

**IN THE AMERICAN ARBITRATION ASSOCIATION**

ACIE MOORE,	)	
RODNEY MCCULLOUGH, AND	)	
RONNY CUNNINGHAM	)	
individually and on behalf of all others similarly situated,	)	
	)	
Claimants,	)	
	)	
v.	)	11-160-02063-10-01
	)	
MENARD, INC., a Wisconsin	)	
d/b/a MENARDS	)	
	)	
Respondent.	)	

**FIRST AMENDED CLASS ACTION COMPLAINT**

Now come the claimants, Acie Moore, Rodney McCullough and Ronny Cunningham, individually and on behalf of a class, by their attorneys, Jeffrey L. Taren and Miriam N. Geraghty of Kinoy, Taren & Geraghty P.C and hereby complain against the respondent MENARD, INC. d/b/a MENARDS as follows:

**I. INTRODUCTION**

1. This individual and class action race discrimination case is brought pursuant to Title VII of the Civil Rights Act of 1964. Claimants bring this case on behalf of a class of African-American employees of respondent to redress systemic corporate-wide discrimination against African-American employees in the areas of promotion and compensation. Qualified African-American employees were denied promotions to Department Head, Assistant Store Manager, Store Manager and headquarters positions at rates grossly disproportionate to White employees. In addition, African-American employees were compensated at rates

disproportionate to comparably situated White employees. Claimant, Rodney McCullough, also brings individual claims alleging hostile environment and termination based upon race.

## **II. JURISDICTION**

2. The parties have agreed to submit claims under Title VII of the Civil Rights Act to binding arbitration with the American Arbitration Association. See Arbitration Agreements of Rodney McCullough, Acie Moore and Ronny Cunningham attached to this Claim as Exhibit A, B and C.

## **III. PARTIES**

3. Respondent Menard, Inc. (hereafter referred to as "Menards") is a Wisconsin corporation with its principle place of business in Eau Claire Wisconsin. Menards currently operates more than 250 home improvement stores with locations in Illinois, Indiana, Iowa, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Ohio, South Dakota, Wisconsin and Wyoming. Menards maintains and stores its personnel files for all employees at its headquarters in Eau Claire, WI. Menards is estimated to have earned 7.9 billion dollars in revenue in 2009 with a sales force of more than 40,000 employees.

4. Claimant, Acie Moore, is an African American citizen of the United States currently residing in Chicago, Illinois. Mr. Moore was employed by Menards for over twelve-years, primarily at its Hall Plaza store in Chicago, Illinois. Mr. Moore left his employment in July 2004 after respondent repeatedly refused to promote him from a Department Manager position into an available Assistant or Store Manager position.

5. Claimant, Rodney McCullough, is an African-American citizen of the United States currently residing in Green Bay, Wisconsin. Mr. McCullough was employed by Menards

in both store and Headquarters positions from 1999 until the termination of his employment in August 2004.

6. Claimant Ronny Cunningham is an African American citizen of the United States, currently residing in Chicago, Illinois. Mr. Cunningham was employed by respondent beginning in July 2002 and continuing until August, 2004.

#### **IV. CLASS ALLEGATIONS**

7. Claimants bring this action pursuant to Fed. R. Civ. P. 23(a) and (b)(3) on behalf of the following classes and subclasses of African-American employees: (a) all African-American employees of Menards within the statute of limitations period who were denied promotion into Department Manager, Assistant Store Manager, Store Manager or Headquarters positions at Menard on the basis of their race and color; (b) all African-American employees of Menards within the statute of limitations period who were denied compensation, wage increases and other terms and conditions of employment on the basis of their race and color.

8. The members of the class identified herein are so numerous that joinder of all members is impracticable. Menards currently operates over 250 stores in Illinois, Indiana, Iowa, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Ohio, South Dakota, Wisconsin and Wyoming with gross sales of over 7 billion dollars. Each store employs between 140-200 employees, a substantial percentage of which are members of the claimants' class. Despite large numbers of African-American entry-level employees, there are few African-American managers within the company. Although the precise number of qualified African-American employees and applicants is currently unknown, it is far greater than can be addressed through joinder.

9. There are questions of law and fact common to the class, which questions predominate over any questions affecting only individual members. Common questions include, among others; (1) Whether Menard's policies and practices discriminate against African-American employees with regard to entry into the management training program and promotion into Department Head, Assistant Store Manager, Store Manager and Headquarters positions; (2) whether Menards maintains an overly subjective promotion policy which adversely affected African American employees, (3) Whether Menards discriminates against African American employees by paying them less than white employees, (4) Whether the practices and policies of Menards violated Title VII of the Civil Rights Act entitling the class to compensatory and punitive damages.

10. The representative claimants' claims are typical of the claims of the class.

11. The representative claimants will fairly and adequately represent and protect the interests of the members of the class. Claimants' counsel is competent and experienced in complex class actions, employment discrimination litigation and the intersection thereof. Kinoy, Taren & Geraghty P.C. has been class counsel in numerous cases in the Northern District of Illinois and elsewhere including: *Bandy, et al v. Roadway Express and YRC*, 10 C-5304 (N.D. Ill.) (class action hostile environment and race discrimination claim on behalf of over 200 African American employees of trucking company); *Ronny Cunningham et al. v. Menard, Inc.* JAMS Case No. 1340005813 (Illinois Wage and Hour case on behalf of over 6000 former employees alleging illegal forfeiture of vacation pay and bonuses upon termination of employment); *Moreno v. DFG Foods* No. 02 C 4019 (N.D. Ill. 2003) (WARN Act class action on behalf 220 employees of food processing company); *Li v. DFG Foods*, 03 C 1167 (N.D. Ill. 2003) (FLSA Action on behalf of former employees of food processing company); *Johnson et. al. v. Reno*

(D.C. Cir. No. 93-5364) (Co-lead counsel of nationwide Title VII class action brought on behalf of 512 African-American FBI agents alleging racial discrimination in all areas of employment); *Tracy et al. v. City of Chicago*, (N.D. IL No.95 C 5714) (Fair Labor Standards class action successfully litigated on behalf of 1,085 Sergeants, Lieutenants and Captains of the Chicago Police Department for unlawful failure to pay overtime); *Miller et al. v. Spring Valley Properties*, 202 F.R.D. 244 (C.D. IL. 2001)(Class action racial steering case in Danville, Illinois). Claimants' counsel is also co-class counsel in a series of nationwide lending discrimination cases litigated around the country. These cases include *Rodriguez et al. v. National City Bank*, 08-cv-02509 (E.D. Pa.); *Guerra et al. v. GMAC*, 2:08-cv-1297-LDD (E.D. Pa.); *Allen et al. v. Decision One and HSBC*, (D. Mass 1:07-cv-11669); *Barrett et al. v. Option One Mortgage*, 08-cv-10157 (Dist. Mass.); *Lopez et al. v. Long Beach Mortgage, and Washington Mutual*, (08-10279 Dist. Mass.); *In re: Wells Fargo Mortgage Lending Practice Litigation*, 08-CV-01930 MMC (N.D. Cal.) and *Steele et al. v. GE Money Bank*, 08-cv-1880, (N.D. IL.)

12. Class certification is appropriate pursuant to Fed. R. Civ. P. 23(b)(3) because common questions of fact and law predominate over any questions affecting only individual members of the class and because a class action is superior to other available methods for the fair and efficient adjudication of this litigation. The class members have been damaged and are entitled to recovery as a result of Menard's common, uniform and unfair racially discriminatory personnel policies and practices. Menard's standardized personnel data and payroll system will make calculation of damages for specific class members relatively simple. The propriety and amount of punitive damages are issues common to the class.

**V. CLASS CERTIFICATION IS APPROPRIATE PURSUANT TO RULE 23(b)(3) FOR CLASS-WIDE PUNITIVE DAMAGES**

13. Claimants seek class certification for the purpose of obtaining class-wide punitive damages pursuant to Rule 23(b)(3), as in *Palmer v. Combined Insurance Company of America*, 217 F.R.D. 430 (N.D. Ill. 2003).

14. Claimants are not seeking individual awards of compensatory damages for the class in this case nor are they seeking class certification for the purpose of obtaining compensatory damages. Rather, claimants are seeking a class-wide declaration that upon the resolution of the common questions of law and fact presented herein, they will be entitled to present their individual claims for compensatory damages in hearings held for that purpose in accordance with each class member's individual damages.

#### **VI. MENARD'S HIGHLY CENTRALIZED DECISION AND POLICY MAKING STRUCTURE**

15. Respondent is 100% privately owned by President and CEO John Menard. During the relevant time period, John Menard along with his brother, Lawrence, participated in the supervision of department heads throughout the stores.

16. Upon information and belief, during the applicable period, all promotion decisions at the level of Department Manager and above, including all promotions to Assistant Store Manager, Store Manager, or Headquarters had to be approved by Larry and/or John Menard. Employees were required to be willing to transfer between store facilities for promotions.

17. Upon information and belief, all other important decisions with regards to hiring policies, wage policies and EEO policies were centrally and uniformly made by the Menard brothers or their immediate advisors.

#### **VII. REPRESENTATIVE CLAIMS**

18. Claimant, ACIE MOORE, was manager of the Lumber Department at Respondent's Hall Plaza store and worked for Menards for over twelve years. Throughout his employment, Moore informed Menards that he was seeking promotion to an Assistant Store Manager position. In May 2004, Mr. Moore interviewed for an available Assistant Store Manager position at Respondent's Melrose Park, Illinois store. Mr. Moore had been on the "promotable" list for over three years. Mr. Moore was the most qualified applicant for the position of Assistant Store Manager at the Melrose Park store. Despite this fact, respondent promoted a less qualified, White employee into the position.

19. In the fall of 2002, claimant, Rodney McCullough applied for the Headquarters managerial position of a Store Trainer. After he was denied the promotion, McCullough was told by Rachel Groshek, Senior Trainer, that Larry [Menard] didn't want people of his "color" in his office. Larry Menard has openly criticized managerial employees who hired and/or promoted African-Americans. In May of 2004, Mr. McCullough applied for an available Assistant Store Manager position in the Green Bay West store. The store manager told him that he was qualified and that he wanted to hire him but that he needed permission from Peter Brown and Larry Menard, the Director of Operations. McCullough was denied the position and a less qualified non-African-American employee was given the position.

20. Claimant, Rodney McCullough, was denied a raise from his base salary for almost four (4) years, despite the fact that comparably situated White employees received annual base rate salary increases.

21. Claimant Ronny Cunningham was employed as an estimator at respondent's Naperville store beginning in July, 2002. Beginning in August, 2003 and continuing until the end of November, 2003, Cunningham sought promotion to various project manager positions at

respondent. He was not selected for any of these positions despite his qualifications. On information and belief, these positions were filled by White employees. At the end of November, 2003, Cunningham told his store manager that he had been turned down for at least five project manager positions at respondent and that if he didn't get the next available position, he would file an EEOC charge. Approximately two weeks later, respondent offered Cunningham a position at Headquarters.

22. As a project manager at Headquarters, Cunningham was paid less than a similarly situated white female employing with the same job title, performing the same work.

23. Upon information and belief, respondent pays African-American employees at rates less than comparably situated White employees and increases their wages over time at rates disproportionately less than for comparably situated White employees.

#### **VIII. INDIVIDUAL CLAIM OF RODNEY MCCOULLOUGH**

24. From the commencement of his employment until his transfer to Headquarters, claimant, Rodney McCullough, was subjected to severe and pervasive racial harassment at the Greenbay West store. The harassment included but was not limited to finding vile, racist and profane pictures, notes and threats posted throughout the work site referring to African-Americans as "Niggers", "apes" and "Gorillas", purportedly attributable to the KKK and White Power movement.

25. McCullough repeatedly complained to his Department Manager, Assistant Store Manager and Store Manager about the presence of this material but no investigation or other action was taken by the respondent to discover the source of the harassment or to prevent it from re-occurring. When McCullough complained to store manager Dane Powers, Powers told him, "Why is this bothering you? These letters aren't about you."

26. In addition to the above, McCullough was repeatedly referred to by co-workers as “boy”. Claimant complained to store manager Powers who said that he would “talk” to the coworkers. No disciplinary action was taken against any of the offenders and the racial statements continued throughout the time claimant was employed at the Greenbay store.

27. McCullough subsequently transferred from the Greenbay store to Menards Headquarters. From the time of his transfer up to and including his termination of employment in August of 2004, claimant was subjected to repeated demeaning racial comments and treatment, including but not limited to the following:

A. He was repeatedly told by his supervisor, Rolly Skifton, the Senior Seasonal Buyer for Hardware to “Get your black ass back to your desk”. Skifton referred to McCullough as a “Big black boy”, “boy”, “nigger” and “Mandingo.”

B. McCullough was referred to as a “Darkie” by co-worker Jason Zimmerman;

C. McCullough was called “boy” by his direct supervisor, Mark Mahold and by co-workers Melanie Mueller and Scott Collette.

D. Numerous derogatory remarks were made to McCullough related to his relationship with a Caucasian employee, Patty Freezy. For example, Collette stated to Complainant, “You still fucking that white woman in Millwork. Why don’t you stay with your own kind?”

28. McCullough complained about the above treatment to managerial employee, Jim Johnson, on numerous occasions. Despite the complaints, respondent refused and failed to take any effective remedial action to prevent further racial harassment.

29. Despite the above incidents and complaints, the respondent never conducted an investigation to determine who may have been responsible for the racially hostile acts. No

surveillance measures were ever taken in an effort to discover the source of the harassment. Law enforcement personnel were never notified of the racially motivated death threats. No warnings were ever issued to non-managerial employees regarding these incidents. No training was ever given to the employees in response to these incidents. No employees were ever questioned to determine whether they had participated in the incidents, suspected anyone of involvement or observed anyone.

30. During the week of August 10th, 2004, claimant, Rodney McCullough, was given an Arbitration Agreement to sign requiring the arbitration of all disputes, including Title VII disputes.

31. McCullough was informed by his supervisor, Mark Mahold, that he was required to sign the new Agreement. Rodney informed Mahold that he was not going to sign the new Arbitration Agreement until he talked with an attorney.

32. Less than five hours later, McCullough was terminated from his employment. The reason articulated for the termination was that McCullough had sent and received a personal email from his girlfriend, Patty Freezy. Ms. Freezy was terminated for the same alleged reason.

33. Numerous White employees repeatedly sent personal emails through the Menards email system without incurring any discipline.

#### **IX. EXHAUSTION OF ADMINISTRATIVE REMEDIES**

34. On or about October 22, 2004, claimant, Rodney McCullough, filed a class action charge of racial discrimination with the EEOC.

35. On or about December 14, 2004, claimant, Acie Moore filed a class action charge of racial discrimination with the EEOC.

36. On September 1, 2004, claimant Cunningham filed a class action charge of racial discrimination with the EEOC.

37. On October 22, 2010 claimants received right to sue letters from the EEOC. Their letters are attached to this complaint as Exhibit C. Claimant's EEOC charges are attached to this Complaint as Exhibit D, E and F.

**X. FIRST CLAIM FOR RELIEF- CLASS PROMOTIONS-INTENTIONAL DISCRIMINATION**

38. Menards has maintained an employment system that is intentionally discriminatory against African American employees with respect to promotion and compensation in violation of Title VII of the Civil Rights Act of 1964.

**XI. SECOND CLAIM FOR RELIEF- DISPARATE IMPACT**

39. Menards has also maintained a system which is subjective, standardless and arbitrary, which system has an adverse disparate impact on African-American employees in violation of Title VII of the Civil Rights Act of 1964. The system is not and cannot be justified by business necessity, but even if it could be so justified, less discriminatory alternatives exist that could equally serve any alleged necessity.

**XII. THIRD CLAIM FOR RELIEF- UNEQUAL COMPENSATION**

40. Menard's discriminatory policies and procedures have denied African-American employees promotions, salaries and raises all because of their race, resulting in the loss of past and future wages and other job benefits in violation of Title VII of the Civil Rights Act of 1964.

41. The above conduct constitutes illegal, intentional discrimination with respect to the making, performance, modification and termination of contracts prohibited by 42 U.S.C. § 2000 et seq.

### **XIII. FOURTH CLAIM FOR RELIEF- RODNEY MCCOULLOUGH**

42. With regard to McCullough, respondent has maintained, fostered and tolerated a racially hostile environment at its individual stores and at Menard's Headquarters. Respondent has allowed severe and pervasive racial harassment to exist throughout its company and has failed to take prompt and effective remedial action to prevent such harassment from continuing. Respondent has a policy and practice of refusing to investigate complaints of racial discrimination, refusing to take effective action after discovering racial discrimination, refusing and failing to train employees in ways to avoid racial harassment, refusing to adopt an effective non-discrimination grievance procedure and actively discouraging the filing of complaints of racial harassment and retaliating against those employees who do file such complaints, all in violation of Title VII of the Civil Rights Act of 1964.

### **XIV. ALLEGATIONS REGARDING RELIEF**

43. Menard's actions have caused and continue to cause claimants and all class members substantial losses in earnings, work experience and other employment benefits.

44. The acts taken by Menards as set forth herein were taken maliciously, willfully and/or with reckless indifference to the rights of the claimants and claimants' class, thus entitling claimants to recover punitive damages.

### **XV. PRAYER FOR RELIEF**

WHEREFORE, claimants and the plaintiff class respectfully request that, after trial by jury, this court grant them relief as follows:

A. Grant certification of the case as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure, for the purpose of obtaining punitive damages, with the designation of the class and subclasses requested herein;

B. Granting Declaratory relief that the practices complained of herein are unlawful and violate 42 U.S.C. § 2000 et seq.

C. Granting injunctive relief against the respondent restoring the claimants wrongfully terminated or who left Menards when respondent refused to grant promotions due to race, to their rightful position with back pay, including interest and benefits, or in lieu thereof, with front pay and benefits;

D. Declaring that claimants may present any claims for compensatory damages sustained as a result of Menard's conduct, including damages for emotional distress, humiliation, embarrassment and anguish, at hearings for that purpose;

E. Awarding claimant Rodney McCollough damages and remedial relief, including reinstatement and backpay, as a result of respondent's discriminatory treatment of McCollough individually;

F. Awarding claimants punitive damages in an amount commensurate with Menard's ability to pay and to deter future conduct;

G. Awarding costs incurred herein, including reasonable attorneys' fees as authorized by 42 U.S.C. § 1988;

H. Awarding claimants pre-judgment and post-judgment interest as provided by law; and

I. Awarding such other relief as this Court deems necessary and proper.

Respectfully submitted,

Jeffrey L. Taren  
Miriam N. Geraghty  
Kinoy, Taren & Geraghty P.C.  
224 S. Michigan Ave. Suite 300  
Chicago, IL 60604-4404  
Tel: (312) 663-5210  
Fax: (312) 663-6663