2008 WL 5501106
United States District Court,
District of Columbia.

Renae MARABLE, et al., Plaintiffs,
v.
DISTRICT HOSPITAL PARTNERS, L.P., Defendant.

Civil Action No. 01-02361 (HHK).
|
Dec. 1, 2008.

West KeySummary

1 Federal Civil Procedure
Discrimination and Civil Rights Actions in General

Applicants for a multi-skilled technician (MST) position at a hospital were denied class certification in a Title VII action alleging a racially discriminatory screening process. The motion for class certification failed because none of the members of the class exhausted administrative procedures by filing requisite charges with the Equal Employment Opportunity Commission (EEOC) required for a class action under Title VII. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

Cases that cite this headnote

Attorneys and Law Firms

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MEMORANDUM OPINION AND ORDER

HENRY H. KENNEDY, Judge.

***1** Plaintiffs Monica Brooks, Tracee Taylor, and others ("Brooks plaintiffs") bring this action against defendant District of Columbia Partners, L.P. d/b/a George Washington University Hospital ("GWUH") alleging that GWUH screened applicants for its Multi-Skilled Technician ("MST") position using a three-part test ("Test(s)") that was racially discriminatory and thus violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"). The Brooks plaintiffs challenge the Test(s) on their behalf and on behalf of a putative class of Black *external* applicants who failed one or more parts of the Test(s) and therefore did not meet the threshold qualifications for the MST position. [1]

1 GWUH considered applicants in two pools. In the first pool were "internal" applicants, those applicants whom GWUH previously had employed as Nursing Assistants until the Nursing Assistant position was eliminated by the creation of the new MST position. In the second pool were "external" applicants, the applicants who were not internal applicants.

Before the court is the Brooks plaintiffs' "Renewed Motion for Class Certification" [# 75]. Upon consideration of the motion, the opposition thereto, and the record of this case, the court concludes that the motion should be DENIED.

I. BACKGROUND

The relevant facts and procedural history of this case are set forth in this court's prior orders denying plaintiff Marable's original motion for class certification [2] [# 56] and granting the motion for leave to amend the complaint to add plaintiffs Brooks and Taylor [# 65]. To the recitations set forth in these orders, the court adds the following.

2 When denying the first motion for class certification, the court explained that the Test(s) that is the subject of this suit served different purposes for internal and external applicants. For internal applicants, the Test(s) was intended to assess whether they would be successful in the ten-week training program designed to prepare former Nursing Assistants for the MST position. Accordingly, the question of law as to internal applicants was "whether, for former Nursing Assistants, the [Test(s)] is a valid predictor of success in the ten-week training program offered by GWUH." *See Marable v. District of Columbia Hosp. Partners, LP,* No. 01-02361, 2006 WL 2547992, *5 (D.D.C. Aug.31, 2006). In contrast,

> for external applicants, the Test(s) was intended to assess whether they ultimately would be successful in the MST position. Accordingly, the question of law as to external applicants was "whether, for external candidates, the [Test(s)] is a valid predictor of success in the job." *Id.* Because the questions of law relating to the claims of internal and external candidates so differed, the court held that the proposed class, which included both internal and external candidates, did not raise common questions of law to meet the commonality requirement of FED. R. CIV. P. 23(a)(2). Accordingly, the court refused to certify the original plaintiffs' proposed class. All that said, the court observes that in this renewed motion for class certification the parties agree that the Test(s) served the same purpose for all of the current proposed class members, namely as a predictor of whether they would be successful in the MST position.

In light of this court's holding that it could not certify a sub-class of external applicants without a Black external applicant who failed the Test(s) among the named representatives [# 56], the original plaintiffs moved to amend their complaint to add Brooks and Taylor, two Black external applicants who failed the Test(s), as named plaintiffs [# 57]. The court granted leave to amend [# 65]. Plaintiffs' third amended complaint [# 66], which names Brooks and Taylor as plaintiffs, is now the operative complaint. Neither Brooks nor Taylor, however, has filed a charge with the EEOC as required by 42 U.S.C. §§ 2000e-5(e), (f). Only original plaintiff Marable, an internal applicant and thus not a member of the Brooks plaintiffs' proposed class, has filed the requisite EEOC charge. Nevertheless, Brooks and Taylor now seek to certify a class of all Black external applicants for the MST position who failed the Test(s), with themselves serving as the named class representatives.

II. ANALYSIS

The question of class certification is a preliminary question distinct from the merits of a case. *See Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 178, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974) (citation omitted). In considering whether to certify a proposed class, courts generally limit their inquiry to whether the requirements of Rule 23(a) are satisfied and whether the proposed class falls within one of the categories set forth in Rule 23(b). [3] *See id.* As the party moving for class certification, the Brooks plaintiffs bear the burden of establishing that all four of the requirements for class certification have been satisfied. *See Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 614, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997); *Hartman v. Duffey,* 19 F.3d 1459, 1468 (D.C.Cir.1994); *In re Vitamins Antitrust Litig.,* 209 F.R.D. 251, 256 (D.D.C.2002). Here, however, the court does not reach the Rule 23 requirements. Rather, because none of the proposed class members, most importantly the named representatives, has exhausted administrative remedies, the proposed class cannot be certified.

3 Rule 23 provides in relevant part:

> (a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
>
> (1) the class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions of law or fact common to the class;
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> (4) the representative parties will fairly and adequately protect the interests of the class.
>
> (b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if: ...
>
> (2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole ....
>
> FED. R. CIV. P. 23.

***2** This court did not address the issue of whether plaintiffs exhausted administrative remedies in its ruling on the original motion for class certification because the original plaintiff and proposed class representative, Marable, had filed the requisite EEOC charge. Brooks and Taylor have not. Thus, the administrative exhaustion issue is now front-and-center.

GWUH contends that this Title VII class cannot be certified because neither named plaintiff has filed a charge with the EEOC, and therefore they have failed to exhaust administrative remedies. (Def.'s Opp'n to Pls.' Renewed Mot. for Class Certification 3-4.) According to GWUH, it is not enough that internal applicant Marable filed a charge because she is not a member of the proposed class of external applicants. (*Id.* at 5.) The Brooks plaintiffs counter that the court allowed Brooks and Taylor to intervene under the single-filing rule, and, under that rule, they can rely on Marable's charge to satisfy the exhaustion

requirement regardless of whether Marable is a member of the proposed class. (Pls.' Reply to Def.'s Opp'n to Pls.' Renewed Mot. for Class Certification 3.)

It is well-settled that a party seeking Title VII relief must file a timely employment discrimination charge with the EEOC and obtain a right-to-sue letter before seeking judicial relief. 42 U.S .C. §§ 2000e-5(e), (f); *see Foster v. Gueory,* 655 F.2d 1319, 1321 (D.C.Cir.1981) (citing *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 798, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); *Love v. Pullman Co.,* 404 U.S. 522, 523, 92 S.Ct. 616, 30 L.Ed.2d 679 (1972); *Evans v. Sheraton Park Hotel,* 503 F.2d 177, 183 (D.C.Cir.1974)). Each plaintiff in a Title VII class action, however, need not file an EEOC charge so long as one member of the class has met the filing prerequisite. *Foster,* 655 F.2d at 1321-22 (citing *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 414 n. 8, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975); *Romasanta v. United Airlines, Inc.,* 537 F.2d 915, 918 (7th Cir.1976); *Dodge v. Giant Food, Inc.,* 488 F.2d 1333, 1333 n. 1 (D.C.Cir.1973); *Macklin v. Spector Freight Sys., Inc.,* 478 F.2d 979, 985 n. 11 (D.C.Cir.1973)). In determining whether a proposed class member must file her own administrative charge, this Circuit consistently favors a bright-line rule: "Exhaustion of administrative remedies by at least one named plaintiff is a condition precedent to sustaining a class action under Title VII." *Thomas v. Reno,* 943 F.Supp. 41, 43 (D.D.C.1996) (citing *Berger v. Iron Workers Reinforced Rodmen Local 201,* 843 F.2d 1395, 1434 (D.C.Cir.1988)), *aff'd* 159 F.3d 637 (D.C.Cir.1997); *see Hartman v. Duffey,* 88 F.3d 1232, 1235 (D.C.Cir.1996) ("[E]xhaustion of administrative remedies by *one member of the class* satisfies the requirement for all others ....") (emphasis added); *Foster,* 655 F.2d at 1321-22 (holding that "at least one member of the plaintiff class" must meet the filing prerequisite); *Contreras v. Ridge,* 305 F.Supp.2d 126, 132 (D.D.C.2004). Applying this rule here, the Brooks plaintiffs' proposed class cannot be certified because no class member has filed the requisite charge with the EEOC. *See id.*

***3** Notwithstanding the clarity of the bright-line rule set forth above, the Circuit also has explained that "the critical factor in determining whether an individual Title VII plaintiff must file an EEOC charge, or whether he may escape this requirement by joining with another plaintiff who has filed such a charge, is the similarity of the two plaintiffs' complaints." *Foster,* 655 F.2d at 1322. If complaints are so similar that filing separate charges would serve no purpose, then requiring separate EEOC filings would be wasteful. *See id.* However, where complaints differ to the extent that there is a real possibility that one claim may be settled administratively while the other may be resolved only in the courts, plaintiffs must file separate EEOC charges to effectuate the purpose of Title VII's provisions for administrative relief. *Id.* (citing *Oatis v. Crown Zellerbach Corp.,* 398 F.2d 496, 498 (5th Cir.1968)).

Even under this pragmatic test, the motion for class certification must fail. In support of its decision to certify the proposed class, the *Foster* Court found that the proposed class members had "asserted claims of racial discrimination that are so similar to those asserted by the original plaintiffs that no purpose would be served by requiring [them] to file independent racial discrimination charges with the EEOC." *Foster,* 655 F.2d at 1323. This court, however, in refusing to certify the Marable class because the claims of external and internal applicants did not satisfy Rule 23's commonality requirement, reached the opposite conclusion. *See Marable,* 2006 WL 2547992, at *3-5; *see also supra* note 2. The court expresses no opinion as to whether filing administrative charges with the EEOC will lead to a different result for Brooks and Taylor than it did for Marable. It is enough to acknowledge that the Brooks plaintiffs' claims raise different questions of law than did the Marable plaintiffs' claims, *see id.,* and therefore the EEOC and GWUH should be given an opportunity to resolve them before the Brooks plaintiffs may resort to the courts. "To hold otherwise would make a mockery of the concept of a right to sue and of the procedures by which one obtains the right." *EEOC v. Air Line Pilots Ass'n.,* 885 F.Supp. 289, 294 (D.D.C.1995). Putative class members who cannot meet the procedural prerequisites for bringing a Title VII suit, like Brooks and Taylor, should not be able to "use the guise of a motion to intervene to take over as the sole class representative[s] for [Marable,] someone who initiate[d] but [was] not legitimately able to continue [the] class action." *Id.*

The Brooks plaintiffs rely heavily on *Tolliver v. Xerox Corp.,* 918 F.2d 1052 (2d Cir.1990),[4] for the proposition that, under the single-filing rule, they may rest on Marable's EEOC charge to satisfy their administrative exhaustion requirement. In that case, the court described three tests to "determin[e] whether an administrative charge suffices to permit piggybacking by a subsequent

plaintiff." *Id.* at 1057-58. The court declined to employ the "broadest test," which "requires only that the claims of the administrative claimant and the subsequent plaintiff arise out of the same circumstances and occur within the same general time frame." *Id.* at 1057. Instead, the court adopted a narrower test, which "requires that the administrative claim give notice that the discrimination is 'class-wide,' *i.e.,* that it alleges discrimination against a class of which the subsequent plaintiff is a member." *Id.* at 1058 (citing *Kloos v. Carter-Day Co.,* 799 F.2d 397, 401 (8th Cir.1986)). [5] Applying that test, the court held that administrative charges that had been filed by members of a decertified class satisfied the administrative exhaustion requirement for former members of that class who had not filed administrative charges. *See id.* at 1059-60.

4 *Tolliver* is an ADEA case, not a Title VII case. Although courts interpret administrative exhaustion requirements similarly under the ADEA and Title VII considering that the ADEA's filing requirement was modeled after Title VII's, *see Tolliver,* 918 F.2d at 1056-57 (citing *Zipes v. Trans World Airlines, Inc.,* 455 U.S. 385, 395 n. 11, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982)), the court notes that Title VII, unlike the ADEA, prohibits any person from initiating a suit without first filing an administrative charge and obtaining a right-to-sue letter. *See* 42 U.S.C. § 2000e-5(f)(1). Thus, exceptions to Title VII administrative exhaustion requirements may be more limited than those under the ADEA. *See id.*

5 The court also declined to adopt a "still narrower test," which "requires that the administrative claim not only allege discrimination against a class but also allege that the claimant purports to represent the class or others similarly situated." *Tolliver,* 918 F.2d at 1058 (citing *Naton v. Bank of Cal.,* 649 F.2d 691, 697 (9th Cir.1981)).

***4** The most obvious problem with applying *Tolliver* here is that Marable's EEOC charge is not before the court. Therefore, the court cannot determine the scope of Marable's charge nor whether it was sufficiently broad to encompass the Brooks plaintiffs' claims. Marable did include her EEOC right-to-sue letter as an exhibit to her original motion to dismiss [# 31-3], and that letter does make some reference to her charge, but the court cannot play a guessing game, even an educated one; simply put, the court cannot base a holding on the scope of an administrative charge not before it. Even if Marable's charge was before the court, it is not bound to accept the Second Circuit's broad reading of the single-filing rule, *see Tolliver,* 918 F.2d at 1058; the Brooks plaintiffs point to no case in this Circuit which does so. Indeed, the court has misgivings about adopting such a broad rule. It has the potential to excuse plaintiffs from exhausting administrative remedies anytime they can point to a similar charge by a similar plaintiff with respect to the same defendant. This exception could swallow the rule and goes beyond the practical inquiry described in *Foster,* 655 F.2d at 1323. Its goal was more modest: advancing judicial efficiency in the unique context of a class action. *See id.* at 1322. Better then to leave it to its limits.

Marable's EEOC charge cannot satisfy the Brooks plaintiffs' administrative exhaustion requirements because Marable is not a member of the proposed class. *See Hartman,* 88 F.3d at 1235; *Foster,* 655 F.2d at 1321-22; *Contreras,* 305 F.Supp.2d at 132; *Thomas,* 943 F.Supp. at 43. Accordingly, the renewed motion for class certification must be denied because the Brooks plaintiffs have failed to exhaust their administrative remedies. *See id.; see also* 42 U.S.C. §§ 2000e-5(e), (f).

III. CONCLUSION

For the foregoing reasons, it is this 1st day of December, 2008, hereby

ORDERED that the "Renewed Motion for Class Certification" [# 75] is **DENIED.**

All Citations

Not Reported in F.Supp.2d, 2008 WL 5501106, 105 Fair Empl.Prac.Cas. (BNA) 174

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