IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

LEAD CASE:

RITA L. PRICE, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED — **PLAINTIFF**

VS. — **CIVIL ACTION NO. 4:03CV167BN**

CHOCTAW GLOVE & SAFETY COMPANY, INC. D/B/A CHOCTAW GLOVE AND SAFETY CO., ALLIED ENTERPRISES AND THE GLOVE FACTORY — **DEFENDANT**

CONSOLIDATED WITH:

JOHNNIE J. CLEVELAND, ET AL. — **PLAINTIFFS**

VS. — **CIVIL ACTION NO. 4:04CV156BN**

CHOCTAW GLOVE & SAFETY COMPANY, INC. D/B/A CHOCTAW GLOVE AND SAFETY CO., ALLIED ENTERPRISES AND THE GLOVE FACTORY — **DEFENDANT**

OPINION AND ORDER

This cause is before the Court on:

1) Plaintiff's Second Renewed and Supplemental Motion to Certify Class Under Rule 23(b)(2) of the Federal Rules of Civil Procedure or, in the Alternative, to Certify Under Rule 23(b)(3) of the Federal Rules of Civil Procedure (hereinafter "Second Renewed Motion to Certify Class");

2) Defendant's Motion to Dismiss or in the Alternative for Summary Judgment (hereinafter "Motion for Summary Judgment");[1] and

3) Plaintiff's Motion for Enlargement of Time.

Having considered the Motions, Responses, Rebuttals and attachments to each, as well as supporting and opposing authority, the Court finds that:

1) the Second Renewed Motion to Certify Class is not well taken and should be denied;

2) the Motion for Summary Judgment is well taken and should be granted; and

3) the Motion for Enlargement of Time should be denied as moot.

I. FACTS AND PROCEDURAL HISTORY

This cause arises out of alleged sex discrimination suffered by Plaintiffs who are females, and other female employees by the acts of Defendant Choctaw Glove and Safety Company, Inc., which does business in Mississippi at three separate facilities, under three separate names. The three facilities are: Defendant Choctaw Glove and Safety Co. (hereinafter "Choctaw Glove") located in Union,

[1]Attached to this Motion, Defendant included evidence outside of the pleadings. Therefore, the Motion must be considered under the standards of a Rule 56 motion for summary judgment. Fed. R. Civ. P. 12(b) & (c) (stating that if a motion is presented under Rule 12(b)(6) or Rule 12(c), and "matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56...."); Gutierrez v. City of San Antonio, 139 F.3d 441, 444 n.1 (5th Cir. 1998) (citing Fed. R. Civ. P. 12(c)).

Newton County, Mississippi; Defendant Allied Enterprises (hereinafter "Allied") located in Philadelphia, Neshoba County, Mississippi; and Defendant The Glove Factory (hereinafter "Glove Factory") located in Noxapater, Winston County, Mississippi.

The facts of this case are somewhat complicated because the two causes stated on the caption of this Opinion have been consolidated into a single case. Under the following two subsections of this Opinion, the Court first describes the facts applicable to the designated "lead case" (Price v. Choctaw Glove & Safety Co., Inc. et al.), then describes the facts applicable to the designated "consolidated case" (Cleveland v. Choctaw Glove & Safety Co., Inc. et al.).[2]

(A) Facts - Lead Case

Plaintiff Price worked at Choctaw Glove beginning on October 15, 1998. On December 20, 2001, Price began a workers' compensation leave of absence, and has not yet returned to work. During her entire employment tenure with Choctaw Glove, she worked in the Finishing Department and earned $5.15 per hour, plus various bonuses. In her Complaint, Price contends that the great majority of women employed by Defendant work in production, and earn salaries roughly equivalent to hers. She further contends that the great

[2]The lead case and the consolidated case were consolidated through an Order rendered by Magistrate Judge Alfred Nicols on September 16, 2004, and filed with the Clerk of the Count on September 17, 2004, as entry no. 81 on the docket of the lead case.

majority of men employed by Defendant are hired into the Knitting Department, with starting salaries ranging from $7.25 per hour to $8.75 per hour. Price attributes this alleged difference in hiring practices and pay rates solely to sex discrimination.

Aggrieved by the purported sex discrimination, Price filed a Charge of Discrimination with the Equal Employment Opportunity Commission (hereinafter "EEOC") on December 12, 2000. In the EEOC Charge, Price stated:

> I believe that myself and other women as a class are being discriminated against because of our sex - female in violation of Title VII of the 1964 Civil Rights Act as amended, inasmuch as; a) Men are being paid more than women and men and women are not allowed to do the same job.

Complaint (Lead Case), Exhibit "2," EEOC Charge of Discrimination. On March 13, 2001, Plaintiff filed an Amended Charge of Discrimination with the EEOC, which stated "I, Rita Price, would like to amend my charge of discrimination to include the Equal Pay Act of 1963, in that, as a female, I am being relegated in a position that is paid less than men." Complaint (Lead Case), Exhibit "2," Amended EEOC Charge of Discrimination. However, Price has now withdrawn her claim under the Equal Pay Act. Second Renewed Motion to Certify Class (docket entry no. 77), unnumbered p. 2, ¶ 2.

In response to Price's discrimination charges, the EEOC rendered its Determination on May 12, 2001. The EEOC Determination stated in part:

> I have determined that the evidence obtained in the investigation establishes reasonable cause to believe that Charging Party was discriminated against in violation of Title VII of the 1964 Civil Rights Act as amended, and the Equal Pay Act of 1963 based on the evidence and records obtained during this investigation.
>
> The records show that women were hired into production positions with a base pay of $5.15 per hour plus production pay and $.50 per hour attendance bonus, per week. Men tend to be placed into positions that pay hourly from $7.25 - $8.75.
>
> Records show that women are being hired into production positions which pay less than the knitting positions that men are being hired into, which pay hourly without regards to production.

Complaint (Lead Case), Exhibit "2," EEOC Determination.

The EEOC issued Price a Notice of Right to Sue letter on November 25, 2002. The letter stated that Price must file a civil suit based on the Title VII claims, if at all, within 90 days of the after receipt of the Notice. The November 25, 2002, Notice of Right to Sue letter was mailed to the wrong address. This error was corrected by a second letter sent to Price on February 7, 2003. Accordingly, Price's 90 day time limit to file her claims under Title VII began on February 7, 2003. The lead case was timely filed in this Court on May 1, 2003.

In her Complaint, Price asserts sex discrimination claims under Title VII. The Complaint also states that Plaintiff

> brings this action as a class action pursuant to Rules 23(b)(2) and (3) and 23(d) of the Federal Rules of Civil Procedure and as a collective action pursuant to 29 U.S.C. § 216(b) on behalf of a class of employees similarly situated defined as: "all present and future female employees who have worked, are working and will in

> the future work at the glove manufacturing plants owned and operated by the Defendant Choctaw Glove & Safety Company, Inc. d/b/a Choctaw Glove and Safety Co. and/or Allied Enterprises and/or the Glove Factory."

Complaint (Lead Case), pp. 2-3, ¶ 5. Price seeks the following relief (excluding the Equal Pay Act claim which has been abandoned):

1) a declaration that Defendant's practices are in violation of Title VII, 42 U.S.C. §2000e, et seq., and 42 U.S.C. § 1981a;

2) injunctive relief requiring Defendant to provide equal employment terms for men and women;

3) back pay to compensate for the historic pay differences between men and women;

4) future pay increases for women which are commensurate with pay rates for men; and

5) punitive damages.

In an Opinion and Order rendered by the undersigned on June 1, 2004 (hereinafter "June 1 Opinion"), and filed with the Clerk of the Court on the same day under docket entry no. 62, the Court denied Price's original Motion for Class Certification. In her original Motion for Class Certification, Price sought certification solely under Rule 23(b)(2) of the Federal Rules of Civil Procedure. Through the June 1 Opinion, that request was denied, but the Court reserved the right for Plaintiff to file a Supplemental Motion for Class Certification under Rule 23(b)(3).

Plaintiff exercised that right on June 14, 2004, through filing her Renewed and Supplemental Motion for Class Certification.[3] The Renewed and Supplemental Motion for Class Certification was addressed by the Court through an Opinion and Order dated August 10, 2004 (hereinafter "August 10 Opinion"), and filed with the Clerk of the Court on the same day under docket entry no. 75. In that Opinion, the Court recognized the conflict in class certification of Price's Title VII and § 1981 claims under Rule 23 of the Federal Rules of Civil Procedure on the one hand, and the certification as a collective action of Price's Equal Pay Act claims under § 216 on the other. August 10 Opinion (docket entry no. 75), pp. 3-7. The August 10 Opinion went on to hold that "the court must deny, without prejudice, Plaintiff's Supplemental Motion for Class Certification. However, the Court will allow Plaintiff to make a decision regarding the claims that she wishes to pursue as class action claims and/or collective action claims." Id. at 7.

In Response to the August 10 Opinion, on August 26, 2004, Price filed the subject Second Renewed Motion to Certify Class. Through that Motion, Price mooted the issue of class certification versus certification as a collective action, because she withdrew her claims under the Equal Pay Act. Second Renewed Motion to Certify Class (docket entry no. 77), unnumbered p. 2, ¶ 2. Therefore, the

[3]The Renewed and Supplemental Motion for Class Certification was filed with the Clerk of the Court under docket entry no. 66.

only issue posed by the Second Renewed Motion to Certify Class is whether Price's Title VII claims, including her § 1981a claims, should be certified as a class action under Rule 23. Analysis of that issue is presented in a subsequent section of this Opinion.

(B) Facts - Consolidated Case

The claims in the consolidated case are premised largely on the facts which form the basis of the claims in the lead case. The consolidated case was filed with this Court on August 26, 2004. It has thirty-five named Plaintiffs, who are prosecuting the case "individually, and on behalf of all others similarly situated." Complaint (Consolidated Case), p. 1, Caption. All of the named Plaintiffs are females. Except for the omission of claims under the Equal Pay Act,[4] and the omission of a prayer for punitive damages, Plaintiffs in the consolidated case seek the same relief that Price seeks in the lead case. Complaint (Consolidated Case), pp. 8-9, ¶ 32, compare to, Complaint (Lead Case), pp. 8-9, ¶ 34.

Other facts follow that are relevant to the issues which must be decided herewith, and which are specific to the consolidated case. None of the thirty-five named Plaintiffs is currently employed by Defendant. The last day on which any of the thirty-five Plaintiffs worked for Defendant was July 29, 2003, when Plaintiff Winnie P. Evans resigned from her employment position. Declaration

[4]As stated above, Price has abandoned her claims under the Equal Pay Act.

of Steve Weeks, p. 1, ¶ 2.[5] None of the Plaintiffs filed a Charge of Discrimination with the EEOC.

Defendant filed the subject Motion for Summary Judgment on October 4, 2004. The Court notes that Defendant is seeking summary judgment on the claims asserted in the *consolidated case only*. Therefore, the rulings of the Court pertaining to this Motion for Summary Judgment have no effect on Plaintiff Price in the lead case, or any of the claims asserted by Plaintiff Price in the lead case.

II. ANALYSIS

(A) Plaintiff's Second Renewed Motion to Certify Class

In her Second Renewed Motion to Certify Class, Plaintiff seeks class certification under both Rule 23(b)(2) and Rule 23(b)(3) of the Federal Rules of Civil Procedure. As a prerequisite for class certification under Rule 23(b), the standards set forth in Rule 23(a) must be met. In the June 1 Opinion, the Court found that the tests of Rule 23(a) are met in this case. June 1 Opinion (docket entry no. 62), pp. 5-9. That finding and the supporting analysis, which is adopted herewith by reference, will not be revisited. The tests applicable to the two avenues for class certification under Rule 23(b) in issue in this case are analyzed below.

(1) Class Certification Under Rule 23(b)(2)

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[5]Steve Weeks has provided two Declarations in this case. The Declaration of Steve Weeks referenced here was filed with the Clerk of the Court under docket entry no. 84. Weeks is the Vice President of Choctaw Glove & Safety Co., Inc.

In the June 1 Opinion, the Court ruled that this case is not amenable to class certification under Rule 23(b)(2) of the Federal Rules of Civil Procedure. The Court continues to stand behind that finding and the accompanying supporting analysis, and adopts the same herewith.[6] However, the Court deems it necessary to further expound upon the Rule 23(b)(2) class certification issue.

As the Court found in the June 1 Opinion, a prayer for monetary relief does not preclude class certification under Rule 23(b)(2), so long as the *predominate* relief sought is injunctive or declaratory in nature.[7] Applying Allison v. Citgo Petroleum Corp., 151 F.3d 402 (5th Cir. 1998), this Court found that Price's claims for injunctive and declaratory relief do not predominate over her claims for monetary damages. That finding was based in part on Price's punitive damages claim.

Price contends that the Court's ruling on this issue was errant because "Allison did hold, in appropriate situations, that a class can be certified where the plaintiff sought *class-wide* punitive

[6]Analysis of class certification under Rule 23(b)(2) is presented on pages 9 through 13 of the June 1 Opinion (docket entry no. 62).

[7]The Court notes that a "predominance" test is part of the analysis of both Rule 23(b)(2) class certification and Rule 23(b)(3) class certification. The predominance test in this Rule 23(b)(2) analysis pertains to whether the subject claims for monetary relief predominate over claims for injunctive and declaratory relief. The predominance test analyzed below in the Rule 23(b)(3) analysis considers whether legal or factual issues common to the class as a whole predominate over issues which are specific to individual class members.

damages, as opposed to a case requiring *individualized determination* for punitive damages for each class member. This case seeks class-wide punitive damages." Plaintiff's Rebuttal Memorandum in Support of Second Renewed Motion to Certify Class (docket entry no. 82), p. 2 (emphasis added). Case law decided subsequent to Allison belies this argument. See, Smith v. Texaco, Inc., 263 F.3d 394 (5th Cir. 2001), opinion withdrawn on other grounds, 281 F.3d 477 (5th Cir. 2002).

In Smith, the Fifth Circuit analyzed whether an individualized inquiry is required when class-wide punitive damages are sought. The Court held:

> Punitive damages have not been assessed merely on a finding that the defendant engaged in a pattern or practice of discrimination. Such a finding establishes only that there has been general harm to the group and that injunctive relief is appropriate. See Price Waterhouse v. Hopkins, 490 U.S. 228, 266, 109 S.Ct. 1775, 104 L.Ed.2d 268, (1989) (O'Connor, J., concurring in the judgment). *The Court's precedent supports the view that an individualized inquiry is necessary to determine liability for punitive damages in the title VII context*, at least where, as here, there are a series of decisions made by various personnel.

Smith, 263 F.3d at 410 (emphasis added).

The holding in Smith supports a finding that if punitive damages are sought in a class action suit, even if sought on a class-wide basis rather than on an individualized basis, then class

certification under Rule 23(b)(2) is generally inappropriate.[8] This Court draws such a conclusion by amalgamating the holdings in Allison and Smith. In Allison, the court held that if individualized inquiries into damage issues are required, then monetary claims predominate over injunctive and/or declaratory relief claims, and Rule 23(b)(2) class certification is not proper. Allison, 151 F.3d at 415. The Smith court held that individual inquiries are usually required if punitive damages are sought in a discrimination case. For these reasons and the reasons stated in the June 1 Opinion, the presence of Price's punitive damages claim requires this Court to disallow class certification of the subject cause under Rule 23(b)(2).

In the alternative, even if the Court refrains from considering the holdings in Smith,[9] Rule 23(b)(2) class certification must

[8]Case law is clear to the extent that claims of punitive damages are not allowed in class actions suits alleging "disparate impact." Garcia v. Woman's Hosp. of Texas, 143 F.3d 227, 230 n.1 (5th Cir. 1998). In issue in this Opinion is whether class-wide punitive damages claims are allowed in class action suits alleging discrimination based on "disparate treatment."

[9]This Court is reluctant to place too much reliance on Smith for two reasons. First, even though the Smith opinion was withdrawn on procedural grounds unrelated to the legal propositions cited by this Court, the opinion has nevertheless been withdrawn. Therefore, even though this Court agrees with the holdings therein, Smith does not represent binding law. Second, Judge Reavley provided a well reasoned dissenting opinion in Smith. In summary, Judge Reavley analyzed the codified language of Title VII and concluded that "[t]o read this language to prohibit a single, class-wide award of punitive damages is wholly unwarranted under the wording of the statute itself...." Smith, 263 F.3d at 422. Judge Reavley's dissenting opinion indicates that the Fifth Circuit is divided on

nevertheless be denied based on Price's claim for punitive damages. This finding can be based solely on the holding in Allison. The Allison court did not definitively determine whether class-wide punitive damages could be awarded without individualized proof of injury. Allison, 151 F.3d at 417. However, the court held that "[a]ssuming punitive damages may be awarded on a class-wide basis, without proof of individualized injury," such an award in not allowed unless "the entire class...is subjected to the same discriminatory act or series of acts...." Id. Because the alleged discriminatory conduct in the subject cause involves employment at three separate facilities, all of which were under separate on-site management, the Court finds that individualized inquiries will be required, at least in substantial part, to determine whether the proposed class members at the three facilities were subjected to the same or similar discriminatory conduct.

Also, the award of class-wide punitive damages without individual inquiries is further complicated by the fact that many women were offered and/or accepted positions within the Knitting Department of Defendant, the very department from which Price contends that females employees were excluded on a systematic and

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the issue of whether a single, class-wide award of punitive damages may be awarded without individual inquiries into the circumstances of each class member. The extent of this division is unknown to this Court. Therefore, the Court must consider binding case law outside of the holdings in Smith.

discriminatory basis.[10] See, Declaration of Steve Weeks, pp. 5-6, ¶ 15, attached as Exhibit "B" (tab 3) to Defendant's Response in Opposition to Motion for Class Certification (docket entry no. 25). According to Weeks' sworn and uncontradicted testimony, at least twenty-nine females have been offered and/or accepted positions in the Knitting Department at either the Choctaw Glove facility in Union, Mississippi, or the Glove Factory facility in Noxapater, Mississippi. This is of importance in two respects.

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[10]Citing Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 178 (1974), Price contends that this Court is barred from considering the fact that females have been afforded employment opportunities in Defendant's Knitting Department. Rebuttal Memorandum in Support of Second Renewed Motion to Certify Class (docket entry no. 82), p. 3 (stating that "the United States Supreme Court has made it clear that class allegations are to be taken as true. The Defendants' [sic] allegations that a small number of women were offered knitting positions, at the class stage, are irrelevant."); Reply Memorandum in Support of Plaintiff's Motion for Certification of Class (docket entry no. 30), p. 8. Price's argument on this issue is not well taken. The Eisen Court found that a district court could not consider the merits of the case in determining whether class certification is appropriate. Eisen, 417 U.S. at 178 (holding that "[i]n determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met."). In considering the undisputed fact that numerous females have been offered, and many have accepted employment opportunities in Defendant's Knitting Department, the Court is *not* making a determination as to whether Price has stated a viable cause of action or whether she will prevail on the merits. The Court is simply using this information to aid in determining the extent to which individualized fact finding inquiries will be required in the adjudication of Price's punitive damages claim. Other extrinsic evidence is used throughout this Opinion in determining whether the tests for Rule 23(b) are met. However, none is used in an effort to measure the merits of Price's claims. Therefore, the manner in which extrinsic evidence is considered in this Opinion is not barred by Eisen.

First, Price has only identified one hundred and thirty-two women "who currently are within the pertinent statute of limitations period [who] have worked for Defendant." Memorandum in Support of Plaintiff's Motion for Certification of Class (docket entry no. 23), p. 2.[11] If twenty-nine of the one hundred and thirty-two females were offered and/or accepted positions in the Knitting Department, then it is difficult to conceive of how class-wide punitive damages may be awarded without individualized fact finding inquiries. That is, since a significant percentage of females have been offered and/or accepted the very positions on which Price's gender discrimination claims are substantially based, in a punitive damages analysis the Court would be required to individually ascertain why those females were not excluded from the Knitting Department, while others allegedly were.

Second, all of the twenty-nine females identified by Weeks as being offered employment opportunities in the Knitting Department worked or were offered positions at either the Choctaw Glove facility or the Glove Factory facility. None of the twenty-nine worked or was offered a position at the Allied facility in Philadelphia, Mississippi. From this set of facts, a reasonable inference can be drawn that different policies were in place at

[11]The Court is not sure whether this one hundred and thirty-two figure includes the thirty-five Plaintiffs named in the consolidated case. Under either scenario, a significant number of female employees have not been excluded from employment opportunities in Defendant's Knitting Department.

Defendant's three facilities, at least in regard to the hiring of female employees into the Knitting Department. This finding is further supported by the following testimony of Steve Weeks: Defendant "does not have a centralized hiring process for all of its locations." Declaration of Steve Weeks, p. 4, ¶ 9, attached as Exhibit "B" (tab 3) to Defendant's Response in Opposition to Motion for Class Certification (docket entry no. 25). As indicated by the Allison court, potentially separate hiring policies at separate facilities weighs in favor of finding that individualized inquiries will be required in deciding the punitive damages issue in a class action suit. Allison, 151 F.3d at 417. This factor provides further support for a finding that Price's claim for punitive damages will require individualized inquiries, thus rendering this suit unamenable to class certification under Rule 23(b)(2).

Based on the reasons stated above and the reasons stated in the June 1 Opinion, the Court must deny Price's request for class certification under Rule 23(b)(2) of the Federal Rules of Civil Procedure. Next analyzed is whether class certification may be granted under Rule 23(b)(3).

(2) Class Certification Under Rule 23(b)(3)

In the alternative to certification under Rule 23(b)(2), Price seeks class certification under Rule 23(b)(3). Under this Rule, class certification is proper if

> the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Fed. R. Civ. P. 23(b)(3). The Allison court held that analyzing class certification under Rule 23(b)(3) requires a court to

> consider [1] whether issues common to the class predominate over issues relating solely to individuals, and [2] whether a (b)(3) class action would be an efficient and manageable means of resolving this case in the light of the plaintiffs' claims for compensatory and punitive damages and their demand for a jury trial.

Allison, 151 F.3d at 408-09. These two issues are referred to herein as the "predominance" test[12] and the "superiority" test. *Both* the predominance test *and* the superiority test must be met before class certification can be granted under Rule 23(b)(3). Fed. R. Civ. P. 23, Advisory Committee Notes, 1996 Amendment, Subdivision (b)(3) (stating "[t]hat common questions predominate is not itself sufficient to justify class certification under subdivision (b)(3)[.] *** [S]ubdivision (b)(3) requires, as a further condition of maintaining the class action, that the court shall find that that

[12] See supra, footnote 7.

procedure is 'superior' to the others in the particular circumstances."). Both tests are considered under the following subsections of this Opinion.

(a) Predominance Test

As stated above, under the predominance test, the Court must consider whether issues common to the class predominate over issues relating solely to individual class members. If class-wide issues predominate, then this test favors granting Price's prayer for class certification. See, Allison, 151 F.3d at 420 (citation omitted). Conversely, if issues specific to individuals within the proposed class predominate, then the test favors denial of class certification. See, id. The predominance test is akin the Rule 23(a)(2) commonality test which the Court has already considered and analyzed in the June 1 Opinion. However, the Rule 23(b)(3) predominance test is far more demanding. O'Sullivan v. Countrywide Home Loans, Inc., 319 F.3d 732, 738 (5th Cir. 2003)(citation omitted).

"The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." Amchem Prod., Inc. v. Windsor, 521 U.S. 591, 623 (1997)(citation omitted). In a proposed class action case in which the plaintiff seeks compensatory and punitive damages, success of the claims is especially susceptible to hinging upon issues specific to the circumstances of each individual, rather then issues

pertaining to the class as a whole. See generally, Allison, 151 F.3d at 420. Therefore, the Court must closely scrutinize whether Price's compensatory damage claims and her claim for punitive damages are sufficiently cohesive to warrant adjudication in a class action format.

As set forth by the O'Sullivan court, the methods of proving a plaintiff's claims and the method of proving the corresponding defenses must be considered in analyzing the predominance test.

> Determining whether legal issues common to the class predominate over individual issues requires that the court inquire how the case will be tried. This entails identifying the substantive issues that will control the outcome, assessing which issues will predominate, and then determining whether the issues are common to the class. Although this inquiry does not resolve the case on its merits, it requires that the court look beyond the pleadings to "understand the claims, defenses, relevant facts, and applicable substantive law." Such an understanding prevents the class from degenerating into a series of individual trials.

O'Sullivan, 319 F.3d at 738 (internal citations omitted).

Price's gender discrimination claims are considered under a disparate treatment analysis.[13] "Disparate treatment refers to deliberate discrimination in the terms and conditions of employment." Munoz v. Orr, 200 F.3d 291, 299 (5th Cir. 2000). The

[13]Defendant contends that Price's claims fall under the purview of disparate treatment, rather than disparate impact. Defendant's Response in Opposition to Plaintiff's Second Renewed Motion to Certify Class (docket entry no. 78), p. 4. Price has not refuted this contention. Based on Price's silence on the issue, and based on the Court's own analysis of Price's claims, the Court finds that her claims fall exclusively under the purview of disparate treatment.

Court first focuses on what Price must prove to recover compensatory damages in this case. Following that analysis, the Court will consider the effect of Price's punitive damages claim on this issue.

To prove a prima facie case of discrimination in a class action disparate treatment discrimination suit, plaintiffs "must show a 'pattern or practice' of discrimination by the employer, i.e. that 'racial discrimination was the company's standard operating procedure – the regular rather than the unusual practice.'" Id. (citation omitted). Proof at the liability stage typically focuses on a pattern of discriminatory decision making rather than on individual hiring decisions. Celestine v. Petroleos De Venezuella SA, 266 F.3d 343, 355 (5th Cir. 2001)(citation omitted). "Proving isolated or sporadic discriminatory acts by the employer is insufficient to establish a prima facie case." Munoz, 200 F.3d at 299 (citation omitted).

In this case, Price seeks permission to be the class representative for "all past, present and future [female] employees employed from June 12, 2000 to the present at the glove manufacturing plants owned and operated by" Defendant. Second Renewed Motion to Certify Class (docket entry no. 77), p. 1. Price further alleges that "[t]he Defendant discriminates against Plaintiffs on the basis of their sex, female, in all phases of employment including [1] wages, [2] recruitment, [3] hiring, [4] job assignment, [5] promotion, [6] training, and [7] other terms,

conditions or privileges of employment. Complaint (Lead Case), p. 6, ¶ 18. Of these seven categories, the Court focuses on Defendant's hiring practices and its wage payment practices, which appear to form the crux of Price's claims.

Price's claim of discrimination pertaining to both hiring practices and wage payment practices can be summarized by the following excerpt from her Complaint: "The Defendant hires women into production positions with a base pay of $5.15 per hour plus production pay and $.50 per hour attendance bonus, per week, while the Defendant hires men into [knitting[14]] positions that pay hourly from $7.25 to $8.75." Complaint (Lead Case), p. 5, ¶ 14. For the reasons set forth below, the Court finds that issues specific to individuals will predominate over class-wide issues with regard to Defendant's hiring and wage payment practices.

First, as set forth above in section II.(A)(1) of this Opinion, numerous females have been hired into the Knitting Department at two of the three manufacturing facilities operated by Defendant. Individual inquiries will be required to determine: (1) why those females were hired into the Knitting Department and others were not; and (2) why two of the facilities hired females into the Knitting Department, and the third did not.

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[14]Price specifically identifies the predominant position into which men are hired as the "knitting" position on p. 5, ¶ 15 of her Complaint.

Second, Price's claim of disparate wage payment will require significant individual inquiry as well because, of the thirty-six females identified by Price as potential Plaintiffs in this case, at least fourteen of them periodically earned wages within or above the $7.25 to $8.75 wage range which Price alleges that male employees earn. Declaration of Steve Weeks, pp. 7-9, ¶ 19, attached as Exhibit "B" (tab 3) to Defendant's Response in Opposition to Motion for Class Certification (docket entry no. 25). In fact, during the week of July 8, 2000, Price herself earned an equivalent hourly rate of $15.84. The fact that a number of female employees earned hourly wages equal to or granter than the wage level which Price contends that male employees earned will require significant individualized inquiries on the wage payment issue in order to prove the subject claims.

For these reasons the Court finds that in the context of proving Price's prima facie case, individualized issues will predominate over class-wide issues. Further, Defendant's defenses will require significant individual inquiries as well.

If Price proves her prima facie case, then "the burden of production shifts to the employer to articulate a legitimate, non-discriminatory reason for the employment action." Munoz, 200 F.3d at 299 (citation omitted). Again, significant individualized explanations will be required in the defense of Price's claims. To articulate nondiscriminatory reasons for Defendant's employment

practices, individualized explanations will be required because: (1) several females were hired into the Knitting Department, the very department from which Price contends that females were excluded based on gender discrimination; (2) two of the three facilities operated by Defendant hired females into the Knitting Department, and the third did not; and (3) a number of female employees earned hourly wages equal to or granter than the wage level which Price contends that male employees earned. These individualized issues pertaining to the defense of this case predominate over the class-wide issues.[15]

Based on the analysis presented above, the Court finds that individualized issues will predominate over class-wide issues in both Price's proof of her prima facie case, and in Defendant's defense to her prima facie case. Also, based on the analysis presented in section II.(A)(1) of this Opinion, the Court finds that individualized issues will predominate over class-wide issues with regard to Price's claim for punitive damages.[16] Accordingly, the

[15]The Court acknowledges that the reasons stated herewith for finding that individualized issues predominate in Price's proof of her prima facie case, and the reasons stated for finding that individualized issues predominate in Defendant's defense of the case are essentially the same. The rationale for this is simple, i.e. if Price is required to assert individualized facts to prove her case, then Defendant will likely be required to rely on equally individualized facts.

[16]The Court realizes that the analysis presented in section II.(A)(1) pertains to class certification under Rule 23(b)(2). However, the findings in that analysis equally support a conclusion that in the context of the subject punitive damages claim,

Court finds that Price has failed to meet the predominance test for Rule 23(b)(3) class certification.

(b) Superiority Test

The predominance test and the superiority test for class certification are "and" tests. That is, *both* tests must be met before class certification can be granted under Rule 23(b)(3). Fed. R. Civ. P. 23, Advisory Committee Notes, 1996 Amendment, Subdivision (b)(3). Because the Court has found that the predominance test fails in this case, the superiority test is only briefly analyzed.

"The most compelling rationale for finding superiority in a class action" suit is "the existence of a negative value suit...." Castano v. Am. Tobacco Co., 84 F.3d 734, 748 (5th Cir. 1996)(citations omitted). A "negative value suit" is defined as a suit in which "class members' claims 'would be uneconomical to litigate individually.'" In re: Monumental Life Ins. Co., 365 F.3d 408, 412 n.1 (5th Cir. 2004)(citations omitted). Factors to consider in determining whether a suit is potentially a negative value suit are: (1) whether individual damages claims are high; (2) whether a punitive damages claim is asserted; and (3) whether the expenses of litigation are recoverable. Castano, 84 F.3d at 748.

The first factor, whether individual damages claims are high, is not completely certain at this stage of the case. However, the

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individualized issues will predominate over class-wide issues.

Court believes that such would probably be relatively low, as the hourly difference in the rate of pay of male employees and of female employees is relatively small ($7.25 / hr. to $8.75 / hr. for males versus $5.15 / hr. plus production bonuses for females). This factor weighs in favor of allowing class certification. Because Price has alleged a punitive damages claim, the second factor obviously favors denial of class certification. The third factor, whether the expenses of litigation are recoverable, also favors denial of class certification. See, Stewart v. Dep't of Health and Hosps., No. 04-30409, 2004 WL 2725863 at *4 (5th Cir. Dec. 1, 2004)(citing 42 U.S.C. § 2000e-5(k) and stating that "[u]nder Title VII, a prevailing party may be awarded attorney's fees at the discretion of the court."). Blending these three factors, the Court finds that this case does not represent a negative value suit. This weighs in favor of a further finding that the superiority requirement of Rule 23(b)(3) class certification fails.

A remaining factor that must be considered in the superiority determination is judicial efficiency. Castano, 84 F.3d at 749 (citation omitted). The Court finds that judicial efficiency would not be served by litigating this case as a class action. This finding is made based on the above analyses in which the Court concluded that many individualized inquiries would be required to prove Price's prima facie case, to prove Defendant's available defenses, and to prove Price's punitive damages claim. Such

individualization of issues in a class action suit would not serve the interests of judicial efficiency for either the Court or the parties.

For all of these reasons, the Court finds that the superiority requirement for class certification fails to be met. Because both the predominance test and the superiority test fail, Price's prayer for certification under Rule 23(b)(3) must be denied.

(3) Conclusion – Plaintiff's Second Renewed Motion to Certify Class

A plaintiff bears the burden to prove that class certification is proper. Horton v. Goose Creek Indep. Sch. Dist., 690 F.2d 470, 486 (5th Cir. 1982). In this case, Price seeks class certification under Rule 23(b)(2) and under Rule 23(b)(3). As the Court found above, Price has failed to carry the burden to prove that class certification under either of these standards is met. The Court therefore finds that Price's Second Renewed Motion to Certify Class must be denied.

(B) Defendant's Motion for Summary Judgment

On October 4, 2004, Defendant filed its Motion to Dismiss or in the Alternative for Summary Judgment. For the reasons stated in footnote 1 above, the Motion must be considered under the Rule 56 standards of a summary judgment motion.[17] This Motion pertains to

[17]Rule 56 of the Federal Rules of Civil Procedure provides, in relevant part, that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and

the *consolidated case only*. The holdings pertaining to this Motion for Summary *have no effect on the lead case*.

The subject Motion can be decided with little analysis. The parties do no dispute that outside the context of a class action suit, an EEOC Charge of Discrimination must be filed in a timely manner as a prerequisite to maintaining a suit under Title VII. The parties do not dispute that none of the thirty-five named Plaintiffs in the consolidated case filed an EEOC Charge of Discrimination. Because the Court denies herewith the Second Renewed Motion to Certify Class, the thirty-five Plaintiffs in the consolidated case cannot prosecute their case in reliance on Price's EEOC Charge of Discrimination. Therefore, these Plaintiffs must be dismissed for failure to satisfy the prerequisites for initiating and maintaining their Discrimination claims, and Defendant's Motion for Summary Judgment must be granted. Because this decision does not represent a decision on the merits, dismissal of the thirty-five Plaintiffs in the consolidated case must be without prejudice.

(C) Plaintiff's Motion for Enlargement of Time

On October 15, 2004, Price filed the subject Motion for Enlargement of Time in which she sought an additional fifteen days in which to serve her Rebuttal to Defendant's Motion to Dismiss or

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admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

in the Alternative for Summary Judgment. Price has since filed the pleading in question, without objection from Defendant, and the pleading was considered by the Court in its analysis of the Motion for Summary Judgment. Therefore, the Motion for Enlargement of Time should be denied as moot.

III. CONCLUSION

Based on the holdings presented above:

IT IS THEREFORE ORDERED that Plaintiff's Second Renewed Motion to Certify Class [77-1] is hereby denied.

IT IS FURTHER ORDERED that Defendant's Motion to Dismiss or in the Alternative for Summary Judgment [83-1 & 2] is hereby granted. The claims asserted in the consolidated cause (4:04cv156BN) are hereby dismissed, without prejudice.

IT IS FURTHER ORDERED that Plaintiff's Motion for Enlargement of Time [87-1] is hereby denied as moot.

SO ORDERED this the 22nd day of December, 2004.

s/ William H. Barbour, Jr.
UNITED STATES DISTRICT JUDGE

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