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United States District Court, S.D. New York.

William EWING, Michael Hamlett, John Johnson, Marcus Garvin, individually and on behalf of all other similarly situated, Plaintiffs,
v.
COCA COLA BOTTLING COMPANY OF NEW YORK, INC., Coca Cola Enterprises Inc., Defendant's.

No. 00 CIV. 7020(CM). | June 25, 2001.

Attorneys and Law Firms

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Opinion

DECISION ON DEFENDANTS' MOTIONS TO DISMISS

MCMAHON, J.

***1** Plaintiffs seek to bring a class action on behalf of all African–American and Hispanic production employees who have worked at the defendants facility in Elmsford, New York from 1993 through the present. In their amended complaint, plaintiffs assert causes of action under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 1981 ("Section 1981"), and Section 296 of the New York Executive Law ("Section 296"). Plaintiffs allege that defendants, Coca Cola Bottling Company of New York ("Coke New York") and Coca Cola Enterprises, Inc. ("CCE") engaged in a practice of discriminating against African–American and Hispanic production workers in terms of their work assignments, training and discipline. They further allege that supervisors employed by defendants subjected African American and Hispanic employees to a hostile work environment on the basis of their race and/or national origin. Plaintiffs seek back pay, compensatory damages, punitive damages, attorneys fees and costs and such other relief, including injunctive relief, as may be just and equitable.

Defendants Coke New York and CCE both filed motions to dismiss on November 16, 2000. At a scheduling conference held on November 20, 2000, the Court directed the parties to conduct discovery on the issue of parent liability during an initial thirty-day discovery period. On December 26, 2000, after the completion of the initial discovery period, plaintiffs filed an amended complaint. Shortly thereafter the Court established a new briefing schedule to allow Coke New York and CCE to renew their motions to dismiss. Both Coke New York and CCE have filed renewed motions to dismiss pursuant to that briefing schedule.

Coke New York maintains that plaintiffs' amended complaint should be dismissed pursuant to Fed.R.Civ.P. 12(b)(6) because (1) plaintiffs failed to plead a prima facie case with respect to their individual disparate treatment or hostile work environment claims; and (2) Plaintiffs, as a matter of law could not meet the requirements for class certification under Fed.R.Civ.P. 23(b). Coke New York further maintains that plaintiffs' complaint should be dismissed pursuant to Fed.R.Civ.P. 12(b)(1) because (1) plaintiffs have failed to establish a basis for standing; and (2) plaintiffs had failed to exhaust their administrative remedies with respect to any claims of discrimination prior to 1996. Coca Cola Enterprises, Inc. joins in Coke New York's motion to dismiss, and also moves to dismiss on the separate ground that plaintiffs have failed to allege a basis for holding CCE liable for the alleged discrimination of Coke New York.

Subject Matter Jurisdiction

Defendants' motion to dismiss pursuant to 12(b)(1) is denied.

Defendants' first contention under this section is that the court lacks subject matter jurisdiction because plaintiffs have failed to allege a basis for standing. This argument is frivolous. Plaintiffs sue to vindicate their rights under federal statute. That confers subject matter jurisdiction. This aspect of the motion comes perilously close to the Rule 11 line.

***2** Defendants' second contention is that the court lacks subject matter jurisdiction over plaintiffs' claims arising prior to 1996 because plaintiffs did not include those allegations in the EEOC charges. Each of the plaintiffs filed charges of discrimination with the EEOC, and received a right to sue letter. This action was thereafter commenced within ninety days of receipt of that letter.

Even if plaintiffs failed to include acts of discrimination occurring prior to 1996 in their EEOC charges, it would

be premature to dismiss the complaint insofar as it alleges discriminatory acts occurring prior to that time. The amended complaint pleads a continuing violation of § 1981 and Title VII, which allows plaintiffs to seek relief for "continuing discriminatory conduct" occurring prior to 1996. *See Robinson v. Cornwald,* 23 F.3d 694, 704 (2d Cir.1994) (A continuing violation may be found where there is proof of specific ongoing discriminatory policies or practices, or where specific and related instances of discrimination are permitted by the employer to continue unremedied for so long as to amount to a discriminatory policy or practice.). Although the continuing violation doctrine is disfavored, it is appropriately applied in some cases. However, on a motion to dismiss, the Court is not able to determine whether this is such a case.

Motion to Dismiss for Failure to Allege a Prima Facie Case

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides for dismissal of a complaint that fails to state a claim upon which relief can be granted. The standard of review on a motion to dismiss is heavily weighted in favor of the plaintiff. The Court is required to read a complaint generously, drawing all reasonable inferences from the complaint's allegations. *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, 515 (1972). "In ruling on a motion to dismiss for failure to state a claim upon which relief may be granted, the court is required to accept the material facts alleged in the complaint as true." *Frasier v. General Electric Co .,* 930 F.2d 1004, 1007 (2d Cir.1991). The Court must deny the motion "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Stewart v. Jackson & Nash,* 976 F.2d 86, 87 (2d Cir.1992) (quoting *Conley v. Gibson,* 355 U.S. 41, 45–46 (1957)). This standard "applies with particular force where," as here, "the plaintiff allege civil rights violations." *See Leather v. Eyck,* 180 F.3d 420, 423 (2d Cir.1999).

The Individual Plaintiffs' Claims

Plaintiffs William Ewing, Michael Hamlet, John Johnson, and Marcus Garvin set forth the following allegations in the amended complaint in support of their disparate treatment and hostile work environment claims:

William Ewing is a Puerto Rican male who has been a production worker at the Coca Cola Plant at Elmsford, New York since March of 1996. He alleges that the defendants refused to train him to operate the machines at the plant, thereby preventing him from performing the more desirable semiskilled jobs. He has been relegated to the menial, disgusting and potentially dangerous jobs such as the denester[1] and pallet repair. On or about March 15, 1999, a supervisor told Ewing that he would only be assigned to the denester. By contrast, defendants have expended time and resources to train similarly situated white employees, and even white employees with less seniority than defendant, so that they may work at the machine jobs. Ewing has on a number of occasions requested that he be trained and assigned to the machine jobs, but the defendants have refused to do so. Ewing contends that defendants' refusal to train him was based on his race and national origin.

***3** Ewing further contends that he has been disciplined for conduct which defendants condone when white employees engage in such conduct. On March 17, 1999, Susan Garrett and Director of Operations, Mike Hall, falsely accused Ewing of forging a supervisor's signature. Supervisors monitor the lunch breaks of Ewing more closely than breaks taken by white employees, and Ewing claims to have heard supervisors refer to minority employees as "spics" and "niggers" on many occasions throughout his employ with defendant.

In sum, Ewing contends that defendants have discriminated against him in work assignments, training, discipline, and fostered a hostile work environment on the basis of his national origin. (Amended Complaint ¶ 4, 57–69).

Michael Hamlett is a Black male who has been a production worker at the Coca Cola Plant at Elmsford, New York since January of 1996. Hamlett was repeatedly assigned to work on the denester. Defendants refused to train or assign Hamlett to the semi-skilled machine jobs such as bottle-line filler, despite his repeated request to be so trained and assigned. Instead, defendants repeatedly trained and assigned less senior white employees to the more desirable semi-skilled positions.

Hamlett has heard supervisors refer to minority employees as "spics" and "niggers" on many occasions throughout his employ with defendant. In or about July 1998, supervisor Mike Hammerhand called Hamlett a "stupid motherfucker"; supervisor Phil Masiolo referred to Hamlet as a "killer"; supervisor Roddy asked Hamlet when he was going to "rob a bank"; and supervisor Aaron Brown asked Hamlett, "what's up hoodlum?" Plaintiff contends that the context and manner in which those statements were uttered made plain that the speaker was motivated by racial animus and an intent to harass him.

Hamlet also claims that he has been disciplined for conduct which defendants condone when white employees engage in such conduct. Hamlett has been disciplined for taking long breaks, but when white

employees such as Dave Volpe, Ken Fadden, and Larry Hollenbach take long breaks they are not disciplined.

Hamlett contends that defendants have discriminated against him in work assignments, training, discipline, and fostered a hostile work environment on the basis of his race. (Amended Complaint ¶ 5, 70–83).

John Johnson is a Black male who has been a production worker at the Coca Cola Plant at Elmsford, New York since July of 1996. Johnson was repeatedly assigned to work on the denester, to repair pallets, or to perform other menial tasks. Despite his requests, defendants refused to train or assign Johnson to the more desirable semi-skilled machine jobs such as bottle-line filler. Instead, defendants repeatedly trained and assigned less senior white employees to semi-skilled positions. Because of his race, Johnson alleges he has never been assigned to perform the desirable task of label operator, a job consistently assigned to less senior white employees. Mike Kinunen, a white employee with less seniority than Johnson, routinely operates the Hi–Lo machine. Vinnie Dunn, a white employee, operates the labeler. Roger Hess, also white, routinely operates the packer. Johnson's requests to have his assignments changed were repeatedly denied by his white supervisors. By contrast, Johnson has witnessed white employees request a change of assignment——on the allegedly rare occasions when they were assigned to perform the menial tasks——and those requests were honored by white supervisors such as Phil Masiolo. Johnson contends that the defendants' decision not to train him on the machines and their refusal to assign him to the machine jobs was based on his race.

***4** Johnson has also heard supervisors refer to minority employees as "spics" and "niggers" on many occasions throughout his employ with defendant. When in September of 1998, Johnson reported a problem with the denester he was working on to supervisor Mike Hanahan, who is white, Hanahan called Johnson a "big baby" and threatened to time him on breaks. Johnson contends Hanahan took these actions against him because of his race.

When Johnson experienced nausea and vomiting when exposed to ammonia at the plant in 1998, defendants initially refused to permit him to go to the emergency room. After an hour they finally relented and allowed Johnson to visit the emergency room. By contrast when Ken Canfield, a white employee, cut his nose, he was immediately provided a taxi to take him to the emergency room. When Anthony Giantempo, another white employee, witnessed an automobile accident on the way to work, supervisor Phil Masiolo, who is also white, allowed Canfield to take the day off. Johnson contends that this disparate treatment for work injuries was based on race.

Johnson too, contends that he has been disciplined for conduct which is condone when engaged in by white employees. In sum, Johnson contends that defendants have discriminated against him in work assignments, training, discipline, and fostered a hostile work environment on the basis of his race. (Amended Complaint ¶ 6, 84–114).

Marcus Garvin is a Black male who from 1993–1998, was employed as a production worker at the Coca Cola Plant at Elmsford, New York. Since 1998, he has been a Checker at the plant. When promoted to Checker, defendants provided Garvin with only a few hours of training a day for a two week period, by an inexperienced supervisor. Similarly situated white employees promoted to checker receive one full month of training. Garvin was left to educate himself about the job. A white employee, Mike Kinunen, was subsequently promoted from production worker to "Checker for inventory," a job superior to Checker. Kinunen was trained for a full month by Gary Raffa and Ron Montagna, both white experienced Checkers. Transportation and Production Manager Larry Maloney told Garvin that he would not have Garvin trained on the new software system, even though white checkers like Tony Valucci, Bobby Galassi, Mike Kinunen, and Gary Raffa, were all trained to use the system and were provided with passwords and access codes. Garvin contends that defendants denial to provide him with the training provided similarly situated white employees was based on race.

In or about August 1999, a white supervisor directed Garvin to perform the duties of Checker and to load product on the same shift. White Checkers were not required to load any product during a checker shift. A Checker's job description does not include loading product. Garvin contends that the disparate treatment was based on race. Garvin was reprimanded by his line manager for holding up the loads by performing two jobs, and then again when he spoke with Plant Manager Mike Hall about the incident.

***5** Garvin has heard supervisors refer to minority employees as "spics" and "niggers" on many occasions throughout his employ with defendant. Supervisory employees have referred to Garvin as "Monkey Marcus."

It is Garvin's position that defendants have discriminated against him in work assignments, training, discipline, and fostered a hostile work environment on the basis of his race. (Amended Complaint ¶ 7, 115–147).

The Disparate Treatment Claims

Although Title VII and § 1981 protect against different substantive offenses, the Supreme Court has held that disparate treatment claims under Title VII, and disparate treatment claims under § 1981, are analyzed under the same standard and approach. *Patterson v. McLean Credit Union,* 491 U.S. 164 (1989). Similarly, because the substantive prohibitions of § 296 of the New York Executive Law mirrors those of Title VII, courts require the same standard of proof for claims brought under § 296 as that for claims brought under Title VII. *Gumbs v. Hall,* 51 F.Supp2d 275, *affirmed* 205 F.3d 1323. Therefore, facts sufficient to give rise to a Title VII claim are sufficient to give rise to claims under § 1981 and § 296. If plaintiffs' amended complaint sufficiently pleads a disparate treatment claim under Title VII, it necessarily pleads disparate treatment claims under § 1981 and the § 296.

To establish a prima facie case of discrimination with respect to work assignments, training or discipline, each plaintiff must show that (1) he is a member of a protected class, (2) he was qualified for the position he held or applied for, (3) he experienced an adverse employment action, and (4) the adverse action occurred under circumstances giving rise to an inference of discrimination. *See Holt v. KMI–Continental, Inc.,* 95 F.3d 123, 129 (2d Cir.1996); *Austin v. Ford Models, Inc.,* 149 F.3d 148, 152 (2d Cir.1998) (citations omitted).

Plaintiffs have met the minimal pleading requirements necessary to establish a prima facie case for a disparate treatment claim. *Austin v. Ford Models, Inc.,* 149 F.3d at 152. (citations omitted). Plaintiffs Ewing, Hamlett, and Johnson allege in their amended complaint that they are qualified Black and Hispanic production employees, all belonging to a protected class. They allege that defendants have assigned them to work exclusively in menial, disgusting, and potentially dangerous manual production jobs while similarly situated, but less senior, white employees have received the training for the more desirable machine jobs. Plaintiffs further allege that they are disciplined for conduct such as taking long lunch breaks, for which white employees are not disciplined. Plaintiff Garvin alleges that even though he was promoted to Checker, he was treated differently than his white counterparts.

Defendants argue that Title VII and § 1981 extend only to ultimate employment decisions, such as hiring, firing, compensation, and that the behavior complained of by the individual plaintiffs does not involve such decisions. The Supreme Court has not taken such a restrictive view. The Court has held that the Title VII prohibition on discrimination in the terms and conditions of employment "is not limited to 'economic' or tangible discrimination. The 'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike out at the entire spectrum of disparate treatment ... in employment." ' *Meritor Savings Bank, FSB v. Vinson,* 477 U.S. 57, 64 (1986) (quoting *Los Angeles Dep't of Water and Power v. Manhart,* 435 U.S. 702, 707 n. 13 (1978). Indeed, the intent of Congress in enacting Title VII was "to prohibit all practices in whatever form which create inequality in employment due to discrimination on the basis of race, religion, sex, or national origin. *Franks v. Bowman Transportation CO., Inc.,* 424 U.S. 747, 763 (1976) (citations omitted).

***6** In *Austin* the Second Circuit held that plaintiffs' allegations that defendants imposed more onerous conditions of employment on her than on their white employees by refusing to provide her with any "assistants" stated a claim under Title VII. *Austin v. Ford Models, Inc.,* at 152. As in *Austin,* plaintiffs allege that defendants imposed more onerous working conditions upon the Black and Hispanic production workers than on their similarly situated white counterparts. They contend that no standards govern the distribution of assignments at the Elmsford plant, and that the supervisors' decisions regarding the assignment of production workers within a shift reflect a policy of racial discrimination. (Amended Complaint ¶ 50–51). Plaintiffs are assigned to work exclusively at menial, disgusting and dangerous jobs, such as pallet repair and cleanup——which require heavy lifting and involves the handling of shelves and pallets that are contaminated with urine, fecal matter, dead mice, snakes, roaches, and broken glass——while the more desirable semi-skilled machine jobs, such as bottle line filler and high/lo operator, are given to white production workers. (Amended Complaint ¶ 46–64, 70–74, 84–98, 148–152, 174–175). Defendants alleged systematic exclusion of plaintiffs from access to the semi-skilled machine jobs, which require training that enhances an employee's skill set and may lead to promotional opportunities, is certainly an adverse employment action. Although plaintiff Marcus Garvin was promoted to the position of "checker," the complaint alleges that he was treated differently than the white checkers and was nonetheless the victim of disparate treatment based on race: Garvin allegedly received lesser training than the white Checkers; he was ordered to load product, while other white checkers were not asked to perform that task; and he was unfairly subjected to bias discipline.

The Court rejects defendants' suggestion that no inference of discrimination arises from these allegations. Indeed, few other inferences flow from plaintiffs' allegation that Black and Hispanic production workers are assigned to work exclusively at the most onerous dead-end jobs, while similar situated white production workers are given the more desirable, and possibly career enhancing

machine jobs. While this is not the case of the strict "inexorable Zero," given Garvin's elevation to checker, the allegations of significant segregation of the production workforce at the Elmsford plant is a sure sign of discrimination. *See International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 343 n. 23 (1977) ("[F]ine tuning statistics could not have obscured the glaring absence of minority line drivers.").

Defendants also argue that the alleged disciplinary actions against the named defendants do not constitute "adverse employment actions" as required for a Title VII, and that in any event no discrimination can be inferred therefrom. While the amended complaint does not set forth in great detail the incidences of race based disparate treatment with respect to disciplining employees, the facts pleaded are more than sufficient to withstand dismissal. The contention here is that white supervisors, out of racial animus, treated their Black and Hispanic workers differently than their white workers when meting out discipline for transgressions of workplace rules. The Federal Rules of Civil Procedure do not require the plaintiffs to set out in detail the facts upon which they base their claims, but rather to provide a short and plain statement of their claim that will give the defendant notice of what is claimed and the grounds upon which it rests. *See Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit,* 507 U.S. 163 (1993). The amended complaint's relatively detailed allegations that Black and Hispanic employees were subjected to discipline for certain conduct for which white employees were not disciplined is a short and plain statement of plaintiffs' claim. *See McDonald v. Santa Fe Trail Transportation CO.,* 427 U.S. 273, 283 n. 11 (1976).

Hostile Work Environment

***7** To establish a prima facie case of hostile work environment harassment, plaintiffs must show that (1) he is a member of the protected class, (2) he experienced unwelcome harassment, (3) the harassment was based on their membership in the protected class, (4) the harassment was severe or pervasive enough to create a hostile work environment, and (5) a basis for employer liability exists. *See Richardson v. New York State Dep't. of Correctional Serv.,* 180 F.3d 426 (2d Cir.1999).

Defendants' attack on plaintiffs hostile work environment claims is much the same as defendants attack on plaintiffs' disparate treatment claims. Defendants argue that each of the named plaintiffs supports his harassment claim with a non-specific, conclusory allegation which does not suffice to state a claim. Defendants argue alternatively that, even if the named plaintiffs had alleged specific instances of harassment on the basis of their race or national origin, the alleged harassment would not be "severe or pervasive" enough to create an actionable claim of hostile work environment.

Plaintiffs' amended complaint alleges a pervasive racially hostile work environment. Each of the named defendants regularly heard supervisors refer to minority employees as "spics" and "niggers." Plaintiff Marcus Garvin states hat he was referred to as "Monkey Marcus" by his supervisors. Plaintiff Hamlett alleges that supervisors have at different times referred to him as a "stupid motherfucker" and "killer," and have made comments such as "when was he going to rob a bank" and "What's up hoodlum."

Although plaintiffs amended complaint does not detail the specific dates and times when defendants supervisors used the terms nigger and spic, the complaint nonetheless alleges that those terms were bantered around regularly by plant supervisors, and that certainly suggests a hostile work environment. Indeed, "no single act can more quickly alter the conditions of employment and create an abusive working environment than the use of an unambiguously racial epithet such as 'niger' by a supervisor in the presence of his subordinates." *Cruz v. Coach Stores, Inc.,* 202 F.3d 560, 571 (2d Cir.2000) (quoting *Rogers v. Western–Southern Life Ins. Co.,* 12 F.3d 668, 675 (7th Cir.1993).

And while some of the other comments are on their face race neutral, when evaluated in the context of the alleged ambiance at the Elmsford Plant, the comments are susceptible of being understood as harassment motivated by racial animus. *Richardson* at 439 (reversing grant of summary judgment where supervisors used racial slurs, including "nigger," and referred to plaintiffs as "apes and baboons"); *Schwapp v. Town of Avon,* 118 F.3d 106 (2d Cir.1997) (reversing grant of summary judgment where supervisors used racial slurs including "nigger" and made references to blacks as criminals). The complaint suggests that what was occurring at the Elmsford Plant was not "isolated incidents of racial enmity [but rather,] a steady barrage of opprobrious racial comments." *See Schwapp,* 109. The gestalt effect of the regular use of racially charged language by supervisors at the Elmsford Plant creates an inference of an overall "hostile and abusive" environment." *See Harris v. Forklift Sys., Inc.,* 510 U.S. 17, 21 (1993). The Court finds that the plaintiffs hostile work environment claims are sufficiently specific and that the allegations in the complaint, if proved, are sufficiently "severe and pervasive" to support a finding of hostile work environment. "It's the real thing."

***8** Accordingly, defendants' motion to dismiss the disparate treatment and hostile work environment claims of the individual defendants is denied.

The Class Allegations

Plaintiff's amended complaint alleges discrimination against plaintiffs as individuals and against Hispanic and Black employees generally. They seek injunctive relief and damages for all current and former Hispanic and Black production workers from 1993 to the present. Defendants argue that the class action allegations should be dismissed because class certification of employment discrimination lawsuits under Rule 23(b) of the Federal Rules of Criminal Procedure is inappropriate where compensatory and punitive damages are sought and a jury is requested. Defendants contend that class certification would be inappropriate pursuant to Rule 23(b)(2) because the compensatory and punitive damages sought by plaintiffs are not merely incidental to the injunctive relief sought. They further contend that certification would be inappropriate under Rule 23(b)(3) because questions of law or fact common to members of the class would not predominate over questions effecting only individual members of the class and because a class action is not superior to other methods of fair and efficient adjudication.

In support of their argument defendants urge this Court to follow the reasoning of the Fifth Circuit in *Allison v. Citgo Petroleum Corp.,* 151 F.3d 402 (5th Cir.1998), which was adopted by the court in *Robinson v. MetroNorth Commuter Railroad Co.,* 197 F.R.D. 85 (S.D.N.Y.2000) (Rakoff, J.). In *Allison,* the Fifth Circuit held that a class action may not be certified under (b)(2) where the complaint requests monetary relief, "unless it is incidental to requested declaratory injunctive relief." *Allison,* 151 F.3d at 415. The Court went on to define "incidental" as follows:

> By incidental, we mean damages that flow directly from liability to the class as a whole on the claims forming the basis of the injunctive or declaratory relief. Ideally, incidental damages should be those to which class members automatically would be entitled once liability to the class ... as a whole is established. That is, the recovery of incidental damages should typically be concomitant with, not merely consequential to, class-wide injunctive or declaratory relief. Moreover, such damages should at least be capable of computation by means of objective standards and not dependant on the intangible, subjective differences each class member's circumstances. Liability for incidental damages should not require additional hearings to resolve the disparate merits of each individual's case; it should neither introduce new and substantial legal and factual issues, nor entail complex individualized determinations.

Allison, 151 F.3d at 415. Applying this standard, the Fifth Circuit held that plaintiffs' discrimination claim could not be maintained as a class action because the damages requested would require individualized proof, introducing new and substantial factual and legal issues. *Id.* at 416–417.

***9** In *Robinson,* Judge Rakoff applied the standard articulated in *Allison* to the proposed employment discrimination class action before the court. Judge Rakoff ruled that the *Allison* standard "required denial of class action status under Rule 23(b)(2), since determination of damages suffered by individual members of the class would require individualized proof and proceedings to determine whether each such member suffered intentional discrimination on the part of his or her department manager, what injuries each such member thereby suffered, what individualized damages were appropriate to redress such injuries." *Robinson,* 197 F.R.D. at 88.

Defendants' argument is at this stage of the proceedings premature. *Allison* and *Robinson,* on which defendants predominately rely, arose in the context of a fully litigated motion for class certification, where the court was in a position to resolve factual disputes and make findings necessary to determine whether a class should be certified. Even if this Court were inclined to adopt the *Allison* analysis for class certification, the Court's role at this stage is to examine the pleadings not make determinations of fact, such as whether individual issues predominate. Defendant's are free to renew this argument in opposition to a motion for class certification.

Parent Liability

The parental control inquiry is fact intensive. Determinations of fact-intensive issues requires resort to evidence. That is why the procedural posture for such motions is one for summary judgment, not dismissed for failure to state a claim. *Balut v. Loral Electronic Systems,* 988 F.Supp. 339, 346 (S.D.N.Y.1997), affirmed 166 F.3d 1199 (2d Cir.1998)(summary judgment); *Dewey v. PTT Telecom Netherlands, U.S., Inc.,* No. 94 Civ.5983, 1995 WL 425005, at *2 (S .D.N.Y.1995), aff'd, 101 F.3d 1392

(2d Cir.1996)(summary judgment); *Kelber v. Forest Elec. Corp.*, 799 F.Supp. 326, 331 (S.D.N.Y.1992)(summary judgment); *Kellett v. Glaxo Enterprises, Inc.*, No. 91 Civ. 6237, 1994 WL 669975, at *5 (S.D.N.Y.Nov.30, 1994)(summary judgment); *Meng v. Ipanema Shoe Corporation*, 73 F.Supp2d 392, 404 (S.D.N.Y 1999) (summary judgment).

I invited the parties to take discovery on this issue. I will be happy to consider the legal implications of what undoubtedly will be the undisputed facts concerning the interrelationship between Coke New York and CCE on a Rule 56 motion (or a Rule 12(b)(6) motion that has been converted due to reliance on extrinsic evidence). The parties have chosen not to provide the extrinsic evidence that would allow the Court to determine whether CCE should be dismissed as a matter of law. I cannot say on the record before me that, there are no set of facts concerning the relationship between Coke New York and CCE, that if proved, would result in CCE's being held liable as matter of law. Therefore, I cannot dismiss the complaint as against CCE for failure to state a claim—even though I recognize that plaintiffs must meet an extraordinarily high standard of proof in order to avoid a properly documented summary judgment motion.

***10** Accordingly, CCE and Coke New York's motions to dismiss are denied.