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CLASS ACTIONS ARE CRITICAL TO REMEDY WORKPLACE GENDER DISCRIMINATION

When Lilly Ledbetter discovered she had been paid significantly less than her male counterparts for the very same work at Goodyear's Gadsen, Alabama plant, she filed a lawsuit and was awarded more than \$3 million by a jury. After the U.S. Supreme Court overturned the decision, ruling that Ledbetter had waited too long to file her case, Congress passed the Lilly Ledbetter Fair Pay Act, the first bill President Obama signed into law.¹ This law supplemented other important federal laws passed by Congress to remedy pay discrimination, particularly Title VII of the Civil Rights Act of 1964, which protects individuals against employment discrimination on the basis of sex.²

Unfortunately, some employers continue to discriminate. In 2014, the Equal Employment Opportunity Commission reported that of the 93,727 workplace discrimination charges it received in 2013, 27,687 or 29.5 percent involved sex discrimination.³ Title VII litigation has been critical not only to remedy past and prevent future racial discrimination but also to compensate employees whose rights have been violated.

Yet there are many reasons why filing an individual lawsuit under Title VII (as opposed to joining a class action) is an unrealistic option for anyone experiencing workplace discrimination. First, class actions may be the only way to prove or remedy "systemic discrimination." As explained by the NAACP Legal Defense & Educational Fund, Inc. (LDF), "Without a broad discovery of company-wide statistical and other data that class actions facilitate, it is difficult for civil rights plaintiffs to prove a pervasive pattern and practice of discrimination."⁴

In addition, it is extremely expensive to prove institutional discrimination. Notes LDF, "In many civil rights cases, most, if not all, pertinent information is within the exclusive province of the defendant—through its agents, employees, records, and documents. Discovery of this evidence—especially in challenges to institution-wide practices of large corporate defendants—is expensive; thus, the ability to spread the costs over a class is key to obtaining redress."⁵

Today, the rights secured by Title VII are in jeopardy as a result of forced arbitration clauses with class action bans in employment contracts. These clauses make private litigation against violators virtually impossible.⁶ In addition, they threaten the ability of the EEOC to do its job.⁷ They allow corporations and businesses to ignore civil rights laws and operate with impunity.

The following are examples of recent class action settlements won on behalf of women in the workplace who have suffered discrimination. They are all contained in CJ&D's extensive class action compilation, *First Class Relief*.⁸ These cases illustrate just how critical class actions are, and what is at risk by the increasing use of forced arbitration clauses and class action bans in employment contracts.

Ellis v. Costco Wholesale Corp (2013), Case Number 3:04-cv-03341, (N.D. Cal.)

Costco agreed to settle a class action alleging that female warehouse workers were discriminated against in pay, promotion and working conditions. The case required nearly a decade of litigation to resolve class issues raised by the Supreme Court's *Wal-Mart* case.⁹ Eventually, Costco settled for \$8 million,¹⁰ and agreed to revise its procedures to prevent future discrimination.¹¹

Easterling v. Conn. Dep't of Correction, (2013), Case No. 08-826 (D. Conn.)

The Connecticut Department of Correction (DOC) used discriminatory criteria for those seeking correction officer positions. After hard-fought litigation, DOC settled with a class of female applicants for over \$1 million in back pay relief, and allowed applicants to participate in a priority hiring process.¹²

Carter v. Wells Fargo Advisors, LLC (2011), Case Number 09-cv- 01752, (D.D.C.)

Wells Fargo agreed to settle a gender discrimination class action by about 1,200 female financial advisors who alleged discrimination in pay, promotion and other aspects of employment.¹³ The settlement totaled \$32 million, or about \$18,000 for each class member.¹⁴ The settlement also provided injunctive relief to prevent future discrimination.

Velez v. Novartis Corp. (2010) Case 04-cv-09194, (S.D. N.Y.)

After losing a \$250 million punitive damage jury verdict for discriminating against female employees over promotion, pay, and pregnancy issues, Novartis agreed to settle for \$175 million, with \$22 million going towards injunctive relief to remedy discrimination. Nearly 6,200 women would be compensated under this agreement.¹⁵

Hubley v. Dell (2009) Case Number 08-804 (W.D. Tex.)

Dell settled a class action brought by a class of female employees who alleged pay and promotion discrimination. The settlement totaled \$9.1 million including \$4.5 million for individual class members and \$3.5 million for base pay adjustments.¹⁶ Dell was also required to implement policy changes to prevent future discrimination.

Fassbender Amochaev v. Citigroup Global Markets, Inc., d/b/a Smith Barney (2008), Case No. C051-298 (PJH) (N.D. Cal.)

Smith Barney settled with a class of female financial advisors who charged that that Smith Barney engaged in a pattern and practice of gender discrimination with regard to pay, professional support and other terms of employment.¹⁷ The settlement totaled \$33 million¹⁸ for the 2,411 class members and included injunctive relief to end future discrimination.

Augst-Johnson v. Morgan Stanley DW Inc. (2007), (D.D.C.) Case No. 1-06-CV-01142 (RWR).

Morgan Stanley settled with a class of female financial advisors trainees in the company's Global Wealth Management Group for gender discrimination in pay and promotion. The settlement of \$46 million included injunctive relief, requiring the company to fix its discriminatory practices.¹⁹

Carlson et al. v. C.H. Robinson Worldwide, Inc., (2005) U.S. Dist. LEXIS 5674 (D. Minn.)

CH Robinson settled with approximately 230 women who sued the freight service provider over pay and promotion gender discrimination. The settlement of \$15 million, or about \$31,500 per class member, on average, also included injunctive relief, requiring the company to fix its discriminatory practices.²⁰

NOTES

¹ <http://www.gpo.gov/fdsys/pkg/PLAW-111publ2/html/PLAW-111publ2.htm>. This law amends several federal laws, to wit: “[T]itle VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967, and to modify the operation of the Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973, to clarify that a discriminatory compensation decision or other practice that is unlawful under such Acts occurs each time compensation is paid pursuant to the discriminatory compensation decision or other practice. . . .”

² U.S. Equal Employment Opportunity Commission, “Sex-Based Discrimination,” <http://www.eeoc.gov/laws/types/sex.cfm> (viewed October 6, 2014).

³ <http://www.eeoc.gov/eeoc/newsroom/release/2-5-14.cfm>

⁴ Amicus brief filed by the NAACP Legal Defense & Educational Fund, Inc. in Support of Respondents in the case, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), p. 19; http://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_09_10_09_893_RespondentAmCuNAACPLDEF.authcheckdam.pdf

⁵ *Ibid.*

⁶ Indeed, in March, 2013, the Court of Appeals for the Second Circuit refused to allow a sex discrimination class action to proceed against Goldman Sachs because the victims' employment contract contained a forced arbitration clause with a class action ban. The court essentially acknowledged that employers can now “curtail class actions against them, even when they're accused of violating employees' civil rights.” Alison Frankel's On the Case, “2nd Circuit squelches Title VII exception to mandatory arbitration,” *Thomson Reuters*, March 21, 2013; <http://newsandinsight.thomsonreuters.com/Legal/News/ViewNews.aspx?id=72276percent20&terms=percent40ReutersTopicCodes+CONTAINS+percent27ANVpercent27>

⁷ See, e.g., <http://susanantilla.com/not-even-the-eeoc-was-allowed-at-this-sex-discrimination-hearing/>. (“On Feb. 26, eight women who had sued Sterling Jewelers, Inc. were ushered into a private hearing room in midtown Manhattan with their lawyers, lawyers for Sterling, and an arbitrator. The door was shut behind them. Like an increasing number of disputes between employees and employers, this one would be heard in a forum where the public and the press were forbidden. I asked to attend the late February hearings on this sex discrimination case that could wind up including 44,000 women in 50 states, but the arbitrator declined my request. More important is that the [Equal Employment Opportunity Commission](#) – the agency in charge of enforcing federal civil rights laws – also asked, and also was declined.”)

⁸ <http://centerjd.org/content/first-class-relief-how-class-actions-benefit-those-who-are-injured-defrauded-and-violated>

⁹ Abigail Rubenstein, *Costco Agrees To Pay \$8M To End Sex Bias Class Action*, Law360.com (Dec. 18, 2013), <http://www.law360.com/articles/496932/costco-agrees-to-pay-8m-to-end-sex-bias-class-action>.

¹⁰ Settlement Agreement, *Ellis v. Costco Wholesale Corp.*, No. 3:04-CV-03341 (Dec. 17, 2013).

¹¹ *Ibid.*

¹² The complete factual and procedural details of this case can be found in the “comprehensive history of the case,” mentioned in the Memorandum Of Law In Support Of Plaintiff's Unopposed Motion For Preliminary Approval Of

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- Settlement And Approval Of The Proposed Notice Of Settlement And Class Action Settlement Procedure, *Easterling v. Conn. Dep't of Correction*, No. 08-826 (D. Conn. 2013). <http://www.clearinghouse.net/chDocs/public/EE-CT-0019-0003.pdf>. Specifically, see *Easterling v. Conn. Dep't of Corr.* (“Easterling I”), 265 F.R.D. 45 (D. Conn. 2010)(certifying class pursuant to Rule 23(b)(2)); *Easterling v. Conn. Dep't of Corr.* (“Easterling II”), 783 F. Supp. 2d 323 (D. Conn. 2011)(granting Plaintiff’s motion for summary judgment); *Easterling v. Conn. Dep't of Corr.* (“Easterling III”), 278 F.R.D. 41 (D. Conn. 2011) (modifying class certification from Rule 23(b)(2) to bifurcated Rule 23(b)(2) and Rule 23(b)(3) class); *Easterling v. Conn. Dep't of Corr.* (“Easterling IV”), No. 08 CV 826 (D. Conn., June 27, 2012) (resolving temporal period of gross class damages relief and hiring shortfall calculation) (Dugger Decl., Exhibit G).
- ¹³ Settlement Agreement, *Carter v. Wells Fargo Advisers, LLC*, No. 09-cv-01752 (Jan. 1, 2011).
- ¹⁴ Tom Schoenberg, *Wells Fargo Agrees to Pay \$32 Million To Settle Bias Lawsuit*, Bloomberg News (Jun. 8, 2011), <http://www.bloomberg.com/news/2011-06-08/wells-fargo-agrees-to-pay-32-million-to-settle-bias-lawsuit.html>.
- ¹⁵ Settlement Agreement and Release, *Velez v. Novartis Corp.*, No. 04 Civ. 9194 (CM) (Jul. 14, 2010).
- ¹⁶ Settlement Agreement, *Hubley v. Dell Inc.*, Case No. A-08-CA-804-JRN (Jul. 22, 2009).
- ¹⁷ Notice of Class Action, Proposed Settlement Agreement, and Settlement Hearing, *Amochaev et al v. Citigroup Global Markets, Inc.*, Case No. C-05-1298 PJH (2008).
- ¹⁸ See Revised Settlement Agreement, *Amochaev et al v. Citigroup Global Markets, Inc.*, Case No. C-05-1298 PJH (2008).
- ¹⁹ Settlement Agreement, *Augst-Johnson v. Morgan Stanley DW, Inc.*, Case No. 1:06-cv-01142 (RWR) (Apr. 23, 2007).
- ²⁰ Settlement Agreement and Consent Decree, *Carlson v. C.H. Robinson Worldwide, Inc.*, Case No. CV-02-3780 (Sept. 18, 2006).