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United States District Court, N.D. Illinois, Eastern Division.

UNITED STATES EQUAL EMPLOYMENT COMMISSION, Plaintiff,
James FERGUSON, Plaintiff–Intervenor
v.
FOSTER WHEELER CONSTRUCTORS, INC., et al, Defendants.

No. 98 C 1601. | July 13, 1999.

Opinion

MEMORANDUM OPINION AND ORDER

COAR, J.

***1** Before this court is Defendants Foster Wheeler Constructors, Inc. ("FW Const.")[1] and Pipe Fitters Association Local Union 597 ("Union")[2] motion to limit claims for damages to claimants who appear at trial and prove their individual cases. Defendants' motion is denied.

I. Analysis

Defendants' motion has two prongs. First, Defendants argue that "[t]his case should not be tried on a class-wide basis." (Mem. in Support at 3.) Second, if the court decides to maintain this case as a "class" action, Defendants argue that the court should refuse to bifurcate

A. Class

Defendants argue that class-wide[3] relief is inappropriate, first, because issues of compensatory and punitive damages predominate over issues of injunctive relief and, second, because hostile working environment claims, which include a subjective element, are inappropriate for class resolution. The court rejects both of these arguments.

Two points significantly weaken Defendants' predominance argument. The first is that Fed.R.Civ.P. 23 does not apply to an EEOC "pattern and practice" case. *General Telephone Co. of the Northwest, Inc. v. Equal Employment Opportunity Commission,* 446 U.S. 318, 324, 100 S.Ct. 1698, 1703 (1980) ("Given the clear purpose of Title VII, the EEOC's jurisdiction over enforcement, and the remedies available, the EEOC need look no further than § 706 for its authority to bring suit in its own name for the purpose, among others, of securing relief for a group of aggrieved individuals. Its authority to bring such actions is in no way dependent upon Rule 23, and the Rule has no application to a § 706 suit."). Thus, while Defendants cite to a recent Fifth Circuit case which broadly limited the availability of class relief pursuant to Rule 23(b)(2) in the wake of the 1991 Civil Rights Act, which made monetary relief available in discrimination cases, *see Allison v. Citgo Petroleum Corp.,* 151 F.3d 402, 415 (5th Cir.1998) (holding that "monetary relief predominates in (b)(2) class actions unless it is incidental to requested incidental or declaratory relief"), *Allison* simply does not address § 706 which, unlike Rule 23(b)(2), does not mention predominance. Indeed, as the Supreme Court noted in *General Telephone,* even the presence of conflicts of interest between the members of the "class" (perhaps the most obvious of "individual" issues) does not bar the EEOC from acting to represent the class "in a unified action and to obtain the most satisfactory overall relief even though competing interests are involved and particular groups may appear to be disadvantaged. The individual victim is given his right to intervene for this very reason." 446 U.S. at 331, 100 S.Ct. at 1707. The second problem is Defendants' assumption that injunctive relief should be ruled out or else is a minor point because the construction project at issue in this case is completed and FW Const. no

longer has a presence in Illinois. This court, however, has already denied Defendants' motion for summary judgment on the EEOC's claims for injunctive relief in a previous opinion.

***2** Defendants' argument that hostile work environment claims are inappropriate for class actions is similarly flawed. Hostile work environment claims involve both an objective and a subjective standard. *See Harris v. Forklift Systems, Inc.,* 510 U.S. 17, 21, 114 S.Ct. 367, 370 (1993) ("Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is not Title VII violation."). Defendants argue that the subjective element of hostile work environment claims makes them inappropriate for class resolution. However, the EEOC has alleged a pattern or practice of discrimination on the Robbins Facility construction site. The EEOC's claim centers around the claim that Defendants wrongfully ignored and failed to remedy racial graffiti. Thus, the central parts of the EEOC's claim—the presence of the racial graffiti and the alleged failure of Defendants to address it—are common to all members of the "classes" at issue in the EEOC's Third Amended Complaint. To force the EEOC to prove each individual claim would be contrary to the way that pattern and practice claims operate. *See International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 336, 97 S.Ct. 1843, 1854–55 (1977) (discussing pattern or practice claim; "As the plaintiff, the Government bore the initial burden of making out a prima facie case of discrimination. And, because it alleged a systemwide pattern or practice of resistance to the full enjoyment of Title VII rights, the Government ultimately had to prove more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts. It had to establish by a preponderance of the evidence that racial discrimination was the company's standard operating procedure, the regular rather than the unusual practice."). The use of clear instructions can ensure that the jury (or juries) properly considers both the objective element of the hostile working environment, which is appropriately decided as part of a "pattern or practice" finding, and the subjective element, which would require an individual showing. Having found that maintenance of this case as a "pattern or practice" case is appropriate, the court now turns to the question of bifurcation.

B. Bifurcation

Bifurcation is appropriate in this case. Under Fed.R.Civ.P. 42(b), this court may order a separate trial of any separate issue "in furtherance of convenience or to avoid prejudice." In considering whether to order bifurcation, the court must avoid permitting separate juries to examine the same issue but may permit separate juries to examine "overlapping evidence." *Houseman v. United States Aviation Underwriters,* 171 F.3d 1117, 1126 (7th Cir.1999). Defendants argue that bifurcation in this hostile environment case would require separate juries both to consider overlapping evidence (which is inefficient but constitutional) and to reexamine factual issues (which is unconstitutional). *Id.* (addressing constitutionality problems of having separate juries to examine the same issues). The court disagrees with Defendants' argument.

***3** While it is true that every claimant must prove both the objective and subjective elements of his or her hostile working environment claim, a well-constructed bifurcation scheme, used in tandem with clear instructions to the juries can delineate the roles of the two juries in order to avoid reexamination of any factual issues. In the first phase, the EEOC would be required to prove, "by a preponderance of the evidence, that an objectively reasonable person would find the existence of: (1) a hostile environment of [racial and/or] sexual harassment within the company (a hostile environment pattern or practice) ... and (2) a company policy of tolerating (and therefore condoning and/or fostering) a workforce permeated with severe and pervasive [racial and/or] sexual harassment." *Mitsubishi,* 990 F.Supp. at 1073.[4] If the jury finds for the EEOC in the first phase, the court would turn to the second phase, in which the subjective element and damages would be addressed for each individual. This bifurcation is reasonable in terms of the nature of the "pattern or practice" case, is likely to produce efficiencies in case management by limiting the initial presentation to the objective case that each and every claimant must meet as a general group, and avoids the constitutional problems of reexamination of factual issues.

FW Const. argues that this court should reject *Mitsubishi's* burden-shifting in phase II, which "shift[ed] the burden of production to the employer on the subjective prong." 990 F.Supp. at 1078–79. The EEOC acknowledges that "the subjective components of individual claims—i.e., exposure to the hostile work environment, subjective unwelcomeness, compensatory damages—would need to be established separately in a Phase II proceeding for each class member for whom EEOC is seeking monetary relief." (EEOC's Mem. in Opp. at 9.) The court agrees with both parties and will not adopt the *Mitsubishi* burden-shifting approach to the subjective elements.

The court is inclined to bifurcate using one jury for both phases in order to maximize the efficiency of evidence presentation. In addition to formulating issue instructions regarding the elements of a hostile work environment and of the EEOC's pattern or practice claim, the parties are responsible for formulating instructions to be given to the jury during the first phase that

make clear how the bifurcation is structured and that they are to consider only the question of whether the EEOC has met its burden in showing a "pattern or practice" and instructions to be given to the jury during the second phase (if any) that clarify the fact that the jury is not to reconsider the "pattern or practice" elements already decided in the first phase.

II. Conclusion

For the foregoing reasons, Defendants' motion is denied.

Footnotes

[1] This motion was also filed by Foster Wheeler Corp., Foster Wheeler Illinois, and Foster Wheeler USA, all of whom have been dismissed as defendants in this action.

[2] The Union has adopted this motion.

[3] As a technical point, this case is not a "class action" in the classic sense of the term because EEOC cases do not proceed under Fed.R.Civ.P. 23. *See Equal Employment Opportunity Commission v. Mitsubishi Motor Manufacturing of America, Inc.,* 990 F.Supp. 1059, 1076 n. 10 (C.D.Ill.1998). However, the term "class" is a useful one and may be used despite the fact that this is not a class action pursuant to Rule 23. *Id.*

[4] One complication is that Ferguson has raised claims addressing graffiti directed specifically at him and his wife. The existence of distinct claims is one of the purposes of complaints in intervention. The court notes that Ferguson's additional claims could be similarly bifurcated and, perhaps, distinguished from the general pattern or practice claims through the use of instructions and jury verdict forms.