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United States District Court, N.D. New York.

D. Drew ABRAMS, Individually and on behalf of all other persons similarly situated; Thomas W. Loucks, Individually and on behalf of all other persons similarly situated, Plaintiffs,
v.
GENERAL ELECTRIC COMPANY, Defendant.

No. 95-CV-1734 (FJS).
|
Nov. 4, 1996.

Attorneys and Law Firms

McNamee, Lochner, Titus & Williams, P.C. (Joseph M. Gaug, of counsel), Albany, NY, for Plaintiff.

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MEMORANDUM DECISION AND ORDER

SCULLIN, District Judge.

Introduction

***1** In this action, the plaintiffs allege that the defendant discriminated against them on the basis of age in contravention of the Age Discrimination in Employment Act of 1967 ("ADEA").[1] 29 U.S.C. §§ 621 et seq. Presently before the Court is a motion by the plaintiff for certification to proceed as a collective action under Section 621(b) of the ADEA, and Section 216(b) of the Fair Labor Standards Act ("FLSA"). 29 U.S.C. § 216(b).

Factual Background

The named plaintiffs in this action were both employees at the defendant's Power Systems plant in Schenectady, New York. General Electric ("GE") Power Systems is comprised of fifteen divisions, each headed by a vice president or general manager. Nine of these divisions are further divided into nine to fifteen individual departments. Plaintiff D. Drew Abrams was employed in the Manufacturing Department of the Finance Division. Plaintiff Thomas W. Loucks was employed in the Steam Turbine Manufacturing Department of the Production Division.

In Early 1995, the senior management of GE Power Systems concluded that significant budgetary reductions were necessary. Each division vice president or general manager was given a budget reduction goal to meet.[2] Each division met their budget reduction goal utilizing a reduction in force. The division and department managers utilized a uniform GE human resources lay off procedure to choose which exempt employees would be subject to adverse employment actions. This procedure directs a manager to rank each employee based on (1) performance, (2) productivity, (3) adaptability/versatility, (4) criticality of skills, and (5) length of service. The employees with the lowest score were selected for layoff. As a result of this process several hundred GE employees from all divisions were laid off in May of 1995. Plaintiffs have alleged that the reduction in force program was part of a company pattern or practice which had a disparate impact on workers over the age of 40, in violation of the ADEA.

Procedural Background

The named plaintiffs filed age discrimination charges with the Equal Employment Opportunity Commission ("EEOC") on behalf of themselves and all others similarly situated, and were issued "right to sue" notices. On December 7, 1995, plaintiffs filed this action in the Northern District of New York. Subsequently, plaintiffs moved to facilitate notice to potential plaintiffs under the statutory provisions of the ADEA. In a September 25, 1996 Order, Magistrate Judge Ralph W. Smith granted the plaintiffs' motion and ordered the defendant to furnish the plaintiffs with the names and addresses of the putative

class plaintiffs to facilitate the notification process. Plaintiff now moves for certification to proceed as a collective action under the § 626(b) of the ADEA and § 216(b) of the FLSA.

Discussion

The ADEA provides that an employee may bring an action on behalf of himself and other similarly situated employees in instances where they have been subject to discrimination based on their age. *Hoffman La Roche, Inc. v. Sperling,* 493 U.S. 165, 167 (1989). An ADEA class action, however, is not governed by the requirements of Fed. R. Civ. P. 23, but is a separate statutorily created class device.[3] *Mete v. New York State Office of Mental Retardation and Developmental Disabilities,* 1993 WL 226434, at *2 (N.D.N.Y. 1993). The enforcement provision of the ADEA, § 626(b), incorporates § 16(b) of the FLSA as the standard for maintaining a collective action under the ADEA. 29 U.S.C. § 626(b); *Kreuger v. New York Telephone Co.,* 163 F.R.D. 433, 444 (S.D.N.Y. 1995). In order to proceed collectively under Section 16(b), the plaintiffs must establish: (1) that the named plaintiffs and the proposed members of the class must be "similarly situated," and (2) that the proposed class members consent in writing to be bound by the result of the suit. 29 U.S.C. § 216(b); *Kreuger,* 163 F.R.D. at 444; *see also Sperling v. Hoffman-La Roche,* 118 F.R.D. 392, 399 (D.N.J.), *aff'd,* 862 F.2d 439 (3d Cir. 1988), *aff'd,* 493 U.S. 165 (1989). The present motion, therefore, turns on the issue of whether the prospective plaintiffs are "similarly situated."[4]

***2** In order to be "similarly situated," plaintiffs need not be identically situated to potential class members, but there must be a "demonstrated similarity among the individual situations, ... some identifiable factual nexus which binds the named plaintiffs and potential class members together as victims of a particular alleged discrimination." *Heagney v. European American Bank,* 122 F.R.D. 125, 127 (E.D.N.Y. 1988) (citing *Palmer v. Readers Digest Ass'n,* 42 Fair Empl. Prac. 212, 213 (S.D.N.Y. 1986)); *see also Mete v. New York State Office of Mental Retardation and Developmental Disabilities,* 1993 WL 226434, at *2 (N.D.N.Y. 1993)(courts require nothing more that substantial allegations that the putative class members were the victims of a single decision, policy, or plan infected by discrimination). Likewise, a finding of "similarly situated" does not require the plaintiffs to perform the same job in the same location as long as there is a discriminatory policy common to all. *Heagney,* 122 F.R.D. at 127.

Here, the potential ADEA class is defined as those employees over forty, previously or presently employed at the GE Power Systems plant, who were terminated, laid off, discharged, demoted, or forced to voluntarily retire from employment due to the "downsizing" that occurred in May of 1995. The plaintiffs allege that the employee retention and elimination procedures developed by GE and used by all the divisions at the Power Systems plant to rank exempt employees for this downsizing, were designed and implemented to have a discriminatory impact on employees over forty. Plaintiffs also allege that GE Power Systems has a corporate policy of not terminating any exempt employees entered in corporate management programs, which accept primarily new college graduates as members. Because these alleged policies would have necessarily impacted all the employees suffering adverse employment decisions in the May 1995 downsizing, these alleged policies are the identifiable factual nexus which bind the potential class members together as victims of alleged discrimination. *See Mete,* 1993 WL 226434 at *2 (the Court found "substantial similarity" in part based on allegations that all the plaintiffs were subject to a state-wide policy utilized in a reduction in force by the New York State Office of Mental Retardation and Developmental Disabilities); *Schwed v. General Electric Co,* 159 F.R.D. 373, 376 (N.D.N.Y. 1995)(GE ranking system used for reduction in force for entire plant was sufficient to find substantial similarity); *see also Frank v. Capital Cities Communications, Inc,* 1983 WL 643 (S.D.N.Y. 1983).

In opposition to this motion, defendant cites *Lusardi v. Xerox Corp.,* 118 F.R.D. 351 (D.N.J. 1987), *mandamus granted in part, appeal dismissed and remanded,* 855 F.2d 1062 (3d Cir.) *aff'd on remand,* 122 F.R.D. 463 (D.N.J. 1988), arguing that the plaintiffs are not similarly situated because they worked in different divisions at the Power Systems plant and were evaluated by different managers. They further argue that the managers of the different departments decided who to lay off, how many to lay off, and ultimately whether to lay off at all. Both *Lusardi* and defendant's arguments can be distinguished in the same manner. In *Lusardi,* the defendant Xerox instituted a reduction in force across all of its divisions and subsidiaries. *Id.* at 357. Unlike the present case, however, in addition to each organizational unit choosing who it would lay off, each unit determined what process it would use to determine who was to be laid off. *Id.*

Therefore, in *Lusardi* there was no single policy or practice used by the defendant which applied to all of the prospective plaintiffs, thus the *Lusardi* plaintiffs could not all be similarly situated. *Id.* at 361. Here, while the different GE divisions separately arrived at the decision of who and how many to lay off, each division did so utilizing the same corporate downsizing policy and ranking structure. It is that policy which the plaintiffs allege is the source of the discrimination in the May 1995 downsizing, and it is that policy which forms the factual nexus necessary to find a "substantial similarity" between the proposed ADEA class members. Therefore the Court certifies the plaintiffs to proceed collectively with their ADEA claim pursuant to 29 U.S.C. § 626(b).[5]

***3** After carefully reviewing the parties' submissions and the applicable law, the Court finds that the plaintiffs have met the requirements of 29 U.S.C. § 216(b) class certification for their ADEA claim, and that their motion should be granted. Therefore, it is hereby

ORDERED that the plaintiffs are certified to proceed with their ADEA claim as a collective action under 29 U.S.C. § 216(b).

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp., 1996 WL 663889

Conclusion

Footnotes

1 Plaintiffs also bring a claim under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001 et seq., and a pendant state claim under the New York Human Rights Law ("HRL"), Executive Law §§ 290 et seq., which are not at issue in the present motion.

2 Here plaintiffs allege that the divisions were directed to conduct a reduction in force. Defendants deny this, stating that each division was solely responsible for achieving the budget goal in any way possible, including, but not limited to, reductions in force.

3 As a threshold matter, the defendants dispute that certification in an ADEA action is materially different than a Rule 23 class certification. They cite to *Shushan v. University of Colorado at Boulder,* 132 F.R.D. 263 (D. Colo. 1990), in support of the proposition that the prerequisites of typicality, commonality, numerousity and adequate representation required by Fed. R. Civ. P. 23 are implicit in the "substantial similarity" test articulated by § 16(b) of the FLSA. This particular viewpoint is at odds with the doctrine followed by the district courts of the Second Circuit, and in particular the Northern District of New York. *See Mete v. New York State Office of Mental Retardation and Developmental Disabilities,* 1993 WL 226434, at *2 (N.D.N.Y. 1993); *Schwed v. General Electric Co,* 159 F.R.D. 373, 375 (N.D.N.Y. 1995); *Kreuger v. New York Telephone Co.,* 163 F.R.D. 433, 444 (S.D.N.Y. 1995); *Heagney v. European American Bank,* 122 F.R.D. 125, 127 (E.D.N.Y. 1988). As such, the Court finds the defendant's argument that the Court should apply the *Shushan* holding to be unpersuasive.

4 As to the second requirement, the plaintiffs have already secured the names and addresses of the potential plaintiffs and have mailed out "opt-in" statements. As a result of this notice, many of the potential plaintiffs have already mailed in their consent. Therefore, the Court finds that the plaintiffs have set in motion a mechanism to

comply with the second requirement for certification under § 216(b). *See Mete,* 1993 WL 226434, at *2.

[5] This decision does not affect the status of the plaintiff's ERISA and HRL class action claims. Plaintiffs are still required to move for class certification with respect to those claims pursuant to Fed. R. Civ. P. 23.