IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MARY PAT CAVANAUGH, CECIL WILSON, JASPER TYSON, and RICHARD BROTHERS,	
Plaintiffs,	CIVIL ACTION FILE
v.	NO. 1:04-CV-3418-BBM
SPRINT/UNITED MANAGEMENT COMPANY,	
Defendant.	

O R D E R

This matter is before the court on the Motion for an Order Specifying the Individuals Who Have Timely Joined This Action [Doc. No. 165] filed by defendant Sprint/United Management Company ("Sprint"). The court is also presented with a Motion to Allow Karen Adkins, William Brawley, Jr., Kenneth Chambers, Cindy Gay, Bernadette Walker Harris, Catherine Holmes, Patty-Jo O'Brien, Evelyn Sanchez, and Brenda White to Opt-In and Participate in This Case [Doc. No. 204] (hereinafter, "Mot. to Allow Pls. to Opt-In and Participate") and a Motion to Send Notice to All Employees Within the Agreed Class Definition and Combined Motion to Allow Addie E. Davis, Carrie M. Johnson, Barbara A. Pompey, Annie M. Warrick, Beatrice Wimbley, Joel Popa, and Gwendolyn Frison to Join This Action (hereinafter, "Mot. to

Send Notice and Allow Pls. to Join This Action") [Doc. No. 211] filed by plaintiffs Mary Pat Cavanaugh, Cecil Wilson, Jasper Tyson, and Richard C. Brothers (collectively, "plaintiffs"); a Motion to Exclude Ineligible Opt-In Plaintiffs [Doc. No. 220] filed by Sprint; and a Motion to Vacate the Scheduling Order [Doc. No. 271] filed by plaintiffs.

I. Procedural and Factual Background

Plaintiffs, all former employees of Sprint, claim the company discriminated against them and other "similarly situated" employees on the basis of age in violation fo the Age Discrimination in Employment Act ("ADEA"). Specifically, plaintiffs claim Sprint "targeted" those workers over the age of 40 "under the guise of reduction-in-work force plans" implemented between April 1, 2003 and May 31, 2004. Second Am. Compl. ¶ 1. Such plans, plaintiffs say, "employed criteria, practices, and policies that had a significantly disparate impact on older workers on the basis of age." Id. The present class action resulted.

On or about February 15, 2005, the parties filed an Amended Joint Preliminary Report and Discovery Plan [Doc. No. 15] which was subsequently approved by this court on or about February 17, 2005 [Doc. No. 16]. Therein, the parties defined the composition of the class to include any employees who: "(a) previously worked for Sprint at any of its locations throughout the United States; (b) were terminated as

part of a reduction in force between April 1, 2003 and May 31, 2004; (c) were age 40 or older on the date of termination; and (d) had a job classification of 71-79 or 38-41 . . . ." (Am. Joint Prelim. Report and Disc. Plan, Ex. A 2.) The parties agreed that in order to join the suit (i.e., "opt-in"), class action members would be required to postmark and send a "Consent to Join" form ("Consent") within ninety days upon receiving notice; such Consents would subsequently be filed with the court. (Id., Ex. B 1-2.) The parties also agreed to a rebuttable presumption whereby all notices would be deemed received within five days after mailing by plaintiffs' counsel. (Id., Ex. B 2.)

Notice was mailed on or about March 3, 2005 to all persons named on a Sperling list provided by Sprint to plaintiffs' counsel.[1] Accordingly, the ninety-day return period and five-day rebuttable presumption for filing Consents ended on June 6, 2005.

II. Pending Motions

A. Motion for an Order Specifying the Individuals Who Have Timely Joined This Action

Sprint requests first that only those employees who filed Consents to opt into

[1]Plaintiffs acknowledge mailing the forms on or about March 2 or 3, 2005. (See, e.g., Mot. to Allow Pls. to Opt-In and Participate 3.) The court relies on the latter date for purposes of analysis given both parties appear to do so as well.

this action prior to June 6, 2005, in addition to plaintiffs, be conditionally certified as members of the class. Although plaintiffs raise other arguments, addressed infra, they respond in relevant part by citing the Eleventh Circuit's decision in Grayson v. K Mart Corp., 79 F.3d 1086 (11th Cir. 1996) for the proposition that "[t]here is no 90-day statute of limitation that would apply to prevent additional persons to opt-in to the case." The court disagrees.

As an initial matter, the court notes that the ninety-day limitations period was agreed to under the express terms of the parties' Amended Joint Preliminary Report and Discovery Plan. (See Am. Joint Prelim. Report and Disc. Plan, Ex. A 2). Indeed, as plaintiffs' counsel himself explained before this court, "The purpose of the 90-day notice period is actually – it serves the interest of finality for both sides with regard to this case." (Tr. of Proceedings Before the Hon. Beverly B. Martin 6, Feb. 15, 2005 (emphasis added).) Plaintiffs' counsel added, "If an individual files a charge, [the Equal Employment Opportunity Commission ("EEOC")] has the case . . . they issue a notice of right to sue, the individual has 90 days to file suit. What we're doing is tracking that notice period in order to ensure finality with regard to the entire class of people." (Id. 6.) That plaintiffs have now seemingly abandoned their position in an attempt to allow additional persons to opt-in thus strikes the court as not a little self-serving.

Beyond the parties' Amended Joint Preliminary Report and Discovery Plan, however, the court is persuaded that the ninety-day limitations period applies under applicable case law. In Grayson, the Eleventh Circuit ruled that "a putative plaintiff must file his written consent to opt into [a] class action prior to the expiration of the statute of limitations on his ADEA claim." Grayson, 79 F.3d at 1107. In so holding, the court explicitly noted that its ruling applied "only to plaintiffs who were subject to the allegedly discriminatory act prior to November 21, 1991, the effective date of the Civil Rights act of 1991" given that "[t]he Civil Rights Act replaced the two-year and three-year statutes of limitations with a ninety-day period in which to begin a civil action after the plaintiff has received the EEOC's notice that his charge was filed." Id. at n.39. The court added, however, "[f]or plaintiffs who allege being subject to wrongful conduct occurring after November 21, 1991, an analogous rule would be to allow potential plaintiffs ninety days from the date they receive the notice of the opt-in class, to file their written consent to opt into the class." Id. Although stated in dicta, the court is nonetheless persuaded that such a rule applies for the same reason relied upon by the Eleventh Circuit as to pre-1991 claims: To hold otherwise "would mean that the piggybacking rule could be applied to virtually

eliminate the statute of limitations for opt-in plaintiffs in ADEA actions."[2] Id. at 1107. Accordingly, Sprint's Motion for an Order Specifying the Individuals Who Have Timely Jointed This Action is GRANTED as follows: The class is hereby limited to only those individuals who postmarked their Consents by June 6, 2005, absent a showing as to why the limitations period should be tolled for a particular plaintiff.[3]

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[2]The "piggybacking" rule provides that "under some circumstances, a grievant who did not file an EEOC charge may opt into a class action by 'piggybacking' onto a timely charge filed by one of the named plaintiffs in the class action." Id. at 1101. The Eleventh Circuit has plainly held that piggybacking is available in ADEA cases provided that: (1) the relied upon charge to which the non-filing plaintiff is piggybacking is not invalid and (2) the individual claims of the filing and non-filing plaintiff arise out of similar discriminatory treatment in the same time frame. Id. at 1101-02 (citing Calloway v. Partners Nat'l Health Plans, 986 F.2d 446, 450 (11th Cir. 1993)).

[3]Plaintiffs argue that the Eleventh Circuit contradicted itself in Grayson, citing Anderson v. Unisys Corp., 47 F.3d 302, 308-09 (8th Cir. 1995) for the proposition that "nonfiling piggybacking plaintiffs who were demoted post-Civil Rights Act may opt into a class so long as the claimant upon whose EEOC charge they are piggybacking files suit within ninety days of receiving a right-to-sue letter from the EEOC" immediately after stating its "analogous rule" as to post-1991 claims. (Pl.'s Opp. to Def.'s Mot. for an Order Specifying the Individuals Who Have Timely Joined This Action and Combined Motion to Re-Open Sending of Notice 5.) Plaintiffs add that in Gitlitz v. Compagnie Nationale Air Fr., 129 F.3d 554 (11th Cir. 1997), the Eleventh Circuit "subsequently 'agreed with' and adopted the reasoning of Anderson." (Id.) The court agrees that the Eleventh Circuit's use of a "but see" signal prior to its citation of Anderson is somewhat confusing, given the signal is used to indicate "a cited authority [that] clearly supports a proposition contrary to the main proposition." See The Bluebook: A Uniform System of Citation R. 1.2(c), at 47 (Columbia Law Review Ass'n et al. eds., 18th ed. 2005). Review of the holdings in Anderson and Gitlitz, however, resolves any such confusion entirely. Simply put, both cases stand for the single proposition plaintiffs cite them for and nothing more: non-filing plaintiffs who were demoted post-Civil Rights Act may opt into a class so long as the claimant upon whose EEOC charge they are piggybacking timely filed his claim. Neither squarely addresses the issue presented here and in Grayson: Namely, when is a piggybacking or opt-in plaintiff deemed to have commenced his civil action for purposes of tolling the limitations period at issue. See Grayson, 79 F.3d at 1105 ("The issue . . . is

B. Motion to Allow Karen Adkins, William Brawley, Jr., Kenneth Chambers, Cindy Gay, Bernadette Walker Harris, Catherine Holmes, Patty-Jo O'Brien, Evelyn Sanchez, and Brenda White to Opt-In and Participate in This Case

Plaintiffs request that the court allow the following nine persons to join this case: Karen Adkins, William Brawley, Jr., Kenneth Chambers, Cindy Gay, Bernadette Walker Harris, Catherine Holmes, Patty-Jo O'Brien, Evelyn Sanchez, and Brenda White. Although it appears that at least some of these "piggybacking" plaintiffs signed and dated their Consents prior to the June 6, 2005 date, none were so postmarked.[4] (See Mot. to Allow Pls. to Opt-In and Participate 4-5.) Plaintiffs nonetheless argue that these persons should be allowed to join the present action because "there is no prejudice to Sprint resulting from an opt-in form being filed late." (Id. 3.) For reasons outlined in Section A of this order (see supra), however, the court disagrees. Indeed, as noted by Sprint, were the court to do as plaintiffs ask, "finality would never be reached." (Sprint's Mem. in Opp. to Pls.' Mot. 15.)

Plaintiffs appear to rely on two other arguments in support of their motion,

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a question of law over which we exercise *de novo* review"). As such, neither contradicts the "analogous rule" stated by the Eleventh Circuit in dicta regarding post-1991 claims.

[4]The court notes as well that at least three individuals – Bernadette Walker Harris, Patty-Jo O'Brien, and Brenda White – appear either not to have dated their Consent form or listed a date subsequent to June 6, 2005. (See Mot. to Allow Pls. to Opt-In and Participate. 4-5.)

both of which the court finds unavailing. First, Plaintiffs cite the Eleventh Circuit's holding in Hipp v. Liberty National Life Ins. Co., 252 F.3d 1208 (11th Cir. 2001) regarding the proper forward and rearward scope of a class suit under the ADEA in support of its argument that no prejudice would result to Sprint from an opt-in form being filed late. In Hipp, the Eleventh Circuit ruled that "the rearward scope of an ADEA opt-in action should be limited to those plaintiffs who allege discriminatory treatment within 180 or 300 days before the representative charge is filed."[5] Hipp, 252 F.3d at 1220. The court also ruled that the forward scope of an ADEA opt-in action "ends on the date the representative charge is filed." See id. at 1225. These holdings thus address which nonfiling plaintiffs will be permitted to "piggyback" onto a filing plaintiff's timely charge. They do not address the separate issue presented in Grayson as to when a nonfiling plaintiff will be deemed to have commenced his action for purposes of tolling the limitations period. Accordingly, the court finds plaintiffs' reliance on Hipp in support of its motion wholly misplaced.

Finally, plaintiffs argue that these nine persons should be allowed to join this

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[5]Whether the 180 or 300 day limit applies depends on whether plaintiffs live in a "deferral" or "non-deferral state." Grayson, 79 F.3d at 1100 (citing 29 U.S.C. § 626(d)(1)). Because Georgia is a "non-deferral state," the 180 day limit applies. See Wilkerson v. Grinnell Corp., 270 F.3d 1314, 1317 (11th Cir. 2001) ("For a charge to be timely in a non-deferral state such as Georgia, it must be filed within 180 days of the last discriminatory act.").

case because the ninety-day period may not apply to them. Specifically, plaintiffs argue that if these persons were participants in the parallel Williams action, a class suit filed against Sprint in the District of Kansas, the ninety-day limitations period would begin running only upon the court's denial of class certification. Plaintiffs are correct that in Armstrong v. Martin Marietta Corp., 138 F.3d 1374, 1385 (11th Cir. 1998), the Eleventh Circuit ruled that "if class certification is denied in whole or in part, the statute of limitations begins to run again as to excluded putative class members as of the date of the district court's order denying certification." Plaintiffs, however, fail to establish whether any of these nine persons were even part of the Williams litigation, let alone whether the court denied class certification therein.[6] The court also notes, preliminarily, that denial of class certification in Williams does not automatically mean these nonfiling plaintiffs are entitled to join this class action.[7]

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[6]The court agrees with Sprint's observation that it is somewhat puzzling as to why plaintiffs' counsel did not simply ask these nine persons whether they received notice as to the Williams action.

[7]To this end, the court notes that the limitations period for each of these nonfiling plaintiffs would have been tolled pending class certification in Williams. Accordingly, denial thereof would not necessarily mean that such persons had a full ninety days in which to file their own suit or intervene in another matter. See, e.g., American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 561 (1974) ("The class suit brought by Utah was filed with 11 days yet to run in the period as tolled . . . the intervenors thus had 11 days after the entry of the order denying them participation in the suit as class members in which to move for permission to intervene. Since their motions were filed only eight days after the entry of Judge Pence's order, it follows that the motions were timely.").

Accordingly, plaintiffs' Motion to Allow Karen Adkins, William Brawley, Jr., Kenneth Chambers, Cindy Gay, Bernadette Walker Harris, Catherine Holmes, Patty-Jo O'Brien, Evelyn Sanchez, and Brenda White to Opt-In and Participate in This Case is DENIED absent a showing as to why the statute of limitations period should be tolled for a particular plaintiff.

C. Motion to Send Notice to All Employees Within the Agreed Class Definition and Combined Motion to Allow Addie E. Davis, Carrie M. Johnson, Barbara A. Pompey, Annie M. Warrick, Beatrice Wimbley, Joel Popa, and Gwendolyn Frison to Join This Action

Plaintiffs also request that the court order notice be sent to all persons who fall within the class definition. Specifically, plaintiffs argue that the class definition currently being used is underinclusive insofar as it excludes persons who were "voluntarily terminated" as part of Sprint's reduction-in-force.[8] Accordingly, plaintiffs request that, because their termination dates fall within the class period, the following seven persons be allowed to join this case: Addie E. Davis, Carrie M. Johnson, Barbara A. Pompey, Annie M. Warrick, Beatrice Wimbley, Joel Popa, and

[8]Plaintiffs also appear to claim that the class definition improperly excludes persons who were terminated from Sprint but subsequently rehired. (See Mot. to Send Notice and Allow Pls. to Join This Action 3.) As plaintiffs fail to proffer any arguments in support of that claim, however, the court declines to reach the issue here. Additionally, plaintiffs base their argument in part on the fact that several former employees who voluntarily resigned from Sprint were nonetheless included on the Sperling list initially provided by the company. The court addresses this issue in Section D, infra.

Gwendolyn Frison. The court disagrees.

It is undisputed that, for purposes of satisfying the class definition, the employee in question must have been terminated from Sprint during the relevant time period. As noted by defendants, however, nothing in plaintiffs' filings before this court indicate their belief that such termination was to have been anything but involuntary. (See, e.g., Second Am. Compl. ¶ 41 ("Defendant . . . failed . . . to validate the criteria employed in selecting employees for termination . . . .") (emphasis added).) More importantly, it must also be recognized that voluntary resignation is fundamentally different from involuntary termination. Simply put, the putative plaintiffs at issue here made a choice, regardless of their reasons for doing so.[9] Moreover, the court deems relevant that, in so choosing, these persons received compensation from defendants. Indeed, plaintiffs themselves include the voluntary separation letter sent to Gwendolyn Frison ("Frison") wherein Frison is offered a "termination allowance" in the amount of $17,898.40 as well as information regarding continued benefits offered by the company. (See, e.g., Mot. to Send Notice

[9]Sprint makes clear, however, that none of the persons at issue were told that they, specifically, would be terminated when offered the option to voluntarily resign from the company. (See, e.g., Sprint's Resp. to Pls.' Mot. 6 ("When Ms. Jefferson was directly asked if she was told that she was being laid-off, she evaded the question . . . . [W]hen pressed further, Ms. Jefferson answered, conceding that she was never told the plant would close.").)

and Allow Pls. to Join This Action, Ex. A 2.) Such voluntary resignation simply does not meet the definition of "termination" as understood by and agreed to by both parties. Accordingly, plaintiffs' Motion to Send Notice to All Employees Within the Agreed Class Definition is DENIED to the extent plaintiffs wish to include in the class definition those employees who voluntarily resigned from Sprint. As it is undisputed that Addie E. Davis, Carrie M. Johnson, Barbara A. Pompey, Annie M. Warrick, Beatrice Wimbley, Joel Popa, and Gwendolyn Frison each voluntarily resigned from Sprint, plaintiffs' motion to allow these persons to join this action is similarly DENIED.[10]

D. Motion to Exclude Ineligible Opt-In Plaintiffs

Defendants request that the court order the following five opt-in plaintiffs be excluded from this class action: Malinda Henderson, Irene Jefferson, Doris Jones, Lenora Walton, and Dora Yon. Specifically, defendants argue that because these plaintiffs left Sprint voluntarily, they do not satisfy the class definition as agreed to by both parties. Because it is undisputed that these plaintiffs left Sprint voluntarily

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[10]There is some dispute in the record as to whether Joel Popa ("Popa") simply resigned from the company or did so in response to receiving a "voluntary separation" letter. As Popa's resignation was undisputably voluntary, however, the court deems irrelevant the precise manner in which it was effected. Additionally, although plaintiffs cite Frison's dismissal from Williams in support of its argument as to why she should be included in the present action, given the court's ruling as to Frison's voluntary resignation from Sprint, the court finds it unnecessary to reach the issue here.

(see Mot. to Exclude Ineligible Opt-In Plaintiffs, Ex. C), for reasons outlined in Section C of this order (see supra), Sprint's Motion To Exclude Ineligible Opt-In Plaintiffs is GRANTED.

E. Motion to Vacate the Scheduling Order

Finally, plaintiffs' Motion to Vacate the Scheduling Order is DENIED. To the extent plaintiffs' motion addresses other matters, the court declines to issue rulings at this time.

III. Summary

Sprint's Motion for an Order Specifying the Individuals Who Have Timely Joined This Action [Doc. No. 165] is GRANTED in the manner described above. Plaintiffs' Motion to Allow Karen Adkins, William Brawley, Jr., Kenneth Chambers, Cindy Gay, Bernadette Walker Harris, Catherine Holmes, Patty-Jo O'Brien, Evelyn Sanchez, and Brenda White to Opt-In and Participate in This Case [Doc. No. 204] is DENIED. Plaintiffs' Motion to Send Notice to All Employees Within the Agreed Class Definition and Combined Motion to Allow Addie E. Davis, Carrie M. Johnson, Barbara A. Pompey, Annie M. Warrick, Beatrice Wimbley, Joel Popa, and Gwendolyn Frison to Join This Action [Doc. No. 211] is DENIED. Sprint's Motion to Exclude Ineligible Opt-In Plaintiffs [Doc. No. 220] is GRANTED. Plaintiffs' Motion to Vacate the Scheduling Order [Doc. No. 271] is DENIED; however, the other issues raised by

plaintiffs in this Motion are reserved for later consideration by the court.

IT IS SO ORDERED, this 4th day of October, 2005.

s/Beverly B. Martin
BEVERLY B. MARTIN
UNITED STATES DISTRICT JUDGE