IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

LINDA JOHNSON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	**CIVIL ACTION NO.: CV-07-C-0064-NE**
STEELCASE INC.	)	
	)	
	)	
Defendant.	)	

DEFENDANT STEELCASE INC.'S
MOTION TO DISMISS AND IN OPPOSITION TO
CLASS CERTIFICATION

COMES now the Defendant ("Steelcase") in the above captioned matter, and pursuant to Fed. R. Civ. 23, and respectfully requests that this Court dismiss all class claims brought pursuant to the Civil Rights Act of 1866, as amended, 42 U.S.C. §§ 1981 and 1981(A) ("§1981") and sounding in disparate impact and deny certification of the Plaintiff's §1981 class disparate treatment claim as asserted in Plaintiff's First Amended Complaint.

In support of this Motion, Steelcase says as follows:

1. Plaintiff Linda Johnson ("Johnson") is an African-American woman employed at Steelcase's Athens, Alabama manufacturing facility ("Steelcase Athens"). Johnson filed her original Complaint in this matter alleging

employment discrimination based on events surrounding her transfer from second to first shift at Steelcase Athens and the resulting loss of her duties as second shift, quality specialist back-up.

2. Steelcase filed its Answer, including denials and affirmative defenses on February 5, 2007.

3. On February 19, 2008, Johnson filed her First Amended Complaint in which she raised individual claims pursuant to both §1981 and Title VII of the Civil Rights Act of 1964, which was amended by the Civil Rights Act of 1991, which is codified at 42 U.S.C. § 2000e et seq. ("Title VII"), and a class disparate treatment claim pursuant to §1981. (First Amended Complaint §§ V-VI.) A scheduling conference with the Court took place on February 28, 2008. Steelcase filed its Answer to the Amended Complaint on March 4, 2008. (The First Amended Complaint is attached hereto as Exhibit 1 and hereby incorporated by reference.)

4. On July 28, 2008, Johnson filed her Motion to File a Second Amended Complaint, seeking to add an individual retaliation claim, individual failure to promote claims, and a Title VII class claim. On July 31, 2008, this Court rightly determined that the motion was untimely and denied the request to amend, but allowed Johnson to pursue her individual failure to

promote claims in the instant action. (The Court's July 31, 2008 Order is attached hereto as Exhibit 2 and incorporated by reference.)

5. Pursuant to §1981, Johnson seeks to represent a class of African American employees at Steelcase Athens consisting of three sub-groups:

a. Those who sought promotions from production technician;

b. Those who may in the future seek promotions; and

c. Those who would have sought promotion in the absence of the challenged practices.

(See First Amended Complaint ¶ 2.)[1]

6. Johnson alternately describes the basis for the class claims as "disparate treatment" and "disparate impact." (First Amended Complaint ¶¶ 66-71.)

7. However, the law is clear that § 1981 requires proof of intentional discrimination which must be adduced by direct or inferential proof. See Ferrill v. Parker Group, 168 F.3d 468, 472 (11th Cir. 1999). Therefore, disparate impact theories are limited to Title VII claims. See Larkin v. Pullman-Standard, 854 F.2d 1549, 1561 (11th Cir. 1988).

8. A showing of disparate impact through a neutral practice is insufficient to prove a §1981 violation because proof of discriminatory

[1] Johnson makes it clear in the Proposed Pre-Trial Order submitted by the parties on September 5, 2008, that she does not seek certification of a nationwide class, but limits her § 1981 class claim to the Steelcase Athens facility.

intent is essential. Accordingly, only direct or inferential modes of proving intentional discrimination are available to the §1981 plaintiff. See Larkin, F.2d at 1561.

9. Because of the need to prove intent, the Eleventh Circuit held in Larkin that the plaintiff could not proceed with a disparate impact claim under § 1981. See id.

10. Likewise, Johnson's class disparate impact claims can not be pursued under the mantle of § 1981 and are due to be dismissed with prejudice.

I. BASIS OF THE CLASS CLAIMS

11. While a court should not determine the merits of a claim at the class certification stage, it is appropriate to consider the merits of the case to the degree necessary to determine whether the requirements of class action rule will be satisfied. Heffner v. Blue Cross & Blue Shield of Alabama, Inc. 443 F.3d 1330, 1337 (11th Cir. 2006). Here they clearly are not.

12. Steelcase Athens does not maintain a selection process for EEO category 5 and 6 jobs which treats African Americans differently than its other employees. At all times, Steelcase acted with the reasonable belief that it was operating its job selection system at Athens within the bounds of the applicable laws. Since 2005, excepting the instant case, Steelcase Athens

has had only five (5) complaints in which race was an issue, and none of those complaints concern job selection practices.

13. In that same time frame, Plaintiff's complaint is the sole EEOC charge/lawsuit related to job selection practices. In May and June of 2008, the Department of Labor's Office of Federal Contract Compliance conducted a compliance evaluation of employment practices at the Athens plant. The results did not identify Defendant's job selection process as non-compliant.

14. Steelcase Athens' excellent record is due in no small part to the emphasis which Steelcase places on diversity. Steelcase's workforce diversity programs include an annual diversity forum, and diversity training for all new leaders. Steelcase also maintains an open door policy, encouraging any employee, regardless of job classification, to pursue any concerns or complaints to any manager, up to and including the CEO.

15. As a result of these practices, Steelcase has twice received the "Eve 2000 Award" from the United States Department of Labor which recognizes "exemplary voluntary efforts" in affirmative action and equal employment opportunity.

16. In addition to its open door policy, Steelcase also maintains a "Global Integrity Hotline" by which its employees can make anonymous complaints by way of a toll free number. Since 2005, Steelcase Athens has been the subject of only two (2) such complaints. Neither of those complaints raised issues of race or promotion practices.

17. Steelcase does not stop at promoting internal diversity, but also focuses on the larger community. Steelcase was the first of 65 corporations to file an amicus curie brief in support of the University of Michigan's claim that business needs a diverse workforce and that colleges need to remain committed to diverse student bodies.

18. Steelcase also maintains a supplier diversity program promoting the growth of minority businesses with the goal of increasing its annual corporate expenditures with minority suppliers.

19. The Steelcase corporate emphasis on diversity is reflected in the efforts made by the employees at Steelcase Athens to increase diversity. Since 2004, the percentage of African-Americans in the feeder classification (EEO 7) has increased from 17.8 % to more than 28%. As a result, the human resources department at Steelcase Athens is able to show marked increases in both EEO Category 6CA (Zone Leaders and Temporary Supervisors) and 6CA (Production Specialists). The number of African-

American zone leaders and supervisors seen a 100% increase (from 28 to 56) while the total work force has seen only a 40% increase.

20. Steelcase Athens maintains several posting boards in various locations throughout the facility. Those boards are near time clocks, restrooms, break rooms, and the cafeteria. Employees of all races work in every area of the plant, and have time before shift, after shift, and during breaks and lunch to locate a posting board to check job postings. In addition, job opportunities are disseminated to supervisors and zone leaders who regularly announce job opportunities to employees in the area at the start of shifts. Steelcase Athens' practice is to post permanent job opportunities. More than 100 jobs were posted during the time period in question.

21. Steelcase Athens uses a variety of job selection procedures related to the job categories in question; none are which are designed to be discriminatory. Targeted interviewing by panels of two or more, experience, area of work, seniority, and the requirements of the formal job descriptions themselves all can and do play a role in candidate selection.

22. Because factors surrounding selection decisions are varied, each decision requires an examination of highly individualized facts. For example, Johnson claims that in 2005 she was denied a promotion to zone leader in the Fabric Center. However, a review of the facts shows that

Steelcase Athens can proffer a legitimate non-discriminatory reason for its candidate selection.

23. The posting for zone leader indicated that preference would be given to the qualified candidate within the "value stream" (Fabric Center) of the posted position. At the time, Johnson was assigned to the value stream identified as "Skins." The candidate selected was both qualified and assigned to the Fabric Center value stream.

24. The highly individualized inquiry needed to address each selection among hundreds of selections under a theory of disparate treatment thus destroys the typicality and commonalty requirements of Rule 23(a) and make this case inappropriate for class certification.

II. REQUIREMENTS OF FED. R. CIV. P. 23(A)

25. Fed. R. Civ. P. 23(a) provides that one or more members of a class may sue on behalf of a class only if

a.) the class is so numerous that joinder of all members is impracticable;

b.) there are questions of law or fact common to the class;

c.) the claims of the representative are typical of the claims or defenses of the class; and

d.) the representative parties will adequately and fairly represent the class.

26. The burden to make these showings rests with the named plaintiff. In the instant case, the named plaintiff, Linda Johnson, can not meet that burden.

A. Numerosity

27. Numerosity is not merely a matter of number, but also entails consideration of the ease of identifying members and determining their addresses, facility of making service and their geographic dispersion. See Garcia v. Gloor, 618 F.2d 264 (5th Cir. 1980).[2]

28. In the instant case, a determination must first be made as to the definition of the class. Johnson seeks to define the class as production technicians who have sought promotions, those who would have but for discriminatory practices, and those who may in the future seek such jobs.

29. Any definition of class must be limited to those who have actually applied for promotion. In order for non-applicants (those who "would have" or "may in the future" seek promotions) to sustain a claim of discrimination, they must show a justifiable belief that applying for a

[2] Decisions rendered by the Fifth Circuit prior to the 1981 split between the Circuits are binding authority in the Eleventh Circuit. Bonner v. City of Prichard, 661 F.2d 1206, 1210 (11th Cir. 1981).

promotion would be futile. See Taylor v. Hudson Pulp & Paper Corp., 788 F.2d 1455, 1462 (11th Cir. 1986).

30. The evidence is clear that application for promotion by African-Americans is far from futile at Steelcase Athens. African-Americans at Steelcase Athens not only regularly apply for promotions, but have a higher success rate than non-minorities of garnering those promotions when they do apply. For example, of those production technicians seeking promotion into the production specialist category (from EEO code 7AA to 6CA) between March 2006 and February 2008, that success rate was 42.8% for African-Americans while it was between 23.8% and 33% for others during that same time period. (See SCAS DOC 023344 attached hereto as Exhibit 3 and incorporated by reference.)

31. The proper definition of any class, then, is limited to those African-American employees of Steelcase Athens who have applied for and been denied promotion into one of the contested categories since January 1, 2005. For production specialists, zone leader, and quality positions, those persons number less than 30. (See Exhibit 3; Exhibit 4 consisting of Plaintiff's Exhibits 70 & 71 to Depo. Harriet McMeans and PS Job Postings 05-14 thru 06-09.) Because of the small number, and because identities and addresses of those persons may easily be

determined from Steelcase personnel records, and those persons are more likely than not to live in a compact geographic area, the putative class does not meet the numerosity requirements. See Garcia, 618 F.2d at 267(holding that a class of 31 where the claimants were all known and easily identified can not be certified).

B. Commonality and Typicality

32. "In many ways, the commonality and typicality requirements of Rule 23(a) overlap. Both requirements focus on whether a sufficient nexus exists between the legal claims of the named class representatives and those of the individual class members to warrant certification." Prado-Steiman v. Bush, 221 F.3d 1266, 1278 (11th Circuit 2000).

33. The prosecution of disparate treatment claims weighs against finding commonality and typicality as required by Rule 23. See Washington v. Brown & Williamson Tobacco Corp., 959 F.2d 1566, 1570 n. 10 (11th Cir. 1992); Nelson v. United States Steel, 709 F.2d 675, 679 n. 9 (11th Cir. 1983).

34. That is especially true in this cases where putative class members are work in different areas, on different shifts, and the named plaintiff herself challenges decisions which were not made by one authority, but are decentralized. In particular, Johnson's allegations

related to unfair temporary work assignments which are made according to business needs, on the fly, by individual supervisors from day to day, in different "value streams," and on different shifts require individual analysis and are not subject to generalized proof. See generally Cooper v. Southern Co., 390 F.3d 695, 714 (11th Cir. 2004); Lumpkin v. E.I. Du Pont de Nemours & Co., 161 F.R.D. 480, 482 (M.D. Ga. 1995)(persuasive and not binding).

III. REQUIREMENTS OF FED. R. CIV. P. 23(B)

35. In addition to the certification requirements of Rule 23(a), a class action is not maintainable where it does not meet one of the three prerequisites of Fed. R. Civ. P. 23(b).

36. In the instant case, Johnson seeks to maintain a § 1981 disparate treatment class action pursuant to either Fed. R. Civ. P. 23(b)(2), or 23(b)(3), or as a hybrid class action.

A. Fed. R. Civ. P. 23(b)(2)

37. Rule 23(b)(2) provides that a class action may be maintained where the relief sought is primarily equitable. Any monetary relief requested must be incidental to injunctive or declaratory relief.

38. Johnson cannot maintain a class action pursuant to Fed. R. Civ. P. 23(b)(2) because she seeks monetary compensation on behalf of the class in the form of punitive damages. (First Amended Complaint § VII.)

39. Where the class seeks legal relief, as it does here in the form of punitive damages, that relief ceases to be incidental to the equitable relief provide for under Rule 23(b)(2) and begins to breakdown commonality. See Prado-Steiman, 221 F.3d 1266 at 1278.

B. Fed. R. Civ. P. 23(b)(3)

40. In order to maintain a class action pursuant to Rule 23(b)(3), the named plaintiff must show that questions of law or fact related to the class as a whole predominate over any questions affecting only individual class members, and that a class action is superior to other methods of adjudication.

41. Under certain circumstances, a §1981 employment discrimination class may avoid the need to show intent to discriminate against each individual member of the class and survive the question of predominance by showing a pattern or practice of discrimination. See International Bro. of Teamsters v. United States, 431 U.S. 324 (1977). Such a showing may raise a presumption that individual class members

have been discriminated against. See Rutstein v. Avis Rent-A-Car Sys., Inc., 211 F.3d 1228, 1237 (11th Cir. 2000).

42. However, such a framework cannot be applied in the instant case where the putative class seeks punitive damages pursuant to its §1981 claim, regardless of the fact that Johnson attempts to frame punitive damages as "group" relief. The framework in Teamsters applies only where the relief sought is equitable, not legal. See Rutstein, 211 F.3d at1239.

> The Supreme Court's decision in Carey v. Piphus, 435 U.S. 247 (1978) (parallel citations omitted), makes it clear that in order to receive compensatory damages, individual plaintiffs must prove that "injury was actually caused." This is especially true since compensatory damages under section 1981 can include damages for emotional and psychological distress. (Citation omitted.) The Teamsters framework is therefore inappropriate in the instant case because the establishment of a policy or practice of discrimination **can not trigger the defendant's liability for damages to all of the plaintiffs in the putative class**. . . . The idea that individual injury could be settled on a class wide basis is preposterous.

Id.[3](emphasis added).

43. Rutstein makes it clear that establishment of a practice of discrimination resulting in disparate treatment can not trigger liability for damages to the putative class as a whole. Id. Because individual class

[3] In addition, the Eleventh Circuit acknowledged that the Teamster's frame work did not apply because Rutstein was not an employment case.

members in the instant case would "have to prove actual damage in order to receive compensation for their loss, the [pattern] and practice issue cannot possibly predominate over all of the other issues in the case that are necessarily capable of only individualized resolution" and Johnson can not maintain this action pursuant to Rule 23(b)(2). Rutstein, 211 F.3d at1241.

C. Hybrid Certification

44. Likewise, this case can not be maintained as a "hybrid" class action. A hybrid class action is one in which class members seek individual monetary relief, typically back pay, in addition to class wide injunctive or declaratory relief. See Cox v. ACIPCO, 784 F.2d 1546, 1554 (11th Cir. 1986).

45. The Eleventh Circuit has allowed hybrid class actions, bifurcating liability from the determination of monetary damages in the form of back pay, where punitive damages were not at stake. See Davis v. Coca-Cola Bottling Consol., 516 F.3d 955, 965 (11th Cir. 2008); Holmes v. Continental Can Co., 706 F.2d 1144 (11th Cir. 1983).

46. However, both Holmes and Davis included Title VII claims, where bifurcation of compensatory damages would be incidental to the injunctive relief sought.

47. Even within the framework of Title VII, the Eleventh Circuit has twice noted the difficulty of maintaining a hybrid or bifurcated procedure when a § 1981 class claim seeking punitive damages is present. See Cooper v. Southern Co., 390 F.3d 695, 721 n. 14 (11th Cir. 2004)("Significantly these cases do not hold that such a process is appropriate . . . when highly individualized awards of compensatory and punitive damages are at stake."); Davis, 516 F.3d at 965 n. 18 (suggesting that the maintenance of a bifurcated Rule 23(b)(2) class action for all the relief, including punitive damages, is problematical).

48. In the instant case where the only class claim is a §1981 disparate treatment claim a request for punitive damages must necessarily result in a highly individualized inquiries of fact, a hybrid class action can not be maintained. The request for monetary damages combined with the high likelihood that disparate treatment allegations will also need to be scrutinized on an individual basis indicates that certification of the proposed class is inappropriate.

WHEREFORE PREMISES CONSIDERED, Steelcase respectfully requests that this Court dismiss the Johnson's disparate impact claim with prejudice and decline to certify a class as to the remaining pattern and practice disparate treatment claim.

Respectfully submitted,

/s/ Roslyn Crews
KENNETH L. THOMAS (THO 043)
FREDERIC A. BOLLING (BOL 030)
ROSLYN CREWS (CRE 013)
AFRIKA C. PARCHMAN (CHI 023)