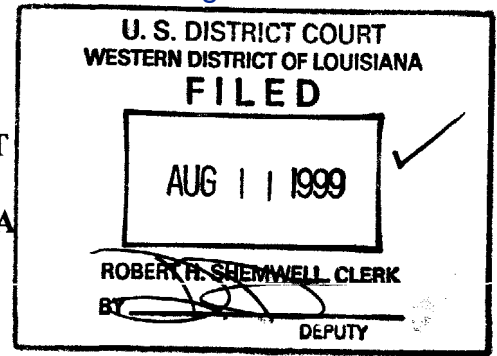


UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION



DR. DWIGHT VINES and
DR. VAN MCGRAW

CIVIL ACTION NO.: 97-0873

versus

JUDGE ROBERT G. JAMES

NORTHEAST LOUISIANA UNIVERSITY,
BOARD OF TRUSTEES, UNIVERSITY OF
LOUISIANA SYSTEM

MAG. JUDGE KAREN HAYES

RULING

Before this Court is the plaintiffs' Motion for Recognition of Action as a Representative Action, for Class Certification as to Pendant State Law Causes of Action and for Authority for Issuance of Notice to Potential Plaintiffs [Doc. # 13]. The plaintiffs seek recognition of this action as a representative action and authority for issuance of notice to potential opt-in plaintiffs pursuant to Section 7(b) of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 626(b). The plaintiffs also request certification of potential plaintiffs for purposes of their state law age discrimination claims pursuant to Rule 23 of the Federal Rules of Civil Procedure. Finally, the plaintiffs request an order requiring the defendants to provide them with the names of all potential plaintiffs known to them. The defendants oppose the motion. For the following reasons the plaintiffs' motion is DENIED.

LAW AND DISCUSSION

1. **Recognition of Suit as a Representative Action and Issuance of Notice Pursuant to the ADEA.**

The ADEA explicitly incorporates § 16(b) of the Fair Labor Standards Act ("FLSA")

which provides in part:

An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

29 U.S.C. § 626(b), referencing 29 U.S.C. § 216(b). In order to proceed as a representative action, the potential plaintiffs must be similarly situated and opt-in by filing their written consent in the court in which the action is brought. Representative actions brought under the ADEA must conform with these opt-in requirements rather than the opt-out requirements of Fed. R. Civ. P. 23. *LaChapelle v. Owens-Illinois, Inc.*, 513 F.2d 286, 289 (5th Cir. 1975); *Anson v. Univ. of Texas Health Science Center at Houston*, 962 F.2d 539, 540 (5th Cir. 1992).

The ADEA also empowers the EEOC to bring suit on behalf of aggrieved employees as set forth in § 16(c) of the FLSA. 29 U.S.C. § 626(b). The opt-in requirement of § 16(b) is not present when suit is brought by the EEOC. Further, the ADEA provides:

(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: Provided, That the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter.

Id. at 29 U.S.C. § 626(c). “Suits brought by the EEOC thus have priority over private suits: Once the EEOC commences an age discrimination suit, the right to commence a private action twice authorized by the ADEA ceases to exist. ADEA private lawsuits therefore are secondary in the

statutory scheme to administrative remedies and suits brought by the Commission.” *EEOC v. Pan American World Airways, Inc.*, 897 F.2d 1499, 1505 (9th Cir. 1990), *cert. denied*, 498 U.S. 815, 111 S.Ct. 55, 112 L.Ed.2d 31 (1990). The purpose of this remedial scheme is “to relieve the courts and employers of the burden of litigating a multiplicity of suits based on the same violations of the act by an employer, . . . to reduce the danger of inconsistent adjudications because the claims of all employees who have not already initiated private actions are consolidated at the time the EEOC files its suit, . . . and to preclude res judicata problems because the EEOC judicially binds all employees on whose behalf it sues.” *Id.* at 1505-06. (Citations omitted) See also *EEOC v. U.S. Steel Corp.*, 921 F.2d 489 (3rd Cir. 1990). Although private ADEA actions brought prior to the EEOC’s suit may persist, upon the commencement of an action by the EEOC an individual’s right to bring a private ADEA action terminates.

In *Wilkerson v. Martin Marietta Corp.*, 875 F.Supp. 1456, 1460-61 (D.Colo. 1995), the court was called upon to determine the legal status of opt-in plaintiffs and those who may opt-in in the future in light of the EEOC’s action. *Id.* at 1463. The court held “that the EEOC’s filing of its suit [did] not cut off any rights of those opt-in plaintiffs who filed notices of their intent to opt-in to the Wilkerson litigation prior to [the date the EEOC’s suit was filed], and they [were] appropriately members of the Wilkerson collective action.” *Id.* at 1464. However, the court held that the opt-in plaintiffs who filed their notices after the date on which the EEOC filed suit, and those who may file opt-in notices in the future, were precluded from joining in the collective action. The court stated:

In light of the Court’s interpretation that the 626(c) cutoff provision “to bring” would contemplate joinder of a plaintiff to an existing suit by virtue of filing an opt-in notice, it is likewise

compelled to hold that the cutoff provision would apply to any opt-in notice filed after the EEOC filed its complaint.

Id. at 1464.

In the present case, Dr. Vines and Dr. McGraw filed suit on May 5, 1997. The EEOC filed suit on January 5, 1998 on behalf of Dr. Vines, Dr. McGraw, and all individuals in a like and similar situation, who were injured by the defendants' practices. Subsequently, on January 23, 1998, the plaintiffs filed the instant Motion for Recognition of Action as a Representative Action, for Class Certification as to Pendant State Law Causes of Action and for Authority for Issuance of Notice to Potential Plaintiffs.

Although the plaintiffs' private ADEA action may persist, the right of any individual to opt-in the plaintiffs' action terminated when the EEOC filed its Complaint on January 5, 1998. Since no other individuals filed claims or opt-in notices prior to January 5, 1998, there are no opt-in or potential opt-in plaintiffs available for the plaintiffs to represent. Accordingly, the Court denies the plaintiffs' motion. Additionally, the Court denies the plaintiffs' requests for the issuance of notice to potential opt-in plaintiffs and order requiring the defendants to provide them with the names of all potential plaintiffs known to them.

2. **Certification of Plaintiffs as a Class for Purposes of State Law Claims Pursuant to Federal Rules of Civil Procedure Rule 23.**


The plaintiffs' request for class certification under Rule 23 of the Federal Rules of Civil Procedure on their state law age discrimination claims is moot in light of this Court's Ruling of August 3, 1999 dismissing the plaintiffs' state law age discrimination claims as untimely.

CONCLUSION

Although the plaintiffs' private ADEA action may persist, the right of any individual to

opt-in the plaintiffs' action terminated when the EEOC filed its Complaint on January 5, 1998. Accordingly, the plaintiffs' requests for recognition as a representative action, authority for issuance of notice to potential opt-in plaintiffs, and order requiring the defendants to provide them with the names of all potential plaintiffs, are DENIED. Additionally, the plaintiffs' request for class certification of their state law age discrimination claims is also DENIED as MOOT.

MONROE, LOUISIANA, this 10 day of August, 1999.


ROBERT G. JAMES
UNITED STATES DISTRICT JUDGE

COPY SENT

DATE 8-11-99

BY DO

TO Jones

Selferty
Adams
McCain
Hill
George
Sanders