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United States District Court,
W.D. Pennsylvania.

Arthur C. RUPERT, Linda K. Austin, Larry L. Campbell, Kenneth J. Hunt and Wade C. Bittner, individually and on behalf of all others similarly situated, Plaintiffs,
v.
PPG INDUSTRIES, INC., Defendant.

Civil Action No. 07–705. | Feb. 11, 2009.

Attorneys and Law Firms

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Opinion

REPORT AND RECOMMENDATION

KEVIN P. LUCAS, Special Master.

I. Recommendation

***1** It is recommended that Defendant's Motion for Judgment on the Pleadings Limiting the Temporal Scope of Plaintiffs' Claims (Docket No. 73) be denied.

II. Report

Plaintiffs Arthur C. Rupert, Linda K. Austin, Larry L. Campbell, Kenneth J. Hunt and Wade C. Bittner bring this action in which they allege that the termination of their employment by Defendant PPG Industries, Inc. ("Defendant") violated the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–634 ("ADEA").[1] Plaintiffs allege claims of both disparate treatment and disparate impact. Plaintiffs bring these claims both as individuals and as class representatives on behalf of others similarly situated.

[1] By Report and Recommendation dated February 5, 2009, this Special Master recommended that summary judgment be granted in favor of the Defendant and against Plaintiffs Hunt and Bittner on the basis that Plaintiffs Hunt and Bittner failed to exhaust their administrative remedies.

Presently pending for disposition is Defendant's Motion for Judgment on the Pleadings Limiting the Temporal Scope of Plaintiffs' Claims, in which it seeks to limit the scope of claims by either named or potential opt-in plaintiffs to claims accruing no earlier than 300 days before October 25, 2006 (i.e., December 31, 2005), the date the first named plaintiff (Plaintiff Rupert) filed a charge with the EEOC. For the reasons that follow, it is recommended that Defendant's Motion for Judgment on the Pleadings be denied.

Defendant acknowledges that under the single filing rule, a plaintiff who has not filed an EEOC charge within the limitations period can join a class action without satisfying the exhaustion and filing requirements if the EEOC charge filed by the plaintiff who filed the class action alleged class-based discrimination. *See, e .g., Communications Workers v. New Jersey Dep't of Personnel,* 282 F.3d 213, 217 (3d Cir.2002). It further acknowledges that the 300–day charge-filing period is not jurisdictional, but rather is subject to equitable tolling. *See Zipes v. Trans World Airlines, Inc. Independent Fed. of Flight Attendants,* 455 U.S. 385, 393, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982). Defendant asserts, however, that plaintiffs opting into a class action relying on the single filing rule are not entitled to the benefits of equitable tolling.

In support, Defendant points to *Hipp v. Liberty Nat'l Life Ins. Co.,* 252 F.3d 1208 (11th Cir.2001). *Hipp* states 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." *Hipp,* 252 F.3d at 1220. Significantly, however, *Hipp* did not have occasion to consider the doctrine of equitable tolling. The claims of the opt-in plaintiff in *Hipp* were already time-barred when the

representative charge was filed with the EEOC. Indeed, the court expressly stated that the opt-in plaintiff ' "could not have filed a timely charge' on the date [the representative plaintiff] filed his charge." *Id.* at 1220 n. 9. This fact was critical to the court's holding the single-filing rule could not revive the untimely claims of the opt-in plaintiff. The court explained that a rule allowing a plaintiff to piggyback on a representative charge filed after his own claim was time-barred would "virtually eliminate the statute of limitations for opt-in plaintiffs in ADEA actions." *Id.* at 1220.

***2** As support for its decision, *Hipp* cited cases from other jurisdictions, the vast majority of which *Hipp* described as holding that "the single-filing rule is properly applied only to those individuals who could have filed timely EEOC charges at the time [the representative plaintiff] actually filed his charge." *Id.* at 1221 (quoting *Theissen v. General Elec. Capital Corp.,* 996 F.Supp. 1071, 1076–77 (D.Kan.1998) and citing *Brooks v. Bellsouth Telecomm., Inc.,* 164 F.R.D. 561, 570 (N.D.Ala.1995); *Church v. Consol. Freightways, Inc.,* 137 F.R.D. 294, 309 (N.D.Cal.1991); *Levine v. Lane Bryant,* 700 F.Supp. 949, 957 (N.D.Ill.1988); *Walker v. Mountain States Tel. & Tel. Co.,* 112 F.R.D. 44, 47 (D.Colo.1986)). *Theissen,* one of the cases cited by *Hipp,* appears to have recognized that equitable tolling would apply in the context of the single filing rule, but rejects application of equitable tolling to the claims before it on the ground that there was not evidence of record that could support equitable tolling. *Theissen,* 996 F.Supp. at 1078.

Where an individual (if any were to exist under the particular circumstances) is entitled to equitable tolling, his or her claim may not have been time-barred at the time the representative charge was filed notwithstanding the fact that it accrued more than 300 days prior to the filing of that charge.[2] Allowing such an individual the benefit of the single filing rule would not eliminate or even expand the statute of limitations for opt-in plaintiffs.

[2] The fact that Plaintiffs Hunt and Bittner have not adduced evidence to support equitable tolling of their individual claims does not preclude the possibility that a potential future opt-in plaintiff may do so. The determination in the prior February 5, 2009 Report and Recommendation that equitable tolling did not apply to Plaintiffs Hunt and Bittner's claims was based upon the information contained in the decisional unit disclosures that Hunt and Bittner received. Not all persons terminated by Defendant received the same informational disclosures.

As both *Hipp* and the Defendant recognize, the purpose of the single filing rule is to avoid the necessity for filing duplicative charges that serve no purpose where the claims have already been asserted in a timely representative charge. *See id.* at 1225 ("The objective of the piggybacking rule is to allow non-filing plaintiffs to rely on the charges of filing plaintiffs when it would be a "useless act" for the non-filing plaintiffs to file their own charges."); *Mooney v. Aramco Servs. Co.,* 54 F.3d 1207, 1223 (5th Cir.1995) ("The policy behind the single filing rule is that "[i]t would be wasteful, if not vain, for numerous employees, all with the same grievance, to have to process many identical complaints with the EEOC"), *overruled on other grounds by Desert Palace v. Costa,* 539 U.S. 90, 123 S.Ct. 2148, 156 L.Ed.2d 84 (2003). This purpose would not be served by requiring an individual with a claim that is viable on the date the representative charge is filed to file his own duplicative charge merely because his or her claim is subject to equitable tolling.

Defendant argues that equitable tolling tolls or stops the running of the statute of limitations but does not affect when a claim accrues and the statute begins to run. This is true insofar as it goes, but the critical inquiry for purpose of the single filing rule is not when the claim accrues, or when the limitations period begins to run, but rather whether it has expired at the time the representative charge is filed. Moreover, there is no merit to Defendant's argument that "[s]ince opt-in plaintiffs ... by definition are not EEOC-charge filers, no limitations period is running with respect to them." As Defendant itself argues in virtually the same breath, the limitations period begins to run for all plaintiffs, whether opt-in or not, and whether charge-filers or not, when their claim accrues. Whether and when the limitations period is running is not determined by whether a person has filed a charge with the EEOC. If an individual who subsequently opts in to a class action had a viable claim on the date the representative charge was filed due to equitable tolling, no purpose would be served by a rule preventing that person from choosing to piggyback on the representative charge and instead forcing that person to file his or her own duplicative charge.

***3** Accordingly, Defendant's motion for a judgment on the pleadings limiting this action to claims accruing no earlier than December 31, 2005, must be denied, where potential future opt-in plaintiffs, if any, whose claims accrued prior to December 31, 2005 but were still viable

on October 25, 2006 due to equitable tolling, are entitled to rely on the single filing rule. While some temporal limitations on the scope of the class no doubt flow from the requirement that opt-in plaintiffs be similarly situated, this issue has not been raised and would not be appropriate for resolution on a motion for judgment on the pleadings.[3]

[3] Similarly, it is noted that other courts have held that in order to take advantage of the single filing rule, a piggybacking plaintiffs claims must arise out of similar discriminatory treatment "in the same time frame." *Hipp v. Liberty Nat'l Life Ins. Co.,* 252 F.3d 1208, 1217 (11th Cir.2001). Whether this is the law in this circuit, and, if so, the appropriate scope of that "time frame" are issues not raised by Defendant's motion.

It is unnecessary to decide Plaintiffs' alternative argument that opt-in plaintiffs discharged prior to December 31, 2005 and alleging a pattern and practice claim would be entitled to participate in this class action on a continuing violation theory. On the pleadings, it is unclear exactly what practice it is that Plaintiffs assert constitutes the alleged discriminatory pattern and practice. While *Ledbetter v. Goodyear Tire & Rubber Co., Inc.,* 550 U.S. 618, 127 S.Ct. 2162, 167 L.Ed.2d 982 (May 29, 2007) raises serious questions about the viability of the continuing violation theory outside the harassment context, the question of its applicability to pattern and practice claims and to the particular pattern and practice claim in this case (concerning which there are only general allegations in the First Amended Complaint) are matters best addressed not by motion for judgment on the pleadings but instead in the context of a factual record with the benefit of full briefing addressing the applicability of both *Ledbetter* and the earlier decision of *Bazemore v. Friday,* 478 U.S. 385, 106 S.Ct. 3000, 92 L.Ed.2d 315 (1986). Given that the parties have already had the opportunity by agreement to conduct discovery going back as far as May 2003 (*see* Stipulated Discovery Order, Docket No. 54), it is suggested that the parties raise this issue on a motion for summary judgment at the beginning of Phase II.

III. Conclusion

For the reasons stated above, it is recommended that Defendant's Motion for Judgment on the Pleadings Limiting the Temporal Scope of Plaintiffs' Claims (Docket No. 73) be denied.