

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION**

MAR 17 2003

JAMES W. McCORMACK, CLERK
By:  DEP. CLERK

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,
Plaintiff

VS.

FRED'S STORES OF TENNESSEE,
INC.,
Defendant

*
*
*
*
*
*
*
*

NO. 5:02CV00153 SWW

MEMORANDUM OPINION AND ORDER

Now before the Court is the motion to intervene of LaSonia Bethea ("Bethea"), Alleonor Smith ("Smith"), Amanda Tolliver ("Tolliver"), and Cassandra Burke ("Burke"). In this case, the Equal Employment Opportunity Commission ("EEOC") filed this sexual discrimination and harassment suit against Fred's Stores of Tennessee, Inc. ("Fred's"), on behalf of Bethea and other unnamed female employees. The EEOC notified Fred's that the unnamed employees included Smith, Tolliver, and other women. Def.'s Resp. to Mot. to Interv. at 1. The movants seek to intervene pursuant to 42 U.S.C. § 2000e-5(f)(1). After careful consideration, and for the reasons stated below, their motion is granted in part (as to Bethea, Smith, and Tolliver) and denied in part (as to Burke).

I. Discussion

A. Timeliness of Application

Federal law recognizes two types of intervention: (1) intervention as of right and (2) permissive intervention. Fed.R.Civ.P. 24(a), (b). Regardless of which type of intervention a movant seeks, the threshold issue is whether the application is timely. *Id.*; *NAACP v. New York*,

413 U.S. 345, 365, 93 S.Ct. 2591, 37 L.Ed.2d 648 (1973); *Arkansas Elec. Energy Consumers v. Middle South Energy, Inc.*, 772 F.2d 401, 403 (8th Cir. 1985). The determination as to timeliness should be informed by evaluating all the circumstances, *NAACP*, 413 U.S. at 366, 93 S.Ct. 2591, including how far the proceedings have gone at the time of the application, prejudice to other parties, and the reason for the delay in intervening. *Winbush v. Iowa*, 66 F.3d 1471, 1479 (8th Cir. 1995). A district court's determination as to timeliness is reviewed for abuse of discretion. *NAACP*, 413 U.S. at 366, 93 S.Ct. 2591; *United States v. Union Elec. Co.*, 64 F.3d 1152, 1159 n.2 (8th Cir. 1995).

The Court first turns to the progress of the proceedings in this case. The EEOC filed a complaint on April 26, 2002, and an amended complaint on June 4, 2002, on behalf of Bethea "and other former female employees." The motion to intervene at issue here was filed on February 12, 2003, over nine months after the EEOC filed its complaint. The discovery and motions deadline is March 19, 2003, and trial is scheduled for May 19, 2003.

This application to intervene undoubtedly comes late in the game, but time itself does not always tell the whole story when it comes to discovery. In particular, the EEOC originally notified Fred's that it was pursuing claims on behalf of Bethea, Tolliver, and Smith, and their depositions had been scheduled when Fred's filed its response to the motion to intervene, but those depositions had not yet taken place. Def.'s Resp. to Mot. to Interv. at 1. Therefore, as it relates to these three movants, Fred's has had an opportunity to conduct discovery regarding the allegations and depose the movants regarding the arguments raised in their complaint in intervention.

The situation is different as it pertains to Burke. Because she was not one of the individuals on whose behalf the EEOC was suing, Fred's has not had an opportunity to conduct discovery regarding her claims and had not yet scheduled her deposition at the time of Fred's response.

The Court next considers the prejudice that would result to the existing parties by allowing the movants to intervene. The EEOC does not object to the intervention [docket no.14]. As for Fred's, the EEOC originally notified Fred's that it was pursuing claims on behalf of five women, including Bethea, Tolliver, and Smith. Def's Resp. to Mot. to Interv. at 1. Consequently, as noted above, discovery could be conducted as to the alleged discrimination and harassment against them, and their depositions were already scheduled when Fred's responded to the motion to intervene. *Id.* Consequently, the prejudice to Fred's is minimal. As explained above, such is not the case as it relates to Burke.

The final factor the Court must consider is the reason for delay. The movants have not provided the Court any rationale for waiting nine months before applying to intervene. Nevertheless, even in the absence of an adequate reason for delay, the Court finds that the totality of the circumstances, especially the lack of any significant prejudice to Fred's, dictates a finding that the application of Bethea, Tolliver, and Smith was timely. As for Burke, the failure to provide justification for her delay only solidifies the conclusion that her application was untimely. Therefore, the motion will be denied in part (as it relates to Burke) as untimely.

B. Intervention

Once a court determines that an application to intervene is timely, it must next consider whether intervention is otherwise appropriate. Federal Rule of Civil Procedure 24(a) provides

that an individual has a right to intervene in a case (1) when a statute grants an unconditional right or (2) “when an applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant’s ability to protect that interest, unless the applicant’s interest is adequately represented by existing parties.” Rule 24(b) provides for permissive intervention when (1) a federal statute grants a conditional right to intervene or (2) when the movant’s claim or defense and the main action have a question of law or fact in common.

Under 42 U.S.C. § 2000e-5(f)(1), an aggrieved employee has an absolute right to intervene in a civil suit brought by the EEOC. *EEOC v. Westinghouse Elec. Corp.*, 675 F.2d 164, 165 (8th Cir. 1982); *Nevilles v. EEOC*, 511 F.2d 303, 305 (8th Cir. 1975). As the individual who filed the EEOC complaint, Bethea has an unconditional right to intervene, a fact which Fred’s concedes. Br. in Supp. of Def.’s Resp. at 2. Because her motion to intervene was timely, the motion to intervene will be granted as it pertains to Bethea.

Whether Tolliver and Smith have an absolute right to intervene under § 2000e-5(f)(1) is a more difficult question. The Court, however, finds it unnecessary to address that issue because the intervention of Tolliver and Smith is acceptable under the permissive intervention provisions of Federal Rule of Civil Procedure 24(b) in that their claims include questions of law and fact in common with the original plaintiff’s complaint.¹ The EEOC’s complaint alleges that

From on or around July of 2000 and continuing, Defendant Employer has engaged in unlawful employment practices at its facility in Lake Village, Arkansas, in

¹ Fred’s, while denying that Tolliver and Smith can intervene as of right, agree with the Court’s analyzing the motion under Rule 24(b). Def.’s Resp. to Mot. to Interv. at 2.

violation of § 703(a) of Title VII, as amended, 42 U.S.C. § 2000e-2(a). The unlawful practices include, but are not limited to, sexually harassing previous female employees because of their sex. The conduct consisted of sexual comments, requests for sexual favors, and other unwelcome conduct of a sexual nature. The harassment was pervasive and continuous, and as a result, these females have been forced to resign rather than endure the sexual harassment.

Am. Compl. ¶ 13. Smith and Tolliver's allegations are virtually identical to those contained in the original complaint. Mot. to Interv. Ex. A at ¶¶ 12, 13. Therefore, the questions of law and fact are the same in the intervention complaint as in the EEOC's amended complaint.

Additionally, the intervention of Smith and Tolliver will not unduly delay or prejudice the adjudication of the rights of the original parties. Fed.R.Civ.P. 24(b). Therefore, intervention is appropriate under Federal Rule of Civil Procedure 24(b)(2).²

Although there is an absence of published court decisions regarding this specific situation, decisions in similar circumstances support granting Tolliver and Smith's motion to intervene. In a comparable situation, except for the fact that the complaint in federal court was filed by an individual rather than the EEOC, the Eighth Circuit explained:

We do not find cases under Rule 24 that clearly govern this issue [of whether a party who did not file an EEOC complaint can intervene]. However, in cases construing Rule 23 with respect to class actions in Title VII cases, it has been held that the purpose of 42 U.S.C. § 2000e-5[(f)] is to provide notice to the charged party so as to bring to bear the voluntary compliance and conciliation functions of the EEOC. When any charge is filed, these purposes are served as there is no claim of surprise in such a situation. The [employer], having been apprised of the sex discrimination claims by the other individuals, cannot now claim it was improper to allow [a party who had not filed an EEOC complaint] to intervene so as to assert charges of the same nature.


² A district court's grant of permissive intervention is reviewed for abuse of discretion. *Winbush*, 66 F.3d at 1478.

Behlar v. Smith, 719 F.2d 950, 953 (8th Cir. 1983) (citations omitted); *see also Wheeler v. American Home Prods. Corp.*, 582 F.2d 891, 897 (5th Cir. 1977). In another case where only two of fifteen plaintiffs had filed EEOC charges, the court concluded that the thirteen non-filing plaintiffs were proper plaintiffs because they had alleged facts demonstrating that they were similarly situated and had received the same discriminatory treatment as the filing plaintiffs. *Allen v. Amalgamated Transit Union*, 554 F.2d 876, 882-83 (8th Cir. 1977). Although the original plaintiff here is not an individual, but is instead the EEOC, the conclusions in *Behlar* and *Allen* suggest that the same rationale—that the purpose of 42 U.S.C. § 2000e-5(f) of preventing surprise to the employer has been met—applies here as well. That is especially the case where the EEOC notified Fred's early on that it was suing on behalf of Smith and Tolliver, the very individuals who seek to intervene.

IV. Conclusion

For the foregoing reasons, the Court finds that movants' motion to intervene [docket no. 12] is GRANTED IN PART (as to LaSonia Bethea, Alleanor M. Smith, and Amanda Tolliver) and DENIED IN PART (as to Cassandra Burke). **LaSonia Bethea, Alleanor Smith, and Amanda Tolliver are hereby directed to file their complaint in intervention within five (5) days of the date of entry of this order.**

IT IS SO ORDERED THIS 17th DAY OF MARCH, 2003


CHIEF JUDGE
UNITED STATES DISTRICT COURT

F I L E C O P Y

vjt

UNITED STATES DISTRICT COURT
Eastern District of Arkansas
U.S. Court House
600 West Capitol, Suite 402
Little Rock, Arkansas 72201-3325

March 17, 2003

* * MAILING CERTIFICATE OF CLERK * *

Re: 5:02-cv-00153.

True and correct copies of the attached were mailed by the clerk to the following:

Terry F. Wynne, Esq.
Bridges, Young, Matthews & Drake
315 East Eighth Avenue
Post Office Box 7808
Pine Bluff, AR 71611-7808

Christopher J. Heller, Esq.
Friday, Eldredge & Clark
Regions Center
400 West Capitol Avenue
Suite 2000
Little Rock, AR 72201-3493

Pamela B. Dixon, Esq.
Equal Employment Opportunity Commission
820 South Louisiana
Suite 200
Little Rock, AR 72201

William A. Cash Jr., Esq.
Equal Employment Opportunity Commission
820 South Louisiana
Suite 200
Little Rock, AR 72201

Terry Beck, Esq.
Equal Employment Opportunity Commission
1407 Union Avenue
Suite 621
Memphis, TN 38104

Katharine W. Kores, Esq.
Equal Employment Opportunity Commission
1407 Union Avenue
Suite 621

Memphis, TN 38104

cc: press

James W. McCormack, Clerk

Date: 3/17/03

V. Turner
BY: _____