed* class members. 357 NLRB No. 184, slip op at 3, n.5 (emphasis added). Indeed, "[e]mployees surely understand what several federal courts have recognized: that named plaintiffs run a greater risk of suffering unlawful retaliation than unnamed class members." *Id.* Just as prohibiting individual employees from coming to management with concerted concerns of a protected nature would violate the Act, giving an employee the option to submit only to arbitration while prohibiting class action is an unlawful infringement on Section 7 activity -- activity which is at the core of what Congress intended to protect. *Id.*, slip op. at 3.