1990 WL 192734
United States District Court, N.D. California.

Nancy J. STENDER; Diane Skillsky; Julie Valentine–Dunn; Reba Barber–Money; Irma Hernandez; Anita Martinez and Jon Gold on behalf of themselves and all others similarly situated, Plaintiffs,
v.
LUCKY STORES, INC., Defendant.

No. C 88–1467 MHP.
|
June 8, 1990.

Attorneys and Law Firms

Brad Seligman, Jocelyn D. Larkin, Donna M. Ryu, Saperstein, Seligman, Mayeda & Larkin, Oakland, Cal., for plaintiffs.

James C. Paras, Kirby Wilcox, James E. Boddy, Jr., Carolyn Rashby, Morrison & Foerster, San Francisco, Cal., for defendant.

MEMORANDUM AND ORDER

PATEL, District Judge.

***1** Plaintiffs, a class of female and black employees[1] of defendant, Lucky Stores, brought this action alleging that the defendant maintains a policy and practice of denying hours, full-time work, desirable job assignments and shifts, training and promotional opportunities to female and black employees in its Northern Food Division. On October 11, 1989, the court approved a stipulation in which the parties agreed to a partial class definition as well as procedures for litigating the remaining class definition disputes. After the stipulation four class definition issues were left unresolved. The parties are before the court to resolve two of those issues, namely (1) whether the class encompasses those complaining of discrimination in their initial assignment at Lucky's and (2) whether the commencement date for the class period for plaintiffs alleging sex discrimination should be based on the date of the EEOC discrimination charge filed by plaintiff Nancy Stender or on the date of the later EEOC charge filed by plaintiff Diane Skillsky. Having considered the arguments of the parties and the papers submitted, for the following reasons the court grants plaintiffs' motion as to the inclusion of initial assignment complainants in the class and denies plaintiffs' motion as to the commencement date.

BACKGROUND

Plaintiffs complain that defendant discriminates against women and blacks by denying them hours, full-time work, desirable job assignments and shifts, training and promotional opportunities. Lucky stores are organized into departments. Depending on the size of the store, there may be as many as five departments: grocery, produce, meat, deli/bakery and non-foods. A new employee can be hired as a courtesy clerk (which is a position in the grocery department) or the employee can be assigned to a particular department in a higher level position such as apprentice clerk or journey clerk. In the deli/bakery and non-foods departments the highest position one can achieve is department head.

Promotion in the grocery department can lead to store management. Promotion is governed by the Collective Bargaining Agreement ("CBA") between Lucky's and the United Food and Commercial Workers union and is supposed to be based on seniority, experience, job performance, aptitude, and attendance, among other factors. Training for upper level positions can be gained through assignments known as floor work or from assignment to the night-crew. The night-crew is better paid than the day crew, and positions in the grocery department are better paid than equivalent positions in deli/bakery and non-foods. Employees who are initially assigned only part-time hours but who want full-time hours can bid for full-time assignments twice a year according to the CBA.

Plaintiff Nancy Stender began to work for Lucky stores in May 1979. She began as a part-time apprentice journey clerk. Beginning in 1980, Stender bid twice a year to be promoted to full-time work. She alleges that she was

passed over in favor of white males with less seniority and in 1984, she filed a claim to that effect with the EEOC. Stender's claim was filed without the benefit of counsel. Beginning in 1984, the EEOC investigated her charges and issued its determination in September 1987. In the meantime, plaintiff Diane Skillsky filed a charge with the EEOC in May 1985. Skillsky's claim, which was prepared by attorneys, raised issues of promotion, training, and job assignments as well as other issues. Skillsky's charge alleged class-wide discrimination by the defendant. As a result of the EEOC's issuance of right-to-sue letters, plaintiffs brought this action in federal court.

***2** On October 11, 1989 the parties stipulated to a partial class definition. After the stipulation only four class definition issues remained. The parties chose to continue to negotiate two of the disputed issues and to bring a motion before this court on the issues of whether initial assignment claims are included within the class and what the proper commencement date should be for those plaintiffs alleging sex discrimination.

DISCUSSION

Plaintiffs and defendant cannot agree on the definition of the class as it pertains to initial assignments and as to the proper commencement date for the sex discrimination claims. Plaintiffs argue that employment practices regarding the initial assignment of new hires are within the scope of the general employment practices the class is challenging. Defendants contend that because none of the named plaintiffs have alleged that they were discriminated against in their initial assignment, any initial assignment claims are improperly included in the class definition.

Plaintiffs also claim that the date of plaintiff Stender's EEOC charge is the proper date from which to calculate the opening date of liability on the sex discrimination charges. Defendants counter that the Stender charge only raised the issue of denial of full-time status and that liability, if any, should run instead from the time of plaintiff Skillsky's EEOC charge, which raised broader class claims.

I. *INITIAL ASSIGNMENT*

Plaintiffs assert that the named plaintiffs fulfill the Rule 23 requirements of commonality, typicality and adequacy of representation even though none of the named plaintiffs have alleged discrimination in their initial assignment. Fed.R.Civ.P. 23. Initial assignment claims, they argue, are properly within the scope of the class because initial assignments are an integral part of defendant's system of employment practices which injures employees by channelling them into less desirable jobs and which limits their promotional opportunities.

As explained above, management of a Lucky's supermarket is divided potentially into five different areas: grocery, produce, meat, deli/bakery and non-foods. New employees can be assigned to a number of different positions. Many new employees are hired as courtesy clerks, a position in the grocery department. Those hired into the grocery department are eligible to advance to store management.

Employees can also be hired directly into one of the five different areas as an apprentice clerk or in some greater capacity. Those assigned into the deli/bakery or non-foods can advance only to the position of department head. There is evidence that those assigned originally into deli/bakery or non-foods can transfer into grocery, but that these transfers are rare and often would require the employee to retrain as an apprentice.

The named plaintiffs were all initially assigned into the grocery department. Nonetheless, plaintiffs posit that there is commonality, typicality and that they are adequate representatives of those employees who were assigned into non-grocery departments. Plaintiffs assert that this is so because (1) defendant has stipulated that the named plaintiffs are adequate representatives for all complaints other than initial assignment even though the named plaintiffs have not suffered each individual harm in training, promotion, assignment of hours and shifts, and because (2) the employer allegedly practices the same entirely subjective decision-making process for making initial assignments as it does in making decisions about promotion, shifts, hours, etc.

***3** The parties argue that the Supreme Court decision in *General Telephone Co. of the Southwest v. Falcon,* 457 U.S. 147 (1982), supplies the appropriate rule of law. Pointing to footnote fifteen of the Supreme Court's opinion in *Falcon,* both parties note that Lucky's does not administer a testing procedure and instead they focus on whether or not Lucky's employs "entirely subjective

decisionmaking." *Id.* at 159 n. 15.

This court believes the parties place greater emphasis on footnote fifteen than is justified in these circumstances. One must heed the Supreme Court's admonition to look to this type of evidence in the context of the situation which faced the Court. In the preamble to the sentence wherein the Supreme Court discusses "entirely subjective decisionmaking," the Court explains that having proof of this nature "conceivably could justify a class of *both applicants and employees.*" *Falcon* at 159 n. 15. In the case at bar, the parties' briefs overlook the facts underlying the *Falcon* case and how those facts are distinguishable from the present case.

Although in *Falcon* the Supreme Court reversed what had been an earlier trend of allowing across-the-board certification of classes in Title VII (42 U.S.C.A. § 2000e et. seq.) discrimination claims, the Court's concern centered on maintaining the efficiency and economy of litigation that class actions were intended to remedy. The named plaintiff in *Falcon* was attempting to represent both those Mexican–Americans who had been discriminated against in promotion and those who had been discriminated against in hiring.[2] In contrast, in the case at bar, the class members are suffering from the same injury. Each of the class members the named plaintiffs seek to represent has already been hired by Lucky's. All plaintiffs already have their feet on the first rung of the ladder at Lucky's, they are simply arguing that there are impediments to their ability to climb farther.

The court finds that, in keeping with the rationale of *Falcon,* the ability of the named plaintiffs to represent those complaining of discrimination in their initial assignment should be analyzed under Rule 23. The Supreme Court's remonstrance in *Falcon* was aimed at maintaining the goals of Rule 23, economy and efficiency without sacrificing fairness. In order to ensure that those who will be bound by the decision have had a fair hearing, the court must conduct conscientiously an investigation into commonality, typicality and adequacy of representation.[3]

Defendant looks to *Vuyanich v. Republic Nat'l Bank of Dallas,* 723 F.2d 1195 (5th Cir.1984) as support for the proposition that, post-*Falcon,* the scope of class actions has been "significantly altered." *Id.* at 1197. In *Vuyanich* the court determined that the class action device:

was improperly used to multiply two significant but discrete classes of claims involving hiring and termination into a full-scale attack on every employment practice of a major metropolitan bank. This extension of the litigation to claims the named plaintiffs could not raise not only violates rudimentary principles of typicality, commonality, and standing but also creates such a legion of claims and defenses that sheer volume tends to obscure the valid rights of the proper classes and such rights as the members of improperly joined classes may be able to assert in another action.

***4** *Id.* at 1200–1201.

The facts of the *Vuyanich* case are also distinguishable from the case at bar. As the above excerpt indicates, the court was concerned about the size and complexity of the case. The trial court in *Vuyanich* had certified six different subclasses complaining about hiring, pay, promotion, placement, maternity leave, and termination. The claims in the present case are not nearly as broad. Nor will they require separate evidentiary investigations. As counsel admitted at this court's December 11, 1989 hearing, much of the testimony required to determine whether there has been discrimination in initial hiring will be from the same managers who are alleged to have engaged in the other disputed practices.

Plaintiffs analogize the present situation to the facts of *Richardson v. Byrd,* 709 F.2d 1016 (5th Cir.), *cert. denied Dallas County Comm.'s Court v. Richardson,* 464 U.S. 1009 (1983). In *Richardson,* the class certified by the court was, like *Falcon* but unlike the case at bar, a class of *employees* and *applicants* allegedly discriminated against in hiring, transfer, promotion and job assignments. Defendants appealed the class certification questioning the appropriateness of Richardson, as an *employee,* representing *applicants.*

In analyzing defendants' complaints, the Fifth Circuit looked to *Falcon.* The court determined that the Supreme Court "did not intend that Rule 23 be administered in ... a categorical fashion." *Id.* at 1019. The Fifth Circuit focussed instead on the Supreme Court's reminder that the proposed class "must meet the requirements of Rule 23, underscoring the request that 'the class claims [be] those fairly encompassed by the named plaintiff's claims.' " *Id.* (quoting *Falcon,* 457 U.S. at 156).

The *Richardson* court found commonality and typicality in that plaintiff demonstrated a "sufficient Rule 23(a) nexus to enable her to represent a class consisting of both employees and applicants." *Id.* at 1020. The court's reasoning was as follows: although plaintiff was attacking

assignment to a particular jail, because the jail had few positions open, the implications are that fewer women would be hired. Similarly in the case at bar, the named plaintiffs are complaining about the lack of promotional opportunities to management positions. If a woman is initially assigned to deli/bakery or general merchandise, she necessarily will be less able, if not unable, to pursue store management positions.

The final determination made by the *Richardson* court was whether Richardson was an adequate representative. Because Richardson was an employee attempting to represent applicants, the court needed to ascertain whether there was a "policy whose impact might be sufficient to connect *otherwise differently situated persons.*" 709 F.2d at 1020 (emphasis added). The court found that she would be adequate because the employer relied on "largely subjective factors" in making employment decisions as it had no established seniority or merit system or written guidelines for promotion or transfer. *Id.* at 1020.

***5** Plaintiffs allege that defendant engages in entirely subjective decision making for initial assignments and all other post-hiring decisions, such as promotion, hours, and shifts. Defendant admits that initial assignment determinations are entirely subjective. However, defendant vigorously contends that the decision-making process for promotion, shifts and additional hours is governed by the terms of the CBA between Lucky's and the union and is therefore not entirely subjective.

For example, under the heading of "Promotion," the CBA provides that determinations of who is to be promoted are to be "based upon seniority provided the employee with the highest seniority has the qualifications necessary for the job. Qualifications shall include such factors as experience, job performance, aptitude, attendance, *etc.*" *See,* Exh. 20 to Wilcox Dec. at section 4.3.1. (emphasis added).

Plaintiffs contend that the provisions of the CBA are "impossibly vague." Pl.Reply at 8. Plaintiffs additionally argue that defendant's decision-making process is entirely subjective because even the criteria of the CBA are ignored by the store and district managers. They contend that "Lucky has offered no evidence to demonstrate that: (1) its managers actually applied these criteria; or (2) that these criteria were applied consistently and objectively." Pl.Reply at 10.

In light of all of the above, the court finds that allowing plaintiffs to represent initial hiring claims as well as the remainder of the claims to which defendant has already stipulated comports with the requirements of Rule 23. This determination accords with the Supreme Court's concerns for both fairness and efficiency. Furthermore, the court is mindful of its continuing duty under Rule 23 to monitor class certification and, if it appears in the future that plaintiffs cannot adequately represent those with initial hiring claims, the court will take the appropriate action.

II. *THE OPENING DATE FOR SEX DISCRIMINATION LIABILITY*

The remaining issue in contention is whether defendant's liability on the charges of sex discrimination should be based on the date that Nancy Stender filed her complaint with the EEOC, or on the date that Diane Skillsky filed her charge (approximately one year later). Plaintiffs argue that the opening date for class membership should be tied to the date of the earliest EEOC charge of discrimination, Stender's charge.

Defendant counters that the Stender charge only raised issues of denial of change from part-time to full-time work. Under a "scope of the charge analysis," defendant argues that Stender's filing with the EEOC was not broad enough to allow the EEOC the proper opportunity to conciliate all the sex discrimination charges which were later raised by the Skillsky charge.

The seminal case discussing "scope of the charge" issues is *Sanchez v. Standard Brands,* 431 F.2d 455 (5th Cir.1970). In *Sanchez,* the Fifth Circuit addressed the issue of whether a complaint filed in the federal court could contain allegations distinct from those plaintiff specifically alleged in the EEOC charge. *Id.* at 464–465. The court reviewed the policies underlying the enactment of Title VII and concluded that a technical construction of plaintiff's EEOC complaint would be counter to Title VII's broad remedial purposes.

***6** The *Sanchez* court noted that "the Act was designed to protect the many who are unlettered and unschooled in the nuances of literary draftsmanship. It would falsify the Act's hopes and ambitions to require verbal precision and finesse from those to be protected, for we know that these endowments are often not theirs to employ." *Id.* at 465. The court concluded, therefore, that the proper scope of the complaint is "the EEOC investigation which can

reasonably be expected to grow out of the charge of discrimination." *Id.* at 466.

The court's conclusion was based, in part, on a prior decision by one of its district courts which stated that "the allegations of a judicial complaint filed pursuant to Title VII may encompass any kind of discrimination like or related to allegations contained in the charge and growing out of such allegation during the pendency of the case before the Commission.' " *Sanchez* at 466, quoting *King v. Georgia Power Co.,* 295 F.Supp. 943, 947 (N.D.Ga.1968). The Ninth Circuit has adopted the *Sanchez* approach. *See e.g., Serpe v. Four–Phase Systems, Inc.,* 718 F.2d 935, 937 (9th Cir.1983); *Kaplan v. International Alliance of Theatrical & Stage Employees,* 525 F.2d 1354, 1359 (9th Cir.1975).

Although the *Sanchez* court was concerned with protecting the unlettered, it was also concerned that its standard not "circumvent the statutory scheme, since Title VII clearly contemplates that no issue will be the subject of a civil action until the EEOC has first had the opportunity to attempt to obtain voluntary compliance." *Sanchez,* 431 F.2d at 467.

In applying the law stated above to the facts of the case at bar, the court notes the following: (1) that Stender's claim filed with the EEOC listed her complaint only as denial of promotion from part-time to full-time (*see* Wilcox Dec.Exs. 9–11); (2) one does not have to be a full-time employee to be promoted to a management position (*see* Javier Supp.Dec.); (3) the EEOC investigation found that Stender had had significant performance problems and written warnings prior to her being denied full-time work (Wilcox Dec., Ex. 13); and that Stender had declined an offer of full-time work as a night stocker. *Id.* Nor has plaintiff adduced any information that other EEOC complaints such as that of Gayle Gravenmier (June 1979; promotion) or Prudence McCafferty (August 1980; shift assignment) were still open at the time that Stender filed her charge.

The submissions before the court indicate that two other complaints regarding full-time status were filed with the EEOC in 1984. These did nothing to suggest a broader investigation. Although Ms. Skillsky's complaint was filed while Ms. Stender's was pending, it complained of the absence of promotions from retail clerk positions. Ms. Stender's complaint of promotions within the retail clerk position from part-time to full-time.

In light of the nature of the claims before the EEOC at the time Ms. Stender's complaint was pending, it is not reasonable to believe that a broad, across-the-board investigation into promotional practices would be triggered.

***7** As a result, the investigation of Ms. Stender's claim looked to promotions to full-time positions and not to general promotion practices. The one identified, related claim noted in her investigation file was another full-time work status complaint. (Lipetzky Dec.Exs. 5, 7, 9).

Ms. Stender also refers to her Request for Review (Stender Dec., Ex. 1) as expanding the scope of her EEOC charge. There is no authority for using the Request for Review in this manner. In addition, the only statement she makes apart from her complaint about the EEOC's handling of her charge is a very broad statement that she is one of approximately twenty-five women in her district being discriminated against. Neither the Request for Review itself nor its content is sufficient to trigger a more expansive reading of the charges.

Despite the remedial purposes of Title VII, the court finds that the information which was available to the EEOC at the time it investigated Stender's complaint was not sufficient to afford the EEOC reasonable notice that problems beyond part-time to full-time needed to be conciliated with Lucky. If therefore, Stender had brought this action after the filing of her complaint but prior to the filing of the Skillsky charge, the court would not be able to find that the sex discrimination charges were appropriately included in the suit.

The Ninth Circuit cases relied upon by plaintiff do not compel a different result. *Oubichon v. North American Rockwell Corp.,* 482 F.2d 569 (9th Cir.1973), does contain broad language. However, in fact, the EEOC complaint included four claims brought before the district court. It was only the DFEH complaint that lacked some of the allegations.

Gibbs v. Pierce County Law Enforcement Support, 785 F.2d 1396 (9th Cir.1986), of necessity required looking at salary comparisons of comparable jobs not alleged in the EEOC charge because the unalleged jobs were inextricably interrelated with those alleged.

Brown v. Continental Can Co., 765 F.2d 810 (9th Cir.1985), involved a single complainant's second claim of a new act of discrimination occurring while his first complaint was pending before the EEOC. The facts in *Brown* are significantly different from the ones here and

unique to that case.

Finally, the district court allegations in *Serpe* are not as far removed from the EEOC complaint as plaintiff suggests. The EEOC charge included a number of broad allegations regarding the employer's sales force and classification-by-sex practices. It was very easy to read into the charge plaintiff's claim of failure to transfer her into the sales division. *See* 718 F.2d at 936. Accordingly, the court finds that a careful reading of the law of this circuit does not support plaintiff's position. The opening date for liability on the sex discrimination charges is based upon the filing date of the Skillsky EEOC charge.

CONCLUSION

For the reasons stated above, the court GRANTS plaintiffs' motion as to the inclusion of initial assignment complaints in the class and DENIES plaintiffs' motion as to the commencement date.

***8** IT IS SO ORDERED.

All Citations

Not Reported in F.Supp., 1990 WL 192734, 57 Fair Empl.Prac.Cas. (BNA) 1437, 55 Empl. Prac. Dec. P 40,367

Footnotes

[1] Although the complaint includes allegations on behalf of Hispanics, the parties stipulation does not include Hispanics within the certified class.

[2] After the trial the court made separate findings of fact and conclusions of law as to Falcon, the class representative, and as to the class. The court found that Falcon had been discriminated against in promotion but not in hiring. The court came to the converse conclusion as to the class. It found that class members had been discriminated against in hiring but not promotion.

[3] Defendant itself cites *Jordan v. County of Los Angeles,* 713 F.2d 503 (9th Cir.1984) for the proposition that post-*Falcon* courts must " 'evaluate carefully' the adequacy of the plaintiff as representative." Def. opp. at 18.

In *Jordan,* the appeals court reviewed a district court denial of certification in a Title VII discrimination case in light of the Supreme Court's decision in *Falcon.* In a one page opinion, the Ninth Circuit focused on whether the named plaintiff met the Rule 23 prerequisites. The court noted that while it would have been permissible to form a class of all black applicants, such a class would have failed to meet the numerosity requirements.