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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

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MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE, FLORIDA

SANDI DORMAN; PAMELA BRIGGS; YOLANDA THOMAS; MARY McGAHEE; BARBARA MITCHELL; AMBROSE DANCY; TERRY WYATT; ANGELA KIRCUS; ANGELA HUBBARD; TAMRAH L. HARRIS; MARVIN BROWN; HENRY DUBOSE; RANOLDO BOSTON and the Classes they Seek to Represent,

Plaintiffs

V.

CASE NO. 99-722-CIV-J-21B

WINN-DIXIE STORES, INC.; WINN-DIXIE CHARLOTTE, INC.; WINN-DIXIE RALEIGH, INC.; WINN-DIXIE TEXAS, INC.; WINN-DIXIE MIDWEST, INC.; WINN-DIXIE ATLANTA, INC; WINN-DIXIE MONTGOMERY, INC.; and WINN-DIXIE LOUISIANA, INC.,

Defendants

_____/

ORDER

Filed herein is Yolanda Flynn's *Amended Motion to Intervene* (Dkt. 40) and plaintiffs' and defendants' responses (Dkts. 43 and 42, respectively) in opposition thereto. The Court heard arguments of counsel on November 12, 1999.

Flynn seeks to intervene as a matter of right pursuant to Fed.R.Civ.P. 24(a). Employees, like Flynn, with less than two years' employment do not qualify for monetary relief in the form of individual claim-based monetary awards under the proposed settlement, although such

employees may be entitled to earn monetary relief in the form of Promotional Achievement Awards and Reimbursable Moving Expenses under the settlement plan.

As indicated by the parties in their opposition to Flynn's intervention, it was determined, after considerable negotiation and mediation, that the monetary settlement classes should be limited to employees having a cumulative total of at least two years' employment. Such determination was based upon statistical data and analyses indicating that few employees received promotions within their first two years of employment. Although excluded from the settlement class for purposes of monetary relief, employees with less than two years of employment are eligible to benefit from extensive injunctive relief in addition to the above-referred monetary bonuses upon promotion by the defendants.

In order to qualify for intervention as of right under Rule 24(a), the movant must meet all of the following four requirements:

> (1) his application to intervene is timely; (2) he has an interest relating to the property or transaction which is the subject of the action; (3) he is so situated that disposition of the action, as a practical matter, may impede or impair his ability to protect that interest; and (4) his interest is represented inadequately by the existing parties to the suit.

Purcell v. BankAtlantic Financial Corp., 85 F.3d 1508, 1512 (11th Cir. 1996). The first two elements are not in dispute. The third and fourth elements are.

With respect to the third element, Flynn has not shown that disposition of this action, without allowing her to intervene as a party, may, as a practical matter, impede or impair her ability to protect her interest. In short, Flynn may simply opt out of the settlement and bring her

own suit. *See* Grilli v. Metropolitan Life Ins. Co., Inc., 78 F.3d 1533 (11th Cir. 1996), amended by 92 F.3d 1074 (11th Cir. 1996), *cert. denied sub. nom*, Coulter v. Metropolitan Life Ins. Co., Inc., 519 U.S. 1040 (1996); EEOC v. Eastern Airlines, Inc., 736 F.2d 635, 639 (11th Cir. 1984). Flynn's alternative to opting out of the proposed settlement is to pursue her objections to the settlement plan in accordance with the procedures established by the Court's Amended Order of Preliminary Approval (Dkt. 21).

In her memorandum supporting her amended motion to intervene, Flynn relies in significant part upon an argument that the provisions of the proposed settlement, including the notice of proposed class action settlement and the language of the approved opt-out statement are such that she cannot opt out. The Court notes that that ground was not advanced as such by Flynn at the hearing. In any event, the Court concludes that, assuming *arguendo* that Flynn's opt-out rights may have been unclear prior to the inclusion of the additional paragraph in the Notice of Proposed Class Action Settlement and Consent Decree authorized by the Court's Order (Dkt. 39) of October 1, 1999, the notice, as amended, sufficiently clarified the opt-out rights of employees, such as Flynn, with less than two years of service as of August 4, 1999.

Flynn complains that opting out would force her to file an individual lawsuit which she says would, among other things, be impractical. However, the interest to be protected by intervention must be a substantive one, and that "[a] procedural interest, either in maintaining the action on behalf of a class as class representative, or in having one's rights vindicated as a

member of a class in a class action rather than through an individual lawsuit is not within the Rule's contemplation." United States v. City of Jackson, 519 F.2d 1147, 1153 (5th Cir. 1975).

Flynn must also show that "[her] interest is inadequately represented by the existing parties to the suit." Chiles v. Thornburgh, 865 F.2d 1197, 1213 (11th Cir. 1989). Although this burden is said to be "minimal," id. at 1214, the Court finds that Flynn has not made the requisite showing. At least one of the named plaintiffs is within the class of employees who have less than two years' employment with Winn Dixie. Courts presume that a proposed intervenor's interest is adequately represented when an existing party pursues the same ultimate objective as the party seeking intervention." United States v. State of Georgia, 19 F.3d 1388, 1394 (11th Cir. 1994) (affirming denial of intervention where interests were identical and there was no evidence of gross negligence or bad faith of the existing party to the suit); *see also* Chiles v. Thornburgh, 856 F.2d at 1215; Athens Lumber Company, Inc. v. Federal Election Commission, 690 F.2d 1364, 1366 (11th Cir. 1982).

In order to rebut the above presumption, the movant must "demonstrate adversity of interest, collusion, or nonfeasance." International Tank Terminals, Ltd. v. M/V Acadia Forest, 579 F.2d 964, 967 (5th Cir. 1978); *see also* Clark v. Putnam County, 168 F.3d 458 (holding that "adequate representation exists 'if no collusion is shown between the representative and an opposing party, if the representative does not have or represent an interest adverse to the proposed intervenor, and if the representative does not fail in fulfillment of his duty,'" but reversing denial of

intervention because there was a "divergence of interest" between the movant and the existing party) (quoting FSLIC v. Falls Chase Special Taxing District, 983 F.2d 211, 215 (11th Cir. 1993).

"A mere disagreement over litigation strategy or individual aspects of a remediation plan does not, in and of itself, establish inadequacy of representation." Bradley v. Milliken, 828 F.2d 1186, 1192 (6th Cir. 1987); *see also* In Re Domestic Air Transportation Antitrust Litigation, 148 F.R.D. 297, 336 (N.D.Ga. 1993) ("The goals of Rule 23 would be defeated if the court permitted every individual or entity that objected to discrete aspects of the settlement to intervene.").

The fact that the named plaintiffs are class members charged with representing the interests of the class, and that Flynn purports to be a class member, indicate that Flynn's objectives and those of the named plaintiffs are the same. *See* McFadden v. Lucas, 713 F.2d 143, 147 (5th Cir. 1983) (affirming district court's decision to deny intervention to class member seeking to assert claim identical to claim asserted by class).

Therefore, Flynn must demonstrate "adversity of interest, collusion, or nonfeasance" in order to show that she is not being adequately represented. International Tank Terminals, 579 F.2d at 967. The Court concludes that Flynn has failed to make the requisite showing.

The Court has considered the other arguments advanced by Flynn to support the above-referred third and fourth requirements for intervention as of right under Rule 24(a) and finds them to be without merit.[1]

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[1] Flynn's subject motion for intervention (Dkt. 40) was expressly and clearly based upon intervention as of right under Rule 24(a). The reference by Flynn's attorney at the hearing to permissive intervention under Rule 24(b) was clearly beyond the scope of her motion and briefing.

Upon consideration of the foregoing, it is **ORDERED** that the *Amended Motion to Intervene of Yolanda Flynn as a Party Plaintiff as a Matter of Right* (Dkt. 40) is **DENIED**.

DONE AND ORDERED, at Jacksonville, Florida, this 18th day of November, 1999.

RALPH W. NIMMONS, JR.
UNITED STATES DISTRICT JUDGE

Copies to: Counsel of record