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United States District Court, S.D. Illinois.

Claudine WILFONG, et al., Plaintiffs,
and
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff-Intervenor,
v.
RENT-A-CENTER, INC., Defendant.

No. 00-CV-680-DRH. | Dec. 27, 2001.

Attorneys and Law Firms

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Opinion

MEMORANDUM AND ORDER

HERNDON, District J.

I. *Introduction, Procedural Background and Facts*

***1** Now before the Court is Plaintiffs' motion for class certification (Doc.147). Defendants oppose class certification.[1] Based on the pleadings and the applicable law, the Court grants Plaintiffs' motion for class certification.

In August 2000, Plaintiffs brought this action pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (Doc. 1). The Plaintiffs are residents of various states and allegedly have all been employed or have applied for employment with Defendant Rent-A-Center, Inc. ("Rent-A-Center"). On October 18, 2000, Plaintiffs filed an amended complaint adding additional Plaintiffs (Doc. 15). Rent-A-Center, a corporation with its headquarters in Plano, Texas, operates rent-to-own stores in various locations throughout the United States. Plaintiffs seek to be certified as representatives of a class, alleging that Rent-A-Center has maintained a pattern and practice of sex discrimination against women employees and women applicants for employment. On May 14, 2001, the Court allowed the Equal Employment Opportunity Commission to intervene in this matter (Doc. 77).

On August 5, 1998, approximately 1400 Rent-A-Center stores, formerly owned by Thorn Americas, were acquired by a Texas-based company, Renters Choice. Renters Choice was owned by Ernest Talley and operated 700 stores prior to the acquisition. By December 1998, the two companies were merged and the Renters Choice management currently runs the combined operations of over 2,200 stores. Rent-A-Center, Inc., is the largest "rent-to-own" company in the country.[2]

Plaintiffs allege that post-acquisition Rent-A-Center has discriminated against female employees in hiring, termination, promotion, demotion and in terms and conditions of employment and seek to represent a class thus defined:

> All women who have been employed by Rent-A-Center, Inc., Thorn Americas, Inc., or Renters Choice, Inc., at any time between August 5, 1998 and the date of trial, as well as any women who have made application for employment or been deterred from making application for employment with any of those corporate entities during the same period, and who have been, are being or may in the future be adversely affected by the continuing policy of discrimination with regard to hiring, promotion, demotion, termination, hostile work environment and terms and conditions of employment because of their sex.[3]

Plaintiffs seek class certification under FEDERAL RULE OF CIVIL PROCEDURE 23(b)(2), alleging that Rent-A-Center has acted or refused to act on grounds generally applicable to the class and seeking declaratory and injunctive relief. Plaintiffs also seek certification under RULE 23(b)(3), alleging that questions of law and fact common to the members of the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of this controversy. RULE 23(a) sets forth four prerequisites to maintenance of a class action:

> ***2** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses fo the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

FED. R. CIV. P. 23(a).

Because this Court finds that Plaintiffs have satisfied all requirements of RULE 23, the Court grants Plaintiffs' motion.

II. *Analysis*

1. Numerosity

The class in this case is so numerous that joinder is impracticable. Because there is no serious dispute between the parties that the proposed class meets the numerosity requirement of RULE 23(a)(1), the Court will not expend a great deal of time on this issue, except to note that the class of current and former employees encompasses approximately 4800 women, with the currently unknown number of rejected and deterred applicants for employment making the number even greater. (Aff. of David A. Peterson, Ph.D., p. 2). This number is well beyond that which has been accepted as meeting the numerosity requirement. *Swanson v. American Consumer Industries, Inc.,* 415 F.2d 1326, 1333 (7th Cir.1969). Rent-A-Center does not contest that the numerosity requirement has been met by the proposed class. (Doc. 170, p 81, n. 16).

2. Commonality

i. *Claims of Discriminatory Hiring, Promotion, Demotion and Discharge*

Here, the Plaintiffs allege that Rent-A-Center maintains and enforces a company-wide policy of intentional sex discrimination which has been repeatedly articulated by the company's top executives and that it is adhered to by management at every level of the company in its decisions regarding hire, promotion, demotion, discharge and the terms and conditions under which employees work. In *General Telephone Co. v. Falcon,* 457 U.S. 147, 159 n. 15 (1982), the Supreme Court stated that "[s]ignificant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself ... in the same general fashion ..." in a number of different employment practices. In the case at bar, Plaintiffs offer significant proof of a general policy of sex discrimination which manifests itself in each of the employment practices under attack. It is this significant evidence of a general policy of sex discrimination and of the existence of a class of women who, like the Plaintiffs, have suffered discrimination that meets the *Falcon* test. The Court finds that Plaintiffs offer much more than just evidence of the validity of their personal allegations of discrimination.

Plaintiffs also present compelling evidence that Rent-A-Center's top executives have enunciated and directed the enforcement of a policy of sex discrimination. (Doc. 155, p. 11-22; Exhibit 10, Statements by Rent-A-Center Managers Demonstrating Gender Bias). Witnesses testified independently to statements made by the company's Chairman and CEO J. Ernest Talley articulating Rent-A-Center's anti-female policy: "A woman's place is not in my stores;" "Women don't belong in rent-to-own;" "Get rid of women any way you can." (Doc. 155, Exhibit 10, p. 1; Bartley Dec. ¶ 6; Weinrich Dec. ¶ 7; Eddins Dec. ¶ 6). Statements like these made by a company's top executive reflect company policy. *Morse v. Southern Union Co.,* 174 F.3d 917, 922 (8th Cir.1999) (when a major company executive speaks, "everybody listens in the corporate

hierarchy"). Mr. Talley's expressions of the company's policy are echoed in statements made by officers, vice-presidents, regional directors, market managers and store managers across the country; these statements are contained in sworn declarations of over 300 current and former company employees.[4] (Doc. 155, Exhibit 10 generally; Exhibit 2, Class Member/Witness Declarations).

***3** Statistics offered by the Plaintiffs establish the existence of a class of women who were arguably affected by the implementation of the anti-female policy by the company's operating management. (See Doc. 155, generally Report of David W. Peterson, Ph.D., Exhibit 4a). Prior to its acquisition of the Thorn stores, less than 2% of the employees of Renters Choice were female. By way of comparison, Thorn had over 20% female employment, as do the company's three main competitors in the rent-to-own industry. Within a year of the acquisition, the combined Rent-A-Center workforce was only 9.8% women, and by September, 2000, two years after the acquisition, that number had dropped further, to 8.5%. (Doc. 155, Exhibit 4a. p.5-7). In absolute numbers, the number of women had dropped from 2,092 to 1,151, a drop of almost 50%, while the number of men actually increased. One plausible explanation for the drop in female employment at Rent-A-Center is the implementation of the company's anti-female policy as reflected in Mr. Talley's directive to "get rid of" women in any way possible.[5] The statistics demonstrate, with respect to the commonality issue that there is a class of women affected by the company-wide policy of sex discrimination at Rent-A-Center.

During the time period in which the members of the proposed class have been employed by Rent-A-Center, women have been under-represented in hiring, been denied promotions at statistically significantly lower rates than similarly situated male employees, and been terminated at rates higher than similarly situated men, again to a statistically significant degree. (Doc. 155, Exhibit 4a, p. 8-11). The Plaintiffs' statistics demonstrate the company's anti-female policy as manifested in Rent-A-Center's hiring, promotion and termination and constitute the kind of "significant proof that an employer operated under a general policy of discrimination" which will support a finding of commonality under RULE 23. *Shores v. Publix Super Markets, Inc.,* 1996 WL 407850; *Caridad v. Metro-North Commuter R.R.,* 191 F.3d at 292.

In addition, Plaintiffs offer approximately 275 sworn declarations of current and former employees who are members of the class they seek to represent: 6 class members who have not been hired; 92 class members who say they have been denied promotions on account of sex; 32 who have been demoted under circumstances which they believe indicate sex discrimination: 100 class members who claim they have been discharged on account of sex; and over 125 who claim to have been constructively discharged because they are women. These declarations provide the "personal experiences with the company" that bring "the cold numbers convincingly to life." *Teamsters v. U.S.,* 431 U.S. 324, 339 (1977).

Rent-A-Center argues that the fact that decisions about hiring, promotion and termination are made by local field management and a "highly decentralized" decision-making process about these issues undercuts a finding of commonality.[6] (Doc. 170, p. 84). However, the existence of a policy of sex discrimination articulated by the company's top executives provides the factual predicate required for a finding of commonality when decision-making is decentralized. It is the lack of proof of such a policy, in the ordinary case, that is the problem with establishing commonality:

***4** Plaintiffs argue this kind of comparison misses the point because the salary levels were assigned pursuant to uniform (and allegedly discriminatory) policies and practices, which provide the requisite commonality and typicality. The court finds plaintiffs' evidence does not show such uniformity.
Jefferson v. Ingersoll Int'l., Inc., 1999 WL 669229, *6 (N.D.Ill.1999).

Where, as here, there is strong evidence of a uniform policy, decentralization of the actual decision-making process, even if it exists, does not preclude a finding of commonality-the common question of fact is the existence of the policy and whether it is manifested in each of the areas of employment alleged. Plaintiffs present substantial evidence of not only the existence of the policy of sex discrimination, but also of its manifestation in hiring, promotion and termination. There is abundant evidence that the policy of sex discrimination was articulated by top management and that this policy was applied throughout the company.

ii. ***Sexual Harassment Claims***

A sexually hostile environment results from unwelcome conduct based on sex which, based on all of the circumstances, is sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment. *Harris v. Forklift Systems, Inc.,* 510 U.S. 17, 23 (1993); *Meritor Savings Bank v. Vinson,* 477 U.S. 57, 67 (1986). Female employees at Rent-A-Center claim they have been subjected to sexual propositions, sexual touching, crude and vulgar sexual comments about themselves and other women and the open display of pornography. (Doc. 155, p.55-60).

A hostile work environment claim, like Plaintiffs' claim, involves crucial questions of fact common to the claims of all class members. These common questions include: management's knowledge and toleration of the systematic creation of an environment hostile to women in its stores; the extent to which the company exercised reasonable care to prevent and promptly correct harassing behavior; and the effectiveness of the company's anti-harassment policies and mechanisms for registering and investigating harassment complaints. *Faragher v. City of Boca Raton,* 524 U.S. 775 (1998).

The declarations of the 78 class members who claim they were subjected to sexual harassment during their employment at Rent-A-Center contain testimony of no or ineffective responses to their complaints. This suggests that management from the store level to the corporate level had knowledge of the hostility of the environment in the company's stores and demonstrates that the company's anti-harassment policies and procedures are/were not followed. CEO Ernest Talley's comment that the company wouldn't "have as many sexual harassment suits" as the number of women employees declined (Declaration of Nicholas Finelli ¶ 5) is further evidence of corporate indifference to what was happening in the company's stores. This evidence also provides a link between the company's anti-female policy and its toleration of sexually harassing conduct: if women's sexual harassment complaints are not adequately addressed, they will leave. Many of the declarations demonstrate that desired result.

***5** A number of courts have certified classes that include women who make claims of sexual harassment, as well as other types of sex discrimination. *See e.g., Jenson v. Eveleth Taconite Co.,* 824 F.Supp. 847 (D.Minn.1993); *Bremiller v. Cleveland Psychiatric Institute,* 195 F.R.D. 1 (N.D.Ohio 2000). Moreover, *Bremiller* and other decisions have rejected the argument made by Rent-A-Center that commonality provision of RULE 23 cannot be satisfied in the sexual harassment context because such claims require individualized treatment. *Warnell v. Ford Motor Co.,* 189 F.R.D. 383 (N.D.Ill.1999); *Markham v. White,* 171 F.R.D. 217, 222 (N.D.Ill.1997). In *EEOC v. Mitsubishi Motor Mfg. Of America, Inc.,* 990 F.Supp. 1059, 1074 (C.D.Ill.1998), the District Court noted that in the class action sexual harassment context:

> [T]he landscape of the total work environment, rather than the subjective experiences of each individual claimant, is the focus for establishing a pattern or practice of unwelcome sexual harassment which is severe and pervasive.

In *Markham,* the Court found that individual differences in each class members's subjective perception and response to harassment does not detract from the satisfaction of the commonality standard. 171 F.R.D. 222. Those differences can be addressed at Stage 2 of the bifurcated proceeding once liability has been established. The Plaintiffs have satisfied their commonality burden with respect to the sexual harassment claims.

iii. *Discriminatory Terms and Conditions of Employment*

While minor or trivial actions that make an employee unhappy do not constitute the materially adverse employment actions necessary for a terms and conditions violation of Title VII, a "wide variety of actions, some blatant and some subtle can qualify" as materially adverse employment actions. *Smart v. Ball State University,* 89 F .3d 256, 258 (7th Cir.1996). A single act, such as a disciplinary suspension, may qualify. *Russell v. Board of Trustees of the University of Illinois at Chicago,* 243 F.3d 336 (7th Cir.2001). *See also, Bryson v. Chicago State University,* 96 F.3d 912 (7th Cir.1996) (title change and loss of committee assignments qualify as materially adverse employment action). A pattern of gender-based conduct which is sufficiently severe and pervasive may also violate Title VII, even when that conduct is non-sexual. In *Haugerud v. Amery School District,* 259 F.3d 678 (7th Cir.2001), the Seventh Circuit recently ruled that a series of non-sexual incidents that singly might not constitute adverse employment actions may collectively amount to a discriminatory change in the terms and conditions of an individual's employment.

The common questions related to the Plaintiffs' class terms and conditions claims are similar to the common questions surrounding their other claims: (a) the existence of a policy of sex discrimination designed to reduce and minimize employment of women; (b) management's knowledge and toleration of the systematic creation of an environment hostile to women in its stores; (c) the extent to which the company exercised reasonable care to prevent and promptly correct the conduct which created this environment; and (4) the effectiveness of the company's policies and procedures for addressing these problems.

***6** Plaintiffs offer substantial evidence on the terms and conditions issues. In fact, almost every class member who submitted a declaration describes being affected by conduct targeted particularly at women employees, as well as work assignments and

working conditions that women, but not men, were subjected to on the job. As the Seventh Circuit noted in *Rosario v. Livaditis,* 963 F .2d 1013, 1018 (7th Cir.1992):

> The fact that there is some factual variation among the class grievances will not defeat a class action. Patterson v. General Motors Corp., 631 F.2d 476, 481 (7th Cir.), cert. denied, 451 U.S. 914, 101 S.Ct. 1988, 68 *1018 L.Ed.2d 304 (1980). A common nucleus of operative fact is usually enough to satisfy the commonality requirement of Rule 23(a)(2).

Thus, the "common question which is at the heart of this case" is do the many experiences of women regarding terms and conditions of employment demonstrate that Rent-A-Center, operated pursuant to an ongoing policy of sex discrimination? *Id.* Moreover, the Court finds Rent-A-Center is judicially estopped from arguing that there is not commonality.[7]

3. Typicality

The Court concludes that the Plaintiffs' claims are typical of those of the class they seek to represent. The Rules requirements of commonality and typicality are "closely related." *Rosario v. Livaditis,* 963 F.2d at 1018. Typicality may be found even in instances where there are factual distinctions between the claims of the named Plaintiffs and those of the other class members. *DeLaFuente v. Stokely-Van Camp, Inc.,* 713 F.2d 225, 232 (7th Cir.1983).

The typicality clause of RULE 23(a)(3) requires that "a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members." *Falcon,* 457 U.S. at 156. In the case at bar, Plaintiffs' legal theory, that Rent-A-Center violated and continues to violate Title VII by maintaining a company-wide policy of discrimination against women, encompasses the claims of the class Plaintiffs seek to represent. Further, the injuries the Plaintiffs attribute to the alleged policy of discrimination are typical of those suffered by class members, as testified to in their sworn declarations.

For example, Plaintiffs Adams, Cohen, Dickerson, Dropthmore, Malone, Pratt and Sheattler contend that they have been discharged from their employment on account of their sex. Approximately 100 putative class members claim the same injury. (Doc. 155, Exhibit 12). In addition, Plaintiffs Jones, Liphart, and Nelson claim that they were denied employment at Rent-A-Center because of their sex-a claim six other putative class members also make. *Id.* Moreover, Nine Plaintiffs claim discriminatory denial of promotion, an injury claimed by ninety-two class members. One hundred thirty-eight class members claim constructive discharge, the same injury claimed by thirteen of the named Plaintiffs. Likewise, the class members make substantially similar claims of sexual harassment, pregnancy discrimination, demotion and unequal working conditions as those of the named Plaintiffs. Because the class members' testimony of the injuries they sustained as a result of Rent-A-Center's discriminatory policy bear a close resemblance to the claims of the twenty-seven named Plaintiffs, the named Plaintiffs satisfy the typicality requirement.

4. Adequacy of Representation.

***7** The Plaintiffs have demonstrated that they will fairly and adequately protect the interests of the class as required by RULE 23(A)(4). Here, there has been no evidence that Plaintiffs have interests adverse to those of the class as a whole.[8] Rent-A-Center argues that some named Plaintiffs and members of the proposed class who were current or past Market Managers "may be determined to be or have been agents for Rent-A-Center as to acts alleged to be discriminatory." (Doc. 170, p. 101). However, none of the named Plaintiffs held a position higher than store manager during the relevant time period. (Doc. 155, p. 75). Further, "only a conflict that goes to the very subject matter of the litigation will defeat a party's claim of representative status." *Meyer v. Macmilan Pub. Co., Inc.,* 95 F.R.D. 411, 416-17 (D.C.N.Y.1982) (quoting *Kuck v. Berkey Photo, Inc.,* 81 F.R.D. 736, 740 (S.D.N.Y.1979)(quoting WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1768 at 639 (1972)).

Here, the fact that some Plaintiffs may have been promoted does not render them unsuitable as class representatives; "the real question...is not whether [these Plaintiffs] have been 'successful', but whether progress toward even greater success in [their] professional career has been impeded by reason of [their gender]." *Wagner v. Taylor,* 836 F.2d 578 (C.A.D.C.1987). In addition, Plaintiffs' counsel have filed affidavits describing their substantial experience in both multi-plaintiff and class action employment litigation. Plaintiffs have retained counsel fully capable of effectively prosecuting their claims. The interests of the class representatives are not antagonistic to those of the class members their class counsel are highly skilled and extremely diligent. Counsel have developed an extraordinarily thorough and wide ranging record of Defendant's actions and practices toward women. As a result, Plaintiffs have met the requirements of RULE 23(a)(4).

5. RULE 23(b)(2) and 23(b)(3) Requirements

The Court finds that Plaintiffs have satisfied both the requirements of RULE 23(b)(2) and RULE 23(b)(3). Plaintiffs argue that Rent-A-Center has "acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole..."[9] Here, Plaintiffs seek declaratory relief that Rent-A-Center's employment policies violate Title VII in addition to significant injunctive relief, including provisions for monitoring, reporting and remedying sex discrimination, including sexual harassment; goals and timetables for the hiring and promotion of women; reinstatement; replacement of Rent-A-Center's 75-pound weight lifting requirement with a non-discriminatory requirement; training for managers at all levels on gender stereotyping, sexual harassment and equal employment opportunity; and retention of jurisdiction by this Court for the purposes of monitoring. This relief is by its nature applicable to the class as a whole.

***8** In addition, class certification is appropriate under RULE 23(b)(3) because "questions of law or fact common to the members of the class predominate" and "a class action is superior to other available methods" of adjudicating the controversy. Common issues "predominate" within the meaning of 23(b)(3) when they constitute a significant part of the litigation. *Jenkins v. Raymark Indus., Inc.,* 782 F.2d 468, 472 (5th Cir.1986).

In this matter, all class members share the common issue of whether Rent-A-Center maintains a company-wide policy of discrimination against women in employment. Rent-A-Center argues that the predominance requirement is not met because the class seeks both injunctive and monetary relief and because damages resulting from discrimination against each woman would require an individual determination of the amount of damages due. However, a finding that Rent-A-Center acted pursuant to a policy of sex discrimination against its women employees creates a presumption that the company discriminated against every member of the class. *Int'l Brotherhood of Teamsters v. U.S.,* 431 U.S. 324, 336 (1977); *see, Rossini V. Oglivy & Mather, Inc.,* 798 F.2d 590, 599 (2nd Cir.1986). Such a finding provides the "essential factual link between all class members and the defendant for which the law provides a remedy." *Hubler v. General Motors Corp.,* 793 F.R.D. 574, 580 (S.D.Ind.2000). Class-wide litigation of whether Rent-A-Center has such a policy and acted pursuant to that policy is clearly superior to separate lawsuits in that it will save judicial resources and preclude inconsistent judgments by various courts.

III. *Conclusion*

Accordingly, the Court GRANTS Plaintiffs' Motion for class certification (Doc. 147). The Court certifies the following Class:

> All women who have been employed by Rent-A-Center, Inc., Thorn Americas, Inc., or Renters Choice, Inc., at any time between August 5, 1998 and the date of trial, as well as any women who have made application for employment or been deterred from making application for employment with any of those corporate entities during the same period, and who have been, are being or may in the future be adversely affected by the continuing policy of discrimination with regard to hiring, promotion, demotion, termination, hostile work environment and terms and conditions of employment because of their sex.

The class is certified as a hybrid pursuant to FED. R. CIV. P. 23(b)(2) and 23(b)(3). The Court will enter an appropriate Order requiring notification of all class members to go out by January 3, 2002, and permit those who wish to opt out of either the RULE 23(b)(2) or 23(b)(3) class certification the opportunity to do so.

Plaintiffs Claudine Wilfong, Lisa Adams, Diana Albrecht Terry Blackburn, Lisa Chenelle, Toni Cohen, Marsha Cromwell, DeEllen Dickerson, Veronica Dropthmore, Kim Hammer, Deborah Hester, Mary Johnson, Anicesha Jones, Mila King, Kathleen Liphart, Melody Luce, Teia Malone, Karen Dueker-Meyer, Dora Nelson, Dawn Pemberton, Hermanette Portis, Amy Pratt, Linda Sheattler, Michele Smith, Melanie Watson, Linda Wigger and Robin Yeubanks are hereby designated as Class Representatives. The following attorneys are designated as Class Counsel: Jerome J. Schlichter of Schlichter, Bogard and Denton and Mary Anne Sedey and Jon A. Ray of Sedey and Ray, P.C. Further, the Court DENIES as moot Plaintiffs' request for immediate certification and issuance of notice to the class if the Court certifies the a class (Doc. 177) and Plaintiffs' motion to shorten time (Doc. 179).

***9** IT IS SO ORDERED.

Footnotes

1 The Court finds it interesting and significant that in responding to the motion for class certification, Rent-A-Center did not distinguish this case from *Bunch v. Rent-A-Center, Inc,* 00-0364-CV-W-3 or *Levings v. Rent-A-Center,* 00-0596-CV-W-3, class actions filed in the Western District of Missouri, let alone mention the existence of these cases. Both cases are based on Title VII for gender discrimination. The Court notes that Rent-A-Center and counsel for the putative class of Plaintiffs in Western District of Missouri cases entered into a stipulation and settlement agreement in which Rent-A-Center stipulated and agreed that all of the requirements of FEDERAL RULE OF CIVIL PROCEDURE 23 were met. (Doc. 172, Exhibit 45, p. 12).

2 Rent-to-own stores rent furniture and appliances to customers who are, typically, unable to get financing to purchase these goods. Customers enter into contracts, renewable on a weekly or monthly basis, to rent the merchandise; at the end of some predetermined time period, the customer owns the merchandise. (Doc. 155, p. 2 n. 1).

3 On November 29, 2001, District Judge Ortie Smith of the Western District of Missouri certified a class action in the *Bunch* and *Levings* cases almost identical to the purported class in this action. The class that Judge Smith certified included the following: "All females who worked at, applied for work, and/or who attempted to apply but were affirmatively discouraged by the Defendant from applying for work at any Rent-A-Center, Rent-A-Center, Inc., or Renters Choice, Inc. store in the United States or any of its territories, at any time between April 19, 1998 and October 1, 2001 (the "Class Period"), except that the Class does *not* include any female employed as a Market Manager and/or Regional Director no any female who previously entered into a written settlement agreement with Rent-A-Center, Rent-A-Center, Inc., or Renters Choice, Inc. which releases a claim of gender discrimination ("Class Members")." (Doc. 172, Exhibit 46).

4 These statements include the following examples of almost two hundred such statements: "Women should be home taking care of their husbands and children, chained to a stove, not working in my stores." (President/Executive Vice President Dowell Arnette). "Why do you have three women working in this store?" (Sr. Vice-President Tom Lopez to a Market Manager). "In case you didn't notice, we do not employ women." (Sr. Vice President Bill Nutt). "I have never had one female store manager working for me and have never promoted a woman." (Regional Director Rick Godfrey). "I regularly throw away women's applications." (Regional Director Bob Lloyd). "If your numbers aren't right I'll let you go because you are the least valuable asset-being female and pregnant." (Regional Director Fred Maddux). "You shouldn't be moving furniture; it's a man's job." (Regional Director Joe Kromer). "Renters Choice is getting rid of all of the girls." (Market Manager Mike Wasser). "They can't do the job well because their boobs always get in the way." (Market Manager Alvin Hosli). "I've never seen a successful female collector; the day I hire a woman will be a cold day in hell." (Market Manager Tim Place). "You can do the vacuuming because that's a woman's job." (Store Manager John Lara). "You were fired because you're a woman." (Store Manager Justin Robertson)

5 Rent-A-Center offers an alternative explanation for the post-acquisition decline in women's employment, in the expert testimony of labor economist Robert Topel, Ph.D. Dr. Topel suggests that the proportional drop in women's employment occurred because of changes in store operation and job duties that made employment at Rent-A-Center stores less attractive to women after the merger. Specifically he, and the company, argue that the physical demands of the single job classification into which several jobs in the Thorn system were merged made that job less attractive to women. Dr. Topel cites no authority for this proposition, and does not even attempt to address the fact that at the same time wages for the store positions rose substantially (see Def's Sugg Opp., p 67, n. 7), arguably making the position in the post-acquisition store structure highly desirable.
The Court STRIKES the opinion of Dr. Topel from Defendant's materials in opposition to class certification. His report was not produced to Plaintiffs as required by the terms of the Magistrate Judge Cohn's Scheduling Order in this case, nor did Defendant seek leave to produce the report after the time required by the Order or as a Rebuttal Report. In any event, this Court has reviewed Dr. Topel's report and finds, even if it were admissible, that his opinions do not defeat the Plaintiffs' commonality evidence. It is not this Court's role to determine the ultimate correctness of either party's contentions in the context of class certification. *Krueger v. New York Tel. Co.,* 163 F.R.D. 433, 440 (S.D.N.Y.1995). Such "statistical dueling" is a matter in dispute directed at the merits of the case. *Caridad v. Metro-North Commuter R.R.,* 191 F.3d 283, 292 (2nd Cir.1999); *Shores v. Publix Super Markets, Inc.,* 1996 WL 407850 *7 (M.D.Fla.1996). Further, Topel's opinion would not defeat commonality in any event because the claimed policy which he uses to justify the decline in the number of women is by his own statement, a company wide policy applied, in all stores, thereby meeting the commonality requirement.

6 The company has, for all intents and purposes, almost no human resources department, and Plaintiffs provide documentary evidence that Mr. Talley and other top officials insert themselves in almost every aspect of the operation of the stores, and specifically in many aspects of decision-making about personnel matters. (Doc. 155, p. 25-32). Moreover, the declarations recount stories in which top company officials like Talley, his Executive Vice-President Dowell Arnette and Chief Operating Officer Dana Goble dictated that its managers should "get rid of" women in general and that specific individuals should be fired. (See, e.g., King Declaration ¶¶ 12, 19; Eddins Declaration. ¶ 6; Finelli Declaration ¶ 4; Pagan Declaration ¶ 4).

[7] In order to protect the integrity of the judicial process, Defendants are judicially estopped from asserting that the commonality requirement of RULE 23(a) cannot be met here. *State of New Hampshire v. Maine,* 532 U.S. 742, 977-78 (2001). Under the doctrine of judicial estoppel, a party is prohibited "from deliberately changing positions according to the exigencies of the moment...." *Id.* at 977. Where a party assumes a certain position in a legal proceeding and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position. *Id.*
When the Defendant stipulated to commonality "for settlement purposes" in the Western District, it stipulated to actual commonality, not some legal fiction for a limited purpose. This is true because even in-and especially in-the settlement only context there must be genuine compliance with the certification requirements of RULE 23 in order for a class to be certified. *Amchem Products, Inc. v. Winston,* 521 U.S. 591, 620 (1997). Thus, Defendant's stipulation to commonality in the Western District case provides an alternative ground, for this Court's finding that there are issues of law and fact common to the claims of the class members in this case.

[8] The Court notes that the EEOC supports the class certification of this case over the Western District of Missouri cases. In fact, the EEOC filed pleadings in the Western District of Missouri cases in which it objected to the certification and the settlement concluding that the settlement was grossly inadequate. (Doc. 177, Exhibit 1).

[9] FED. R. CIV. P. 23(b)(2)