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United States District Court, D. Kansas.

Gary A. THIESSEN et al., Plaintiffs,
v.
GENERAL ELECTRIC CAPITAL CORPORATION, d/b/a GE Capital, and Montgomery Ward Credit Services, Inc., f/k/a Monogram Retailer Credit Services, Inc., Defendants.

No. 96–2410–JWL.
|
Nov. 8, 2002.

Attorneys and Law Firms

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MEMORANDUM & ORDER

JOHN W. LUNGSTRUM, District Judge.

***1** Plaintiff Gary Thiessen, an employee of defendants, filed suit under the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq., alleging that he and other similarly situated employees had been adversely affected by a pattern or practice of age discrimination implemented by defendants. This case has been certified as a collective action and the trial of plaintiffs' pattern-or-practice claim is scheduled to begin in January 2003. Defendants seek summary judgment on the claims of three individual plaintiffs-Don Farrow, Billie Huddleston and Artemio Robles-on the grounds that the claims of these individuals are time-barred. For the reasons set forth below, the court grants defendants' motion and dismisses with prejudice the claims of Mr. Farrow, Ms. Huddleston and Mr. Robles.[1]

The sole issue presented by defendants' motion is whether Mr. Farrow, Ms. Huddleston and Mr. Robles-none of whom filed EEOC charges-can "piggyback" on the EEOC charge filed by Mr. Thiessen. As the Tenth Circuit recognized in its *Thiessen* opinion, federal courts "universally hold that an individual who has not filed an administrative charge can opt-in to a suit filed by any similarly situated plaintiff under certain conditions." *Thiessen v. General Electric Capital Corp.*, 267 F.3d 1095, 1110 (10th Cir.2001) (citations and quotations omitted). This "single-filing rule" permits a plaintiff who did not file an EEOC charge to piggyback on the EEOC charge filed by another person who is similarly situated. *Id.*

In applying the single-filing rule, the court must first determine "the effective scope of the EEOC charge actually filed" -a task that the Tenth Circuit, in *Thiessen*, has already undertaken and conclusively resolved. *See id.* (citing *Jones v. Firestone Tire & Rubber Co.*, 977 F.2d 527, 532 (11th Cir.1992)). According to the Circuit, the proper scope of Mr. Thiessen's EEOC charge is from September 1993 through 1995. *Id.* at 1110–11. Specifically, the Circuit reasoned:

> Thiessen is relying on the continuing violation doctrine to bring in claims that arose more than 300 days prior to the filing of his EEOC charge. More specifically, Thiessen alleges that defendants implemented the blocker policy and began taken adverse action against him in pursuit of that policy beginning in September 1993. Further, Thiessen alleges that, notwithstanding Lanik's repudiation in the fall of 1994, defendants continued the policy and applied it against him in 1994 and 1995. If Thiessen can substantiate his allegations, the time frame for his claims would generally be from September 1993 through 1995. Accordingly, it would this time frame during which the district court should make its

> determination of which opt-in plaintiffs to include in the class. In other words, the class should, at this stage of the proceedings, include all those plaintiffs whose related claims ... arose between September 1993 and 1995.

Id. This court's task on remand, then, is abundantly clear from the Tenth Circuit's opinion: "[O]n remand, the district court is directed to include in the opt-in class all those plaintiffs who allegedly suffered adverse employment actions from September 1993 through 1995." *Id.* at 1111.

***2** Viewing the evidence in the light most favorable to plaintiffs, the non-moving parties, the record reflects that Mr. Farrow was constructively discharged in July 1993; that Ms. Huddleston was constructively discharged in April 1992; and that Mr. Robles was constructively discharged in May 1993. It is undisputed, then, that none of these plaintiffs suffered an adverse employment action at any time after September 1993. Under the Circuit's clear directive, then, these plaintiffs cannot be included in the opt-in class. In fact, the Circuit suggested in its *Thiessen* opinion that these individuals would not be included in the class. In that regard, this court had previously dismissed eight opt-in plaintiffs-including Mr. Farrow, Ms. Huddleston and Mr. Robles-on the grounds that the claims of those eight plaintiffs were time-barred. Reversing that decision, the Circuit defined the appropriate time frame as September 1993 through 1995 and noted that this time frame "would include at least four of the eight excluded individuals, all of whom resigned or were laid off during or after September 1993." *Id.* The four individuals that the Circuit contemplated would be included in the class were Julia Bates Allgood; Delilah Hicks; Eugene Laurenzo; and Larry Nobles. *See id.* at 1111 n. 13. By implication, then, the Circuit contemplated that those individuals who were discharged prior to September 1993–*i.e.*, Mr. Farrow, Ms. Huddleston, and Mr. Robles-would not be included in the opt-in class.

Plaintiffs oppose defendants' motion on the grounds that a jury should be permitted to determine whether the blocker policy was implemented prior to September 1993. According to plaintiffs, if a jury determines that the blocker policy was implemented prior to that time, then the court must include Mr. Farrow, Ms. Huddleston and Mr. Robles in the opt-in class. Plaintiffs, however, misconstrue the Tenth Circuit's opinion. The Tenth Circuit held that, because the opt-in plaintiffs are attempting to piggyback on Mr. Thiessen's EEOC charge, those plaintiffs are bound by the time frame covered by Mr. Thiessen's charge. The Circuit concluded that the time frame for Mr. Thiessen's charge began in September 1993 because that is when defendants allegedly began taking adverse action against Mr. Thiessen in pursuit of the policy. Moreover, the Circuit had an opportunity to assess plaintiffs' evidence that the blocker policy was implemented prior to mid–1993 and it expressly rejected that evidence. *See id.* at 1111 n. 11 ("Although Thiessen contends defendants generally had an ageist working environment, there is little, if any, evidence indicating that the blocker policy was actually implemented until mid 1993."). The Tenth Circuit made this determination despite evidence in the record before it that the blocker concept was discussed by defendants' management as early as 1991, at various times in 1992, and in early 1993. *See id.* at 1100 (summarizing plaintiffs' evidence and including allegations of discussions of blocker concept in early 1990s).

***3** In short, the Tenth Circuit has already decided, for purposes of this case, that only "those plaintiffs who allegedly suffered adverse employment actions from September 1993 though 1995" should be included in the opt-in class. *See id.* at 1111. This court need not, and may not, revisit that issue. *See United States v. Monsisvais*, 946 F.2d 114, 118 (10th Cir.1991) (where issue of law had been decided by the Circuit, district court was not permitted to consider additional evidence on the issue; the law of the case doctrine is intended to avoid having the district court substitute its opinion for that of the Circuit). As it is undisputed that Mr. Farrow, Ms. Huddleston and Mr. Robles did not suffer any adverse actions during or after September 1993, they cannot be included in the opt-in class and their claims must be dismissed. Defendants' motion is therefore granted.

IT IS THEREFORE ORDERED BY THE COURT THAT defendants' motion for summary judgment as to proposed opt-in plaintiffs Don Farrow, Billie Huddleston and Artemio Robles (doc. # 480) is **granted.**

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2002 WL 31571614

Footnotes

[1] Plaintiffs have filed a motion to deem admitted (doc. # 522) their statements of fact contained in their memoranda in opposition to the various motions for summary judgment filed by defendants and currently pending before the court, including the motion resolved in this order. The court need not resolve plaintiffs' motion to deem admitted prior to resolving defendants' motion for summary judgment regarding Mr. Farrow, Ms. Huddleston and Mr. Robles because the only three facts pertinent to this motion for summary judgment-the dates of these individuals' constructive discharge-are undisputed in any event. Thus, plaintiffs' motion to deem admitted remains under advisement.

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