UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 96-1104-CIV-KING
Magistrate Stephen T. Brown

DOBSON COLLINS, an individual
on behalf of himself and others
similarly situated,

Plaintiffs,

-vs-

EXECUTIVE AIRLINES, INC.,
d/b/a AMERICAN EAGLE AIRLINES, INC.,
and FLAGSHIP AIRLINES, INC.,

Defendants.
_____/

REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS'[1/] MOTION TO DISMISS PLAINTIFF'S COMPLAINT OR FOR SUMMARY JUDGMENT, OR, ALTERNATIVELY, TO LIMIT DISCOVERY TO ISSUE OF CLASS CERTIFICATION

The statutory notice of right to sue in this case, under which Plaintiff has brought suit, stems from dismissal of a charge of retaliation Plaintiff filed with the Equal Employment Opportunity Commission ("EEOC") on May 12, 1994, and amended on December 14, 1994, pursuant to specific statutory authority 42 U.S.C. § 2000e-5(f). It alleges that he was subjected to specific acts of discipline and was ultimately discharged in retaliation for his earlier filing of a different charge of discrimination in 1993. Despite the December 14, 1994, amendment,

1/ As Plaintiff has agreed to dismiss Executive Airlines, Inc. from the action, the only remaining Defendant is Flagship Airlines, Inc..

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of his additional allegations now contained in his Complaint. He bases this on an informal meeting between counsel that occurred seven days prior to his amendment to the currently operative charge, on December 7, 1994, and ignores the fact that he failed to raise these additional "hostile environment" claims in that amended charge, even though operating with the assistance of experienced counsel. (Plaintiff's Memorandum at p. 10).

What Plaintiff ignores in making this argument is one of the substantial underpinning policies of Title VII. In creating litigation authority for the Commission and for individual plaintiffs, Congress debated and explicitly adopted a short statutory limitations period. It did so with the expressed purpose of ensuring that the emotionally charged environment surrounding claims of discrimination would not be allowed to fester without resolution. 1972 U.S.C.C.A.N. 2137, 2147-48. Consequently, since at least 1972, Title VII has required that an employee claiming racial discrimination under Title VII must file an administrative charge with the EEOC within 300 days, and must file any claim in court within 90 days of receipt of a right-to-sue notice. 42 U.S.C. § 2000e(5)(f).

This statutory policy enables an employer to receive informal notice of claims of discrimination, to participate in the investigation and potentially in the amicable resolution of claims without the publicity of litigation. Significantly here, the employer is entitled to treat claims not pursued on this schedule as closed. See generally, United Air Lines, Inc. v. Evans, 431 U.S. 559, 568 (1977) (Marshall, J.) ("A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute

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was passed and therefore, is not actionable"). See also, Khader v. Aspen, 1 F.3d 968, 971 (10th Cir. 1993) (A charging party who withdraws his claim before a determination is made cannot be deemed to have exhausted his administrative remedies); Rivera v. U.S. Postal Service, 830 F.2d 1037, 1039 (9th Cir. 1987) ("To withdraw is to abandon one's claim, to fail to exhaust one's remedies").

Plaintiff seeks to revive his expired claims under the theory that the Complaint initiating this action makes allegations concerning conduct that is "like or related to" claims made at the EEOC. See Sanchez v. Standard Brands, Inc., 43 F.2d 455, 466 (5th Cir. 1970); Mulhall v. Advance Security, Inc., 19 F.3d 586, 689 n. 8 (11th Cir. 1994). Plaintiff cites no case in which the courts have applied the "like or related to" standard to revive claims previously settled or expired, but seeks to distinguish the Eighth Circuit's decision in Williams v. Little Rock Mun. Water Works, 21 F.3d 218, 222-23 (8th Cir. 1994). Contrary to Plaintiff's argument, the Plaintiff here, like the plaintiff in Williams, made specific charge of retaliatory acts, and the court rejected his attempt to expand them in court. See also, Lee v. Kroger Co., 901 F. Supp. 1218, 1224 (S.D. Tex. 1995) (plaintiff's third EEOC charge alleging retaliation did not provide a basis for a Title VII complaint alleging race claims because those claims are not "like or related to" charges of retaliation).

Plaintiff's argument that the informal meeting between counsel and the existence of charges filed by other potential plaintiffs should put Defendant on notice sufficient to revive Collins' claims should be unavailing for at least two reasons. First, like Collins' claim, the

claims of the other four that have been investigated by the EEOC are related to specific complaints which differ factually from Collins'; and three have resulted in findings of no cause (Tab A). Second, Plaintiff Collins, having engaged counsel by December 7, 1994, and informally suggested the existence of a hostile environment claim, cannot fail to provide evidence to support that claim in the informal proceedings, omit to include that claim in his amended charge of discrimination seven days later, and then claim that the company is exposed on that claim in court, particularly where he is represented by counsel and the Commission found no cause.

Defendant acknowledges that those of the other four employees who filed charges, and who have not allowed their statutory limitations period to expire, may initiate actions against Flagship. However, each of those will rise or fall on their merits, and they are not related to the claims of Plaintiff here.[2/] Plaintiff's claim under Title VII should be dismissed with prejudice with appropriate leave to amend to conform to the operative December 1994 charge.

II. PLAINTIFF'S CLASS ALLEGATIONS FAIL TO COMPLY WITH RULE 23(a)

Plaintiff argues that Count III purporting to allege a class action is not an attempt to allege an "across-the-board" class action, but is instead, a single claim of race discrimination based on a racially hostile work environment. However, a reading of Plaintiff's Complaint

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2/ Plaintiff submits the affidavits of Messrs. Lee and McLean, containing statement of class-wide discrimination. However, there is no indication that such affidavits are shared with the employer. To the contrary, EEOC regulations require confidentiality. 42 U.S.C. § 2000e-5(b); 29 CFR § 1601.22.

shows that Plaintiff is attempting to allege a class action that challenges virtually every employment practice of the Defendant. Complaint ¶ 27. Such a class action clearly is impermissible. General Telephone Company v. Falcon, 457 U.S. 146, 156 (1982). Even assuming Plaintiff has standing to bring such a claim, his complaint fails to adequately allege the prerequisites of Rule 23(a) and should be dismissed.

1. Numerosity

Hypothetical future employees should not be considered for purposes of numerosity. See, Frazier v. Consolidated Rail Co., 851 F.2d 1447 (D.C. Cir. 1988). See also, Tucker v. Union Underwear Co., Inc., 144 F.R.D. 325, 327-328 (W.D. Ky 1992) (cited by Plaintiff) (court cannot through conjecture address the interests of future nonascertainable class members); Scott v. University of Delaware, 601 F.2d 76 (3rd Cir.), cert. denied, 444 U.S. 972 (1979) (where the present and former employees are insufficient to satisfy the numerosity requirement, the inclusion of future employees does not satisfy the numerosity requirement).

Similarly, merely requesting injunctive relief as to future employees is insufficient to establish numerosity, particularly where the future employees do not need to form part of the putative class in order to obtain the benefit of any injunctive relief. See, Selzer v. Bd. Of Educ., 112 F.R.D. 176, 182 (S.D.N.Y. 1986) (future applicants need not be included in the proposed class because any injunctive relief will benefit them and no monetary relief can be awarded them for discrimination not yet inflicted). The putative class here, consisting of twelve persons, does not meet the numerosity requirement.

Plaintiff argues, however, that his class allegations meet the numerosity requirement of Rule 23(a), even though there are only twelve identifiable class members, because the putative class includes all future employees and because the Complaint seeks injunctive relief. [3/] Plaintiff's argument would render compliance with Rule 23(a) a mere technicality - a result in contravention of Falcon.[4/] This Court should reject Plaintiff's request to "read the numerosity requirement out of the class action rule." Gurmankin v. Costanzo, 626 F.2d 1132, 1135 (3rd Cir. 1980) (even where plaintiff seeks to include future employees, court may deny certification if the number of persons in the class is too few to warrant class treatment). [5/]

3/ Plaintiff's argument assumes certification pursuant to Rule 23(b)(2). Certification under 23(b)(2) is not available where as here the final relief requested relates predominantly to money damages. Hall v. Burger King Corp., 1992 WL 372354 (S.D. Fla. 1992) (even though plaintiff sought to downplay request for money damages in an effort to fit under the more relaxed requirement of rule 23(b)(2), certification under that rule was denied where request for monetary relief predominated). (Copy attached at Tab B).

4/ All but one of the cases cited by Plaintiff were decided prior to Falcon and based their holdings on the theory that across-the-board class actions were effective and should be encouraged. See, Jones v. Diamond, 519 F.2d 1090, 1100; Phillips v. Joint Legis. Comm., 637 F.2d 1014, 1022 (5th Cir. 1981); Jack v. American Linen Supply Co., 498 F.2d 122, 124 (5th Cir. 1974). At a minimum the Falcon decision casts doubt on the viability of those cases. In Jordan v. County of Los Angeles, 669 F.2d 1311 (9th Cir.), vacated and remanded, 459 U.S. 810 (1982), on remand, 713 F.2d 503 (9th Cir.), amended, 726 F.2d 1366 (1984), initially decided before Falcon, numerosity was established by including future employees whose joinder was considered impracticable. In a subsequent post Falcon phase, the class action failed on numerosity grounds.

5/ Plaintiff makes much of the fact that the alleged discrimination was suffered by Plaintiff at the hands of Noel Franz. Presumably, future employees would be at risk because of Mr. Franz's presence at the Defendant's facility. Plaintiff has not alleged that Mr. Franz remains employed by Flagship and that, consequently, future employees may be subject to the same allegedly hostile environment. In fact, Mr. Franz is no longer employed either

(continued...)

2. Commonality and Typicality

Plaintiff argues that he meets the commonality and typicality requirements because he alleges that he and other mechanics at the Miami facility have been the victims of the same racially hostile environment. The Plaintiff, and the other members of the putative class have alleged factually divergent claims of discrimination. Their claims do not arise from the same event and they have not identified a practice which affects all the purported class members in the same fashion. Collins and the other class members have only their race in common and this is insufficient to support class treatment. See e.g., Washington v. Brown & Williamson Tobacco Corp., 959 F.2d 1566, 1570 (11th Cir. 1992).

Moreover, because Plaintiff's 1994 charge did not allege a hostile work environment, the only claims which can be the subject of any class claim are Plaintiff's claims for retaliation and retaliatory discharge as alleged in the charge at issue. Those types of claims are generally inappropriate for class certification. Henderson v. National Railroad Passenger Corp., 117 F.R.D. 620, 622-23 (D. Ill. 1987); Pendleton v. Crown Cork and Seal Company, 31 Fair Emp. Prac. Cas. (BNA) 1701, 1705 (D. Md. 1981).

3. Adequacy of Representation

Plaintiff argues that, because his claims are typical, he is an adequate representative of the class. However, Plaintiff's claims are not typical of the class. Due to his

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5/(...continued)
at the Miami facility or by Flagship and, therefore, there is no factual basis for Plaintiff's contention that future employees should form part of the class on these facts.

disciplinary history, he is subject to multiple unique defenses which threaten to overshadow any common issues. Accordingly, he cannot adequately represent the class.

III. PLAINTIFF'S INDIVIDUAL CLAIMS FOR RETALIATION UNDER 42 U.S.C. § 1981 MAY NOT BE MAINTAINED

Plaintiff argues that the legislative history of § 1981, as amended, supports a finding that claims for "retaliation," left out of the 1991 amendments, are nevertheless covered by that section. Plaintiff cites, and Defendant acknowledges, several cases holding that such a claim is permissible under the amended § 1981 as the authority for his argument. Without any analysis of the language of § 1981, as amended, and relying solely on the legislative history, those cases found that § 1981 now encompasses retaliation claims.

However, while it is unequivocally clear that Congress intended the 1991 amendment to reverse a Supreme Court decision that held that retaliation claims were not included in the prohibitions of § 1981, Patterson v. McClean Credit Union, 491 U.S. 164 (1989), the plain language of the 1991 amendment does not include retaliation. Retaliation for "protected activity" is a separate and explicitly articulated statutory violation. In various statutes Congress has enacted provisions that define and prohibit conduct that chills potential claims activity. See e.g., Title VII, 42 U.S.C. § 2000e-(3)(a); Age Discrimination in Employment Act, 29 U.S.C. § 623(d); Occupational Safety & Health Act, 29 U.S.C. § 660(c); Fair Labor Standards Act of 1938, 29 U.S.C. § 215(a)(3). In short, Congress knows what "retaliation" is, and knows that it is different from race, sex, age or other discrimination, and from the failure to guarantee a safe workplace or to pay overtime. Likewise Congress must be charged with knowing that

refusing to "make contracts" because of race is different from retaliating because of prior charge activity that may or may not have anything to do with race.

Congress' failure to include "retaliation" in the amended § 1981 must be given effect. Having set out to make specific its reversal of the Supreme Court's interpretation of Section 1981 in Patterson, and having done so in explicit language in 42 U.S.C. § 1981(b), the courts cannot insert "retaliation" where Congress left it out.

IV. DISCOVERY SHOULD BE LIMITED TO CLASS CERTIFICATION ISSUES

Plaintiff argues that discovery should not be limited to certification issues if the class claim is not dismissed but offers no authority as to why it should not be so limited. Washington v. Brown and Williamson Tobacco Corp., supra, clearly states that courts may allow class-wide discovery on the certification issue and postpone class-wide discovery on the merits. There is no reason to burden a defendant with class-wide discovery on the merits unless a class is certified. Postponement of class-wide discovery on the merits is appropriate here.

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CERTIFICATE OF SERVICE

We hereby certify that a true copy of the foregoing was mailed this 31st day of July, 1996, to Ira J. Kurzban, Esquire, Kurzban, Kurzban, Weinger & Tetzeli, P.A., 2650 Southwest 27th Avenue, Second Floor, Miami, Florida 33133.

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ADDITIONAL

ATTACHMENTS

NOT

SCANNED

PLEASE REFER TO COURT FILE