

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SOLOMON WILLIAMS; and all persons
similarly situated,

Plaintiffs,

v.

THE BOEING COMPANY, *et al.*,

Defendants.

No. C98-761P

NOTICE OF APPEAL

Notice is hereby given that Mara Ferrari, Rhonda Capps, Kevin Biglow, Doreen Ferguson and Beverly Trotter, plaintiffs in the above named case on behalf of themselves and all others similarly situated, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on February 6, 2006 [Dkt. #1042], from the *Order Granting Defendants' Motion for Partial Summary Judgment* [Dkt. # 793], entered on January 10, 2005, from the *Order Denying in Part and Granting in Part Plaintiffs' Motion for Reconsideration of Order Granting Partial Summary Judgment and Granting Plaintiffs' Motion to Strike* [Dkt. # 817], entered on February 15, 2005, and from the *Order on Boeing's Motion for*

1 *Partial Summary Judgment on Plaintiffs' Compensation Discrimination Claim and to Decertify*
2 *the Class as to That Claim* [Dkt. #915], entered on November 4, 2005. A copy of all Orders and
3 the Judgment are attached to this Notice.
4

5 DATED: March 7, 2006

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SOLOMON WILLIAMS, et al.,

Plaintiffs,

v.

THE BOEING COMPANY, et al.

Defendants.

No. C98-761P

ORDER GRANTING DEFENDANTS'
MOTION FOR PARTIAL SUMMARY
JUDGMENT

This matter comes before the Court on Defendants' Motion for Partial Summary Judgment. (Dkt. No. 772). Having reviewed the pleadings and supporting materials, the Court GRANTS Defendants' motion and DISMISSES Plaintiffs' 42 U.S.C. § 1981 claim of discrimination in compensation for salaried employees based on acts or conduct prior to June 11, 2000. Plaintiffs Second Amended Complaint is the first time they allege a claim for racial discrimination in compensation for salaried employees. As such, the four-year statute of limitations for § 1981 claims applies and any claims relating to conduct or actions prior to June 11, 2000 (four years before the Second Amended Complaint was filed) are time-barred. Contrary to Plaintiffs' assertion, Boeing is not judicially estopped from seeking summary judgment on this issue by virtue of the Consent Decree. The Consent Decree was directed at rectifying discrimination in promotions, retaliation, and a hostile work environment; it was not directed at discrimination in compensation of salaried employees.

1 Likewise, Plaintiffs' compensation claim does not relate back under Fed. R. Civ. P. 15(c) to Plaintiffs'
2 original or First Amended Complaint. Plaintiffs did not allege facts in those complaints that Boeing
3 discriminated in terms of compensation. The compensation claim does not arise out of the same
4 operative facts as the promotions, retaliation, and hostile work environment claims that Plaintiffs
5 alleged in their original and First Amended Complaints.

6 BACKGROUND

7 Plaintiffs filed a Complaint against Boeing on June 4, 1998, alleging racial discrimination in
8 promotions, training, retaliation, and a hostile work environment. (Dkt. No. 1) They filed a First
9 Amended Complaint on November 4, 1998, alleging these same forms of racial discrimination (the
10 amended complaint added additional named representatives and Defendants). (Dkt. No. 93).

11 In August, 1999, Plaintiffs served Boeing a discovery request with interrogatories and requests
12 for production of documents. Boeing responded in September, 1999, asserting general and specific
13 objections to many of the requests for production.

14 Plaintiffs did not file a motion to compel. Any emerging discovery disputes were cut short
15 because later in September, 1999, the parties entered a Consent Decree. Judge Coughenour approved
16 the Consent Decree. In 2003, the Ninth Circuit reversed on fairness grounds and remanded. Stanton
17 v. Boeing Co., 327 F.3d 938 (9th Cir. 2003).

18 On June 11, 2004, Plaintiffs filed a Second Amended Complaint, alleging racial discrimination
19 in compensation for salaried employees, overtime for hourly employees, as well as promotions,
20 retaliation, and a hostile work environment. (Dkt. No. 651).

21 Boeing moves for partial summary judgment, seeking dismissal of Plaintiffs' 42 U.S.C. § 1981
22 claim of discrimination in compensation for salaried employees based on acts or conduct prior to June
23 11, 2000. Boeing contends that this claim for acts before June 11, 2000 is barred by the four-year
24 statute of limitations and that this claim does not relate back to Plaintiffs' original or First Amended
25 Complaints.

ANALYSIS

Summary judgment is not warranted if a material issue of fact exists for trial. Warren v. City of Carlsbad, 58 F.3d 439, 441 (9th Cir. 1995), cert. denied, 516 U.S. 1171 (1996). The underlying facts are viewed in the light most favorable to the party opposing the motion. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). "Summary judgment will not lie if . . . the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The party moving for summary judgment has the burden to show initially the absence of a genuine issue concerning any material fact. Adickes v. S.H. Kress & Co., 398 U.S. 144, 159 (1970). However, once the moving party has met its initial burden, the burden shifts to the nonmoving party to establish the existence of an issue of fact regarding an element essential to that party's case, and on which that party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986). To discharge this burden, the nonmoving party cannot rely on its pleadings, but instead must have evidence showing that there is a genuine issue for trial. Id. at 324. Additionally, "at the summary judgment stage the judge's function is not . . . to weigh the evidence . . . but to determine whether there is a genuine issue for trial." Liberty Lobby, 477 U.S. at 249.

The statute of limitations for actions under 42 U.S.C. § 1981 is four years. 28 U.S.C. § 1658(a). Plaintiffs' Second Amended Complaint alleging racial discrimination in compensation of salaried employees was filed June 11, 2004. Therefore, Plaintiffs' salary compensation claim can extend to events only as far back as June 11, 2000. Plaintiffs argue that salary compensation claim can include actions or conduct going as far back as June, 1994 because: 1) Boeing is judicially estopped from arguing that Plaintiffs failed to allege the salary compensation claim earlier, and 2) Plaintiffs' salary compensation claim relates back under Rule 15(c) to their original complaint filed in 1998. Neither argument is persuasive.

I. Judicial Estoppel

1 Plaintiffs assert that Boeing should be judicially estopped from arguing that Plaintiffs did not
2 allege salary discrimination in 1998 on the grounds that Boeing acknowledged in the Consent Decree
3 that Plaintiffs had alleged salary discrimination and then sought and obtained (temporarily) court
4 approval of that Consent Decree. Boeing counters that it consistently took the position until Plaintiffs
5 filed their Second Amended Complaint that Plaintiffs' claims were limited to the promotion,
6 retaliation, and hostile work environment claim, and that the Consent Decree merely contained a
7 standard broad release of all possible and related claims of discrimination, but that nothing in the
8 injunctive or monetary relief portions of the Consent Decree addressed any salary discrimination
9 claims specifically.

10 A party is judicially estopped from asserting a certain position if that party previously and
11 successfully asserted the contrary position. This is especially true when doing so would prejudice the
12 opposing party. New Hampshire v. Maine, 532 U.S. 742, 749 (2001). The purpose of the doctrine is
13 to "protect the integrity of the judicial process." Id. (quotation and citation omitted). Application of
14 the doctrine is appropriate when: 1) the party's current position is "clearly inconsistent" with its earlier
15 position, 2) the party was successful in persuading a court to accept its earlier position, and 3) the
16 party would obtain an unfair advantage or impose an unfair detriment on the opposing party if not
17 estopped. Id. at 750-51. The court may consider additional facts specific to the factual context at
18 hand.

19 The "Litigation Background" section of the Consent Decree stated that:

20 The Plaintiffs in the Alleged Class Action contend that Boeing has engaged in a policy
21 or pattern or practice of unlawful Discrimination . . . in respect to promotions within
22 the hourly ranks, promotions from hourly positions into managerial and other salaried
23 positions, promotions among salaried positions, training, education, skills and career
24 development, performance appraisals, transfers, compensation, discharge, discipline and
25 other terms, benefits and conditions of employment.

(Berman Decl., Ex. 7 at 6). Plaintiffs point to this language and the fact that the district court
approved the Consent Decree and argue that Boeing successfully represented to the Court that

1 Plaintiffs had alleged the salary compensation claim, which is “clearly inconsistent” with the position
2 Boeing is asserting in the instant motion. Boeing counters that it never attempted to persuade the
3 Court that Plaintiffs had alleged a salary compensation claim and that the reference to it in the
4 Consent Decree is “merely . . . a laundry list of possible claims.” (Defs’ Reply at 6).

5 Despite the fact that the above-quoted Consent Decree language refers to a compensation
6 claim alleged by Plaintiffs, the Court is not persuaded that this language alone judicially estops
7 Boeing. The Consent Decree released Boeing from any and all claims, “known or unknown” by class
8 members “which arise out of or are related to . . . any conduct . . . allegedly constituting Race
9 Discrimination under Title VII” (Berman Decl., Ex. 7 at 12). As such, the Consent Decree
10 included a broad release of all possible racial discrimination claims, whether pled in the complaint or
11 not. It is standard practice for a party to attempt to protect itself from all possible related claims both
12 pled and not pled as a condition for settling. More telling in this instance is the fact that the injunctive
13 and equitable relief portion of the Consent Decree specifically referred to training and information
14 regarding promotions and prevention of racial harassment, but made no reference to compensation.
15 (Id. at 16-25). Likewise, the monetary relief portion set out a “point system” for allocating funds,
16 which specifically referred to promotions, but made no reference to compensation. (Id. at 25-30).
17 The questionnaire on the claim form, which class members were to fill out to receive a portion of the
18 monetary damages, asked about the class member’s experiences regarding promotions, racial
19 harassment, and retaliation, but did not ask about compensation. (Id, Ex. B to Consent Decree).

20 In light of the absence of any relief regarding compensation, Boeing’s current position that
21 Plaintiffs never asserted a salary compensation claim until they filed their Second Amended Complaint
22 is not “clearly inconsistent” with the position Boeing took in the Consent Decree. In sum, nothing in
23 the Consent Decree judicially estops Boeing from obtaining partial summary judgment on the salary
24 compensation claim.

25 II. Relation Back Under Rule 15(c)

1 Rule 15(c) provides that an amendment to a pleading relates back to the date of the original
2 pleading when “the claim . . . asserted in the amended pleading arose out of the conduct, transaction,
3 or occurrence set forth or attempted to be set forth in the original pleading.” Rule 15(c)(2). In
4 determining whether a new claim relates back under this provision, the court should consider
5 “whether the original and amended pleadings share a common core of operative facts so that the
6 adverse party has fair notice of the transaction, occurrence, or conduct called into question.” Martell
7 v. Trilogy Limited, 872 F.2d 322, 325 (9th Cir. 1989). One indication that the new claim that arises
8 out of the same operative facts is if the plaintiff will rely on the same evidence to prove the new claim
9 that will be used to prove the originally pled claim. Percy v. San Francisco Gen. Hosp., 841 F.2d
10 975, 978 (9th Cir. 1988). Because Rule 15(c) is “intimately connected with the policy of the statute
11 of limitations,” the rule requires that the defendant have notice of the particular set of facts on which
12 the new claim is based. Id. at 979 (citing the Rule 15 Advisory Committee Notes to the 1966
13 Amendment). In sum, the relevant factors in determining relation back are: 1) whether the new claim
14 is based on the same operative facts as the claims in the original complaint, 2) whether the new claim
15 will be proven by the same evidence as the original claims, and 3) whether the defendant had notice of
16 the facts that form the basis of the new claim.

17 A. Same Operative Facts and Same Evidence to Prove New Claim

18 The facts supporting Plaintiffs’ claim for discrimination in salary compensation will likely
19 focus on a statistical comparison of African-American employees’ salaries and their white
20 counterparts’ salaries, as well as the criteria used in setting salaries. In contrast, the facts supporting
21 Plaintiffs’ claim for discrimination in promotions will likely focus on a statistical comparison of the
22 number of promotions that African-Americans applied for and received (or were qualified for but did
23 not receive) and those of their white counterparts, as well as the selection criteria for awarding
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1 promotions. Not only are the core operative facts different, but the evidence that Plaintiffs will rely
2 on to prove the salary compensation claim will be different.¹

3 Additionally, Plaintiffs' Second Amended Complaint contains factual assertions to support the
4 salary compensation claim that were not asserted in the original or First Amended Complaints.

5 Neither the original Complaint nor the First Amended Complaint ever specifically alleged
6 discrimination in compensation for salaried employees or any facts showing discrimination in
7 compensation. The mere fact that the named representatives included salaried employees does not
8 establish that they alleged discrimination in compensation. The factual allegations relating to these
9 individual salaried employees specifically refer to discrimination in promotions and a hostile work
10 environment, but do not refer to discrimination in compensation. (Compl., ¶¶ 53, 59, 61; First Am.
11 Compl., ¶¶ 75, 80, 82, 87-88, 94, 96-98). The general factual allegations in both complaints
12 specifically refer to discrimination in promotions, training necessary to compete for promotions,
13 retaliation, and a hostile work environment. (Compl., ¶¶ 39-42, 47; First Am. Compl., ¶¶ 58-61, 66,
14 68). The only explicit reference to compensation or pay is in one paragraph: "Senior management at
15 Boeing/defendant employers is well aware that there is a company-wide pattern and practice of racial
16 discrimination in promotion, pay and other areas." (Compl., ¶ 43; First Am. Compl., ¶ 62). In
17 contrast, the Second Amended Complaint alleges many facts that specifically and explicitly relate to
18 the salary compensation claim. (Second Am. Compl., ¶¶ 58, 60, 63-64, 71-72, 76, 78-79, 81).

19 The comparison of the factual assertions in the original and First Amended Complaints with
20 the Second Amended Complaints highlights that fact that the compensation claim does not arise out
21 of the same operative facts as the promotions, training, retaliation, or hostile work environment
22 claims.

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24 ¹ This is true even if other evidence that Plaintiffs will rely on, such as Boeing's internal
25 studies regarding adverse impacts on minority employees regarding compensation, promotions, and
other criteria, is the same for both the salary compensation claim and the promotions claim.

1 B. Notice of the Facts That Are the Basis of the Salary Compensation Claim

2 As highlighted above, the numerous factual allegations in the original and First Amended
3 Complaints are squarely directed at discrimination in promotions, training, retaliation, and a hostile
4 work environment. This, plus the absence of any factual assertions relating to compensation,
5 especially in the paragraphs detailing the discrimination suffered by the salaried named representatives
6 belies any notion that one passing general reference to discrimination in pay is sufficient to have put
7 Boeing on notice that facts relating to compensation of salaried employees would be at issue. Any
8 alleged discrimination in compensation of salaried employees cannot be said to have been brought to
9 Boeing's attention by the allegations in the original or First Amended Complaints.

10 Plaintiffs point to more vague language in the original and First Amended Complaints to argue
11 that their allegations were broad enough to have encompassed the salary compensation discrimination
12 claim, and that Boeing was therefore on notice that salary compensation would be at issue. The
13 original and First Amended Complaints both repeatedly referred to Boeing having subjected African-
14 Americans to "different terms and conditions of employment" or "different treatment on the basis of
15 their race." (Compl., ¶¶ 27, 47, 66, 71; First Am. Compl., ¶¶ 46, 49, 68).² However, in describing
16 the "Nature of the Case" and the "Class Allegations" in the original and First Amended Complaints,
17 Plaintiffs specifically referred to racial discrimination in promotions, retaliation, and a hostile work
18 environment, but did not refer anywhere to pay or compensation. (Compl., ¶¶ 2-4, 27, 30; First Am.
19 Compl., ¶¶ 2-4, 46, 49). The only exception is a reference in the "Nature of the Case" section in the
20 First Amended Complaint, which states that "plaintiffs are qualified persons who have been denied the
21 opportunity for promotion and pay increases, who have been subjected to a hostile work
22 environment, and/or have been retaliated against" (First Am. Compl., ¶ 2). In this context, it is

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24 ² Similarly, the factual assertions for the individual representative salaried employees allege
25 that Boeing subjected them to "different conditions of employment." (Compl., ¶¶ 53, 59, 61; First
 Am. Compl. ¶¶ 75, 80, 82, 87-88, 94, 96-98)

1 more reasonable to interpret “pay increases” as increases that would have accompanied promotions,
2 not as equality of pay with white employees.

3 Given the specificity of the promotions, retaliation, and hostile work environment claims
4 throughout the complaints, this single ambiguous reference together with repeated references to
5 discrimination in “terms and conditions of employment” cannot be said to have put Boeing on notice
6 that Plaintiffs were also alleging discrimination in salary compensation. See Barcume v. City of Flint,
7 819 F. Supp. 631, 637-38 (E.D. Mich. 1993) (court held that new claims of sexual harassment and
8 disparate treatment did not relate back to claims of discrimination in hiring, promotions, and other
9 “terms and conditions of employment” because the new claims were based on different facts and there
10 was no notice to defendant that the “terms and conditions of employment” claim was for any violation
11 other than those explicitly alleged in the original complaint). Plaintiffs have not pointed to any case
12 where such language was sufficient to permit a new claim of discrimination to relate back. To hold
13 otherwise would be to imply that alleging discrimination in the “terms and conditions” of employment
14 is sufficient to put the employer on notice that every aspect of employment relating to the plaintiffs is
15 potentially at issue; it would relieve the plaintiffs of having to specify at the outset what type of
16 discrimination they allegedly suffered. Further, it would permit relation back of all possible
17 employment claims and would thereby undermine the policy interests that statute of limitations further
18 and upon which the relation back doctrine rests.

19 Plaintiffs assert that their initial discovery requests (before the parties entered the Consent
20 Decree) provided Boeing with notice that they intended to challenge Boeing’s practices with respect
21 to compensation for salaried employees. Plaintiffs requested production of documents relating to the
22 number of salaried employees, describing how salaries were determined, and any studies or reports
23 analyzing compensation of African-Americans (in addition to studies or reports analyzing promotions
24 or terminations of African-Americans). (Berman Decl., Ex. 4, Request Nos. 6, 19, 25). Boeing
25 objected to the requests on the grounds that they were overly broad and that, because the requests

1 were for confidential information, Boeing would not produce the requested documents until a
2 protective order could be entered. In response to the request to produce studies or reports, Boeing
3 stated that there were no non-privileged documents that were responsive to this request.³ (See Ex. 4
4 at 8:12-19, 10:9-16, Request Nos. 3, 6, 18, 19, 25). Regardless of whether Boeing's objections were
5 specific enough, requesting information about compensation of salaried employees cannot be said to
6 have created a salary compensation claim when it was not alleged in the complaint.

7 Lastly, Plaintiffs argue that Boeing acknowledged in the Consent Decree that Plaintiffs had
8 alleged discrimination in compensation for salaried employees. This argument is similar to that in the
9 judicial estoppel section. As discussed above, while the "Litigation Background" section of the
10 Consent Decree did include compensation as one of Plaintiffs' claims in addition to the promotions
11 and training claims, the relief awarded in the Consent Decree focused on promotions, retaliation, and
12 hostile work place. Further, this same sentence refers to claims for discrimination in discharge and
13 discipline, neither of which is purportedly alleged in the original or First Amended Complaints. Given
14 this, together with Boeing's attempt to protect itself through this Consent Decree by insulating itself
15 from any future race discrimination claims, even ones not plead by Plaintiffs, this reference to
16 compensation did not put Boeing on notice that Plaintiffs had alleged in their original or First
17 Amended Complaint discrimination in compensation.

18 CONCLUSION

19 The Court GRANTS Defendants' Motion for Partial Summary Judgment and DISMISSES
20 Plaintiffs' 42 U.S.C. § 1981 claim of discrimination in compensation for salaried employees based on
21 acts or conduct prior to June 11, 2000. The four-year statute of limitations for § 1981 claims bars
22 any claims relating to conduct or actions prior to June 11, 2000 because Plaintiffs' Second Amended

23 ³ Plaintiffs further argue that Boeing's PAT study was responsive and that Boeing failed to
24 include it on Boeing's privilege log. Whether this is true or not, it is not relevant to whether Boeing
25 had notice through Plaintiffs' discovery requests that Plaintiffs were alleging discrimination in
compensation of salaried employees.

1 Complaint, filed on June 11, 2004, is the first time Plaintiffs allege a claim for racial discrimination in
2 compensation for salaried employees. Plaintiffs' compensation claim does not relate back under Rule
3 15(c) to Plaintiffs' original or First Amended Complaint. Likewise, the principle of judicial estoppel
4 does not require a different result.

5 The clerk is directed to provide copies of this order to all counsel of record.

6 Dated: January 10, 2005

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8 /s/ Marsha J. Pechman
9 Marsha J. Pechman
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SOLOMON WILLIAMS, et al.,

Plaintiffs,

v.

THE BOEING COMPANY, et al.,

Defendants.

No. C98-761P

ORDER DENYING IN PART AND
GRANTING IN PART PLAINTIFFS'
MOTION FOR RECONSIDERATION
OF ORDER GRANTING PARTIAL
SUMMARY JUDGMENT AND
GRANTING PLAINTIFFS' MOTION
TO STRIKE

This matter comes before the Court on Plaintiffs' Motion for Reconsideration of Order Granting Summary Judgment. (Dkt. No. 794). Having reviewed the pleadings and supporting materials, including Defendants' response to Plaintiffs' motion for reconsideration, the Court DENIES in part and GRANTS in part Plaintiffs' motion for reconsideration.

In its Order Granting Defendants' Motion for Partial Summary Judgment ("Order"), the Court held that Plaintiffs' salary compensation claim is barred for conduct or actions prior to June 11, 2000.

1 (Dkt. No. 793). Plaintiffs request that the Court amend its Order such to bar the salary compensation
2 claim for conduct or actions prior to February 26, 1996. Plaintiffs argue that: 1) the statute of
3 limitations cannot have run from January 22, 1999 until April 29, 2003 while the settlement agreement
4 was on appeal, and 2) the limitations period stopped running on May 28, 2004 rather than June 11,
5 2004.

6 The Court denies Plaintiffs' motion as to their first argument and grants their motion as to their
7 second argument. Equitable tolling does not apply to Plaintiffs' salary discrimination claim. Class
8 actions toll the statute of limitations only for the claims pled, not for different or additional claims
9 added later such as the salary discrimination claim. Further, Plaintiffs were not barred from bringing a
10 salary discrimination claim against Boeing while the Consent Decree was on appeal. Plaintiffs' second
11 argument, however, is well taken. Therefore, the Court AMENDS its Order to bar the salary
12 compensation claim for conduct or actions prior to May 28, 2000.

13 Plaintiffs filed a Motion to Strike Boeing's Surreply. (Dkt. No. 809). The Court GRANTS
14 Plaintiffs' motion to strike Boeing's surreply because Boeing did not comply with the Local Rules in
15 filing the surreply.

16 ANALYSIS

17 Motions for reconsideration are warranted if the moving party shows either that the Court
18 committed manifest error in the prior ruling or there are new facts or legal authority that could not
19 have been brought to the court's attention earlier with reasonable diligence. Plaintiffs assert that it
20 would be clear error not to amend the Court's Order as it proposes.

21 I. Equitable Tolling While the Consent Decree Was On Appeal

22 Plaintiffs contend that the statute of limitations cannot have run from the date Judge
23 Coughenour approved the Consent Decree to the date of the Ninth Circuit's mandate reversing
24 (January 22, 1999 until April 29, 2003) because Plaintiffs were barred from suing Boeing for salary
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1 discrimination during that time. According to Plaintiffs, this time period must be tolled under
2 equitable tolling principles.

3 Equitable tolling is applied sparingly. Irwin v. Department of Veterans Affairs, 498 U.S. 89,
4 96 (1990). Equitable tolling is appropriate “where the claimant has actively pursued his judicial
5 remedies by filing a defective pleading during the statutory period, or where the complainant has been
6 induced or tricked by his adversary's misconduct into allowing the filing deadline to pass. We have
7 generally been much less forgiving in receiving late filings where the claimant failed to exercise due
8 diligence in preserving his legal rights.” Id.

9 Class actions raise unique issues regarding equitable tolling. The commencement of a class
10 action suspends the statute of limitations for all asserted class members. Crown, Cork & Seal Co.,
11 Inc. v. Parker, 462 U.S. 345, 350 (1983); American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 554
12 (1974). This is true whether the class is eventually certified or denied certification. Totsi v. City of
13 Los Angeles, 754 F.2d 1485, 1488 (9th Cir. 1985). Tolling the statute of limitations in these
14 circumstances furthers the notice function of limitations periods because “a class complaint notifies the
15 defendants . . . of the substantive claims being brought against them” Crown, Cork & Seal, 462
16 U.S. at 353 (citing American Pipe, 414 U.S. at 555). However, allowing equitable tolling of claims
17 that are different from those asserted in the class complaint would undermine this important notice
18 function. As Justice Powell cautioned in his concurrence in Crown, Cork & Seal, the tolling rule of
19 American Pipe “should not be read . . . as leaving a plaintiff free to raise different or peripheral claims
20 following denial of class status.” 462 U.S. at 354 (Powell, J., concurring). To do so would abuse
21 American Pipe’s “generous tolling rule.” Id.

22 Here, the statute of limitations for the salary discrimination claim would only be tolled if
23 Plaintiffs’ original Complaint or First Amended Complaint had included that claim. In the Court’s
24 Order, the Court concluded that Plaintiffs had not asserted a salary discrimination claim in the original
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1 on all members of the Seattle Class and will bar any person who is a member of the Settlement Class
2 from seeking relief from Boeing . . . for any and all claims of alleged employment discrimination
3 because of race” (Order Preliminarily Approving Proposed Consent Decree, Ex. 4 at 7 (Dkt. No.
4 111) (emphasis added)). Based on this language, the Consent Decree was not in effect while on
5 appeal. Therefore, Plaintiffs would not have violated the Consent Decree by asserting a salary
6 discrimination claim while the Consent Decree was on appeal and Boeing could not have successfully
7 asserted an affirmative defense that the Claim had been released pursuant to the Consent Decree. In
8 short, unlike the IRS in Young, Plaintiffs were not legally prevented from filing a lawsuit alleging a
9 salary discrimination claim. Likewise, because the Consent Decree did not bar Plaintiffs from bringing
10 their salary discrimination claim while it was on appeal, Boeing is not estopped from asserting the
11 limitations defense now.

12 Lastly, Plaintiffs argue in their reply that the settlement class was certified for all claims and
13 therefore, under Totsi, the statute of limitations was tolled while the Consent Decree was on appeal.
14 This argument is unpersuasive because the Court concluded in its Order that the Consent Decree did
15 not include a claim for salary discrimination. The fact that it included a release of any and all possible
16 racial discrimination claims by African-Americans, which necessarily included a salary discrimination
17 claim, is not the same as alleging a salary discrimination claim.

18 II. The Correct Date When the Limitations Period Stopped

19 Plaintiffs’ argument that the limitations period stopped running on May 28, 2004 when they
20 filed their Motion for Leave to File a Second Amended Complaint, rather than June 11, 2004 when
21 they filed the Second Amended Complaint is well taken. Boeing did not respond to this argument. By
22 filing their Motion for Leave to File a Second Amended Complaint on May 28, 2004, Boeing was on
23 notice as of that date that Plaintiffs intended to allege a salary compensation claim.

24 CONCLUSION

1 The Court DENIES in part and GRANTS in part Plaintiffs' motion for reconsideration. The
2 Court AMENDS its Order to bar the salary compensation claim for conduct or actions prior to May
3 28, 2000.

4 The clerk is directed to provide copies of this order to all counsel of record.

5 Dated: February 15, 2005

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7 /s/ Marsha J. Pechman
8 Marsha J. Pechman
9 United States District Judge
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SOLOMON WILLIAMS, et al.

Plaintiffs,

v.

THE BOEING COMPANY, et al.

Defendants.

NO. C98-761P

ORDER ON BOEING'S MOTION
FOR PARTIAL SUMMARY
JUDGMENT ON PLAINTIFFS'
COMPENSATION DISCRIMINATION
CLAIM AND TO DECERTIFY THE
CLASS AS TO THAT CLAIM

This matter comes before the Court on Defendant Boeing Company's motion for partial summary judgment on Plaintiffs' compensation discrimination claim and to decertify the class as to that claim. (Dkt. No. 890). In this motion, Boeing argues: (1) the Court should enter summary judgment on the class compensation discrimination claim; and (2) in the alternative, the Court should enter summary judgment on the named Plaintiffs' individual compensation discrimination claims and decertify the class as to the compensation claim because the individual named Plaintiffs lack standing to maintain individual claims of compensation discrimination and cannot satisfy the typicality or adequacy of representation requirements of Fed. R. Civ. P. 23(a). Having reviewed the papers and pleadings submitted by the parties and having heard oral argument on this matter, the Court hereby GRANTS Boeing's motion in part.

1 The Court GRANTS Boeing's request for summary judgment on individual compensation
2 discrimination claims of named Plaintiffs Kevin Biglow, Rhonda Capps, Doreen Ferguson, Mara
3 Ferrari, and Beverly Trotter. The Court further GRANTS Boeing's motion to decertify the
4 compensation discrimination class that had been previously certified in January 2005.

5 Because the Court has concluded that the compensation discrimination class should be
6 decertified, it would not be appropriate or necessary for the Court to issue a ruling on the merits of the
7 class-wide allegations of compensation discrimination by Boeing. Therefore, Boeing's request for
8 summary judgment on the class compensation discrimination claim is STRICKEN as moot.

9 This order does not affect the class claim for discrimination in promotions. Trial will go
10 forward on the class promotion discrimination claim as scheduled on December 5, 2005.

11 Background

12 This case was originally filed in 1998 has a long procedural history, which the Court previously
13 set forth in its January 21, 2005 order on class certification. (Dkt. No. 800). The Court will not
14 repeat the procedural background except to highlight facts and rulings that are pertinent to the
15 pending motion.

16 Plaintiffs' original and first amended complaints in this action were filed in 1998 and alleged
17 racial discrimination against African-Americans in promotions, as well as claims for retaliation and
18 hostile work environment. Before any motions to certify the class were filed, Plaintiffs and Boeing
19 reached a proposed Consent Decree. In September 1999, Judge Coughenour certified the class for
20 settlement purposes and approved the Consent Decree. In certifying the class, Judge Coughenour held
21 that Fed. R. Civ. P. 23(a)'s four requirements of numerosity, commonality, typicality, and adequacy of
22 representation were satisfied.

23 Objectors appealed the approval of the settlement. In Staton v. Boeing, 327 F.3d 938 (9th Cir.
24 2003), the Ninth Circuit upheld the district court's determination that the class certification

1 requirements of Rule 23(a) had been satisfied, but reversed the district court's approval of the
2 settlement on fairness grounds. The case was then remanded and ultimately transferred to this Court.

3 In June 2004, the Court granted Plaintiffs leave to file a Second Amended Complaint (SAC)
4 that included claims for racial discrimination in compensation of salaried employees. (Dkt. No. 651).
5 In their brief in support of this motion, Plaintiffs maintained that the SAC did not add any new causes
6 of action. (Dkt. No. 639). Although Boeing did not oppose Plaintiffs' motion for leave to amend,
7 Boeing disputed that the SAC did not add any new causes of action. In particular, Boeing asserted
8 that the SAC "alleges for the first time claims involving issues of alleged 'compensation
9 discrimination.'" (Dkt. No. 645).

10 On January 7, 2005, the Court heard oral argument from the parties on class certification.
11 In their class certification brief, Plaintiffs argued that no additional analysis regarding Rule 23(a)'s
12 requirements was necessary in light of the Ninth Circuit's ruling in Staton, which found that the class
13 certified for settlement purposes in 1999 satisfied the requirements of Rule 23(a). (Dkt. No. 674 at
14 22). Boeing did not dispute that assertion. However, at oral argument the Court asked the parties:

15 [O]ne of the things that concerns me is that the plaintiffs want to jump over the 23(a)
16 requirements but it also appears to me that they have expanded the class, and so I want to
17 know if you are going to expand the class do we need to go back and go through the 23(a)
18 criteria for . . . at least the portion of the class that is expanding?

19 (Dkt. No. 898 at 3). Plaintiffs indicated that it was not necessary to address Rule 23(a) requirement.
20 Id. at 6-7. Although Boeing stated that "[w]e think that the 23(a) issues are on the table," Boeing did
21 not offer any specific argument with respect to Plaintiffs' ability to satisfy Rule 23(a) requirements for
22 either the promotion or compensation discrimination claims. Id. at 83-84.

23 On January 21, 2005, the Court issued a class certification order that certified the following
24 class under Fed. R. Civ. P. 23(b)(2):
25
26

1 African-American salaried employees employed by Heritage Boeing¹ from June 6, 1994 to the
2 present, excluding executive and SPEEA Techs, seeking injunctive relief for racial
discrimination in compensation and promotions.

3 (Dkt. No. 800 at 1). Because the certified class was limited to “Heritage” Boeing salaried employees,
4 Boeing maintains and Plaintiffs do not dispute that only five of the Plaintiffs named in the Second
5 Amended Complaint are included within the certified class: Kevin Biglow, Rhonda Capps, Doreen
6 Ferguson, Mara Ferrari, and Beverly Trotter (hereinafter, the “named Plaintiffs”).

7 In the class certification order, the Court addressed Rule 23(a) criteria in light of the addition
8 of Plaintiffs’ compensation discrimination claim as follows:

9 To the extent that the currently proposed class is the same as or smaller than the class that was
10 before the Ninth Circuit on appeal, the teaching of Staton is that Rule 23(a)’s four
11 requirements for class certification are met. Plaintiffs, however, seek to enlarge the class . . .
by adding the salary compensation claim (which could bring in additional salaried employee
class members to whom the other claims did not apply)

12 While the proposed class is potentially larger than it was on appeal, the Court finds that there is
13 no reason why the addition of the salary compensation claim . . . would change the Ninth
14 Circuit’s 23(a) analysis. Therefore, this Court adopts the Ninth Circuit’s Rule 23(a) analysis
and concludes that Rule 23(a)’s requirements have been met, notwithstanding the additional
claim

15 Id. at 7 (citations and footnotes omitted).

16 By separate orders in early 2005, the Court granted a motion by Boeing to dismiss Plaintiffs’
17 compensation discrimination claims to the extent such claims are based on acts or conduct prior to
18 May 28, 2000. (Dkt. Nos. 793 & 817). In granting the motion, the Court found that Plaintiffs’
19 Second Amended Complaint represented the first time that a claim for racial discrimination in
20 compensation for salaried employees had been alleged. (Dkt. No. 793). Because it was undisputed
21 that Plaintiffs’ claims for compensation discrimination could be brought only under 42 U.S.C. § 1981,
22 the Court found that the four year statute of limitations for § 1981 claims applied and was tolled by
23 the submission of the Second Amendment Complaint on May 28, 2004.

24
25 ¹ “Heritage Boeing” refers to the Boeing Company before it acquired additional companies in
the late 1990s and 2000.

1 In the pending motion, Boeing argues: (1) that summary judgment should be entered on the
2 class compensation discrimination claim; and (2) in the alternative, summary judgment should be
3 entered on the named Plaintiffs' individual compensation discrimination claims and the class should be
4 decertified as to the compensation discrimination claim because the named Plaintiffs lack standing to
5 maintain such claims as individuals and cannot satisfy the typicality or adequacy of representation
6 prongs of Rule 23(a).

7 Analysis

8 1. The Named Plaintiffs' Individual Compensation Discrimination Claims

9 Boeing argues that there is no evidence (or even allegation) that any of the named Plaintiffs
10 themselves suffered racial discrimination in compensation after May 28, 2000. Therefore, Boeing
11 argues that the named Plaintiffs lack standing to maintain individual compensation discrimination
12 claims. Boeing also asserts that if the named Plaintiffs lack standing, they cannot serve as
13 representatives for a compensation discrimination class. The Court regards these arguments as
14 threshold issues that must be resolved before reaching Boeing's argument that summary judgment
15 should be entered as to the class compensation discrimination claim.

16 A. Standing Requirements

17 Standing is a jurisdictional issue that may be raised at any time. United States v. Viltrakis, 108
18 F.3d 1159, 1160 (9th Cir.1997). To have standing to maintain a claim, a plaintiff must at a minimum
19 satisfy the "actual injury" component of the standing doctrine. Casey v. Lewis, 4 F.3d 1516, 1519
20 (9th Cir. 1993). This element "requires an injury to be 'real and immediate,' not merely 'conjectural'
21 or 'hypothetical.'" Id. (citations omitted).

22 In the context of a class action, "[a]t least one *named* plaintiff must satisfy the actual injury
23 component of standing in order to seek relief on behalf of himself or the class." Id. (emphasis in
24 original). In cases where multiple claims are asserted, "it is not enough that a named plaintiff can
25 establish a case or controversy between himself and the defendant by virtue of having standing as to

1 just one of many claims he wishes to assert.” Griffin v. Dugger, 823 F.2d 1476, 1483 (11th Cir.
2 1987). Instead, “each claim must be analyzed separately, and a claim cannot be asserted on behalf of a
3 class unless at least one named plaintiff has suffered the injury that gives rise to that claim.” Id.

4 B. Standing of the Named Plaintiffs to Maintain Individual Compensation Discrimination
5 Claims

6 Boeing argues that the five named Plaintiffs “admit that they themselves have not suffered
7 compensation discrimination” during the relevant liability period (post-May 28, 2000). (Opening Brief
8 at 2). As such, Boeing argues that the named Plaintiffs lack standing to maintain such claims as
9 individuals. Boeing has introduced the following evidence with respect to the named Plaintiffs:

10 * **Doreen Ferguson** testified at her deposition that from 2001-2005, she cannot say that her
11 supervisors discriminated against her in setting her salary because she is African American.
12 (Shapiro Cohen Decl., Ex. 1, at 562:25-563:14). When asked whether she felt that her
13 compensation in 2000 was in any way discriminatory based on her race, she testified “[f]or me,
14 because I have nothing to compare it to, I’m thinking this is good. I also work with someone,
a white male, who received 1,500, and he thought it was an insult, and he quit the company
because he thought it was an insult, his merit raise. So, I really have nothing to base anything
on. I think when I get any kind of an increase I’m doing well, but that’s because I really don’t
have anything to compare it with, so I think I’m fine. But if I was to listen to other people,
they’re not happy with what they’re receiving.” Id. at 567:12-24.

15 * **Mara Ferrari**, when asked whether she had any complaints against Boeing in terms of
16 discrimination since 1999, testified “no, I have not had any complaints.” (Shapiro Cohen
Decl., Ex. 2 at 58:12-16).

17 * **Rhonda Capps** has not worked at Boeing since 1999. (Shapiro Cohen Decl. Ex. 3). Plaintiffs
18 do not dispute that Ms. Capps cannot maintain a compensation discrimination claim after May
28, 2000. (Opp. Brief at 17, n.7).

19 * **Kevin Biglow** had summary judgment entered against him by a federal district court in Kansas
20 on November 29, 2001 on discrimination claims against Boeing, including compensation
21 claims. (Shapiro Cohen Decl., Ex. 6). When asked whether he believed that he had been
22 discriminated against in terms of compensation since November 2001, Mr. Biglow testified “I
23 believe that I have been discriminated against and my compensation has been affected because
24 of management’s manipulation of denying me promotions which affects my salary.” (Shapiro
25 Cohen Decl., Ex. 4 at 249:5-12). When Mr. Biglow was later asked “[t]o the extent you have
26 been discriminated against in compensation, it is tied to these promotions that you did not get;
is that right?” He responded “I believe that my salary has been affected because of the
opportunities that – the promotional opportunities were denied.” Id. at 252:10-18.

1 * **Beverly Trotter** answered “no” when asked “whether you contend that Boeing discriminated
2 against you in terms of compensation after May of 2000?” (Shapiro Cohen Decl., Ex. 6 at
182:17-23).

3 Boeing presents strong evidence that none of the named Plaintiffs have demonstrated standing
4 to maintain an individual claim for compensation discrimination after May 28, 2000. Ms. Capps
5 clearly lacks standing because she was not working for Boeing during that period, while Ms. Ferrari
6 and Ms. Trotter indicated that they have no complaints about compensation discrimination during the
7 relevant period. Similarly, Ms. Ferguson’s testified that she could not say that she had been
8 discriminated against in terms of compensation since 2000. Boeing asserts that Ms. Ferguson, who
9 works as a Library Specialist C and earns \$55,022, is currently the highest paid person in the Library
10 Specialist position at any level nationwide. Finally, Mr. Biglow’s deposition testimony indicates that
11 his salary complaints arise from allegations that Boeing has discriminated against him in promotions.
12 Since a promotion discrimination claim is distinct from a claim that he was paid less than similarly-
13 situated white employees for doing the same work, this testimony supports Boeing’s contention that
14 Mr. Biglow lacks standing to maintain a compensation discrimination claim.

15 Plaintiffs argue that regardless of the merits of the named Plaintiffs’ individual claims for
16 compensation discrimination, the named Plaintiffs “had standing to allege in the Second Amended
17 Complaint that they suffered pay discrimination in the post-May 2000 time period.” (Opp. Brief at
18 20). Plaintiffs point to the Ninth Circuit’s ruling in Harmsen v. Smith, 693 F.2d 932 (9th Cir. 1982),
19 which noted:

20 [S]tanding must be determined from the pleadings rather than from the liability actually
21 imposed. . . . Standing ordinarily does not depend on the merits of a plaintiff’s contentions;
22 the requirement is based upon a separate determination that the plaintiffs have made
“allegations of demonstrable, particularized injury.” As we have stated, “failure of proof as to
the named plaintiffs would not bar maintenance of the class action or entry of judgment
awarding relief to the members of the class.”

23 Id. at 942-43 (citations omitted).
24
25

1 In its reply brief, Boeing argues that Harmsen is not applicable because “[h]ere, the named
2 plaintiffs make no allegations that they suffered compensation discrimination in the amended
3 complaint.” (Reply Brief at 10). Because this argument was raised in Boeing’s reply brief, the Court
4 asked Plaintiffs to address this assertion at oral argument. Plaintiffs pointed to sections of the SAC
5 that allege discrimination by Boeing in compensation. Plaintiffs argue that under the notice pleading
6 requirements of Fed. R. Civ. P. 8(a), these allegations were sufficient to state individual claims for
7 compensation discrimination for the named Plaintiffs.

8 The SAC includes a number of allegations of compensation discrimination by Boeing against
9 African-Americans. However, in terms of specific allegations of discrimination regarding the named
10 Plaintiffs, the SAC alleges:

- 11 94. Doreen Ferguson has worked for Boeing for more than 20 years. When she applied for
12 a lead position in the maintenance stores, Boeing failed to promote her by simply
13 closing the job title and making a lateral transfer which prevented her from getting the
14 upgrade. The job was eventually offered to a less-qualified Caucasian worker with less
seniority. Ms. Ferguson has also been subject to a racially hostile work environment by
her supervisors. Boeing has failed to promote Ms. Ferguson, and has subjected her to
different conditions of employment than her Caucasian coworkers, based on race.
- 15 101. Mara Ferrari has worked for Boeing since 1986. She was a manager (PC7) but was
16 reclassified to a lesser position after her maternity leave. Ms. Ferrari applied for several
17 promotions. She was slated for a promotion, but was later forced into a lesser position.
18 The position was given to a Caucasian female, who was the daughter of the Deputy
19 Vice President of BCAG. This person has less seniority and no experience in the
20 organization. As to several other positions for which Ferrari applied, they were filled
21 by people who did not have to interview or the job was not posted and/or no interview
22 opportunity was given to Ms. Ferrari. Ms. Ferrari has been denied all promotions
based upon race. Boeing has failed to promote Ms. Ferrari, and has subjected her to
different conditions of employment and retaliation, based on race.
- 23 110. Beverly Trotter began working for Boeing in 1974. She was a computer operator
24 before being laid off. She applied for several promotions, but Caucasians with less
25 experience and seniority were given the promotions. She trained several Caucasian
managers’ sons who were given promotions over her. She has been subjected to
different conditions of employment based on race.

1 114. Kevin Biglow has worked for Boeing since 1989. He is a System Configuration
2 Specialist. He has applied for promotions and Caucasians with less experience and
3 seniority were given the positions. He has been subjected to different conditions of
4 employment based on race.

5 (Dkt. No. 651). In sum, these allegations for each named Plaintiff focus on promotion discrimination
6 (and for Ms. Ferguson and Ms. Ferrari, allegations of hostile work environment and retaliation,
7 respectively), with no mention of compensation discrimination. These are not “demonstrable,
8 particularized” allegations of injury from compensation discrimination.

9 In any case, Boeing is challenging the standing of the named Plaintiffs at the summary
10 judgment stage of the litigation. In Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992), the
11 Supreme Court indicated that the elements of standing “are not mere pleading requirements but rather
12 an indispensable part of the plaintiff’s case,” and therefore each element of standing “must be
13 supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*,
14 with the manner and degree of evidence required at the successive stages of the litigation.” As the
15 Court in Lujan noted:

16 At the pleading stage, general factual allegations of injury resulting from the defendant’s
17 conduct may suffice, for on a motion to dismiss we “presum[e] that general allegations
18 embrace those specific facts that are necessary to support the claim.” In response to a
19 summary judgment motion, however, the plaintiff can no longer rest on such “mere
20 allegations,” but must “set forth” by affidavit or other evidence “specific facts” which for
21 purposes of the summary judgment motion will be taken to be true.

22 Id. at 561 (internal citations omitted).

23 In response to Boeing’s motion, the named Plaintiffs have not offered affidavits or other
24 evidence that, even if taken as true, would show that they themselves have suffered injury after May
25 28, 2000 due to compensation discrimination. Plaintiffs argue that Ms. Ferguson and Mr. Biglow
26 cannot be expected know whether they have been discriminated against in terms of salary because they
27 do not know what their co-workers are paid. Plaintiffs also argue that the named Plaintiffs’ testimony
28 in response to deposition questioning should not be regarded as a concession that they have no viable
29 claim as a matter of law. However, these arguments overlook Plaintiffs’ obligation on a motion for

1 summary judgment to produce affidavits or other evidence that they have themselves suffered injury as
2 a result of compensation discrimination.

3 Therefore, the Court grants Boeing's motion for partial summary judgment with respect to the
4 individual compensation discrimination claims of the named Plaintiffs. The named Plaintiffs have not
5 demonstrated standing to maintain such individual claims during the relevant liability period.

6 C. Ability of the Named Plaintiffs to Serve as Class Representatives for a Compensation
7 Discrimination Class

8 Boeing argues that because the named Plaintiffs lack standing to maintain individual
9 compensation discrimination claims during the relevant liability period, the named Plaintiffs necessarily
10 cannot satisfy Rule 23(a)(3)'s requirement that a class representative's claims must be typical of the
11 claims of the class. Boeing also maintains that the named Plaintiffs' lack of standing to maintain
12 individual compensation discrimination claims renders them inadequate class representatives for such
13 claims under Rule 23(a)(4). As Boeing notes, "[i]t should be obvious that there cannot be adequate
14 typicality between a class and a named representative unless the named representative has individual
15 standing to raise the legal claims for the class." Prado-Steiman v. Bush, 221 F.3d 1266, 1279 (11th
16 Cir. 2000).

17 However, Plaintiffs argue that even if the named Plaintiffs do not have claims for damages due
18 to compensation discrimination, they nonetheless have standing to seek injunctive relief directed at
19 compensation discrimination at Boeing. At oral argument, Plaintiffs also cited Rossini v. Ogilvy &
20 Mather, Inc., 798 F.2d 590 (2d Cir. 1986), and General Telephone Co. of the Southwest v. Falcon,
21 457 U.S. 147 (1982), to support their argument that the named Plaintiffs may serve as representatives
22 for a compensation discrimination class even if they do not have individual compensation
23 discrimination claims.

1 i. Standing To Seek Injunctive Relief

2 Plaintiffs argue that the “three named plaintiffs who currently work for Heritage Boeing – Ms.
3 Ferguson, Ms. Ferrari and Mr. Biglow – have standing to seek an injunction, regardless of whether
4 they have damage claims during the limitations period.” (Opp. Brief at 17). To support their
5 argument, Plaintiffs cite Robinson v. Metro-North Commuter R.R., 267 F.3d 147, 171 (2d Cir. 2001).

6 Robinson is not analogous to the situation here. In Robinson, the plaintiffs alleged race
7 discrimination on behalf of a class and sought both injunctive and monetary relief. Id. at 155. While
8 pursuing the litigation, the named plaintiffs entered into a settlement stipulation in which they agreed
9 only to “participate as named plaintiffs and/or class representatives . . . in support of the class claims
10 and/or [to] receive any class-wide injunctive relief,” “but not [to seek] individual relief of any kind,”
11 including monetary relief. Id. at 171. The defendant argued that as a result of this settlement
12 stipulation, Plaintiffs could not serve as adequate representatives for the class, since they had agreed
13 not to pursue claims for damages. The court rejected that argument.

14 Unlike here, there was no question in Robinson that the named plaintiffs had standing in the
15 first instance to pursue their claims; instead, the question was whether the named plaintiffs could serve
16 as adequate class representatives after they had settled their individual monetary claims with
17 defendant. Robinson cannot be read to provide that named plaintiffs in a class action may seek
18 injunctive relief to remedy injuries that they have not experienced themselves.

19 ii. Rossini and Falcon

20 Although not cited in their briefing, at oral argument Plaintiffs pointed to Rossini v. Ogilvy &
21 Mather, Inc., 798 F.2d 590 (2d Cir. 1986), a case in which the Second Circuit held that a named
22 plaintiff who alleged discrimination in transfers could serve as a representative for a class asserting
23 claims for discrimination in promotion and training. The Rossini court found that the named plaintiff
24 offered evidence that, if believed, indicated that the employer “discriminated ‘in the same general
25

1 fashion' against [the named plaintiff] in her quest for transfer and against other class members seeking
2 training or promotion." Id. at 598.

3 Rossini turned on the Supreme Court's ruling in General Telephone Co. of the Southwest v.
4 Falcon, 457 U.S. 147 (1982) ("Falcon"), which addressed the ability of a named plaintiff who allegedly
5 experienced one form of discrimination to maintain an "across-the-board" challenge to other forms of
6 alleged discrimination by an employer. In Falcon, the named plaintiff alleged that he had experienced
7 discrimination in promotions. He also sought to maintain class claims for discrimination in hiring. The
8 Falcon Court noted that Rule 23(a) requirements "effectively 'limit the class claims to those fairly
9 encompassed by the named plaintiff's claims.'" Id. at 156 (internal citation omitted). The Court found
10 that the named plaintiff's claim for discrimination in promotions did not fairly encompass the class
11 claims for discrimination in hiring, noting that "[t]he mere fact that an aggrieved private plaintiff is a
12 member of an identifiable class or persons of the same race or national origin is insufficient to establish
13 his standing to litigate on their behalf all possible claims of discrimination against a common
14 employer." Id. at 159 n.15. The Falcon Court also emphasized that a "rigorous analysis" must be
15 conducted to ensure satisfaction of Rule 23(a)'s requirements. Id. at 161. The Court found that the
16 trial court had erred by failing "to evaluate carefully the legitimacy of the named plaintiff's plea that he
17 is a proper class representative under Rule 23(a)" and stated that "actual, not presumed, conformance
18 with Rule 23(a) remains . . . indispensable." Id. at 160.

19 Falcon clearly limits the ability of named plaintiffs in discrimination cases to bring "across-the-
20 board" class actions against employers. However, as the court in Rossini noted, "[t]he Falcon Court
21 did not hold that a plaintiff asserting one particular type of employment discrimination claim can never
22 represent a class of employees asserting other types." Rossini, 798 F.2d at 597. As such, the named
23 Plaintiffs are not necessarily barred from representing a compensation discrimination class, even if they
24 do not have such claims as individuals. Nonetheless, Falcon teaches that under Rule 23(a), class
25 claims must be limited to those "fairly encompassed" by the named Plaintiffs claims. Falcon, 457 U.S.

1 at 156. In addition, Falcon emphasizes the need for a “rigorous analysis” to ensure that Rule 23(a)
2 requirements are met; compliance with Rule 23(a) may not be presumed. Id. at 160-61.

3 In this case, no “rigorous analysis” of the named Plaintiffs ability to satisfy Rule 23(a)
4 requirements for the class compensation discrimination claim asserted in the Second Amended
5 Complaint has ever occurred. Instead, Plaintiffs argued at the class certification stage of the
6 proceedings that Rule 23(a) analysis was not necessary. Because Boeing did not dispute that
7 assertion, compliance with Rule 23(a) was effectively presumed, based on the Ninth Circuit’s decision
8 in Staton upholding Judge Coughenour’s determination in 1999 that Rule 23(a) requirements had been
9 satisfied for the settlement class. This presumption of compliance with Rule 23(a) was not
10 appropriate. Although the Staton court upheld the 1999 certification of a broad class for settlement
11 purposes, the certification of that class in 1999 did not concern the compensation discrimination claim
12 first alleged in 2004 in the Second Amended Complaint – a claim that is limited to acts or conduct
13 after May 28, 2000. Under these circumstances, the compensation discrimination class should not
14 have been certified without a rigorous analysis showing that the named Plaintiffs satisfied the
15 requirements of Rule 23(a) for the newly-asserted compensation discrimination claim.

16 It should also be noted that the Court has determined that the compensation claim “does not
17 arise out of the same operative facts as the promotions [claim].” (Dkt. No. 793 at 7). The Court
18 made this determination in ruling on Boeing’s motion for partial summary judgment to restrict the
19 compensation claim, on statute of limitations grounds, to those based on acts or conduct after May 28,
20 2000. In analyzing whether the compensation claims alleged for the first time in the Second Amended
21 Complaint related back to the promotion claims asserted in the earlier complaints, the Court found that
22 “[n]ot only are the core operative facts different, but the evidence that Plaintiffs will rely on to prove
23 the salary compensation claim will be different” from the promotion claim. Id. In light of this ruling,
24 it would be incongruous to find that compensation discrimination claims first alleged in the Second
25

1 Amended Complaint are “fairly encompassed” by the promotion discrimination claims previously
2 asserted by Plaintiffs. See Falcon, 457 U.S. at 156.

3 Therefore the Court finds that the named Plaintiffs have not demonstrated their ability to serve
4 as representatives for the compensation discrimination class under the principles of Falcon or Rossini.

5
6 2. Decertification Request

7 “Even after a certification order is entered, the judge remains free to modify it in the light of
8 subsequent developments in the litigation.” Falcon, 457 U.S. at 160. Boeing argues that the
9 compensation class should be decertified because the named Plaintiffs lack standing to maintain
10 individual compensation discrimination claims and cannot satisfy the typicality and adequacy of
11 representation prongs of Rule 23(a) for a compensation class. The Court agrees that decertification of
12 the compensation discrimination class is warranted.

13 Plaintiffs indicated at oral argument that they would request leave to amend the operative
14 complaint in order to address standing or Rule 23(a) concerns. Plaintiffs also indicated in a letter sent
15 to the Court following oral argument that they are “prepared to immediately file . . . a motion for
16 intervention by an absent class member with a post-May 2000 compensation claim if the Court deems
17 it necessary and proper” and maintained that “the compensation class should not be decertified without
18 [Plaintiffs’] first being permitted to file a motion for intervention.” (Dkt. No. 909). In response,
19 Boeing submitted a letter to the Court indicating its opposition to granting either leave to amend or to
20 intervene. (Dkt. No. 910).

21 The Court sees no basis to grant leave to amend the Second Amended Complaint. In the most
22 recent scheduling order issued in this matter, the Court set a deadline of July 18, 2005 for filing
23 amended pleadings. (Dkt. No. 646). Furthermore, since this litigation has been pending for seven
24 years, leave to amend would cause undue delay in the proceedings.

1 The Court also finds that decertification should not be delayed to permit intervention by absent
2 class members. The Ninth Circuit's decision in Lierboe v. State Farm Mutual Automobile Insurance
3 Co., 350 F.3d 1018 (9th Cir. 2003), is instructive on this point. In Lierboe, the district court initially
4 certified a class, but it was subsequently determined that the named plaintiff did not have a valid claim
5 from the outset of the litigation. The Ninth Circuit noted that if the plaintiff "initially had a viable . . .
6 claim that later became moot, then our law in an appropriate case would permit substituting proper
7 class representatives to allow the suit to proceed." Id. at 1023 n.6. However, the court found:

8 [B]ecause this is not a mootness case, in which substitution or intervention might have been
9 possible, we remand this case to the district court with instructions to dismiss. We are
10 persuaded by the Seventh Circuit's approach in an analogous case, *Foster v. Center Township*
11 *of LaPorte County*, 798 F.2d 237, 244-45 (7th Cir. 1986), which held that where the sole
named plaintiff "never had standing" to challenge a township's poor-relief eligibility guidelines,
and where "she never was a member of the class she was named to represent," the case must
be remanded with instructions to dismiss.

12 Id. at 1023.

13 Similarly, this is not a case where the named Plaintiffs initially had viable compensation
14 discrimination claims during the relevant liability period that subsequently became moot. Instead, the
15 named Plaintiffs have not demonstrated standing in the first instance to maintain such claims.
16 Under these circumstances, decertification of the compensation discrimination class is warranted and
17 intervention would not be appropriate. See, e.g., Lidie v. State of California, 478 F.2d 552, 555 (9th
18 Cir. 1973) ("where the original plaintiffs were never qualified to represent the class, a motion to
19 intervene represents a back-door attempt to begin the action anew, and need not be granted"); see also
20 McClune v. Shamah, 593 F.2d 482, 486 (3d Cir. 1979) ("A motion for intervention under Rule 24 is
21 not an appropriate device to cure a situation in which plaintiffs may have stated causes of action that
22 they have no standing to litigate.").

1 3. Motion for Partial Summary Judgment on the Class Claim for Compensation Discrimination

2 Because the Court is ordering decertification of the compensation class, it would not be
3 necessary or appropriate for the Court to reach Boeing's request for summary judgment on the class
4 compensation discrimination claim.

5
6 4. Notice to Absent Class Members

7 The Court finds that notice of the decertification of the compensation discrimination class
8 should be sent to absent class members. See Culver v. City of Milwaukee, 277 F.3d 908, 914-15 (7th
9 Cir. 2002). Class counsel shall prepare notice for the Court's approval within seven days of the date
10 of this order.

11
12 **Conclusion**

13 The named Plaintiffs lack standing to maintain individual compensation discrimination claims
14 against Boeing after May 28, 2000, which is the relevant liability period for such claims in this
15 litigation. Therefore, the Court GRANTS Boeing's request for summary judgment on the individual
16 compensation discrimination claims of named Plaintiffs Kevin Biglow, Rhonda Capps, Doreen
17 Ferguson, Mara Ferrari, and Beverly Trotter.

18 The Court also GRANTS Boeing's motion to decertify the compensation discrimination class
19 that was certified in January 2005. Because the named Plaintiffs lack standing to maintain individual
20 compensation discrimination claims, they do not satisfy the typicality requirements of Rule 23(a) and
21 cannot serve as class representatives for this claim. See, e.g., Prado-Steiman v. Bush, 221 F.3d 1266,
22 1279 (11th Cir. 2000) ("It should be obvious that there cannot be adequate typicality between a class
23 and a named representative unless the named representative has individual standing to raise the legal
24 claims for the class.").

1 Because the Court has concluded that the compensation discrimination class should be
2 decertified, it would not be appropriate or necessary for the Court to issue a ruling on the merits of the
3 class-wide allegations of compensation discrimination by Boeing. Therefore, Boeing's request for
4 summary judgment on the class compensation discrimination claim is STRICKEN as moot.

5 The Court's order does not preclude absent class members from pursuing compensation
6 discrimination claims against Boeing, either as individuals or as a putative class action. In addition,
7 this order does not affect the class claim alleging discrimination in promotions by Boeing. Trial on the
8 class promotion discrimination claim will go forward as scheduled on December 5, 2005.

9 The clerk is directed to send copies of this order to all counsel of record.

10 Dated: November 4, 2005

11
12 s/Marsha J. Pechman
13 Marsha J. Pechman
14 United States District Judge
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