HNOT v. WILLIS GROUP HOLDINGS

06-5761

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Reply Brief: Appellant-Petitioner

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TEXT: Preliminary Statement

The fundamental flaw in both the district court's opinion and the defendants' position on appeal is that they would require that, to be timely, an intervention motion be filed before it is clearly necessary to prevent the impairment of the intervenor's interest in the litigation.

The district court held that plaintiff's motion was untimely because it was not filed immediately after she learned of the court's March 2005 decision certifying the Hnot class only through 2001. However, that holding erroneously ignores subsequent events which gave rise to a reasonable belief that the class period would be extended, such that the Hnot plaintiffs and their counsel could adequately represent Cronas's and the class' post-2001 interests without intervention by Cronas. n1

> n1 Perhaps sensing the illogic and weakness of the district court's holding, defendants here suggest that Cronas should have been required to intervene shortly after the Hnot class action was filed in 2001. But this makes no sense either. There was no reason to think that the Hnot plaintiffs and their lawyers were not, or would not be, adequately representing the interests of the entire class they sought to represent - from 1998 to the time of trial.

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This error was compounded by an erroneous finding that the defendants were prejudiced by Cronas's failure to seek intervention until August 2006. This finding ignores the posture of the case during the period between the district court's certification decision and August 2006 - nothing of significance occurred [*2] during this time. It also gives undue weight to the delay in the Hnot trial that would result from the need for discovery on Cronas's claims, ignoring the fact that the same discovery would take place in the separate case that the district court assumed Cronas would file after the denial of intervention.

Finally, the district court erred in not recognizing the enormous prejudice resulting to Cronas and the post-2001 class from the denial of intervention. While the court thought that Cronas could institute a separate action to fully vindicate her claims and those of the post-2001 class, defendants have now moved to dismiss that separate action on the ground that, because the single-filing rule does not apply to separate Title VII actions, Cronas has not met, and cannot meet, the administrative prerequisites of such separate action.

Because the district court failed [**6] to address the fact that the denial of intervention and dismissal of the separate action could leave Cronas and the class with no vehicle for vindicating their post-2001 claims, it unfairly minimized the prejudice to them.

Defendants vainly try to justify the decision below by suggesting that, even if intervention had been permitted, they would have succeeded in dismissing Cronas's subsequent complaint based on two legal arguments - that Cronas cannot overcome her failure to exhaust the Title VII administrative requirements, even in [*3] intervention, because the single-filing rule does not apply to her claims, though they are closely related to the Hnot claims, and that an arbitration

clause in Cronas's employment agreement, though narrowly-drawn, bars the discrimination claims Cronas seeks to vindicate here. They are wrong, for reasons summarized in this memorandum and explained more fully in briefing on the motion to dismiss now pending before the trial court.

By perceiving delay and prejudice to defendants where there was neither, and by failing to recognize the very significant prejudice to Cronas and the post-2001 class which would result from denying intervention, [**7] the district court got its timeliness analysis wrong. This Court should set it right by reversing and granting leave to intervene.

Legal Argument

I. This Court Should Clarify Whether the Timeliness Inquiry Commences from the Date When the Proposed Intervenor Learns of His or Her Interest in the Litigation, or Rather, the Date When it Becomes Clear That Interest Is No Longer Being Adequately Protected by the Parties

Both the court below and defendants here contend that the timeliness inquiry is governed primarily by the date on which the proposed intervenor learns of his or her interest in the litigation, rather than the date on which the intervenor learns that that interest is no longer being adequately protected by the existing parties, here, [*4] the named plaintiffs and their attorneys in Hnot. n2 (A148; Defs.' Br. 11-12). Such a rule, particularly in the context of a class action like this one, would effectively preclude intervention beyond a short time after the filing date, the point at which members of a putative class have an interest in the litigation.

n2 The district court adopted the former principle, but then denied intervention on the rationale that Cronas did not even file her motion immediately after learning of her impaired interest - a discovery the court wrongly concluded occurred in May 2005, once Cronas was on notice of the initial class certification decision. (A148-50); see also Part II infra.

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But such a rule makes no sense. Intervention should not be required before it becomes apparent that the named plaintiffs and class representatives are not adequately protecting the interests of the putative class members. n3 Were it otherwise, trial courts would be inundated with premature - and, in many cases, needless - motions by individual class members, defeating the very purposes of class action litigation and significantly undermining judicial efficiency and [*5] economy.

n3 See, e.g., *Pub. Citizen v. Liggett Group, Inc., 858 F.2d 775, 785 (1st Cir. 1988)* ("[I]t is now well-established that it is not the simple fact of knowing that a litigation exists that triggers the obligation to file a timely application for intervention. Rather, the appropriate inquiry is when the intervenor became aware that its interest in the case would no longer be adequately protected by the parties"); *Werbungs Und Commerz Union Austalt v. Collectors' Guild, Ltd., 782 F. Supp. 870, 874-75 (S.D.N.Y. 1991)* (although the intervenor had been directly or indirectly involved with the defendant in the case throughout the litigation, it was granted leave to intervene almost two years after the filing of the case, when its interest in the action became direct and the existing parties could not adequately represent its interests).

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II. It Did Not Become Clear That the Interests of Cronas and the Post-2001 Class Were Being Impaired Rather than Protected by the Named Plaintiffs and Their Attorneys, and Intervention Did Not Become Necessary to Protect Those Interests, until the District Court's August 17, 2006 Decision

The district court found that, even assuming that the critical question is when Cronas knew or reasonably should have known that her interests were not being adequately protected, her delay should be measured from May 2005, when she learned that the court had certified the Hnot class. "At that time, Cronas could and should have learned through reasonable diligence that the class, as certified by the Court, only encompassed employees who had worked for Willis from 1998 through 2001." (A149.)

But the court's holding ignores the facts that (1) Hnot plaintiffs' counsel had a good faith argument that the court had mistakenly forgotten an understanding between the parties and the court that discovery would be limited to 1998-2001 until after the class certification decision had been made; (2) Hnot plaintiffs' counsel advised the court at a

conference shortly after its March 21, 2005 decision [**10] certifying the class only through 2001 that, in limiting the scope of the class, it had ignored its own off-the-record direction to plaintiffs to hold off on post-2001 discovery until after the class certification decision was made; (3) the court [*6] admitted that, notwithstanding that plaintiffs' certification motion sought certification of a class of employees up to the present time, it had mistakenly perceived the motion to seek certification only up to 2001; (4) prior to considering whether and how to remedy that mistake, the court ordered mediation to try to settle the entire case (apparently including post-2001 damages); and (5) when settlement discussions broke down, the court permitted briefing on whether the class should be extended to the present and post-2001 discovery allowed. Thus, the court also ignored the fact that Cronas could and would have learned through due diligence, and actually did learn prior to filing her motion to intervene, that the Hnot plaintiffs filed a motion to extend the class period, which would have remedied the impairment of Cronas's and the class' interests. At the time, the limited temporal scope of the class reasonably appeared to be [**11] the result of inadvertence rather than a lack of due diligence by the Hnot named plaintiffs and their lawyers.

In short, it was not clear that intervention was necessary until the motion to extend the class period was denied on August 17, 2006, not only because of the substance of that ruling confirming the limited temporal scope of the class, but also because the ruling was grounded in the lack of due diligence by the Hnot plaintiffs. Accordingly, Cronas's motion to intervene, which was actually filed a few weeks [*7] earlier, n4 was not untimely under the appropriate legal standard.

> n4 Cronas filed her motion to intervene on August 1, 2006 (after notifying the court of her intention to do so on July 17), when her counsel obtained from Hnot plaintiffs' counsel a copy of papers on the motion to extend the class period. The fact that the motion was filed earlier than necessary by a few weeks does not detract from the timeliness analysis above. Moreover, the record contains substantial evidence of Cronas's counsel's previously unsuccessful efforts to learn about the status of the case from both plaintiffs' and defendants' counsel. The existing parties were not forthcoming, which especially hindered Cronas's access to information because virtually all of the relevant discovery, and much of the relevant papers, were marked confidential and not provided to Cronas's counsel despite repeated requests. See Cronas Br. 14-16. In the class action context, especially where, like here, notice is not published or issued to class members after certification of the class and information about the case is affirmatively denied to class members seeking it, courts should be cautious in assessing what class members "should have known," and in calculating when a timely motion to intervene should have been made.

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The district court's observation that its August 17 decision did not change its earlier ruling, but merely maintained the status quo by reaffirming it (A 150), and defendants' argument predicated thereon (Defs.' Br. 15), miss the point. Based on everything Hnot plaintiffs' counsel had said about the reasons for the court's limitation of the class period, and on everything the court itself had said and done prior to its August 17 decision, the March 2005 decision appeared to be the product of mistake which could be, and was in the process of being, remedied by plaintiffs' counsel. Until those attempts were rejected by the court, per a finding that the limited temporal scope of the class was instead the result of lack of diligence, [*8] intervention was premature. Accordingly, there was no delay in making the motion, and where there is no delay, the motion to intervene should not be denied as untimely. n5

> n5 The cases cited by defendants at page 14 of their brief are distinguishable given the lengthy time that the putative intervenors were aware of the clear impairment of their interests.

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Since there is no real dispute on this record that the other requirements for intervention as of right have been met here - that Cronas has an interest in the action that may be impaired and which was not adequately protected by the Hnot plaintiffs - the motion to intervene should have been granted.

III. District Court Erred in Finding Prejudice to Defendants Resulting from Any Delay, and in Failing to Perceive the Significant Prejudice That Would Accrue to Cronas and the Post-2001 Class from the Denial of Intervention

In evaluating the timeliness of a motion to intervene, this Circuit looks specifically at "prejudice to existing parties resulting from any delay" in the filing of the motion. n6 *D'Amato v. Deutsche Bank, 236 F.3d 78, 84 (2d Cir. 2001)* (emphasis supplied). This standard requires a causal link between the delay and the prejudice to the existing parties.

Because, as set forth above, there was no delay by Cronas in moving to intervene, there logically can be no prejudice to [*9] defendants "resulting from any delay."

n6 The Hnot plaintiffs do not claim any prejudice as a result of Cronas's intervention; rather, they support the intervention.

[**14]

Moreover, this was a case that was languishing, and had for years, for reasons unrelated to Cronas or her motion to intervene, as the court below acknowledged. n7 After the district court's March 2005 certification decision, the court and parties were engaged in a lengthy process of, first, trying to settle the case (including the post-2001 claims) and, second, revisiting the class certification decision, including the motion to extend the class period which, at the time Cronas moved to intervene, had been pending *sub judice* for eight months. In fact, that revisitation continued after the motion to extend the class period and Cronas's motion to intervene were denied - the court accepting defendants' protestations of delay and prejudice - as defendants then engaged in further delay of the proceedings by filing a motion to decertify the 1998-2001 class. That motion was not decided until March 8, 2007. n8 See *Hnot v. Willis Group Holdings Ltd., 2007 WL 749675* (S.D.N.Y. Mar. 8, 2007).

n7 "Cronas is not responsible for the fact that this case has dragged on so long . . . ." (A152 n.1.)

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n8 Cronas requests that the Court take judicial notice of these further proceedings below.

It can therefore hardly be said that Cronas's motion to intervene, or more importantly, any delay between her discovery in May 2005 of the class [*10] certification and her filing of the motion to intervene in August 2006, caused any delay in the ultimate disposition of the Hnot case, let alone any cognizable prejudice to defendants.

Indeed, the court below never identified any prejudice "resulting from the delay" in filing the motion to intervene. Instead, it relied on what it perceived would be delay resulting from the grant of intervention itself, if Cronas's and the class' interests in their post-2001 claims were duly recognized and protected. Absent the Hnot class counsel's lack of diligence, which impaired those interests, the post-2001 claims would in any event have been an appropriate subject of litigation in the case, since they were a significant part of the allegations originally raised and prosecuted by the Hnot plaintiffs and their lawyers.

We respectfully submit that this [**16] is not the kind of delay which should appropriately be considered on a motion to intervene. Intervention jurisprudence speaks, or should speak, only of prejudice "resulting from the delay" in moving to intervene, not from subsequent delay which might result from granting leave to intervene when, as here, it is appropriately sought and the legal prerequisites have been satisfied. n9

n9 The cases cited by defendants for the proposition that courts have routinely denied intervention when it will unduly delay the underlying action are distinguishable. See, e.g., *United States v. Visa U.S.A., Inc., 2000 WL 1174930,* *1-2 (S.D.N.Y. Aug. 18, 2000) (denying motion to intervene in government antitrust action where the requisite showing of bad faith or malfeasance was not made and intervenor's ability to seek relief in a private antitrust action was not impaired); *EEOC v. Trans World Airlines, Inc., 1991 WL 156370,* *1-2 (S.D.N.Y. Aug. 7, 1991) (intervention denied where applicant waited a year after the EEOC informed her she could intervene to file her motion and her interests were adequately protected by the EEOC's actions on her behalf); *Mrs. W. v. Tirozzi, 124 F.R.D. 42, 44 (D. Conn. 1989)* (intervention denied where applicant asserted no reason for his failure to move for intervention at an earlier date and had not represented that his interests would be inadequately represented by the existing parties).

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[*11] Finally, even if arguendo it were appropriate to consider the delay which might result from the grant of intervention itself, the delay here would be far too modest to constitute significant prejudice to defendants. Defendants themselves have estimated that it would take only 250 person-hours - less than two months even if only one person were

assigned to the task(s) - to provide the post-2001 discovery necessary to try those claims with the earlier ones. This hardly constitutes real prejudice in a class action case which had been pending for years and in which no trial date had then been set, and where the same defendants may now have to defend the identical or closely-related post-2001 claims in the separate action that has needlessly resulted from the denial of intervention. n10

n10 Defendants also claim prejudice from having to litigate claims they denominate as Cronas's "individual" claims and "new" class claims. However, the claims of failure to award stock options, the denial of promotional opportunities, and the state law claims, are merely species of the under-compensation and promotion class claims contained in the Hnot complaint; they are neither "new" nor "individual" to Cronas. For example, claims of failure to award stock options to eligible women in a non-discriminatory manner are part and parcel of the under-compensation claims already raised, and the slight variation hardly renders these "new" class claims or "individual" claims. Notwithstanding defendants' assertion to the contrary (Defs.' Br. at 20), we do contend that the Hnot plaintiffs failed to protect Cronas's and the class' interests for the certified class period 1998-2001, because Cronas's stock option claims in that period were not explored.

Moreover, assuming that Cronas's separate action is not dismissed, defendants will be required to defend against, and engage in discovery regarding, the same claims that could be addressed more expeditiously through intervention. There is therefore no prejudice to defendants from the grant of intervention, and the parties and the court would benefit from the unified treatment of the alleged claims from 1998 until the time of trial, particularly at the trial stage.

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[*12] Thus, there would have been little or no prejudice to defendants from the grant of intervention, and no prejudice from any delay in moving to intervene, which is the only prejudice that should have been considered in determining whether intervention was appropriate.

Contrast this with the enormous prejudice to Cronas and the post-2001 class from the denial of intervention below. First, they have been relegated to a separate action to pursue similar, and in many cases identical, claims in the post-2001 period which, absent due diligence, should have and would have been prosecuted and resolved along with the earlier claims. n11 Many class plaintiffs, like Cronas, have claims that overlap the two periods, and may now have to prosecute identical [*13] claims in two separate actions. n12 The increased burdens and expense are not confined to those plaintiffs; they are also imposed on the courts by this ill-considered denial of intervention which could result in two separate actions, and possibly two lengthy trials.

n11 Even if Cronas can pursue her own litigation in state court, it is likely that her state law under-compensation claims would only date back to 2003.

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n12 There is also prejudice to Cronas and the post-2001 class in being denied access to years of relevant confidential discovery in Hnot.

Second, Cronas faces very significant prejudice despite the district court's belief that she "remains free to bring a separate action against defendants" (A152), and defendants' disingenuous contention that she "remains free to litigate her post-2001 claims in that action" and is therefore not prejudiced (Defs.' Br. 29). Defendants downplay the fact that they have now moved in the district court to dismiss Cronas' separate action, effectively asserting exactly the opposite proposition - that Cronas is legally barred from pursuing her and the class's post-2001 claims in that action. They erroneously suggest that the legal inability to maintain a separate action does not constitute prejudice to Cronas because the legal defenses asserted - that Cronas cannot use the "single-filing rule" to maintain her post-2001 claims and that her claims are subject to mandatory arbitration - apply equally to Cronas's motion to intervene.

These two defenses are addressed [**20] in the remaining sections of this reply [*14] brief. As set forth therein, the arbitration clause in Cronas's employment agreement does not apply to the discrimination and retaliation claims which are the subject of both the Hnot and Cronas actions, n13 and this issue therefore is not a prejudicial factor. However, while the single-filing rule clearly permits Cronas to intervene in the Hnot action, it is less clear that it would

permit Cronas to maintain her separate action. Because the single-filing rule would allow Cronas's intervention in Hnot but may not permit her to maintain a separate action, there is clear prejudice to Cronas and the post-2001 class in being denied intervention.

n13 Thus, defendants' assertion that we conceded that Cronas's "claims are time-barred and subject to arbitration" (Defs.' Br. at 28) is flat-out wrong.

Defendants' brief to this Court disingenuously omits mention of the argument that they are making below, in their motion to dismiss, that the single-filing [**21] rule does not allow Cronas to prosecute her separate action, because that rule only permits a plaintiff who has not filed her own EEOC charge to join a preexisting Title VII lawsuit in which at least one plaintiff has filed a timely charge - precisely what Cronas sought to do in moving to intervene in Hnot. Defendants' motion relies on *Tolliver v. Xerox Corp., 918 F.2d 1052, 1057 (2d Cir. 1990),* a decision in which this Court allowed plaintiffs to invoke the single-filing rule in a separate ADEA action, but noted in dicta that, "under Title VII, the single filing [*15] rule has been used only to permit joining a preexisting suit in which at least one plaintiff had filed a timely charge." Tolliver attributed this distinction between ADEA and Title VII actions to "Title VII's requirement that no person may initiate a Title VII suit without obtaining a right-to-sue letter." Id.

While we have argued in opposition that the district court can and should determine that the Hnot plaintiffs' right-to-sue letter applies to Cronas's separate action in this factual context, where her post-2001 claims are a natural extension of the earlier Hnot claims, [**22] or alternatively that the requirement should be waived in Cronas's case, the district court (and this Court) may not agree, in which case Cronas's separate action would fail, and intervention in Hnot would constitute Cronas's (and the post-2001 class') only recourse to vindicate their post-2001 claims. This is real and serious prejudice to Cronas and the class - being relegated to a separate action where prospects for success are far less clear because of legal obstacles to the maintenance of that action. This prejudice was not considered in the district court's balance-of-prejudice calculus. n14

n14 The Hnot plaintiffs' failure to explore the discrimination in stock options during the class period - a particular species of discriminatory under-compensation alleged in that action - is another element of prejudice to Cronas that was largely ignored by the court below. Defendants contend that the Hnot plaintiffs' failure to conduct discovery on stock option awards does not warrant intervention because the stock option awards are not a class claim. But that logic is fundamentally flawed. Cronas's claims of failure to award stock options are merely a species of the under-compensation class claims contained in the Hnot complaint, and it remains to be seen whether the class members were similarly denied such stock option compensation. See, e.g., Compl. in Intervention P 19(i) (A42); Hnot Compl. (A7 # 2) P 21.

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[*16] IV. Decision below Cannot Be Justified on Grounds Not Considered by District Court

A. Cronas's Claims in Intervention Are Not Time-barred under the Single-filing Rule

Defendants allege that Cronas is not entitled to take advantage of the single-filing rule - which allows a Title VII plaintiff who has not filed an EEOC charge to join an action brought by plaintiffs who have filed an EEOC charge for reasonably-related claims - because Cronas's individual claims of under-compensation (in the form of failure to provide stock option awards), demotion and termination are not similar to the Hnot class claims of gender discrimination in compensation and officer-level promotions and her post-2001 individual and class claims are not in the same time frame as the Hnot class claims. These assertions are meritless.

Where two plaintiffs allege similar grievances against an employer, "the purposes of the exhaustion requirement are adequately served if one plaintiff has filed an EEOC complaint." *Snell v. Suffolk County, 782 F.2d 1094, 1101 (2d Cir. 1986)* (internal quotations omitted); see also *Tolliver, 918 F.2d at 1057.* Those purposes [**24] are to provide prompt notice to the employer and to the EEOC so that [*17] conciliation may be achieved where possible. See *Snell, 782 F.2d at 1101;* Tolliver at 1057. When the Hnot plaintiffs filed their EEOC charge in August 1999, they clearly placed defendants and the agency on notice of Cronas's closely-related claims.

As long as a plaintiff's claims are "reasonably related" to the allegations set forth in another's EEOC charge, the single-filing rule applies. See, e.g., *Malarkey v. Texaco, Inc., 983 F.2d 1204, 1208 (2d Cir. 1993); Kirkland v. Buffalo*

Bd. of Educ., 622 F.2d 1066, 1068 (2d Cir. 1980); see also *Connelly v. Mfrs. Hanover Trust, 1990 WL 129186,* *3 (S.D.N.Y. Aug. 30, 1990) (citing *Snell, 782 F.2d at 1097)* ("It is not necessary that the incidents complained of be identical, so long as they are generically similar").

Moreover, an EEOC charge placing the agency and employer on notice of patterns of wide-spread discriminatory conduct, like the one here, satisfies the single-filing rule for similarly situated individuals who have not filed their own charges. See, e.g., *Tolliver, 918 F.2d at 1058* [**25] (applying single-filing rule where EEOC charges give "some indication that the grievance affects a group of individuals defined broadly enough to include those who seek to piggyback on the [*18] claim."). n15 Accordingly, courts have specifically adopted the single-filing rule where claims arise from the same alleged general practice of gender discrimination in the denial of promotions, unequal compensation, and discriminatory termination. See *Connelly, 1990 WL 129186;* see also *EEOC v. Wilson Metal Casket Co., 24 F.3d 836 (6th Cir. 1994)* (single-filing rule applies to unfiled claims of sexual harassment when EEOC charge and letter of determination regarding similar pattern of discrimination put employer on notice regarding the allegations).

n15 Even differences in allegations or circumstances between parties which may justify denial of Rule 23(b)(3) class certification do not necessarily defeat application of the single-filing rule. See Tolliver at 1059.

Cronas raises [**26] gender discrimination claims that are obviously reasonably related to, and identical in most ways to, the Hnot plaintiffs' sweeping allegations in their EEOC charge and pending class action. In their EEOC charge, the Hnot plaintiffs alleged gender-discriminatory "practices and activities [which] are widespread and pervasive at all levels of [Willis Corroon] and have resulted in significant economic and other damage to what we believe to be large classes of affected employees." (A125.) The "widespread and pervasive" allegations made in the EEOC charge included, inter alia: (1) denial of promotions (A130-31); (2) discrimination in compensation, including in the award of bonuses (A131-33); (3) denial of adequate support commensurate with the female employees' positions [*19] (A127-28); and (4) wrongful discharge based on both gender-discriminatory and retaliatory motives (A138-39). See also EEOC Letter of Determination (A140-42).

The Hnot plaintiffs clearly charged that their grievances affected a group of individuals defined broadly enough to include Cronas, who claims largely the same continuous gender-discriminatory patterns of under-compensation, n16 [**27] denial of promotional opportunity, and wrongful discharge at the hands of defendants, for the entire period 1998 to the present.

n16 As discussed in n.10, 14, Cronas's claims of discrimination in the award of stock options simply constitute a species of the under-compensation class claims contained in the Hnot complaint. In fact, while, on information and belief, the Hnot plaintiffs have not pursued discovery regarding stock options, their complaint raises the issue. Hnot Compl. (A7 # 2) P 43.

Allegations of such continuous practices are not conducive to a narrowly delimited time frame like the one defendants would have this Court impose on Cronas's post-2001 claims. Nothing distinguishes the 1998-2001 claims from the post-2001 claims except the district court's determination to penalize the Hnot plaintiffs' lack of diligence by excluding the later years from the case and relegating them to Cronas's separate action. Accordingly, courts may consider Title VII claims based on conduct occurring subsequent [**28] to the filing date of the EEOC charges, as long as the subsequent conduct and charges are reasonably related. See, e.g., *Almendral v. New York State Office of Mental Health, 743 F.2d 963, 967* [*20] *(2d Cir. 1984)* (district court erred in refusing to consider discrimination that occurred after Almendral filed her EEOC complaint; "a court may consider, in addition to the original EEOC charges, those claims 'reasonably related' to the EEOC charges" or that could "reasonably [have been] expected to grow out of the [EEOC] charge of discrimination"); n17 *Butts v. City of New York Dep't of Hous. Pres. and Dev., 990 F.2d 1397, 1402-03 (2d Cir. 1993)* (superseded by statute on other grounds as recognized in Hawkins v. 1115 Legal Serv. Care, 163 F.3d 684 (2d Cir. 1998) (single-filing rule applies even to those reasonably-related incidents occurring after completion of the EEOC investigation because the EEOC would have had the opportunity to investigate, if not the particular discriminatory incident, the method of discrimination manifested in prior charged incidents).

n17 Like Cronas's claims, Almendral's subsequent allegations "all address[ed] the same alleged course of discrimination . . . as contained in the original complaint" and EEOC charge. Id.

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See also *Snell v. Suffolk County, 782 F.2d at 1101* (allowing those plaintiffs who had not filed their own EEOC charges to use the single-filing rule for claims arising from subsequent incidents because "[a]ll these incidents [in the lawsuit] were of a similar nature and occurred at the Suffolk County Correction Facility within a three-year period"); *Wilson Metal, 24 F.3d 836* (sexual harassment victim [*21] for three months in 1987 may take advantage of EEOC filing by similar sexual harassment victim discharged in 1984).

There is thus no basis for defendants' arbitrary assumption that the 1999 EEOC charge filed by the Hnot plaintiffs, which specifically cites discriminatory incidents in 1996, 1997, 1998, and 1999, justifies certification of the Hnot class, including Cronas, through 2001, but not Cronas's closely-related post-2001 claims. In effect, Cronas's claims and the Hnot allegations together cover the same time period - 1998 to the present - stemming from the expansive allegations of defendants' entrenched discriminatory policies in the Hnot EEOC charge, which contained no fixed endpoint at 2001. The Hnot plaintiffs [**30] attempted to cover this very time frame themselves, but were precluded by this Court for reasons unrelated to their EEOC charge. See Part II supra. In addition, the district court recognized by opinion dated March 8, 2007 that "defendants have presented no evidence that defendants' conduct has changed" to date. See *Hnot, 2007 WL 749675,* *8.

Contrary to defendants' contentions, then, Cronas's claims arise out of similar discriminatory treatment in the same time frame as the Hnot plaintiffs' claims and therefore trigger the single-filing rule in accordance with the Snell standard. See also *Tolliver, 918 F.2d at 1057* (stating that the single-filing rule test used in Snell "requires only that the claims of the administrative claimant and the [*22] subsequent plaintiff arise out of the same circumstances and occur within the same general time frame" (emphasis supplied)). Notably, the Second Circuit in Snell focused on whether two plaintiffs were similarly situated and received the same discriminatory treatment, rather than on time period, as "the appropriate standard for waiving the filing requirements." *782 F.2d at 1101.* [**31]

Accordingly, the other cases cited by defendants on page 23 of their brief, all of which feature plaintiffs whose claims, unlike Cronas's, were not similar to the claims of their co-plaintiffs, are inapposite.

Thus, because all of Cronas's claims are closely related to the Hnot plaintiffs' claims, as alleged in their EEOC charge and class action litigation, she is entitled to maintain them under the single-filing rule.

B. Cronas's Claims Are Not Subject to Mandatory Arbitration

Arbitration is "a matter of contract" and "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Gerling Global Reinsurance Corp. v. Home Ins. Co., 302 A.D.2d 118, 126 (1st Dept. 2002)* (quoting *United Steelworkers of Am. v. Warrior & Gulf Nav. Co., 363 U.S. 574, 582 (1960))*. "The mere invocation of the FAA does not operate to convert a nonarbitrable claim into an arbitrable one." Id. at 125. Rather, one must look to the language and context of the agreement to determine its scope and the parties' [*23] intent, and only those disputes which the parties agreed to submit to arbitration must in fact be arbitrated. [**32] *Alliance v. Bernstein Inv. Research and Mgmt., Inc., 445 F.3d 121, 125 (2d Cir. 2006),* accord, *State of New York v. Oneida Indian Nation of New York, 90 F.3d 58, 59, 62 (2d Cir. 1996)); Thompson-CSF, S.A. v. Am. Arbitration Ass'n, 64 F.3d 773, 776 (2d Cir. 1995);* see also *Hoffman v. Aaron Kamhi, Inc., 927 F. Supp. 640, 644 (S.D.N.Y. 1996)* (agreement must put plaintiff on clear notice that he is waiving right to bring federal employment discrimination claims in federal court).

The state law principles which govern Cronas's state law claims are similar. A court will not order a party to submit to arbitration absent evidence of that party's "unequivocal intent to arbitrate the relevant dispute." *Pharmacia & Upjohn Co. v. Elan Pharm., 10 A.D.3d 331, 333-34, 781 N.Y.S.2d 95, 97-98 (1st Dept. 2004); Primavera Labs., Inc. v. Avon Prods., Inc., 297 A.D.2d 505, 505-06, 747 N.Y.S.2d 16 (1st Dept. 2002)* (citations omitted).

In their brief, defendants ignore this analysis altogether, and understandably so from their standpoint, because it is clear that neither defendants nor Cronas agreed to [**33] arbitrate the claims she seeks to bring in intervention. The scope of their agreement is quite circumscribed. (A98-101.) Paragraph 1 asserts only that Willis agrees to employ Cronas for the period of the agreement, and to pay her the [*24] proffered compensation, which Willis can change pursuant to its normal compensation review procedures. The remaining substantive terms of the agreement, including the representations and warranties, all focus exclusively on matters of proprietary rights of the business, rules governing confidentiality of company information, rules governing employee loyalty and non-competition and non-solicitation by former employees. There is also a "Miscellaneous" clause that explicitly states that this Agreement constitutes the entire agreement between the parties.

The mandatory arbitration clause at P 6 of this limited employment agreement states as follows: "Except for a claim beginning with a request for injunctive relief by Employer, Employer and Employee agree that any dispute arising under this Agreement shall be resolved by arbitration . . . ." Thus, the plain language of the arbitration clause limits the obligation to arbitrate to disputes arising [**34] under the Agreement - the scope of which is limited to matters wholly unrelated to the discrimination and retaliation claims Cronas alleges and seeks to litigate here, for herself and the class. None of these claims involves questions of confidentiality, loyalty, solicitation, non-compete rules, ethical violations, misuse of proprietary information or, in connection with paragraph 1, whether defendants paid the compensation initially offered or thereafter changed pursuant to normal [*25] compensation review procedures. Rather, all the claims in Cronas's complaint challenge defendants' alleged gender discrimination in assignments, promotion and compensation (and other terms and conditions of employment unrelated to the specific substantive paragraphs of the limited employment agreement executed in 1996), and alleged retaliation for opposing such discrimination.

Because the scope of the agreement does not touch upon the claims in this lawsuit, the arbitration clause does not apply here. See, e.g., *Hoffman, 927 F. Supp. 640* (holding that scope and language of arbitration agreement did not put plaintiff on notice that he was waiving right to bring federal employment [**35] discrimination claims in federal court). The September 19, 2006 affidavit of Cronas makes clear that she understood that the 1996 agreement was a standard non-compete agreement, and that it was not her understanding or intent, in executing that agreement, to waive her rights to sue for discrimination. (A116-17.)

It is also clear that defendants did not understand that this agreement would be proffered to compel arbitration of claims other than those relating to the non-compete and associated issues to which the agreement specifically applied. This is evidenced by the fact that Willis later thought it necessary, in a subsequent employment agreement in 2003 with another newly-hired [*26] employee, to broaden the language of the mandatory arbitration clause to cover not just disputes "arising under the agreement" but rather "to any dispute arising either under this Agreement or from the employment relationship." (A118-21) (emphasis supplied). It appears obvious that defendants made that subsequent change because they understood that the arbitration clause of the prior agreement with Cronas was limited in scope and did not generally require arbitration of employment claims, including [**36] the discrimination claims raised here by Cronas.

Accordingly, virtually all of the cases cited by defendants miss the mark since they stand for the general and unremarkable proposition that employment disputes and civil rights claims may be subject to the FAA and may be arbitrated. Only one district court case, *Elwell v. Google, Inc., 2006 WL 217978* (S.D.N.Y. Jan. 30, 2006) (Cote, J.), appears worthy of discussion because, while distinguishable, it seems inconsistent with the authority in this Circuit that precludes relegating a plaintiff to arbitration absent the demonstration of an unequivocal agreement and intent by both parties to arbitrate the claim.

In Elwell, plaintiff brought claims for discrimination and retaliation based on a demotion and reduction in pay during a high-risk pregnancy [*27] when she informed her supervisors that she could no longer travel. Elwell had signed an employment agreement that included a specific provision designating her an at-will employee. The agreement also contained a mandatory arbitration clause - broader than that here - that stated, "I agree that any dispute or controversy arising out of or relating to any interpretation, [**37] construction, performance or breach of this Agreement, shall be settled by arbitration." Id.

The district court granted Google's motion to compel arbitration of plaintiff's civil rights claims based on its perception that "the core factual dispute underlying all plaintiff's allegations" was whether Google's decision to transfer plaintiff to another position and reduce her pay were permissible alterations of the terms of an at-will employee or were discrimination. Thus, the court held, since the first provision of the employment agreement explicitly set forth plaintiff's at-will employment status, this purported "core factual dispute" of plaintiff's case constituted a "dispute or controversy arising out of or relating to any interpretation, construction, performance or breach" of that employment agreement. Id. at 3-4.

Frankly, we fail to see how claims of pregnancy discrimination and retaliation can possibly arise under an employment agreement merely [*28] because that agreement recites that plaintiff is an at-will employee. Claims of unlawful discrimination really have nothing to do with whether or not the employee is at-will. All at-will employees, just like employees [**38] who have an employment contract that prohibits their demotion or termination other than for good cause, may still be subject to unlawful discrimination and retaliation, and whether they are or not is unrelated to their at-will status. Nor does it appear that Elwell ever agreed or intended that her discrimination claims would arise under her agreement and would have to be resolved by arbitration rather than a jury. Accordingly, we respectfully

submit that the Elwell reformulation of the discrimination and retaliation claims into a "core dispute" having to do with her at-will status was error, and that the case was wrongly decided.

Nevertheless, Elwell is distinguishable from the case at bar. There is nothing in Cronas's narrow 1996 employment agreement - intended by both parties to be a limited agreement about non-competition and associated issues - to which her discrimination claims are related, in a "core factual dispute" or otherwise, and therefore they are not encompassed by the arbitration clause. Indeed, Cronas's arbitration clause confines arbitration to claims arising under the agreement, while Elwell's broader agreement [*29] required arbitration whenever the [**39] dispute is related to the "interpretation, construction, performance or breach" of the Agreement. Even if arguendo Elwell's discrimination claims somehow could be reformulated into a dispute involving the interpretation, construction, performance or breach of the Agreement, Cronas's claims cannot be under her agreement.

Therefore, because Cronas's agreement does not contemplate or require the arbitration of the discrimination claims she raises in intervention, mandatory arbitration is not a bar to adjudication of her claims in district court.

V. District Court Erred in Denying Permissive Intervention

As discussed in Parts I-III supra, Cronas's motion to intervene was timely. In addition, her claims have issues of law and fact in common with the current promotion and compensation claims under the more lenient permissive intervention standard. Indeed, almost all of Cronas's claims stem from the same patterns of gender-based discrimination in promotions and compensation from 1998 to 2001 alleged by the current plaintiffs - they just continue into the post-2001 period.

Accordingly, the district court's denial of permissive intervention, like its denial of intervention [**40] as of right, was an abuse of discretion.

[*30] **Conclusion**

The order below denying leave to intervene should be reversed.

Dated: New York, New York
April 2, 2007

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CERTIFICATION PURSUANT TO

Fed. R. App. P. 32(a)

The undersigned hereby certifies that the foregoing brief complies with the type-volume limitation of *Fed. R. App. P. 32(a)(7)(B)* because the brief contains 6982 words of text.

The brief also complies with the typeface requirements of *Fed. R. App. P. 32(a)(5)* and the type style requirements of *Fed. R. App. P. 32(a)(6)* because [**41] it was prepared in a proportionally spaced typeface using WordPerfect 12, Times New Roman, Size 14.

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ANTI-VIRUS CERTIFICATION PURSUANT TO

Fed. R. App. P. 32(a)(1)(E)

The undersigned hereby certifies that the PDF version of the foregoing brief complies with the virus protection requirement of *Fed. R. App. P. 32(a)(1)(E)* because it was scanned for viruses, and no viruses were detected, before it was submitted as an e-mail attachment to briefs@ca2.uscourts.gov, as well as to Defendants-Appellees at BPlevan@proskauer.com, on April 2, 2007.

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