

Honorable John C. Coughenour

CC TO JUDGE DJ

FILED

ENTERED

LODGED

RECEIVED

AUG 07 2001

DJ

BY  AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
DEPUTY

CV 00-01596 #00000024

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION,

Plaintiff,

v.

AMERICAN SEAFOODS COMPANY,

Defendant.

NO. C00-1596C

MEMORANDUM IN SUPPORT OF
AMERICAN SEAFOODS COMPANY'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT DISMISSING EEOC'S
CLASS CLAIMS

Noted for: August 31, 2001

CONNIE L. MARTIN,

Plaintiff-in-Intervention

Defendant, American Seafoods Company ("ASC"), submits this
memorandum in support of its motion for partial summary judgment dismissing the class

MEMORANDUM IN SUPPORT OF AMERICAN SEAFOODS
COMPANY'S MOTION FOR PARTIAL SUMMARY
JUDGMENT DISMISSING EEOC'S CLASS CLAIMS -1


MUNDT MACGREGOR LLP
ATTORNEYS AT LAW

999 Third Avenue Suite 4200 Seattle, Washington 98104-4082
Telephone (206) 624-5950

1
2
3 action claims of plaintiff, Equal Employment Opportunity Commission ("EEOC")¹ In this
4 matter, the EEOC contends that ASC failed to hire and/or terminated a class of employees
5 based on their pregnancy. The EEOC has been investigating this matter since 1999 and it
6 has been litigating this matter since 2000. It has had approximately 19 months to pull
7 together, and present, its class claims. Yet, it is now August 7 -- after the extended
8 discovery cutoff date-- and the EEOC has failed to identify a single employee who was
9 allegedly refused employment or terminated based on her pregnancy. Accordingly,
10 without any class members - much less any facts to support any class member's claim --
11 the EEOC's class action claims should be dismissed.

12 BACKGROUND

13 In this employment discrimination matter, the EEOC claims that defendant,
14 American Seafoods Company ("ASC"), discriminated on the basis of pregnancy against
15 plaintiff-in-intervention, Connie Martin, and a purported class of employees:

16 Specifically, the defendant failed to hire and/or terminated
17 [Connie] Martin and similarly situated females for/from
18 employment aboard one or more of defendant's factory
19 trawlers based upon sex and pregnancy.

20 Complaint ¶ 7 (emphasis supplied) (on file) . The EEOC seeks monetary and equitable
21 relief on behalf of this class. Id. at ¶¶ A-E. ASC served written discovery on the EEOC,
22 seeking the basis for the class claims, including the identities of the class members, the
23 facts relating to the claims, and the damages sought. It is now after the close of discovery,
24 and the EEOC has not identified a single class member as defined above. And the EEOC

25 ¹ In this Motion, ASC does not seek to dismiss the EEOC's claims on behalf of plaintiff-in-
26 intervention, and the charging party, Connie Martin. ASC does continue to dispute those claims,
and believes that they are without merit.

has not provided facts to support any class member's claim. At most, the EEOC's claim is only a claim on behalf of Connie Martin, and there is no basis for a claim on behalf of similarly situated employees. Accordingly, the EEOC's class claims should be dismissed.

On or about November 15, 1999, Connie Martin filed a charge of discrimination with the EEOC.² The EEOC enjoys broad powers to investigate charges of discrimination, 42 U.S.C. § 2000e-8, and, in this matter, it conducted an extensive investigation with respect to Ms. Martin's charge.³

On January 12, 2000, in a Determination statement, the EEOC indicated that a class of employees might be involved in this matter. Unable to identify a single class member, the EEOC indicated that, in addition to Ms. Martin, "other similarly situated pregnant women may have been affected by [ASC's] treatment/attitude toward pregnant employees on its processing vessels."⁴ In the same Determination, the EEOC stated:

[T]he EEOC believes that [ASC's] policies and practices regarding pregnancy . . . violates [sic] Title VII and had adverse employment consequences for Charging Party and similarly situated female employees.⁵

At that point, the EEOC had not identified a single, "similarly situated female employee."

On or about September 20, 2000, the EEOC commenced this lawsuit. The EEOC's Complaint does not identify a single employee similarly situated to Connie Martin. Since commencing this action, the EEOC has conducted extensive discovery.⁶

² Charge of Discrimination (attached as Exhibit A to Declaration of John H. Chun in Support of Motion for Summary Judgment Dismissal of EEOC's Class Claims ("Chun Declaration"))

³ Chun Declaration at ¶ 3.

⁴ Determination dated January 12, 2000 (attached as Exhibit B to Chun Declaration) (emphasis supplied).

⁵ Id. (emphasis supplied).

⁶ Chun Declaration at ¶ 5.

On or about May 8, 2001, ASC served the EEOC with a set of discovery requests, seeking facts to support the class claims. Specifically, ASC requested the following information:

INTERROGATORY NO. 2: Please describe in detail the class of persons you allege to be aggrieved in this matter. In this description, please include, without limitation, the following information:

- a. Please identify all persons whom you believe to be "similarly situated females," as stated on page 1 of your complaint, as well as in paragraphs 7 and 8 of the complaint and in paragraphs C, D, and E of the complaint's prayer for relief.
- b. Please identify all persons other than Connie Martin whom you believe fall within the scope of your complaint.
- c. For any persons identified in subsection (a) of this Interrogatory, please state how and why such persons are "similarly situated."
- d. For any persons identified in subsection (b) of this Interrogatory, please state how and why such persons fall within the scope of your complaint.⁷

ASC also requested detailed information regarding each class member's claim(s), including: the class member's period and position of employment; the vessel involved; all facts relating to the claim(s); the identity of all persons known to have information relating to the claim(s); and the documents pertaining to the claim(s).⁸ Additionally, ASC requested the EEOC to set forth both the damages and the remedy or remedies it seeks with respect to each class member.⁹

⁷ Defendant American Seafoods Company's Second Set of Discovery Requests to the EEOC dated May 8, 2001 (attached as Exhibit C to Chun Declaration).

⁸ Id.

⁹ Id.

The EEOC's responses to this set of discovery requests were due on or about June 7, 2001. See Fed. R. Civ. P. 34(b). On June 8, the EEOC's counsel left a voice message for ASC's counsel, stating:

[We] . . . have been pretty busy this week pulling together . . . whatever information on class members we've got and, I think that if we have an extension, we're going to be in a position of giving you . . . everything, as opposed to anything piecemeal. And, . . . it's also looking like . . . we're not dealing with a very large class to begin with. [A]nyway . . . what I'm asking for is for an extension on . . . the response to [the discovery requests]. . . . I'm guessing that we probably only need another week but just to . . . be on the safe side, if we could have another couple weeks to respond with that class member information, that would be great . . . [S]o, what I would like to ask for is an extension until June 22nd. . . [A]nd . . . again, whatever information we pull together, if we get it together sooner we'll be happy to share it with you sooner[.]¹⁰

The EEOC sent a letter following up on this voice message, indicating that it "was not quite finished gathering the information concerning potential class members[.]"¹¹

ASC accommodated the EEOC's request for additional time. In order to allow ASC sufficient time to follow up on the discovery responses expected to be provided by the EEOC, ASC sought, and the parties stipulated to, an extension of the discovery cutoff from July 6, 2001 to August 6, 2001.¹² On June 22, the extended deadline for the discovery responses on the class action, the EEOC did not serve any responses.

¹⁰ Transcript of Kathryn Olson's voice message of June 8, 2001 (emphasis supplied) (attached as Exhibit D to Chun Declaration).

¹¹ Letter dated June 8, 2001 from Kathryn Olson to John H. Chun (attached as Exhibit E to Chun Declaration).

¹² Stipulation, Joint Motion and Order Regarding Limited Extension on Discovery Cutoff dated June 19, 2001 (on file).

1
2 Finally, on June 27, 2001 -- with a little over a month left before the extended
3 discovery cutoff date -- ASC received the EEOC's response to the discovery requests
4 regarding the class. But the EEOC responded as follows:

5
6 There are no identified class members at this time. However,
7 discovery is on-going and should other information come to
8 light this response will be supplemented immediately ¹³

9 On or about June 6, 2001, ASC served the EEOC with a set of discovery
10 requests, seeking supplementation of the discovery responses, including discovery
11 relating to the class.¹⁴ Responses to this set of discovery requests were due on July 6, 2001.
12 On July 6, however, the EEOC failed to serve a response.

13 On July 20 -- only 17 days before the extended discovery cutoff -- the EEOC
14 finally served ASC with responses to the discovery requests seeking supplementation.¹⁵ In
15 these responses, for the very first time in this case, the EEOC purported to identify class
16 members: Patricia Too Too and Linda Dinnocenzo.¹⁶ With respect to Ms. Too Too, the
17 responses do not present any facts whatsoever, much less indicate whether Ms. Too Too
18 was (a) denied employment or (b) terminated, the two defining categories set forth in the
19 complaint. With respect to Ms. Dinnocenzo, the responses do not present any facts to
20 support a claim of discrimination; all it states is the following:

21
22 ¹³ Defendant American Seafoods Company's Second Set of Discovery Requests to the EEOC
23 and Responses Thereto dated June 26, 2001 at 4 (emphasis supplied) (attached as Exhibit F to Chun
24 Declaration).

25 ¹⁴ Defendant American Seafoods Company's Third Set of Discovery Requests to the EEOC
26 dated June 6, 2001 (attached as Exhibit G to Chun Declaration).

¹⁵ Defendant American Seafoods Company's Third Set of Discovery Requests to the EEOC
and EEOC's Responses Thereto dated July 20, 2001 (attached as Exhibit H to Chun Declaration).

¹⁶ Id. at 3.

[Ms. Dinnocenzo] hid her pregnancy from American Seafoods for fear of termination.¹⁷

They do not state whether Ms. Dinnocenzo was denied employment or terminated. The responses do not provide any alleged damages sustained by any class members. The responses indicate:

Given the findings made through discovery that some women may not have disclosed their pregnancies to the company, the EEOC contends its class will also encompass any women employed by American Seafoods aboard any of its vessels during all of the fishing seasons from 1995 to the present. . . This response will be supplement [sic] as soon as the EEOC is provided with crew rosters covering the time period as set above in order to begin contacting potential class members.¹⁸

At the time of the foregoing response – without a single identified class member, and in a desperate attempt to find claimants – the EEOC had noted a Rule 30(b)(6) deposition of ASC, requesting that the company provide such crew rosters and contact information for employees dating back to 1995. To support this inappropriate discovery effort, the EEOC advanced a new theory (a theory that falls outside the allegations of the EEOC's complaint): that potential class members would include employees, dating back to 1995, who had "hid" their pregnancies from the company. The EEOC planned to send a mailing to these employees.¹⁹ On July 30, the Court quashed the EEOC's untimely deposition notice.²⁰

¹⁷ Id.

¹⁸ Id.

¹⁹ See American Seafoods Company's Motion to Quash EEOC's Rule 30(b)(6) Deposition Notice (on file).

²⁰ On July 30, 2001, the Court communicated this ruling telephonically through its judicial law clerk

1
2
3 In light of the EEOC's July 20 response, ASC requested that the EEOC fully
4 respond to ASC's discovery requests regarding the class by August 2, 2001.²¹ ASC
5 requested "the factual basis for Ms. Dinnocenzo's and Ms. Too Too's claims, and the
6 damages and relief sought on their behalf."²² The EEOC did not respond by August 2.
7 Instead, it advised that it would need until the week of August 6 to provide the requested
8 information.²³ It is now August 7, and ASC still has not received the requested
9 information.²⁴

10 The discovery period closed yesterday, and the EEOC has failed to identify a
11 single class member who was denied employment and/or terminated based on
12 pregnancy. And the EEOC has failed to set forth any facts to support a single class
13 member's claim. Accordingly, the class action should be dismissed.

14 ARGUMENT & AUTHORITIES

15 For approximately 19 months, the EEOC has been investigating, and
16 conducting discovery, with respect to its claims of pregnancy discrimination. In that time,
17 the EEOC has failed to identify a single class member with a supportable claim of
18 discrimination. In that time, the EEOC has failed to provide any facts to support a claim of
19 discrimination on behalf of any class member.

20 Where, as here, there is no genuine dispute of material fact and the moving
21 party is entitled to judgment as a matter of law, summary judgment is appropriate. Fed.
22 R. Civ. P. 56(c). The United States Supreme Court has interpreted Rule 56(c) as mandating

23
24 ²¹ Letter dated July 31, 2001 from John H. Chun to Carmen Flores (attached as Exhibit I to
Chun Declaration).

25 ²² Id.

26 ²³ Chun Declaration at ¶ 12

²⁴ Id.

1
2 potential class members include employees who may have hidden their pregnancies from
3 ASC.²⁵ This theory, an attempted "back door" amendment of the EEOC's complaint, does
4 not suffice to support the claims of class discrimination.

5 This theory falls outside the allegations of the EEOC's Complaint, which
6 states that ASC "failed to hire and/or terminated Ms. Martin and similarly situated
7 females for/from employment . . . based upon sex and pregnancy "²⁶ Logically,
8 employees who "hid" their pregnancies could not have been denied employment or
9 terminated on the basis of pregnancy. And it is too late in this matter to assert this new
10 claim based on "hidden" pregnancies.

11 Further, the EEOC fails to explain how employees who hid their pregnancies
12 could have suffered discrimination.

13 Finally, the EEOC has identified only one individual, Ms. Dinnocenzo, who
14 allegedly hid her pregnancy.²⁷ Upon learning of Ms. Dinnocenzo's inclusion as a
15 purported class member, ASC requested information regarding the factual basis of her
16 claims as well as the damages and relief sought.²⁸ To date, the EEOC has failed to provide
17 ASC with a response to its request and has not developed Ms. Dinnocenzo's claims in any
18 other way. The EEOC has not asserted any facts indicating that ASC either terminated or
19 refused to hire Ms. Dinnocenzo, or any other employee who may have hidden her
20 pregnancy.
21

22
23 ²⁵ Defendant American Seafoods Company's Third Set of Discovery Requests to the EEOC
and EEOC's Responses Thereto dated July 20, 2001 (attached as Exhibit F to Chun Declaration).

24 ²⁶ Id.

25 ²⁷ Defendant American Seafoods Company's Third Set of Discovery Requests to the EEOC
and EEOC's Responses Thereto dated (attached as Exhibit F to Chun Declaration).

26 ²⁸ Letter dated July 31, 2001 from John H. Chun to Carmen Flores (attached as Exhibit I to
Chun Declaration).

CONCLUSION

In light of the foregoing, ASC respectfully requests that the Court dismiss the EEOC's class action claims in this matter with prejudice. As it is now after the close of discovery, allowing the EEOC to proceed with its class claims would result in prejudice, as well as substantial expense, to ASC.

DATED this 7th day of August, 2001.

MUNDT MacGREGOR L.L.P.

By 

Jay H. Zulauf
WSB No. 2277

John H. Chun
WSB No. 24767

Attorneys for Defendant
American Seafoods Company

\\JCT\PLEADINGS\PMEMS\EEOC-1058-138A.DOC