UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

GAROLD ALLEN, SYLVESTOR J. DEROSA, WALTER MAGNESS, DAVID MCKILLOP, DONALD MURPHY, SUZANNE J. NOVAK, and RONNIE WILLMS, on behalf of themselves and those similarly situated,

Plaintiffs,

-vs-

SEARS ROEBUCK AND CO., SEARS HOME IMPROVEMENT PRODUCTS, INC. and SEARS HOLDINGS CORPORATION, jointly and severally.

Defendants.

Case No. 2:07-cv-11706

Hon. George Caram Steeh
Mag. Judge Mona K. Majzoub

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FIRST AMENDED COMPLAINT AND JURY DEMAND
(CLASS ACTION)

I - INTRODUCTION

1. This is a proposed class action to vindicate the rights of former employees of Defendant SEARS, ROEBUCK AND CO. under the Age Discrimination in Employment Act, as amended, 28 U.S.C. §621-634 (hereinafter "ADEA").

2. Defendant SEARS HOLDINGS CORPORATION, through its predecessor and wholly owned subsidiary, Defendant SEARS, ROEBUCK AND CO., offers installed home improvement products and services to the public for purchase, including heating,

ventilation and air conditioning ("HVAC") products and installation services.

3. Defendant SEARS, ROEBUCK AND CO. employed approximately five hundred and fifty HVAC Sales Associates nationwide. HVAC Sales Associates worked from their homes on a commission basis. HVAC Sales Associates received "leads" from their respective home offices. HVAC Sales Associates were reimbursed for their business expenses, including mobile telephone use, mileage, etc. They received paid holiday, vacation and personal time using their "benefit rate," an hourly amount that changed quarterly dependent upon commissions earned.

4. Defendant SEARS, ROEBUCK AND CO. acquired other home improvement companies and combined some of them, in 2001, into a wholly owned subsidiary: Defendant SEARS HOME IMPROVEMENT PRODUCTS (hereinafter "Defendant SHIP" or "SHIP").

5. In 2004, Defendant SEARS, ROEBUCK AND CO., announced to its employees who worked as HVAC Sales Associates that their employment would be "transitioned" to SHIP, effective various dates dependent upon the Sales Associate's region. The Sales Associates were advised that their former department would no longer exist and that they would become employees of Defendant SHIP. By virtue of the "transition" Defendant SEARS, ROEBUCK AND CO. employees were terminated and hired by Defendant SHIP.

6. Defendants, per the implementation of the merger, dramatically changed HVAC Sales Associates' compensation. Approximately two hundred and eighty eight hours of paid time off per year was lost and business expenses were no longer to be reimbursed. Moreover, HVAC Sales Associates were required to be available more days and more hours and to travel greater distances for sales calls.

7. Far greater responsibilities were imposed upon the HVAC Sales Associates, all for less compensation. The benefit of the "transition" ran to SHIP – a wholly owned subsidiary of Defendant SEARS, ROEBUCK AND CO., and now Defendant SEARS HOLDINGS CORPORATION.

8. As a result of the forced transition of HVAC Sales Associates to SHIP, and the dramatic changes that occurred, many HVAC Sales Associates were terminated or terminated their employment with Defendants.

9. The Plaintiffs named herein have brought this suit on behalf of themselves and the other similarly situated former HVAC Sales Associates, who at the time of their separation from employment with Defendants were age 40 and above and who terminated their employment or were terminated during the years 2004 through 2006.

II - JURISDICTION AND VENUE

10. This is a civil action over which original jurisdiction is vested in this Court by 28 U.S.C. §1331 (federal question jurisdiction) as well as the ADEA, as amended, 29 U.S.C. §621-634.

11. Venue is appropriate in this Court under 28 U.S.C. §1391 as it is brought in a judicial district in which the Defendants may be found at the time the action is commenced. Further, many of the Plaintiffs and class members reside in the State of Michigan, including counties located within the Eastern District of Michigan.

III - THE PARTIES

Specific Allegations Regarding the Plaintiffs

12. Plaintiff SUSAN J. NOVAK, (date of birth 6/15/48), is a resident of the State of Michigan who became employed by Defendant SEARS, ROEBUCK AND CO.

in 1980. Plaintiff NOVAK was employed in the Metro Detroit region as a HVAC Sales Associate. In late 2004, Plaintiff NOVAK was notified that her region would be "transitioned" to SHIP effective March 1, 2005.

13. As a result of the transition, Plaintiff NOVAK was forced to terminate her employment with Defendants on or about March 7, 2005 and retire.

14. Plaintiff SYLVESTER DEROSA, (date of birth 2/20/50), is a resident of the State of New York who became employed by Defendant SEARS, ROEBUCK AND CO. in 1971. Plaintiff DEROSA was employed in the Western Suffolk County, Long Island region as a HVAC Sales Associate. In late 2004, Plaintiff DEROSA was notified that his region would be "transitioned" to SHIP effective April 16, 2005.

15. As a result of the transition, Plaintiff DEROSA was forced to terminate his employment with Defendants on or about April 15, 2005 and retire.

16. Plaintiff DAVID MCKILLOP, (date of birth 5/15/44), is a resident of the State of Michigan who became employed by Defendant SEARS, ROEBUCK AND CO. in 1964. Plaintiff MCKILLOP was employed in the Midwest Region, including the Detroit/Ann Arbor area, as a HVAC Sales Associate. In late 2004, Plaintiff MCKILLOP was notified that his region would be "transitioned" to SHIP effective March 1, 2005.

17. As a result of the transition, Plaintiff MCKILLOP was forced to terminate his employment with Defendants on or about March 7, 2005 and retire.

18. Plaintiff DONALD MURPHY, (date of birth 8/5/47), is a resident of the State of North Carolina who became employed by Defendant SEARS, ROEBUCK AND CO. in 1976. Plaintiff MURPHY was employed in the Washington D.C. Metro region, including southern Maryland and northern Virginia as a HVAC Sales Associate. In late 2004, Plaintiff MURPHY was notified that his region would be "transitioned" to SHIP

effective February 1, 2005.

19. As a result of the transition, Plaintiff MURPHY was forced to terminate his employment with Defendants on or about April 19, 2005 and retire.

20. Plaintiff, WALTER F. MAGNESS, (date of birth 12/24/43), is a resident of the State of California who became employed by Defendant SEARS, ROEBUCK AND CO. in October 1970. Plaintiff MAGNESS was employed as an HVAC Sales Associate. In September 2004, Plaintiff was notified that his department would be "transitioned" to SHIP.

21. As a result of the transition, Plaintiff MAGNESS was forced to terminate his employment with Defendants on or about January 23, 2005 and retire.

22. Plaintiff, RONNIE WILLMS, (date of birth 9/12/53), is a resident of the State of Tennessee who became employed by Defendant SEARS, ROEBUCK AND CO. in February 1990. Plaintiff WILLMS was employed as an HVAC Sales Associate. In late 2004, Plaintiff was notified that his department would be "transitioned" to SHIP.

23. Plaintiff WILLMS "transitioned" to SHIP on or about January 26, 2005.

24. As a result of the transition, Plaintiff WILLMS was forced to terminate his employment with Defendants on April 5, 2005.

25. Plaintiff, GAROLD ALLEN, (date of birth 2/27/57), is a resident of the State of Illinois who became employed by Defendant SEARS, ROEBUCK AND CO. on March 30, 1974. Plaintiff ALLEN was employed as an HVAC Sales Associate in the Midwest/HVAC Central Region. On November 1, 2004, Plaintiff and the other Sales Associates in his region were "transitioned" to SHIP.

26. Plaintiff ALLEN was subsequently terminated on August 10, 2005.

27. Plaintiffs filed timely complaints with the Equal Employment Opportunity

Commission alleging violation of the ADEA.

28. Plaintiffs ALLEN, DEROSA, MCKILLOP, MURPHY, NOVAK and WILLMS were sent Right to Sue letters on January 18, 2007.

29. Plaintiff MAGNESS was sent a Right to Sue letter on April 9, 2007.

Allegations Regarding the Defendants

30. Defendant SEARS, ROEBUCK AND CO. is incorporated in the State of New York and conducts business in each of the United States, including Michigan.

31. Defendant SEARS HOLDINGS CORPORATION is a publicly traded Delaware corporation doing business throughout the United States, including the State of Michigan.

32. Defendant SHIP is a Pennsylvania corporation doing business throughout the United States, including Michigan.

IV - FACTUAL ALLEGATIONS

33. The Plaintiffs and similarly situated HVAC Sales Associates labored for the benefit of Defendant SEARS, ROEBUCK AND CO. for decades, building a substantial HVAC product and installation business.

34. As HVAC Sales Associates, the Plaintiffs and those similarly situated, worked from their homes selling HVAC products and installation services.

35. HVAC Sales Associates were expected to work a forty-hour workweek.

36. HVAC Sales Associates were paid on a commission-only basis, with the amount of commission tied to the product sold.

37. HVAC Sales Associates also received, as part of their compensation, paid time off: vacation (up to five weeks), personal days and paid holidays. Because there

was no set hourly rate of pay for HVAC Sales Associates, their paid time off was calculated by an average of their commissions for the previous quarter, known as the "benefit rate."

38. HVAC Sales Associates were also eligible for sales promotions, including bonuses and prizes.

39. HVAC Sales Associates were provided benefits including medical, dental, disability and life insurance, and stock options.

40. HVAC Sales Associates were reimbursed the amounts they expended on behalf of their employer, including mileage, mobile telephone calls, postage, copies, etc.

41. Each HVAC Sales Associate was assigned a territory which was shared with a few other HVAC Sales Associates.

42. HVAC Sales Associates were encouraged to self-generate sales leads and were rewarded for doing so by way of increased commissions.

43. HVAC Sales Associates were also provided leads based upon equitable distribution within the assigned territories.

44. The HVAC Sales Associates followed the sale from start to finish: receiving the sales call, scheduling the appointment, writing the estimate, procuring contractors, obtaining credit approval, etc., culminating in a satisfied customer.

45. The HVAC Sales Associates were trained to be "counselor" sales associates, working with the customers to fulfill their HVAC needs, often having multiple customer contacts prior to obtaining a sale. Consequently, the cancellation rate was extremely low.

46. The flexibility of the HVAC Sales Associate position attracted those with exceptional sales skills who excelled in an independent role. Well-matched employees

continued in the position for decades.

47. Defendant SEARS, ROEBUCK AND CO. acquired various home improvement companies specializing in window installation, vinyl siding, kitchen remodels, etc. These companies were combined, in 2001, into a single corporation: Defendant SHIP, a wholly owned subsidiary of Defendant SEARS, ROEBUCK and CO.

48. In late 2004, only days before the very first transition was to take place, Defendant SEARS, ROEBUCK AND CO. announced that the HVAC Sales Associates would be "transitioned" to Defendant SHIP.

49. Essentially, this meant that each HVAC Sales Associate would be terminated from employment by Defendant SEARS, ROEBUCK AND CO. and hired by Defendant SHIP.

50. Defendant SEARS, ROEBUCK AND CO. would no longer employ HVAC Sales Associates.

51. There were stark differences in the HVAC Sales Associate's employment by Defendant SEARS, ROEBUCK AND CO. when compared to the SHIP positions.

52. SHIP Sales Associates were expected to be available for work seventy-two hours each week.

53. While SHIP Sales Associates are paid on a commission only basis, the commission amounts per product were to be controlled by Defendant SHIP and differed from the commissions established by Defendant SEARS, ROEBUCK AND CO.

54. Because Defendant SHIP priced many of the products higher, the ability to sell them was reduced and, therefore, the ability to earn the commissions was reduced.

55. Defendant SHIP would not provide any paid time off to former HVAC Sales Associates: no vacation, no personal days, no holidays.

56. The cost of doing business in terms of expenses, e.g. mileage, postage, telephone, etc., upon transition, would be hoisted squarely upon the Sales Associates, who would no longer be reimbursed for such expenses.

57. The sales territories to which the Sales Associates would be assigned at Defendant SHIP were dramatically larger compared to those with Defendant SEARS, ROEBUCK AND CO., (approximately five times larger) increasing the amount of travel required and thereby increasing un-reimbursed business expenses, decreasing the potential number of appointments an associate could complete in a day and thereby decreasing the number of potential sales.

58. Sales appointments would be made exclusively by Defendant SHIP at the discretion of its managers.

59. The Defendant SHIP sales model is very different – focusing upon high pressure sales tactics, including a "one call close" rule. Sales Associates are required to make the sale on the first call to the customer or receive a substantially reduced commission or none at all.

60. These high-pressure sales tactics result in a higher average cancellation rate with Defendant SHIP.

61. As a result of the "transition," many HVAC Sales Associates, age 40 and above, with long tenure within the company were forced to terminate their employment with Defendants or were terminated.

V - CLASS ACTION ALLEGATIONS

62. Plaintiffs bring this class action on behalf of themselves and other similarly situated persons who have been similarly harmed by Defendants in the matter described herein.

63. Specifically, Plaintiffs bring this action as a class action on behalf of all former HVAC Sales Associates who were age 40 and above at the time of the "transition" to SHIP and terminated their employment or were terminated between 2004 and 2006 as a result of the transition to SHIP.

64. Upon information and belief, the number of members of the Plaintiffs' class exceed 200 and is so numerous that individual joinder into a single action is impracticable.

65. There are questions of law and fact that are common to all class members. The central questions of law and fact involved in this action are of a common and general interest.

66. Common, legal, and factual issues predominate over any questions affecting only individual members of the class.

67. The claims of the named representative Plaintiffs are typical of the claims of all class members because: (a) they were identically situated as HVAC Associates, (b) they all received the same compensation package as HVAC Associates, (c) they all were similarly situated with respect to the terms and conditions of their employment as HVAC Associates, (d) they were all terminated by Defendant SEARS, ROEBUCK AND CO. and were "transitioned" to SHIP, (e) they terminated their employment or were terminated at or after the time of the "transition" from Defendants for the reasons set forth herein.

68. The class representatives have an incentive and are committed to vigorously prosecuting this action because they have actually suffered losses as a result of Defendants' actions.

69. Plaintiffs have retained qualified counsel to represent them in this matter.

70. A class action is the only realistic method available for the fair and efficient adjudication of this controversy. Were each individual required to bring a separate lawsuit, the resulting multiplicity of proceedings would cause undue hardship and expense with litigants and the Court. The prosecution of separate actions would also create the risk of inconsistent rulings, which may be dispositive of the interests of class members, who are not parties to the adjudication and/or may substantially impede the class members' ability to protect their interest, and therefore would be contrary to the interest of justice and equity.

71. This matter should also proceed as a class action because Defendants' acts and/or omissions apply generally to members of the class warranting equitable relief.

Count I – Violation of the Age Discrimination in Employment Act
(Class Representatives and Class against Defendants)

72. Plaintiffs incorporate paragraphs 1 through 71 above as if specifically repeated herein.

73. This count is brought on behalf of Plaintiffs and the class they seek to represent.

74. At the time of the transition to SHIP, Plaintiffs and the class they seek to represent were qualified for protection against age discrimination under ADEA.

75. Defendants violated the ADEA prohibition against age discrimination in "transitioning" the employment of Plaintiffs and the class they seek to represent from Defendant SEARS, ROEBUCK AND CO. to an inferior position with Defendant SHIP, causing a disproportionate number of employees age 40 and above to terminate their employment, or to be terminated.

76. The decision of Defendants to "transition" all HVAC Sales Associates from Defendant SEARS, ROEBUCK AND CO. to Defendant SHIP had the consequence of causing a statistically significant number of employees, age 40 and above, to terminate their employment or be terminated and thus such decision had a disparate impact on employees age 40 and above in violation of the ADEA.

77. As a direct and proximate result of Defendants' violation of the ADEA, Plaintiffs and members of the proposed class have experienced economic harm, including loss of back and front pay and other employee benefits.

78. By reason of the discrimination suffered, Plaintiffs and the members of the proposed class are entitled to all equitable remedies available under the ADEA.

79. Attorneys' fees should be awarded under the ADEA.

VI – PRAYER FOR RELIEF

WHEREFORE, Plaintiffs on behalf of themselves and the class members whom they seek to represent, request the following relief:

(a) Acceptance of jurisdiction of this cause;

(b) Certification of the case as a class action on behalf of the proposed Plaintiff class, and designation of the Plaintiffs as representatives of the class and their counsel of record as class counsel;

(c) Declare and adjudge that Defendants have violated Plaintiff's rights under the ADEA;

(d) An injuction against Defendants from engaging in any further unlawful practices, policies, customs, usages, or actions that have a disparate impact upon employees protected under the ADEA;

(e) An award of back pay, front pay, the value of lost benefits and other equitable relief for the Plaintiffs and the class they seek to represent;

(f) An award of liquidated damages under the ADEA;

(g) An award of litigation costs and expenses, including reasonable attorney fees to the Plaintiffs and class members;

(h) Pre-judgment and post-judgment interest; and,

(i) Such other and further relief as this Court may deem just and proper.

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Dated: April 18, 2007

PLAINTIFFS' DEMAND FOR JURY TRIAL

NOW COME the above named Plaintiffs, by and through their attorneys, DIB, FAGAN AND BRAULT, P.C., and hereby demand trial by jury on the above matter.

Respectfully submitted,

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