UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

James Peterson, et al., Civil No. 07-2502 MJD/AJB

Plaintiffs,

v.

Seagate US LLC, et al.,

Defendants.

REPORT AND RECOMMENDATION ON PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON SIRP RELEASES AND DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON CALCAGNO CLAIMS

This matter is before the Court, Chief Magistrate Judge Arthur J. Boylan, on plaintiffs' motion for summary judgment as to the invalidity of 2004 SIRP releases [Docket No. 206], and on defendants' motion for summary judgment dismissing claims asserted by Paul Calcagno [Docket No. 220]. The case has been referred to the magistrate judge for report and recommendation pursuant to 28 U.S.C. § 636. Hearing was held on July 1, 2010, at the U.S. Courthouse, 316 North Robert Street, St. Paul, Minnesota 55101. Plaintiffs were represented at the hearing by Dorene R. Sarnoski, Esq., and Beth E. Bertelson, Esq. Defendants were represented by Marko J. Mrkonich, Esq., and Susan K. Fitzke, Esq.

Based upon the file and documents contained therein, including memorandums, affidavits, and exhibits, and in consideration of arguments presented at hearing, it is hereby **RECOMMENDED** that:

1. Plaintiffs' Motion for Summary Judgment as to the Invalidity of 2004 SIRP Releases be **granted** [Docket No. 206]; and

2. Defendants' Motion for Summary Judgment Regarding All Claims Asserted by Paul Calcagno be **denied** [Docket No. 220].

Dated: December 28, 2010

s/ Arthur J. Boylan
Arthur J. Boylan
United States Chief Magistrate Judge

Pursuant to Local Rule 72.2(b), any party may object to this Report and Recommendation by filing with the Clerk of Court, and by serving upon all parties, written objections which specifically identify the portions of the Report to which objections are made and the bases for each objection. This Report and Recommendation does not constitute an order or judgment from the District Court and it is therefore not directly appealable to the Circuit Court of Appeals. Written objections must be filed with the Court before January 12, 2011.

Unless the parties stipulate that the District Court is not required by 28 U.S.C. § 636 to review a transcript of the hearing in order to resolve all objections made to this Report and Recommendation, the party making the objections shall timely order and file a complete transcript of the hearing within ten days of receipt of the Report.

MEMORANDUM

Procedural Background and Claims

Defendant in this matter, Seagate US LLC, et al.[1] (Seagate) is a manufacturer of computer hard drives and data storage solutions. Plaintiffs are former Seagate employees who either retired from the company pursuant to a Special Incentive Retirement Plan (SIRP) or were terminated in connection with a Reduction in Force (RIF) plan. In each instance the affected employee was offered a severance payment in exchange for execution of a release and waiver of possible employment claims against Seagate. Both of these employee reduction plans were

[1] The presently existing Seagate entities that have been named as defendants are identified as Seagate US LLC, Seagate Technology, Seagate Technology, Inc., Seagate Technology LLC, and Seagate Technology (US) Holdings, Inc. Defendants will hereafter be referenced in the singular.

implemented in 2004. The motions presently before the court relate to SIRP employee claims only.

Plaintiffs commenced this action by complaint filed in May 2007 in which it is alleged that plaintiffs suffered damages as a consequence of Seagate's failure to comply with provisions of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq*. Plaintiffs are seeking to prosecute the case as a collective, opt-in action, and have requested declaratory relief with respect to the enforceability of releases under the Older Workers Benefits Protection Act (OWBPA), 29 U.S.C. § 626(f), and further requesting injunctive relief and monetary damages.

In June 2007, Seagate moved to dismiss nineteen specified plaintiffs from the action,[2] based primarily upon the releases and waivers of claims executed by the employees, as well as the failure of each of them to exhaust EEOC administrative remedies. The district court denied the motion to dismiss the declaratory judgment action, concluding that the complaint stated sufficient allegations that the releases are not valid under the OWBPA, and under the circumstances in this case, it is not required that each individual member of a complaining class have filed an administrative charge.[3] The district court declined a request by defendant for reconsideration of the motion to dismiss.[4]

Plaintiffs thereafter moved for partial summary judgment on the claim that

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[2] Defendants' Motion to Dismiss [Docket No. 3].

[3] Mem. Opinion and Order dated November 20, 2007 [Docket No. 46].

[4] Order dated December 3, 2007 [Docket No. 49].

releases were invalid as a matter of law[5] because they did not meet strict requirements of the OWBPA. The motion was granted with respect to releases offered to plaintiffs who were terminated pursuant to the 2004 RIF, and the motion was denied with respect to a release executed by plaintiff Paul Calcagno in connection with the 2004 SIRP.[6] Specifically, and as pertains to the present motion, the district court determined that the then-existing record did not permit a finding that the Calcagno release violated the OWBPA on grounds that the plaintiff had not been provided job titles and ages of employees who were eligible and ineligible for the SIRP at designated work facilities. Defendant's motion to certify the November 20, 2007, and May 28, 2008, Order for Interlocutory Appeal to the Eighth Circuit[7] was denied.[8] Plaintiffs were given authorization to provide nation-wide notice of the lawsuit to potential class members on October 23, 2008,[9] but unconditional class certification has not been granted to date.

Plaintiffs now move for summary judgment on the declaratory judgment action relating to the validity of releases executed by SIRP employees. Plaintiffs contend that the record is now sufficiently established to support the determination that the SIRP-terminated employees were not provided accurate lists of other Seagate employees in United States facilities who were eligible or not eligible to participate in the plan. Plaintiffs further argue that SIRP employees were not provided the OWBPA mandated 45 days in which to consider the plan

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[5] Plaintiffs' Motion for Partial Summary Judgment: Invalidity of Releases [Docket No. 50].

[6] Mem. Opinion and Order dated May 28, 2008 [Docket No. 84].

[7] [Docket No. 103].

[8] Mem. and Order dated August 24, 2008 [Docket No. 116].

[9] Mem. of Law and Order [Docket No. 120}

before deciding whether to participate. It is alleged that Seagate's failure to strictly comply with such disclosure requirements invalidates the releases and claim waivers as a matter of law. Defendant on the other hand, asserts that affected employees were indeed given the necessary 45 days to consider whether to execute a release, and defendant further insists that any errors in disclosures were not material and do not provide grounds for invalidating the releases. Defendant also contends that SIRP participants, with the exceptions of James Peterson and David Olson, are not proper parties in this case because they did not file EEOC charges and cannot piggyback onto the EEOC charges filed by Peterson and Olson to satisfy the administrative exhaustion requirement. Defendant's motion for summary judgment seeks dismissal of claims by individual plaintiff Paul Calcagno on grounds that he did not exhaust EEOC administrative remedies, and he cannot show constructive discharge or other adverse employment action as necessary to establish a *prima facie* case of age discrimination.

Standard of Review

Summary Judgment. Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c) The moving party has the initial responsibility of demonstrating that there is no genuine issue of material fact to be decided. Celotex Corp. v. Catrett, 477 U.S. 317, 322-323, 106 S.Ct. 2548, 2553 (1986). In its review of the facts the court must consider the evidence in the light most favorable to the party opposing summary judgment. Kneibert v. Thomson Newspapers, Michigan, Inc., 129 F.3d 444, 451 (8th Cir. 1997). When a motion for summary judgment has been made and supported by the pleadings and affidavits as provided in Rule 56(c), the burden shifts to the party opposing the motion to proffer evidence demonstrating that a

trial is required because a disputed issue of material fact exists. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S.Ct. 1348, 1355-56 (1986). In satisfying this burden, however, the non-moving party must do more than simply establish doubt as to the material facts. The party opposing summary judgment may not "rest upon the mere allegations or denials of the adverse party's pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." Matsushita, 106 S.Ct. at 1355, n.11, Krenik v. County of Le Sueur, 47 F.3d 953, 957 (8th Cir. 1995), Fed. R. Civ. P. 56(e). Evidence must be presented to defeat a properly supported summary judgment motion and a party may not rely upon conclusory allegations and unsupported assertions. Dunavant v. Moore, 907 F.2d 77, 80 (8th Cir. 1990). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" Matsushita, 106 S.Ct. at 1356 (citation omitted).

DISCUSSION

Defendant's Motion for Summary Judgment on Claims by Paul Calcagno

Defendant Seagate moves for dismissal of claims by individual defendant Paul Calcagno on grounds that undisputed evidence establishes that he voluntarily resigned his employment and therefore, as a matter of law he cannot satisfy an element of a cause of action for age discrimination. Seagate contends that the *prima facie* case for an age discrimination case, as set forth in McDonnell Douglas v. Green, 411 U.S. 792 (1973), requires that plaintiff Calcagno show that (1) he is age forty or more; (2) he suffered an adverse employment action; (3) he was qualified and able to meet the employer's expectations at the time of the adverse action; and (4) he was replaced by a substantially younger person. Lewis v. St. Cloud State

Univ., 467 F.3d 1133, 1136 (8th Cir. 2006). Also, in the reduction in force context there must be evidence that age was a motivating factor in the action. Johnson v. Runyon, 137 F.3d 1081, 1082 (8th Cir. 1998) (no adverse employment action where employee voluntarily retired). The complete McDonnell Douglas test provides that upon plaintiff establishing a *prima facie* case, a defendant employer must thereafter carry the burden of producing evidence of a legitimate, non-discriminatory reason for its employment action, which would then shift the burden back to the defendant to show that the proffered reason is a mere pretext for discrimination. Lewis at 1137. Defendant Seagate argues that Mr. Calcagno cannot meet the initial *prima facie* burden of showing adverse employment action because he resigned to take advantage of the benefits available under the SIRP plan, and he cannot prove constructive discharge where evidence does not show employer conduct that created a hostile or abusive work environment. Johnson v. Runyon, 137 F.3d at 1082.

Plaintiffs in opposition insist that the McDonnell Douglas test does not apply in the context of a class action in which a pattern-or-practice of age discrimination is alleged. Rather, it is asserted that the analytical framework adopted in International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) is properly applied when a plaintiff has alleged age discrimination as being the employer's "standard operating procedure." Thompson v. Weyerhauser, 582 F.3d 1125, 1126 (10th Cir. 2009). The plaintiffs here emphasize that it is necessary for the court to weigh statistical evidence and evidence relating to individual claims in combination with one another. Craik v. Minnesota State University Bd., 731 F.2d 465, 471 (8th Cir. 1984).

In Craik the court noted that it was "squarely confront[ing] the necessity of

distinguishing the analysis required for broad-based class actions from that required for individual, non-class actions." Id. at 471. The court went on to conclude that in the context of a Title VII class action, "[w]ith regard to both the individual and class claims, all the evidence was relevant and should [be] considered together. The statistical and other evidence is relevant to the individual claims because it 'is often a telltale sign of purposeful discrimination.'" Id. (quoting Teamsters v. United States, 431 U.S. at 340 n.20). Defendant argues that Teamsters espouses a burden shifting framework that does not relieve the plaintiff of the ultimate burden of proving a adverse employment action resulting from discrimination, and in any event, Teamsters addressed evidentiary burdens in Title VII claims which may not apply in a ADEA case under the reasoning in Gross v. FBL Financial Services, Inc., 129 S.Ct. 2343 (2009) (holding that the burden shifting framework applied in Title VII cases was based upon statutory language that was not present in the ADEA). However, the decision as to the evidentiary burden as presented in Craik v. Minnesota State University Bd., 731 F.2d at 471, did not relate merely to shifting the burdens of proof or persuasion, but rather, concerned the extent and nature of the evidence that is pertinent to proving claims in the class context. Consequently, evidence regarding the individual plaintiff's circumstances are relevant to class-based claims and conversely, statistical and class oriented evidence may be relevant to individual claims. Id. at 472; see also Thompson v. Weyerhaeuser Co., 582 F.3d 1125, 1131 (declining to apply Gross to pattern-or-practice burden shifting framework in ADEA case) and Clark v. Matthews Int'l Corp., __ F.3d __ (8th Cir. 2010).[10] Determination as to whether plaintiffs, including Mr. Calcagno, have established a *prima facie* case is premature at best and the defendant's motion for summary judgment should

[10] 8th Cir. Ct. of App. File No. 10-1037, Opinion filed December 27, 2010, pp. 9-11.

be denied to the extent it relies upon failure to establish an element of the cause of action for class-based age discrimination.

Also, with respect to defendant's assertion that plaintiff Paul CALCAGNO's claims are barred for failure to exhaust administrative remedies by filing his own EEOC charges, the court concludes that such failure to exhaust should not preclude Mr. Calcagno's claims in this instance. Specifically, defendant contends that Mr. Calcagno cannot piggyback onto EEOC charges by co-defendants Peterson and Olson, especially since those co-defendant EEOC charges did not allege adverse employment action in the nature of involuntary retirement or constructive discharge in connection with the SIRP. See Ulvin v. Norwestern Nat'l Life Ins. Co., 943 F.2d 862 (8th Cir. 1991). This matter was previously addressed by the court in its Memorandum Order and Opinion dated November 20, 2007, wherein it was determined that:

> "[t]he Peterson and Olson charges made reference to the July 2004 terminations, that Seagate retained younger, less qualified individuals for ongoing projects, and that Peterson and Olson were bringing charges on behalf of themselves and other similarly situated. In this case, similarly situated persons would be those individuals affected by the 2004 terminations. Accordingly, the Court finds that the Peterson and Olson charges were sufficient to put Seagate on notice of the class claims of age discrimination in the Complaint."[11] (Emphasis added).

Mem. Order and Opinion, pp. 8-9. Defendant Seagate is essentially asking the court to again reconsider the prior decision with regard to the claims of plaintiff Paul Calcagno,[12] and the court

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[11] See Aff. of Susan Kluger, Ex. U and Ex. V (EEOC charging documents) [Docket No. 223].

[12] Mem. Order and Opinion, pp. 8-9 [Docket No. 46]. The district court also denied a direct request for reconsideration in an Order dated December 3, 2007 [Docket No. 49], and denied defendant's request for certification for an interlocutory appeal on the issues of exhaustion of EEOC administrative remedies and enforcement of a SIRP release signed by Paul

is not persuaded that there has been a change in the law that would compel reconsideration or modification of prior court rulings. Defendant's motion to dismiss claims asserted by Paul Calcagno should be denied.

Plaintiffs' Motion for Summary Judgment as to SIRP Releases

Plaintiffs move for summary judgment on a claim for declaratory relief whereby releases and waivers of possible employment claims executed by plaintiffs in connection with a SIRP plan would be ruled invalid. Plaintiffs previously sought to obtain this determination by way of motion for summary judgment filed in December 2007. The district court held that releases offered to plaintiffs terminated pursuant to the 2004 RIF were invalid as a matter of law, but the invalidity finding did not extend to an employees covered by the SIRP because the record before the court at the time was insufficient to support such determination. Mem. Order and Opinion dated May 28, 2008. In any event, the court held that the OWBPA imposed "a 'strict, unqualified statutory stricture on waivers' and [the statute] incorporates no exceptions or qualifications." Id. at 3 (quoting Oubre v. Entergy Operations, Inc., 522 U.S. 422, 427 (1998). Therefore, "[s]ubstantial compliance is not adequate, and [t]he party asserting the validity of the waiver has the burden of proving that the waiver was knowing and voluntary. Id. at 3-4 (citations omitted).

In order to satisfy the "knowing and voluntary" requirement the conditions established at 29 U.S.C. § 626(f)(1) must be satisfied such that, at a minimum, the waiver: (1) is written in a manner calculated to be understood by the individual or by the average individual eligible to participate; (2) refers to rights or claims arising under the ADEA; (3) does not include

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Calcagno, in an Order dated February 14, 2008 [Docket No. 80].

a waiver of rights or claims that may arise following execution of the waiver; (4) is made in exchange for consideration over and above the value to which the individual is already entitled; (5) advises the individual in writing to consult with an attorney before executing; (6) provides at least 21 days to consider the agreement, or 45 days in the context of a reduction in force; (7) allows the individual at least seven days to revoke the waiver agreement; and (8) if in connection with an exit incentive or job termination program offered to a group or class of employees, advises the individual in writing, in a manner calculated to be understood by the individual or by the average individual eligible to participate, as to any class, unit, or group of individuals covered by the program, along with eligibility factors and time limits, as well as job titles and ages of all persons eligible or selected for the program and the ages of persons in the same job classification or organizational unit who are not eligible or selected. 29 U.S.C. § 626(f)(1). Mem. Order and Opinion dated May 28, 2008, page 4. Furthermore, "[t]he absence of even one of the OWBPA's requirements invalidates a waiver," Id. at 5 (quoting Kruchowski v. Weyerhauser Co., 446 F.3d 1090, 1095 (10th Cir. 2006) and Butcher v. Gerber Prods. Co. 8 F. Supp. 2d 307, 314 (S.D.N.Y. 1998)), and even a technically sufficient waiver must not have a misleading or misinforming effect. Id. (citing 29 C.F.R. § 1625.22(a)(3)). Plaintiffs contend that the waivers offered to SIRP employees are not enforceable because Seagate did not accurately inform terminated employees as all employees who were included, and not included, in the plan, as required by 29 U.S.C. § 626(f)(1)(H), and that the SIRP employees were not given the required 45-day consideration period under 29 U.S.C. § 626(f)(1)(F)(ii).

Participant List Compliance. Plaintiffs contend that the releases and suit waivers executed by SIRP participants are invalid as matter of law because defendant Seagate

failed to comply with the strict OWBPA mandate that each participant be provided identities and other information regarding all persons who are eligible or are not eligible or selected as participants in the plan, pursuant to 29 U.S.C. § 626(f)(1)(H). In support of this position plaintiffs offer several lists of employees which were obtained in discovery and appear to reveal discrepancies in numbers and identities of employees who were eligible or ineligible for workforce reduction plans.[13] Neither plaintiffs nor defendant contend that a representation has been made that any employee list that has been produced in discovery is in fact an accurate list of employees disclosed for purposes of implementation of the SIRP plan as issue in this case. However, plaintiffs contend that the discrepancies serve as persuasive evidence that Seagate failed to comply with the strict requirements of the OWBPA, and releases signed by SIRP terminated employees should therefore be invalidated. Defendants on the other hand argue that their inability to produce a definitive disclosure list is explained and justified in light of the lapse of more than five years since the SIRP was offered to employees, and that an issue of material fact therefore exists and precludes summary judgment.

Considered separately, none of the various employee lists produced in discovery constitutes or reveals a distinct flaw in the SIRP participant disclosure scheme which establishes

[13] Plaintiffs describe each compilation as follows: (1) a list of 7,156 individuals disclosed to SIRP terminated employees in 2004; (2) the "Tom Hall Roster" which identifies 7,530 individuals as U.S. workforce employees on May 24, 2004, on a list maintained by a Seagate executive; (3) a list of 7,464 individuals which is described as a May 1, 2004, U.S. snapshot of the U.S. workforce at the time, produced in response to amended interrogatory request # 2, seeking such a list; (4) a list of 7,557 individuals provided by Seagate as an amended list in response to the prior interrogatory #2 request; (5) a list of 30 individuals who were identified as persons who had received OWBPA SIRP disclosures, but had not been included in the previously disclosed amended interrogatory #2 workforce list; and (6) another supplemental answer to amended interrogatory #2.

as a matter of law that inaccurate information was conveyed to potential participants. However, plaintiffs have compared certain lists and have expressly designated more that 80 employees nation-wide who were either improperly included as SIRP employees or were improperly excluded as SIRP employees, thereby providing particularized factual evidence regarding defendant's noncompliance with 29 U.S.C. § 626(f)(1)(H).[14] Specifically, plaintiffs identify nine individuals[15] who were employed at a Seagate U.S. facility during the relevant time period who held the same job titles as employees on the SIRP eligible list, but were not included as OWBPA disclosures; plaintiffs next identify more than forty individuals[16] who were named in OWBPA disclosures to SIRP employees, but had been previously terminated and were not actually employed by Seagate during the pertinent time period; and plaintiffs identify thirty individuals[17] who were named as OWBPA disclosures but were not employed at U.S. facilities and were therefore improperly included among disclosures to SIRP employees. Plaintiffs argue that each of these inaccuracies in disclosure lists alone is sufficient to manifest a failure to strictly comply with requirements of 29 U.S.C. § 626(f)(1)(H) and is fatal to the release defense.

Defendant does not directly address the noncompliance claim regarding each of the referenced individuals or groups of individuals, but rather, contends that substantial compliance is sufficient and that 80 employees out of a population of over 7000 affected

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[14] Aff. of Andrea Ostopowich, Ex. 1, 4, 5, 16a, and 16b (CDs filed under seal).

[15] Plaintiffs state that there were ten such employees identified in discovery responses, but only nine are named in the Memorandum of Law in Support of Motion for Summary Judgment, pp. 16-17.

[16] Mem. of Law in Support of Motion for Summary Judgment, pp. 17-19.

[17] Id., pp. 19-20.

employees is not a material disclosure error. Defendant also argues that plaintiffs' claims are barred by laches because no claims relating to SIRP agreements were brought for more than five years after SIRP employee separations and nearly six years after SIRP disclosures were made. Defendant's contentions are unpersuasive under the circumstances in this case. As an initial matter the court finds that the defendant has not presented facts or argument to establish a fact issue as to plaintiffs' representations regarding any single one of the above-discussed particularly named persons. Rather, defendant seemingly asks the court to arbitrarily set some benchmark number or percentage of employees, greater than roughly 1% of the affected workforce, and certainly greater than 80 individuals in this case, with respect to which the number of inaccurate disclosures and nondisclosures would become material. In light of the strict compliance requirements under Oubre v. Entergy Operations, Inc., 522 U.S. 422, 427, and in particular, being especially mindful of the court's prior decision on RIF waivers and the fact evidence put forth by plaintiffs, the court now concludes that defendant has not carried its burden of proving that the SIRP waivers were knowing and voluntary based upon adequate compliance with all the OWBPA requirements under 29 U.S.C. § 626(f)(1), and defendant has not presented evidence sufficient to establish the existence of a material fact issue as to sufficiency of SIRP disclosures. Plaintiff's motion for summary judgment invalidating 2004 SIRP releases should be granted.

Laches. Defendant asserts the equitable doctrine of laches as a bar to plaintiffs' effort to invalidate SIRP releases. Seagate contends that more than five years were allowed to pass between the time of employee separations under the plan in 2004, and the time that SIRP release invalidity claims in this matter were clearly asserted. It is argued that this amount of time

is unreasonable, inexcusable, and prejudicial to the defendant, and therefore laches should be applied in this instance. Defendant correctly acknowledges that application of the doctrine lies within the sound discretion of the court. Whitfield v. Anheuser-Busch, Inc., 820 F.2d 243, 244 (8th Cir. 1987). Seagate alleges that the prejudice from the delay lies in its inability to respond with respect to the specific individuals who plaintiffs assert as having been inaccurately included or excluded from the SIRP disclosures, and the inability to identify persons having the requisite knowledge.

The court stated in Sandobal v. Armour & Co., 429 F.2d 249 (8th Cir. 1970), that "[l]aches is a doctrine ordinarily applied in action of an equitable nature and is rarely, if ever, invoked as a bar to an action at law seeking damages for breach of contract. Furthermore, [ ] it is not applicable unless there has been harmful reliance by the other party." Id. at 256. The present matter is an action for money damages and is a not a case in equity. Also, the complaint was served and filed in May 2007, and included allegations relating to the SIRP employees, which effectively advised the defendant as to the existence of potential issues now before the court and signaled that it might be prudent to locate and preserve SIRP related information, both for discovery by the plaintiff and perhaps as evidence favorable to the defense. Defendant can be credited with knowledge of SIRP claims within three years of the plan implementation, far sooner that the five-plus years represented in current argument. Under these circumstances the defendant has shown neither laxity on the part of plaintiffs in asserting claims, nor its own harmful reliance on delay or inaction by the plaintiffs. Id. The court concludes that application of laches is not appropriate in this case.

45-days Consideration Period. Plaintiff's argue that SIRP participants did not

receive 45 days in which to ponder whether to accept the termination agreement as mandated by 29 U.S.C. § 626(f)(1)(F)(ii). Plaintiffs argue that a mere 18-day consideration period was allowed pursuant to SIRP notice letters which provided a window period for voluntary resignations between May 17, 2004, and June 4, 2004, after which time the employee would be ineligible for SIRP participation.[18] Defendant contends that plaintiffs are incorrectly relying upon a SIRP election document that was sent to eligible employees along with other related documents to be reviewed by the employee, and that the actual separation and release agreements signed by employees expressly provided a consideration period of 45 days from the date the agreement document was provided.[19] See Decl. of Susan Kugler, Ex. A-V.[20] The interpretation of the SIRP Election document(s) that plaintiff advocates as establishing an inadequate consideration time states that additional materials are provided for review by the employee, including "[a] draft, sample Election to Participate in Special Incentive Retirement Plan and Release. This document is not in a final form and cannot be signed." The document further states that "I acknowledge that I will be provided, on or about the date of my retirement, with final documentation for my execution confirming my participation in the SIRP and providing Seagate with a release of any and all claims which I might assert against the Company."[21]

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[18] Docket No. 6, Ex. 22B, page 15.

[19] Id., Ex. 20, page 3.

[20] [Docket 223]. Ex. A-J are separate and individually executed SIRP Election proposal documents which plaintiffs rely upon as evidence of a insufficient 18-day consideration period. Ex. K-T are separate and individually executed elections to participate in the SIRP with release agreement.

[21] Id., Ex. A-J.

Though not a model of clarity, the document entitled "SIRP Election" on its face anticipates that a subsequent termination agreement and release must be executed before the employee's SIRP participation becomes binding, and the present document is primarily a means to provide employees an informed opportunity to later "confirm" such participation. The employee's signing of the document simply does not contractually compel the individual to accept the terms and conditions of the SIRP, particularly with regard to the release requirement, and likewise, defendant Seagate is not clearly bound to accept participation. Moreover, SIRP participants were subsequently presented an "Election to Participate in Special Incentive Retirement Plan and Release Agreement"[22] which clearly represents an operative contractual agreement, intended to be conditioned upon a release of claims, and containing an express provision whereby the employee was given at least 45 days in which to consider whether to accept termination pursuant to the SIRP. Seagate did not limit employees to a shorter agreement consideration period, and did not violate 29 U.S.C. § 626(f)(1)(F)(ii), by requiring them to preliminarily indicate their desire to make a SIRP election by June 4, 2004. To the extent that the initial SIRP election document arguably required some employees to reject participation with inadequate time for consideration, the election was clearly revocable and affected employees could simply execute the document and continue to consider participation in the SIRP. Of course, those employees who did not sign the document are not SIRP class members and did not execute a SIRP release. As defendants have contended, opt-in plaintiffs actually had far more than 45 days to make a decision on termination and releases. Plaintiffs are not entitled to a declaration of SIRP release invalidity based upon violation of the statutory 45-day period for

[22] Decl. of Susan Kugler, Ex. K-T.

consideration mandate.