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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

DEIDRE BROWN, LYNN CAIN, CHERYL
GERALD, DEBRA JONES, DONNA
KELSAY, ANNE M.Z. NOVOTNY and
GLORIA SALAZAR, on behalf of
themselves and all others
similarly situated,

NO. CIV. S-98-1719 LKK/JFM

Plaintiffs,

v.

ORDER

SACRAMENTO REGIONAL TRANSIT
DISTRICT,

Defendant.

Plaintiffs brought this class action against their employer,
the Sacramento Regional Transit District ("RT"), alleging gender
discrimination in violation of Title VII of the Civil Rights Act,
42 U.S.C. § 2000-e, and the California Fair Employment and Housing
Act, Cal. Gov't Code § 12900 ("FEHA"). This matter is now before
the court on plaintiffs' motion to reopen discovery and to deny
defendant's motion for summary judgment or, in the alternative, to

1 allow for the submission of further discovery. I resolve the
2 matter based on the papers and pleadings filed herein and after
3 oral argument.

4 I.

5 **PROCEDURAL HISTORY**

6 On February 16, 2000, the court tentatively certified the
7 following three subclasses of plaintiffs:

8 Subclass 1: All current or former women employees of RT who
9 applied for promotions to salaried positions but were denied such
10 promotions on the basis of their gender and/or who were discouraged
11 from making such an application by virtue of defendant's alleged
12 discriminatory policies and practices.

13 Subclass 2: All current or former women employees of RT who
14 sought training for salaried positions and/or who were discouraged
15 from seeking such training by virtue of defendant's alleged
16 discriminatory policies and practices.

17 Subclass 3: All current or former women employees of RT who
18 were salaried and who were discriminated against with regard to
19 salary, job title, job description and/or grade level.

20 In June 2000, RT moved for partial summary judgment and for
21 partial class decertification. In its motions, RT contended that
22 plaintiffs had insufficient evidence to support a finding of class-
23 wide discrimination with respect to subclass 2 and subclass 3. RT
24 also argued that these sub-classes did not meet the numerosity
25 requirement under Fed. R. Civ. P. 23 and raised allegations outside
26 the scope of the EEOC charge.

1 Former class counsel, The Thierman Law Firm and Hoffman &
2 Lazear, filed opposition papers on behalf of the named plaintiffs
3 and the class. The court heard oral argument in July 2000 but
4 stayed its decision at the request of the parties, who were engaged
5 in settlement talks. On March 26, 2001, the court accepted the
6 voluntary withdrawal of former class counsel and substituted The
7 Impact Fund and Equal Rights Advocates as counsel for the class.

8 **II.**

9 **ANALYSIS**

10 Plaintiffs move to amend the court's Status (pretrial
11 scheduling) Order to reopen discovery, Fed. R. Civ. P. 16(b) and
12 23(d), and they move to defer consideration of the defendant's
13 motion for summary judgment. Fed. R. Civ. P. 56(f). I grant their
14 motions based on the analysis below.

15 Subsequent to a scheduling order prohibiting further
16 amendment, the moving party must demonstrate "good cause" in order
17 to modify the order. Johnson v. Mammoth Recreations, Inc., 975
18 F.2d 604, 608 (9th Cir. 1992) (citing Fed. R. Civ. P. 16(b)). Rule
19 16(b)'s "good cause" standard primarily considers the diligence of
20 the party seeking the amendment. Id. at 609. Thus, the district
21 court may modify the pretrial schedule "if it cannot reasonably be
22 met despite the diligence of the party seeking the extension." Id.
23 (quoting Fed. R. Civ. P. 16 advisory committee's notes (1983
24 amendment)) Carelessness is not compatible with a finding of
25 diligence and offers no reason for a grant of relief. Id.

26 ////

1 Although the existence or degree of prejudice to the party opposing
2 the modification might supply additional reasons to deny a motion,
3 the focus of the inquiry is upon the moving party's reasons for
4 seeking modification. Id. (citing Gestetner Corp. v. Case Equip.
5 Co., 108 F.R.D. 138, 141 (D.Me. 1985)). If that party was not
6 diligent, the inquiry should end. Id.

7 Normally, a court cannot grant a party leave to amend the
8 pretrial scheduling order to allow for further discovery unless
9 that party demonstrates that it diligently pursued discovery in the
10 first instance. See Johnson v. Mammoth Recreations, Inc., 975 F.2d
11 604, 608 (9th Cir. 1992). Moreover, litigants bear responsibility
12 for their attorney's lack of diligence. See Anderson v. Airwest,
13 Inc., 542 F.2d 522 (9th Cir. 1976). As I explain below, other
14 considerations prevail when the carelessness arises in a class
15 action.

16 Due process requires that class representatives adequately
17 represent the absent class members. Crawford v. Honig, 37 F.3d
18 485, 487 (9th Cir. 1995) (citing Hansberry v. Lee, 311 U.S. 32,
19 42-43 (1940) and Fed. R. Civ. P. 23(a)(4) (representative must
20 "fairly and adequately protect the interests of the class."))¹

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23
24 ¹ Defendant makes much of the fact that the court certified
25 the class action under Fed. R. Civ. P. 23(b)(2) and not Fed. R.
26 Civ. P. 23(b)(3). See Order filed February 16, 2000. Both
sections, however, require that "the representative parties will
fairly and adequately protect the interests of the class." Fed.
R. Civ. P. 23(a).

1 Adequate representation "depends on the qualifications of counsel
2 for the representatives, an absence of antagonism, a sharing of
3 interests between representatives and absentees, and the
4 unlikelihood that the suit is collusive." Crawford, 37 F.3d at 487
5 (quoting Brown v. Ticor Title Ins. Co., 982 F.2d 386, 390 (9th Cir.
6 1992), cert. denied, 511 U.S. 117 (1994))(internal citations
7 omitted). In determining whether class counsel adequately
8 represents the class, the court looks to, inter alia, the record
9 of counsel's performance in the current litigation. See Key v.
10 Gillette Co., 782 F.2d 5, 7 (1st Cir. 1986)(class counsel found
11 inadequate after failing to present expert testimony in
12 understandable way and following lackluster performance).

13 As the plaintiffs' moving papers adequately describe, former
14 class counsels' performance was less than fully adequate. Not only
15 did class counsel fail to conduct the kind of statistical discovery
16 which could demonstrate systematic discrimination, but this court
17 observed that the evidence submitted in opposition to defendant's
18 motion for summary judgment was entirely deficient in form; the
19 witness declarations counsel submitted in opposition to defendant's
20 motion lacked foundation and were replete with inadmissible
21 hearsay.

22 Defendant avers that even if the court finds that the due
23 process rights of the class have been violated, the class members
24 may avoid any injury by collaterally attacking the judgment in a
25 later court proceeding. In administering class actions, the court
26 is empowered to "make appropriate orders" in order to "prevent

1 undue repetition or complication in the presentation of evidence
2 or argument [or for] similar procedural matters." Fed. R.
3 Civ. P. 23(d). The Rule also provides that these "orders may be
4 combined with an order under Rule 16, and may be altered or amended
5 as may be desirable from time to time." Reopening discovery for
6 a limited period of time to allow for the proper presentation of
7 evidence would prevent undue repetition or complication attendant
8 to the collateral attack on final judgment. Fed. R. Civ. P. 23(d).

9 Defendant argues that even if reopening discovery as to the
10 absent class members is appropriate, the class representatives are
11 entitled to no such relief. Defendant reasons that, unlike the
12 absent class members, the class representatives are responsible for
13 the inadequacies of their counsel and should bear responsibilities
14 for the consequences of their performance. I reject defendant's
15 argument based on the analysis below.

16 In their Second Amended Complaint, plaintiffs allege that
17 defendant violated Title VII and FEHA through its discriminatory
18 denial of promotions and training to women. The representative
19 plaintiffs, however, make no claims on behalf of themselves apart
20 from the class-wide allegations. "The crucial difference between
21 an individual's claim of discrimination and a class action alleging
22 a general pattern or practice of discrimination is manifest. The
23 inquiry regarding an individual's claim is the reason for a
24 particular employment decision, while 'at the liability stage of
25 a pattern-or-practice trial the focus often will not be on
26 individual hiring decisions, but on a pattern of discriminatory

1 decisionmaking.'" Cooper v. Federal Reserve Bank of Richmond, 467
2 U.S. 867, 876 (1984) (quoting Teamsters v. United States, 431 U.S.
3 324, 360, n. 46 (1977)).

4 Dismissing the class claims is not res judicata as to the
5 individual's claims because of the proof distinction between the
6 two types of discrimination suit. Therefore, it would be
7 inappropriate to dismiss the claims of the class representatives
8 without first adjudicating the claims of the class especially when
9 such claims were never asserted in the first instance. See Cooper,
10 467 at 881 ("[Rule 23's] purposes might well be defeated by an
11 attempt to decide a host of individual claims before any common
12 questions relating to liability has been resolved") The
13 fact that the representative plaintiffs, as they must,² also allege
14 injury as a result of defendant's allegedly discriminatory
15 practices does not change this conclusion. "Nothing in Rule 23
16 requires as a matter of law that the District Court make a finding
17 with respect to each and every matter on which there is testimony
18 in the class action." Id., 467 U.S. at 881.

19 In light of this and the affidavits plaintiffs submit in
20 support of the discovery they intend to propound, the court
21 concludes that plaintiffs have demonstrated good cause to amend the
22 pretrial scheduling order and for denial of defendant's motions

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26 ² See General Telephone Co. of Southwest v. Falcon, 457 U.S.
157 (1982).

1 under Fed. R. Civ. P. 56(f).³

2 **III.**

3 **ORDERS**

4 Accordingly, the court hereby makes the following ORDERS:

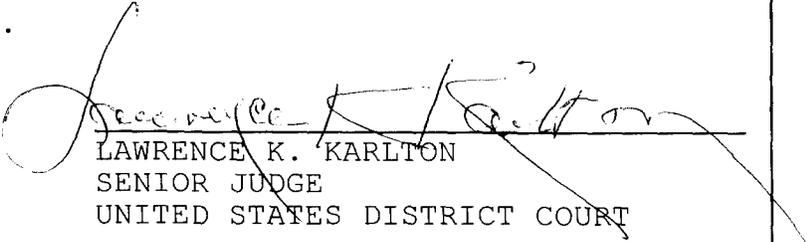
5 1. Plaintiffs' motion for leave to conduct further discovery
6 is GRANTED;

7 2. Defendant's motion for summary judgment and partial
8 decertification is DENIED without prejudice; and

9 3. A Status (pretrial scheduling) Conference is SET for
10 August 13, 2001 at 2:30 p.m. in Chambers.

11 IT IS SO ORDERED.

12 DATED: July 3, 2001.

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14 
15 LAWRENCE K. KARLTON
16 SENIOR JUDGE
17 UNITED STATES DISTRICT COURT
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21 ³ In their supplemental brief, defendant requests that the
22 court certify this decision for interlocutory appeal. 28 U.S.C.
23 § 1292(b). Review under 28 U.S.C. § 1292(b) is only available
24 where the issue presented is a controlling question of law about
25 which there is a substantial difference of opinion. City of Las
26 Vegas v. Foley, 747 F.2d 1294, 1296 (9th Cir. 1984). In light of
the fact that this decision merely allows plaintiffs to present
further evidence on defendant's motion for partial summary
judgment, the court concludes it does not involve a matter of
controlling law and declines to certify the matter for
interlocutory appeal.

ndd

United States District Court
for the
Eastern District of California
July 5, 2001

* * CERTIFICATE OF SERVICE * *

2:98-cv-01719

Brown

v.

Sacramento Regional

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on July 5, 2001, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office, or, pursuant to prior authorization by counsel, via facsimile.

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Jack L. Wagner, Clerk


by: Deputy Clerk