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United States District Court,
S.D. New York.

David COKELY, Natasha Perez, Sean Hannah, Julio Teran, Individually and as Class Representatives on behalf of all others similarly situated, and Dennis Crowley, Robert Iadarola and Daniel Perrella, Individually, Plaintiffs,
v.
THE NEW YORK CONVENTION CENTER OPERATING CORPORATION, Gerald T. Mcqueen, Richard Powers, and Al Tomaczuk, Defendants.

No. 00 Civ. 4637(CBM). | April 2, 2003.

Attorneys and Law Firms

Barry A. Weprin, Douglas Hoffman, Milberg Weiss Bershad Hynes & Lerach LLP, for Plaintiffs.

Richard A. Levin, Eric D. Roth, Proskauer Rose LLP, for Defendant New York Convention Center Operating Corporation.

Eliot Spitzer, Attorney General of the State of New York, by Ivan B. Rubin, Assistant Attorney General, for Individual Defendants, of counsel.

ALSO PRESENT: ELIZABETH BRADFORD, Vice President/General Counsel, The JACOB K. JAVITS Convention Center of New York.

Opinion

MEMORANDUM OPINION AND ORDER

MOTLEY, J.

INTRODUCTION AND BACKGROUND

***1** Plaintiffs David Cokely, Natasha Perez, Sean Hannah and Julio Teran, on behalf of themselves and all other persons similarly situated, bring this putative class action, alleging discrimination based on race, ethnicity and gender against the New York Convention Center Operating Corporation ("NYCCOC"), the entity that runs the Jacob K. Javits Convention Center ("the Javits Center"), as well as three individuals, Richard Powers ("Powers"), Gerald McQueen ("McQueen") and Alexander Tomaczuk ("Tomaczuk") (collectively, "Individual Defendants"). The suit is brought pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.;* the Civil Rights Act of 1871, as amended, 42 U.S.C. § 1981 *et seq.;* the 1991 Civil Rights Act, as amended, 42 U.S.C. § 1981a *et seq.;* and 42 U.S.C. § 1983 *et seq.*.

In their Second Amended Complaint, plaintiffs allege that the discrimination practiced by the white males who run the Javits Center is manifested in four different ways. First, plaintiffs complain that the job allocation and promotion system is manipulated to give white male employees preferences with respect to the type and amount of work assigned and greater opportunities to obtain higher paying jobs at the Javits Center. Second, plaintiffs claim that management has created and condones a hostile work environment rife with racist and misogynist epithets. Third, plaintiffs allege that they have been denied various privileges of employment and singled out for reprimand because of their race and/or gender. Finally, plaintiffs argue that they have suffered retaliation for complaining to management about this discrimination.

Plaintiffs' Motion for Class–Certification

Currently before the court is plaintiffs' Motion for Class Certification. Plaintiffs offer two alternative schemes for certification:

Scheme A.

> Plaintiffs move that the court certify "a class of all black and Hispanic persons who are or have been employed as freight handlers, carpenters or housekeepers at the Javits Center from July 1, 1995 to the present ('the Class')." Pl.s' Mem. in Supp. at 2. "The representative plaintiffs seek certification on behalf of the entire Class, including their claims for injunctive and equitable relief, backpay and compensatory and punitive damages under Rule 23(b)(2)." *Id.* at 2–3; or, alternatively,

Scheme B.

> Plaintiffs move that the court "certify the Class's claims for injunctive and other equitable relief under Fed.R.Civ.P. 23(b)(2), and ... certify the claims for the Class' compensatory and punitive damages under Fed.R.Civ.P. 23(b)(3), with three separate 23(b)(3) subclasses consisting of: (1) minority freight handlers; (2) minority carpenters; and (3) minority housekeeping employees." *Id.* at 3.

For the reasons explained in the Discussion section below, although the court believes that at least some aspects of

this case may be fit for adjudication as a class action (under some version of Scheme B and along the lines of the partial certification mandated by the Second Circuit in *Robinson v. Metro North Commuter R.R.,* 267 F.3d 147, 168 (2d Cir.2001)), plaintiffs' motion is denied without prejudice.

Procedural History

***2** The original complaint filed in this matter was brought on behalf of fifty current and former Javits Center employees, in their *individual* capacities. Initial Complaint, June 22, 2000. That was followed by the First Amended Complaint, which joined an additional thirty-eight plaintiffs, bringing the total number to eighty-eight. First Amended Complaint, January 4, 2002. Still, the suit was not brought on behalf of a formal class. On April 8, 2002, attorneys for plaintiffs wrote to the court suggesting that in setting a discovery schedule it order the parties to "select [several] representative 'test claims' ... and conduct discovery on those claims...." Fraser Aff. Ex. A (Weprin Letter, April 8, 2002). Plaintiffs' attorneys noted that the case "has certain similarities to a class action" and that the proposed test claim scenario would thus be appropriate under the Second Circuit's recent holding in *Robinson.* Fraser Aff. Ex. A (Weprin Letter). Attorneys for defendants NYCCOC and Individual Defendants opposed this suggestion (and NYCCOC explicitly took no position on whether the matter was appropriate for class treatment). Fraser Aff. Ex. A (Levin Letter, April 25, 2002).

The court, familiar with the pleadings and the similarities of at least some of the allegations of the eighty-eight plaintiffs, ordered plaintiffs to move for partial class certification by Order dated June 5, 2002.[1] Having ordered that defendant NYCCOC produce documents relating to personnel and other matters, *see* Orders dated June 5, 2002 and July 18, 2002, the court presumed that plaintiffs would have the information necessary to make at least a modest evidentiary showing in support of their Motion.

[1] The court's familiarity derived from having scrutinized the first two complaints and having issued opinions with respect to the motions to dismiss filed after each. *See Aguilar I,* 174 F.Supp.2d 149; *Aguilar v. New York Convention Ctr. Operating Corp.,* 2002 WL 844397 (S.D.N.Y. May 2, 2002) (*"Aguilar II"*).

DISCUSSION

The court finds that plaintiffs have not met their evidentiary burden in moving to have their class certified and will discuss that failure first. However, some of the reasons offered by defendants in opposition to the motion are without merit, and the court will address those subsequently.

A. Plaintiffs Must Offer Some Admissible Evidence in Support of Their Motion

Defendants' principal point of opposition to the instant motion is that plaintiffs, by failing to provide any evidence beyond the pleadings of the commonality and typicality of plaintiffs' causes of action (with the exception of the single affidavit of Sean Hannah), have not met their burden.

Plaintiffs submit that because the court has reviewed three different complaints containing the fact patterns of eighty-eight different plaintiffs, they are relieved of the obligation to undertake a statistical analysis or provide more than a single sworn statement of a single named plaintiff in order to obtain certification of their proposed class. They note that the cases cited by defendants for the proposition that more is required come from outside this Circuit and District. *See Reid v. Lockheed Martin Aero. Co.,* 205 F.R.D. 655 (N.D.Ga.2001); *Marquis v. Tecumseh Prods. Co.,* 206 F.R.D. 132 (E.D.Mich.2002); *Reap v. Cont'l Cas. Co.,* 199 F.R.D. 536 (D.N.J.2001).

***3** While it is true that the Second Circuit and courts in the Southern District have not addressed the issue of just how much evidence is required for class certification with the same clarity of the *Reap* court, for example, it is also clear that plaintiffs may not rest on the pleadings alone.[2] In *General Telephone Co. v. Falcon,* 457 U.S. 147, 157 n. 13 (1982), the Supreme Court held that a district court may not certify a class action until it is satisfied, "after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." It is plaintiffs' burden to satisfy those prerequisites, *Caridad v. Metro–North Commuter R.R.,* 191 F.3d 283, 291 (2d Cir.1999), but the burden is not onerous, since at this stage, plaintiffs need not demonstrate a likelihood that they will prevail. *Cf. id.* ("[A] motion for class certification is not an occasion for examination of the merits of the case.") They must, however, go beyond the pleadings. *See In re Philip Morris Inc.,* 214 F.3d 132, 135 (2d Cir.2000) (" '[I]n making a certification decision, a judge must look *somewhere between the pleading[s] and the fruits of discovery ...*" ')(alteration in original, emphasis added, quoting *Sirota v. Solitron Devices, Inc.,* 673 F.2d 566, 571 (2d. Cir.1982)).

[2] In *Reap,* the court noted that a "plaintiff is required to produce evidence, usually in the form of affidavits, statistical evidence, or both, tending to show that the

individual claims share questions of fact or law with the class claims and that individual claims are typical of those brought for the class." 199 F.R.D. at 544.

Furthermore, the evidence supplied by plaintiffs for use by the court in its analysis must be such that it could be received into evidence. In *In re Visa Check/Mastermoney Antitrust Litigation,* 280 F.3d 124, 135 (2d Cir.2001) the Second Circuit held that a "district court must ensure that the basis of the expert opinion [submitted in support of the motion for certification] is not so flawed that it would be inadmissible as a matter of law." In this case, however, there has been only one piece of evidence submitted—the affidavit of Sean Hannah. Unlike in *In re Visa Check, Robinson* and *Latino Officers' Ass'n City of New York v. City of New York* (*"Latino Officers"*), 209 F.R.D. 79 (S.D.N.Y 2002), there has been no statistical analysis prepared by an expert offered for the court's consideration. The statistics offered by plaintiffs in the Second Amended Complaint are clearly not in a form admissible in court. *See* Second Amended Complaint, ¶¶ 30, 31. Counsel for defendant NYCCOC accurately described them as "back of the envelope type calculations" during oral argument on this motion. Oral Argument, Jan. 8, 2003 at 9.[3]

[3] Judges sitting and living in New York City can take judicial notice of the fact that discrimination based on race, nationality and gender have been endemic in the construction industry over the past several decades. *See Grant v. Martinez,* 973 F.2d 96 (2d Cir.1992); *see also, United States v. Wood, Wire and Metal Lathers Int'l Union, Local Union 46 et al.,* 328 F.Supp. 429 (S.D.N.Y.1971); *Rios v. Enterprise Ass'n Steamfitters Local Union No. 638 of U.A. et al.,* 326 F.Supp. 198 (S.D.N.Y.1971). Nevertheless, a generalized awareness of discrimination is not sufficient to find common issues specific to a proposed class.

Plaintiffs claim that they have not done such an analysis because "despite repeated requests, the Javits Center has not produced documentation identifying the race of all Javits Center employees." Pl.s' Mem. in Reply at 9. Defendant NYCCOC, in response to that claim, wrote to the court that "we in fact provided plaintiffs with detailed statements concerning race, gender and earnings for relevant groups of employees at NYCCOC," as well as 25,000 pages of relevant documents with directions as to where that information could be found in them. Letter from Richard Levin, January 10, 2003. If plaintiffs are in possession of the materials to make a statistical showing, they should do so; if they believe defendants are withholding those materials, they should bring a motion to compel production. If those materials simply do not exist, then plaintiffs should compile sworn statements from a large enough sample of plaintiffs to demonstrate that common issues exist. Based on the allegations in the several complaints filed so far, that should not be difficult. But it must be done.

B. Complaints of Discrimination in Employment Policy and a Hostile Work Environment May Be Appropriate for Class Treatment

***4** Defendants oppose certification of the class schemes proposed by plaintiffs on several other grounds. The court finds them unpersuasive. It would, of course, be premature to undertake an in-depth analysis of the extent to which plaintiffs have satisfied the requirements of Rule 23 before they have submitted the material called for in the preceding section. Nevertheless, the court believes it likely that plaintiffs can satisfy the requirements of Federal Rules of Civil Procedure 23(a), 23(b) and 23(c) for at least some portion of the claims and is not moved by defendants' blanket objections to class certification for certain types of claims. Courts in this district have certified actions wherein plaintiffs have challenged components of company-wide employment and disciplinary practices. *See, e.g., Caridad,* 191 F.3d at 292–93 ("[T]he fact that the class plaintiffs challenge the subjective components of a company-wide employment practices does not bar a finding of commonality...."); *Latino Officers,* 209 F .R.D. at 88 & n. 73 ("The delegation of discretionary authority to supervisors for disciplinary purposes constitutes a policy or practice sufficient to satisfy the commonality requirement"). Courts have likewise certified class action claims of a hostile work environment. *See, e.g., Latino Officers,* 191 F.R.D. at 93.

C. Defendant NYCCOC's Two Final Objections

Defendant NYCCOC raises two more objections to limit the number of claims against it. Again, the court does not find them convincing.

First, NYCCOC argues that since plaintiffs made no mention of discrimination within the housekeeping department in their Initial Complaint, plaintiff housekeepers' claims should be limited to the period beginning three years before January 4, 2002, when the First Amended Complaint was filed (as opposed to three years before June 22, 2000, when the Initial Complaint was filed). Plaintiffs respond that housekeepers should benefit from the "relation back" concept codified in Federal Rule of Civil Procedure 15(c). Under that Rule, "the central inquiry is whether adequate notice of the matters raised in the amended pleading has been given to the opposing party within the statute of limitations 'by the general fact situation alleged in the original pleading." ' *Stevelman v. Alias Research,* 174 F.3d 79, 86–87 (2d Cir.1999) (quoting *Rosenberg v.. Martin,* 478 F.2d 520, 526 (2d Cir.1973)).

Plaintiffs argue that "since the housekeepers raise claims of a hostile work environment and discrimination in work assignments, the same types of claims raised by other plaintiffs," their claims should relate back to the original complaint. Pl.s' Mem. in Reply at 28. The court agrees. Enough of the allegations in the original complaint dealt with NYCCOC management's failure to address complaints of discrimination in work assignment and widespread on-the-job harassment by managers as well as workers that defendant should have been on notice that housekeepers might lodge similar grievances.

***5** Second, NYCCOC argues that plaintiffs cannot bring a class action under Title VII because the right-to-sue letter issued to named plaintiff Natasha Perez was issued in response to a complaint that did not alert the NYCCOC or the Equal Employment Opportunity Commission ("EEOC") as to the scope of the case. It is certainly true that Perez's complaint makes no mention of a class action. Levin Aff., Nov. 26, 2002, Ex. C ("Perez Complaint"). Plaintiff counters that under the "single filing rule" as discussed in *Snell v. Suffolk County,* 782 F.2d 1094, 1100 (2d Cir.1986) and *Tolliver v. Xerox Corp.,* 918 F.2d 1051, 1056–58 (2d Cir.1990), as long as a single named plaintiff has filed an EEOC complaint alleging grievances that are similar to and within "the same general time frame" as those of the class plaintiffs, the class may proceed without filing further claims. *Tolliver,* 918 F.2d at 1058. The EEOC claim, however, must be such that it "alerts the EEOC that more is alleged than an isolated act of discrimination and affords sufficient notice to the employer to explore conciliation with the affected group." *Id.*

The court finds that the Perez Complaint satisfies the *Tolliver* rule. It alleges that defendant's "practice of having only two females, who are not Black, on the sixty 'Man' list is indicative of their discriminatory policies toward Black females." Perez Complaint, ¶ 4. Further, NYCCOC's "sixty 'Man' list was purportedly done by 'lottery', yet no Black females and only eight minority males (Black and Hispanic) are on the list, which was promulgated by Management and is entirely comprised of White males." *Id.,* ¶ 5. Both allegations indicate that "more is alleged than an isolated act of discrimination and affords sufficient notice to the employer...." *Tolliver,* 918 F.2d at 1058. Furthermore, in conjunction with the Initial Complaint, six individual plaintiffs filed claims alleging violations of Title VII and New York State Human Rights Law. *See* Levin Aff., Aug. 11, 2000, Ex.s B, C, D, E, F, G. Two of those came from named plaintiffs in the Second Amended Complaint, David Cokely and Natasha Perez. *Id.,* Ex.s C, G, respectively. There can be no doubt that the EEOC and the employer were aware that these grievances concerned more than isolated acts.

D. Joinder of Unions as Necessary Parties

Defendant NYCCOC raises an interesting question in its opposition papers, namely, to the extent that plaintiffs seek an injunction potentially modifying systems for hiring, work assignment and promotion, "the various labor organizations which represent the employees who make up the proposed class would become indispensable parties." NYCCOC Mem. in Opp. at 18 n. 12. Defendant cites several cases from district courts within the Second Circuit which have held that when an action's resolution may affect a collective bargaining agreement, the signatory union is a necessary party. *See Ware v. City of Buffalo,* 186 F.Supp.2d 324, 330–31 (W.D.N.Y.2001); *Adams v. Delta Air Lines, Inc.,* 1997 WL 12803, *1–2 (S.D.N.Y. Jan. 14, 1997); *Lynch v. Sperry Rand. Corp.,* 62 F.R.D. 78, 86–88 (S.D.N.Y.1973). Plaintiffs respond by distinguishing the cited cases and offering others that suggest that as long as the goals of the litigation are consistent with the relevant union's obligations, the union need not be joined as an indispensable party. *See, e .g., Rodolico v. Unisys Corp.,* 189 F.R.D. 245 (E.D.N.Y.1999).

***6** Given the mandatory nature of Rule 19 (a party *"shall* be joined ...), the court cannot afford to overlook this issue. Fed.R.Civ.P. 19(a) (emphasis added). Unfortunately, because the parties were concerned primarily with the issue of class certification, they did not give this issue the attention it deserves. Accordingly, the court hereby orders the parties to submit briefs on the issue of whether or not the various labor organizations which represent class members are indispensable parties to this litigation. Those briefs, which should not exceed five pages in length, are to be served and filed with the court within twenty days of the date of this opinion.

CONCLUSION

For the reasons provided in section A, *supra,* plaintiffs' Motion for Class Certification is denied without prejudice. Plaintiffs are granted leave to refile this motion as soon as they have gathered more evidence of commonality and typicality, either in the form of a statistical analysis, or in the form of affidavits from a number of plaintiffs, or both.