

**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**

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**CHARGING PARTY'S STATEMENT OF POSITION**

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## CHARGING PARTY'S, PAMELA HERRINGTON, STATEMENT OF POSITION

This case is about Waterstone Mortgage Corporation's ongoing coercion and interference with its employees' protected concerted activity first by requiring employees to waive their right to bring collective actions and now, after the District Court struck the illegal waiver and an arbitrator allowed Charging Party to bring her claims in class arbitration, by promulgating a new employment agreement prohibiting employees from participating in pending class arbitration to assert their employment claims.

### Background

In November, 2011, Charging Party, Pamela Herrington (hereinafter "Herrington") commenced a class and collective action in the Western District in Wisconsin against Waterstone Mortgage Corporation (hereinafter "Waterstone") alleging violations of the Fair Labor Standards Act (FLSA). J. Mot. at ¶ 15(a). Waterstone moved to compel arbitration on the ground that Herrington's claims were subject to an arbitration agreement requiring employees to waive their right to collectively pursue employment related claims. Id. at ¶¶ 14(a), 15(b). Herrington opposed the motion on grounds that the collective action waiver violated the National Labor Relations Act (hereinafter "the Act"). In January, 2012, Herrington filed an initial Charge claiming that the collective action waiver violated the Act. Id. at ¶ 1. In District Court, Waterstone explicitly argued that if the Court found the waiver invalid, it should send the case to collective arbitration. The Court applied *D.R. Horton, Inc.*, 357 NLRB No. 184 (Jan. 3, 2012) and held that Waterstone's arbitration agreement violated the Act's prohibition on interference with or restraint on employees' concerted activities. J. Mot. at ¶ 15(c). The Court struck the class and collective waiver and sent the case to arbitration under the American Arbitration Association's (AAA) Supplementary Rules for Class Arbitration. Id. at ¶ 15(d). In arbitration,

Waterstone argued that it had not agreed to collective or class relief and that the Court did not require that the arbitration be allowed to proceed on a class basis. On July 11, 2012, the AAA arbitrator, Judge George C. Pratt, granted a clause construction award concluding that the arbitration agreement permitted arbitration to proceed under the AAA's class rules. *Id.* at ¶ 15(e). Less than two weeks after the arbitration decision, Waterstone sent all current employees a letter and new waiver form demanding they select one of two options, both of which waive their right to participate in Herrington's class arbitration. *Id.* at ¶¶ 16(a)-(e). In August, 2012, Herrington, filed a First Amended Charge against Waterstone's ongoing conduct violating the Act. *Id.* ¶ 7.

### **Waterstone's Employment Agreements Violate the Act**

Waterstone has engaged in unfair labor practices first by requiring employees to waive their right to bring collective actions and now, after the Court struck the illegal waiver and the arbitrator's award allows for class arbitration, by prohibiting employees from participating in pending class arbitration. The Board has held that it is unnecessary to establish that employees were actually coerced when it is evident that an employer's communication is capable of producing that result.<sup>1</sup> In determining the coercive nature of communications, Courts examine the totality of circumstances surrounding the communication.<sup>2</sup> An employer violates Section 8(a)(1) of the Act when the timing of a new rule demonstrates a nexus between the new rule and protected activity or the new work rules are referenced in connection with the protected activity.<sup>3</sup>

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<sup>1</sup> *See, N.L.R.B. v Clearfield Cheese Co.*, 322 F.2d 89, 94 (3d Cir. 1963) (it would not seem necessary to establish that the employees were actually coerced, since it is evident the [communication] was capable of producing that result.")

<sup>2</sup> *See, N. L. R. B. v. D'Armigene, Inc.*, 353 F.2d 406, 408 (2d Cir. 1965) ("The question... is whether the nature and circumstances of [the manager's] speech were such as to have the natural and foreseeable effect of interfering with the rights of the employees. This must be determined from the speech itself in the light of the background and circumstances under which it was delivered.")

<sup>3</sup> *See, Dilling Mechanical Contractors, Inc.*, 318 NLRB 1140 (1995) (the Board affirmed the ALJ's ruling holding that the employer violated Section 8(a)(1) of the Act by changing "its former break policy to more severely restrict ... employees' freedom of movement on the jobsite because its employees engaged in... concerted activities."); *see also, Chartwells, Compass Group, USA, Inc.*, 342 NLRB No. 121 (2004).

Waterstone's new employment agreement demands that loan officers select one of two options both of which prohibit participation in Herrington's arbitration and chills concerted activity. The new waiver form is coercive because it was sent to current employees who are employed on an at-will basis and the new waiver gives employees the directive, in mandatory "shall" language, that they have only two choices. The purpose behind this letter and waiver is to coerce employees not to assert their rights in Herrington's class arbitration and to mislead them into believing they cannot or should not be part of it.

It is clear from the content and timing of Waterstone's new employment agreement that its intention was to interfere with, restrain, and coerce employees in the exercise of protected concerted activity. Waterstone's coercive communication with employees drastically and misleadingly interferes with the orderly class action process in Herrington's arbitration by creating the inescapable impression among members of the putative class that they are legally unable to join the class arbitration. There is a clear nexus between Waterstone's new coercive waiver and the recent clause construction award allowing employees to engage in concerted activity through class arbitration of their FLSA claims. Indeed, if there was any doubt that Waterstone's purpose was specifically to interfere with the right to participate in the class arbitration, that doubt is dispelled by the agreement's specific mention that the waiver will affect rights to participate in the class arbitration.

Board action is warranted under these circumstances in order to prevent Waterstone's ongoing violations of the Act and safeguard the right of its employees to participate in concerted activity by joining Herrington in the class arbitration of their FLSA claims.