IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

FERMIN COLINDRES, *et al.*, and OTHERS SIMILARLY SITUATED	§	
Plaintiffs,	§	
v.	§	CIVIL ACTION NO. H-01-4319 consolidated with H-01-4323
QUIETFLEX MANUFACTURING CO., L.P., *et al.*	§	
Defendants.	§	

MEMORANDUM AND OPINION

The EEOC has moved to intervene in this consolidated private employment discrimination action. Defendants have filed an opposition to the proposed complaint in intervention, asserting that the intervention is untimely and would result in prejudice. This court has carefully considered the pleadings; the motion to intervene and response; the record; and the applicable law. Based on that review, this court GRANTS the motion to intervene, for the reasons set out below.

I. Background

Plaintiffs, certain present and former employees of defendants, Quietflex Manufacturing Co., L.P., Quietflex Holding Co., Goodman Manufacturing Co. L.P., and Goodman Holding Co., assert that these defendants discriminated on the basis of

national origin, in violation of Title VII, 42 U.S.C. §§ 2000e *et seq.*, and 42 U.S.C. § 1981. Plaintiffs also allege that defendants fired them in retaliation for engaging in protected activity, in violation of Title VII and section 1981. Beginning in January 2000, plaintiffs filed complaints with the EEOC, asserting that defendants were an integrated enterprise; had discriminated against them on the basis of national origin; and had fired them in retaliation for participating in the work stoppage to oppose discrimination. On September 9, 2000, the EEOC issued its determination that Quietflex and Goodman were an integrated enterprise and had "engaged in a pattern and practice of disparate adverse treatment of Hispanics based on their national origin," in violation of Title VII. (Docket Entry No. 16, Ex. A, pp. 3-5). The EEOC also determined that defendants had fired plaintiffs in retaliation for engaging in a protected activity. (*Id.* at 5-6). The EEOC pursued conciliation efforts, which proved unsuccessful. The EEOC issued notices of right to sue in September 2001. The *Colindres* plaintiffs filed suit in October 2001 and the *Aleman* plaintiffs in December 2001. On February 26, 2002, this court granted the parties' joint motion to consolidate the two cases.

In April 2002, the parties filed their joint discovery/case management plan. In that report, the parties indicated that no discovery had yet begun, except that defendants had produced documents to the EEOC during its investigation. This court

entered a scheduling and docket control order with a deadline for the addition of new parties of November 1, 2002; a discovery cutoff of June 27, 2003; and a January 10, 2003 deadline for class certification motions. Defendants moved to dismiss or for partial summary judgment as to certain issues and claims, which this court denied. Plaintiffs filed a first amended complaint in July 2002. On September 26, 2002, the EEOC moved for leave to intervene under Rule 24(b) of the Federal Rules of Civil Procedure. Defendants have opposed the intervention as untimely and prejudicial.

II. Analysis

The EEOC's ability to intervene in a private lawsuit under Title VII is set out in sections 705(g)(6) and 706(f)(1) of Title VII. The former provision grants the Commission the ability to intervene. The method of intervention is set out in section 706(f)(1), which provides that "[u]pon timely application, the court may, in its discretion, permit the Commission . . . to intervene in such civil action upon certification that the case is of general public importance." 42 U.S.C. § 2000e-5(f)(1). There are three prerequisites to EEOC intervention: certification that the case is of general public importance, timely application, and permission of the district court. *Harris v. Amoco Prod. Co.*, 768 F.2d 669 (5th Cir. 1985); *Wurz v. Bill Ewing's Service Ctr., Inc.*, 129 F.R.D. 175, 177 (D. Kan. 1989) (quoting *Harris*).

Federal Rule of Civil Procedure 24(b)(1) provides the general procedure for seeking permissive intervention that is predicated on a conditional right found in a statute of the United States. Although Rule 24(b) provides the general framework for the court's discussion of permissive intervention, the "EEOC's right of intervention is narrower than permissive intervention under the Federal Rules" because it is allowed only in cases of general public importance. *E.E.O.C. v. Louisville & Nashville R. Co.*, 505 F.2d 610, 614 (5th Cir. 1974); *McElrea v. Volt Info. Sciences, Inc.*, 119 F.R.D. 630, 631 (E.D. Pa. 1987). Rule 24(b), similar to section 706(f)(1), gives the court discretion to allow intervention when timely application is made. It provides that the court "shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." FED. R. CIV. P. 24(b). In evaluating the timeliness of a Rule 24(b) motion filed by the EEOC, courts consider the extent to which the case has already been litigated; additional delay that intervention might cause; possible prejudice to the rights of the parties; and the relief the EEOC seeks. *Harris*, 768 F.2d at 670; *Reid v. Lockheed Martin Aeronautics Co.*, 2001 WL 568113 (N.D. Ga. Jan. 29, 2001); *Molthan v. Temple Univ. of Com. Sys. of Higher Ed.*, 93 F.R.D. 585 (E.D. Pa 1982); *Meyer v. Macmillan Pub. Co., Inc.*, 85 F.R.D. 149 (S.D.N.Y. 1980).

The EEOC has filed a certification of the general public importance of this case. Defendants do not challenge that certification. The first element for intervention is satisfied.

Defendants challenge the second element for intervention, arguing that the delay between the issuance of the letters of determination in September 2000 and the notice of right to sue letters in September 2001 and the filing of the motion for leave to intervene in September 2002 makes the proposed intervention untimely. Defendants rely on *Reid v. Lockheed Martin*, 2001 WL 568113 (N.D. Ga. Jan. 29, 2001), in which the district court denied the EEOC's motion to intervene in two class actions as untimely. The court found that the EEOC had been considering intervention for seven months before it sought to intervene. During that time, the parties to the suit had engaged in extensive discovery. In addition, the court had entered an order controlling contacts with members of the potential class. The court found that defendants would likely have conducted their discovery differently had they known that the EEOC would seek to intervene. The court also noted that during the seven-month period when the EEOC was considering whether to intervene, the Commission's communications with the potential class members were not subject to any control or scrutiny by the court, which prejudiced the defendants. The court acknowledged that the EEOC may be authorized to communicate with complainants

in its role as an investigator but found its unmonitored and unknown contacts with the potential class of plaintiffs to be problematic in light of the court order limiting such contacts. The court also held that allowing the EEOC to intervene would unduly delay the adjudication of the rights of the original parties. Depositions of the plaintiffs had been taken in one case and scheduled in the other and more than a million documents had been produced by the defendants. The deadline for class-related discovery was scheduled to close within one month for plaintiffs and within four months for defendants. The court found that given the volume of information already produced and the information yet to be discovered, it would be extremely difficult for an additional set of lawyers to familiarize themselves with the cases within the court's schedule. Finally, the court also noted the split in the circuits as to whether Rule 23 is applicable to the Commission in its role as an intervenor, an issue unresolved in the circuit in which that court sat. Given the absence of controlling precedent in that circuit, the district court concluded that allowing the EEOC to intervene and to pursue claims of discrimination on a national level would expand the scope of the litigation to the prejudice of the defendants. *Reid*, 2001 WL 568113.

Defendants urge this court to follow the same reasoning as the court in *Reid*. Defendants emphasize the two-year lapse between the EEOC's letters of

determination and the motion to intervene, arguing that they would have conducted discovery differently had the EEOC intervened earlier and would have avoided focusing on the class certification issues. Defendants also argue that they are prejudiced by the uncontrolled communications between the EEOC and potential plaintiffs. Finally, defendants urge that if the EEOC is permitted to intervene, attorney fees for the class certification work should be awarded because the Fifth Circuit has decided that the EEOC is not subject to Rule 23 requirements. *Harris*, 768 F.2d at 683.

Defendants' arguments are not sufficient to defeat intervention in this case. Although the EEOC did delay in seeking intervention, it did file its motion for leave to intervene within the court ordered deadline for motions to add new parties, and a year before the docket call setting. The delay in this case is far less egregious than in most of the cases in which courts have denied intervention as untimely. *See, e.g., Molthan*, 93 F.R.D. at 586 (ten year delay). Rule 24 does not set a specific time limit for a motion for leave to intervene. The length of the delay is a factor to be considered, but is not dispositive. The critical factor is the impact of the proposed intervention on the case, and whether intervention will, as a practical matter, "unduly delay or prejudice the adjudication of the rights of the original parties." Rule 24(b);

Diaz v. Southern Drilling Corp., 427 F.2d 1118, 1125 (5th Cir.), *cert. denied sub nom., Trefina, A.G. v. United States*, 400 U.S. 878 (1970).

In this case, there has been little discovery conducted, beyond the production of documents to the EEOC during its investigation. It appears from this court's file and the briefs of the movant and defendants that no depositions have been taken and that defendants have not responded to written discovery requests or produced documents other than during the EEOC investigation. The discovery cutoff is presently set for June 27, 2003. The absence of discovery, and the length of time remaining for discovery, distinguish this case from *Reid*, in which the parties had conducted a number of depositions, produced voluminous documents and conducted other discovery before the EEOC moved to intervene, and only one month remained before the discovery cutoff for plaintiffs.

Defendants' argument that the EEOC has been able to communicate with plaintiffs without any court control is unpersuasive in this case. In *Reid*, the court was troubled by this factor, but in that case, defendants had sought, and the court had issued, an order limiting communications with members of the potential class. In this case, defendants did not seek and this court did not issue any such order imposing monitoring requirements or additional limits on contacts with potential class members. Defendants have not pointed to specific communications from the EEOC

that would not have been permitted had the EEOC intervened earlier and that caused defendants prejudice.

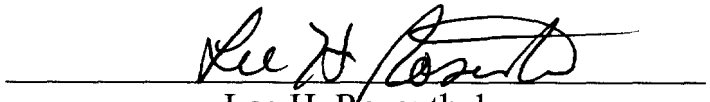
Finally, the argument that defendants would have followed a different strategy with respect to class certification had the EEOC intervened earlier is not a sufficient basis for denying intervention or, on this record, for awarding defendants attorney fees for the work related to the class certification issues. As the plaintiff in a pattern-or-practice suit under section 706(f)(1) of Title VII, 42 U.S.C. § 2000e-5(f)(1), the EEOC may seek classwide relief without regard to the standards of Rule 23, because the EEOC does not act on behalf of private parties and a suit under section 706(f)(1) is not a class action. *Gen. Tel. Co. v. Equal Opportunity Employment Comm'n*, 100 S. Ct. 1698, 1704 (1980). In this circuit, this rule applies to cases in which the EEOC has intervened, rather than filed a direct action. *Harris*, 768 F.2d at 682-83. However, the EEOC's intervention does not necessarily moot the issue of class certification for the private plaintiffs. The EEOC could dismiss its action or settle with defendants on terms that leave the private plaintiffs dissatisfied. As the Seventh Circuit has noted, "[t]he EEOC may or may not be able to obtain on behalf of the class the full extent of monetary relief, and it may not attempt to secure all legally available relief. Disappointed [plaintiffs] may find that their own suit remains useful. Whether to maintain parallel litigation is their choice: the Court

concluded in *General Telephone* that 'where the EEOC has prevailed in its action, the court may reasonably require any individual who claims under its judgment to relinquish his right to bring a separate private action.' The Court did not hold that an action by the EEOC supersedes pending private litigation or disables victims of discrimination from preferring relief under § 1981a(b) to whatever relief the Commission secures. The agency's claim is both logically and legally distinct from the private suit." *Jefferson v. Ingersoll Intern. Inc.,* 195 F.3d 894, 899 (7th Cir. 1999). Defendants assume that plaintiffs will believe that the EEOC's appearance makes the class allegations of plaintiffs' complaint irrelevant. That is not a foregone conclusion. It is premature to conclude that the defendants' prior work is without value or has caused prejudice.

III. Conclusion

The record does not show that granting the EEOC's motion for leave to intervene will unduly delay or prejudice the adjudication of the rights of the parties to this suit. The motion for leave to intervene is GRANTED.

SIGNED on December 4, 2002, at Houston, Texas.



Lee H. Rosenthal
United States District Judge