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United States Court of Appeals, Eleventh Circuit.

Bridget DRAYTON, Wanda Gibbs Mitchell, et al., Plaintiffs-Appellees,
v.
WESTERN AUTO SUPPLY COMPANY, Advance Stores Company, Inc., Defendants-Appellants.

No. 01-10415.
|
March 11, 2002.

Appeal from the United States District Court for the Middle District of Florida.

Attorneys and Law Firms

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Before BLACK, HILL and STAPLETON,* Circuit Judges.

Opinion

PER CURIAM.

***1** Appellants Western Auto Supply Company (Western) and its successor, Advance Stores Company, Inc. (Advance), appeal the district court's grant of class certification to Appellees Bridget Drayton, Wanda Gibbs Mitchell, and Anthony Rich, the named plaintiffs and class representatives. Appellees brought suit claiming race discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (1994), and 42 U.S.C. § 1981 (1994). Upon Appellees' motion, the district court certified a class under Federal Rules of Civil Procedure 23(b)(2) and (b)(3), consisting of: "All African-American individuals who are employed or have been employed in Western Auto's retail division, or who have applied for positions within that division, since July 7, 1994." Appellants filed this interlocutory appeal contesting class certification. *See* Fed.R.Civ.P. 23(f). [1]

On appeal, Appellants raise three arguments: (1) Appellees lack standing to raise the class claims or seek injunctive relief; (2) Appellees are inadequate class representatives; and (3) the district court failed to perform the appropriate analysis in determining class certification. We affirm the district court's grant of class certification under Rule 23(b)(3) to the extent (1) Appellees abandon their individual claims seeking compensatory and punitive damages, and (2) the class is defined to exclude job applicants. We reverse the district court's grant of class certification under Rule 23(b)(2).

I. BACKGROUND

Appellees were all African-American employees of Western when it announced it was converting its stores to Parts America stores which would no longer perform automotive services, only sell automotive parts and accessories. The conversion resulted in the elimination of certain positions. The eliminated positions included those of Appellees. [2] Thereafter, Advance acquired Western and folded the Parts America stores into its operations; Western's retail division ceased to exist.

Each of the Appellees claim they were subjected to a racially hostile work environment, and are the victims of disparate treatment and disparate impact. [3] Essentially, their theory is that a policy of segregation limited the opportunities of African-Americans within Western's retail division, ultimately leading to a disparate impact on African-Americans when Western converted its stores and eliminated its retail division. [4] Although they were aware of the impending conversion, they were unaware of the policy of segregation until a Regional Vice President of Western, Don Lockard, testified in another matter indicating such a policy existed. Thereafter, Appellees brought suit, and filed a motion for class certification which the district court granted.

II. DISCUSSION

We review *de novo* whether the named plaintiffs have standing to assert their claims. *See Griffin v. Dugger,* 823 F.2d 1476, 1482 (11th Cir.1987). Findings of fact relating to the timeliness of claims are reviewed for clear error. *See Ross v. Buckeye Cellulose Corp.,* 980 F.2d 648, 660 (11th Cir.1993). We review the district court's grant of class certification for abuse of discretion. *See Andrews v. American Tel. & Tel. Co.,* 95 F.3d 1014, 1022 (11th Cir.1996). Whether the district court applied the wrong legal standard is reviewed *de novo. See Andrews,* 95 F.3d at 1022.

***2** To maintain a class action the individual named plaintiffs must establish three initial requirements: they must have standing to raise the claims before the court, they must meet the requirements of Rule 23(a)[5] to represent a class, and the class they seek to represent must be one of the types recognized by Rule 23(b).[6] *Griffin,* 823 F.2d at 1482. On appeal, Appellants raise three challenges, the first two of which address the initial requirements for class certification: (1) Appellees lack standing to raise the class claims or seek injunctive relief; (2) Appellees are inadequate class representatives under Rule 23(a); and (3) the district court failed to perform the appropriate analysis in determining class certification.

Under Rule 23(c),[7] district courts are encouraged to decide class certification at an early stage in the process. At the same time, they are making a decision based on an undeveloped record and, thus, need to continue to monitor the class so it may decertify the class as soon as possible if certification is no longer appropriate. In this case, the district court is aware of its obligations, and has stated it will review the appropriateness of its decision and will "modify or vacate its certification order, should the interests of justice so require, as this case progresses."

A. *Standing*

Appellants present three arguments challenging Appellees' standing: (1) Appellees did not personally suffer the injuries giving rise to the claims; (2) Appellees' claims are time-barred; and (3) Appellees have not alleged an imminent threat of future harm for purposes of seeking injunctive relief.

1. *Injury In Fact.*

Any analysis of class certification must begin with the issue of standing. *Griffin,* 823 F.2d at 1482. Principles of standing require plaintiffs to establish they were injured. *Id.* at 1482-83. In the context of a class action, at least one of the named plaintiffs must have personally suffered the injury giving rise to each claim; it is insufficient for unnamed members of the alleged class to have suffered the injury. *Id.* at 1483.

Appellees seek to represent a class of employees injured as a result of a racially hostile work environment, discriminatory practices in determining pay, training, and promotion, and discriminatory policies which led to a disparate impact on African-Americans when certain job positions were eliminated. Appellees also seek to represent a class of applicants subjected to discriminatory hiring practices by a policy of segregation which matched the racial composition of a store to the racial composition of the neighborhood in which the store was located. Appellants present three challenges to these allegations: (1) the hostile working environment claim cannot succeed because any allegedly hostile environment was not sufficiently severe or pervasive; (2) the disparate impact claim cannot be raised because it was not previously raised in an EEOC complaint; and (3) Appellees, as former employees, cannot represent job applicants.

***3** First, Appellants challenge the hostile work environment claim asserting the claim cannot succeed as a matter of law because the hostile environment was not sufficiently severe or pervasive to alter the terms or conditions of employment. Appellants' assertion is premature; this challenge addresses the merits of the claim and not standing.

Second, Appellants argue Appellees cannot raise their disparate impact claim because Appellees did not raise termination as an issue in their EEOC complaints. A judicial complaint, however, may vary from an EEOC complaint to the extent the claims are "like or related," or grow out of the initial allegations. *Evans v. U.S. Pipe & Foundry Co.,* 696 F.2d 925, 928 (11th Cir.1983). The EEOC complaints filed by Appellees alleged discrimination in promotional and employment opportunities. According to Appellees, these acts of discrimination resulted in the elimination of Appellees' jobs. Thus, the discrimination alleged in the present

case is "like or related," or grew out of, Appellees' EEOC complaints alleging denial of promotional and employment opportunities.

Third, Appellants assert Appellees lack standing to represent a class of job applicants because Appellees, as employees, were not denied positions with Western for discriminatory reasons. In a seminal case the Supreme Court addressed "across-the-board" class certifications including both job applicants and employees, significantly narrowing the circumstances under which such broad certification would be appropriate under Rule 23. *See General Tel. Co. of the S.W. v. Falcon,* 457 U.S. 147, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982). Discussing the commonality and typicality requirements of Rule 23(a), the Supreme Court recognized limited circumstances under which a broad class certification might be appropriate: "significant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decision making processes." *Falcon,* 102 S. Ct 2371 n .15.

Nonetheless, as we noted in *Griffin,* as an initial matter Appellees need to have constitutional standing, even if they would be able to satisfy *Falcon's* requirements for representative capacity to assert claims on behalf of job applicants.[8] *See Griffin,* 823 F.2d at 1484. In *Griffin,* an employee initially filed suit alleging injury as a result of his employer's discipline and promotion practices. *See id.* at 1479. He also challenged his employer's use of an entry-level examination which allegedly detrimentally impacted the hiring of black employees. *See id.* Because the named plaintiff employee had already met the educational and testing requirements for his job, we concluded he lacked standing to challenge the entry-level examination. *See id.* at 1483. Likewise, Appellees lack standing to challenge Appellants' hiring practices or to represent job applicants because each Appellee was hired at the store where he or she applied for a position.

2. *Timeliness of Claims.*

***4** Appellants argue Appellees' claims are time-barred. In response, Appellees assert their claims are timely based on the doctrine of equitable tolling. "Under equitable tolling, Title VII's statute of limitations does not start to run until a plaintiff knew or reasonably should have known that she was discriminated against." *Carter v. W. Publ'g Co.,* 225 F.3d 1258, 1265 (11th Cir.2000). Even though they were aware of Western's impending conversion to Parts America stores, Appellees assert they were not aware of Appellants' segregation policy until Don Lockard's testimony. Only upon hearing about the segregation policy through Lockard's testimony did Appellees begin to suspect a policy of discrimination had impacted their positions. The district court agreed, stating it was not "convinced" Appellees should have known about Appellants' discriminatory segregation policy until Lockard's testimony, which was within 300 days of filing their EEOC complaints.

We rely on the district court's willingness to modify or vacate its order as this case progresses, and conclude it was not clear error for the district court to find Appellees did not know, or reasonably should not have known, they were being discriminated against with regard to the disparate impact claim, and related disparate treatment claims, prior to learning about the alleged policy of segregation. Equitable tolling applies to all of Appellees claims, except for the wage discrimination claim;[9] however, Appellants acknowledge that one of the Appellees has an appropriate § 1981 wage claim, therefore, at least one Appellee has standing for such a claim and that is all that is required to maintain the class. *See Griffin,* 823 F.2d at 1482.

3. *Injunctive Relief under Rule 23(b)(2).*

Certification under Rule 23(b)(2)[10] is applicable when final injunctive relief or corresponding declaratory relief with respect to the class as a whole is appropriate. *See* Fed.R.Civ.P. 23(b)(2). A civil rights plaintiff seeking prospective injunctive relief must demonstrate a "real and immediate" threat of future injury. *City of Los Angeles v. Lyons,* 461 U.S. 95, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983) (holding plaintiff could not seek injunctive relief prohibiting Los Angeles police officers from utilizing a "chokehold" maneuver because there was no real and immediate threat the plaintiff would be arrested in the future); *Johnson v. B. of Regents of the Univ. Of Ga.,* 263 F.3d 1234 (11th Cir.2001) (holding former applicants for admission to freshman class at state university, denied admission due to use of unconstitutional admission standards, did not have standing to seek prospective injunctive relief absent

showing of likelihood they would ever again be subjected to freshman admissions process); *Shotz v. Cates,* 256 F.3d 1077, 1081-82 (11th Cir.2001)(holding plaintiffs alleging violation of the ADA in a county courthouse do not have standing to seek injunctive relief because they have not alleged an immediate and real threat of future injury only past incidents of discrimination); *Jackson v. Motel 6 Multipurpose, Inc.,* 130 F.3d 999 (11th Cir.1997) (holding former employees of motel chain did not have standing to seek injunctive relief because they did not allege they would be discriminated against in the future). "[T]his Court has held that former employees who submit no fact that they will be discriminated against in the future lack standing to seek an injunction." *Jackson,* 130 F.3d at 1007.

***5** Appellants argue Appellees lack standing to seek injunctive relief under Rule 23(b)(2) because they are former employees who have not submitted facts establishing future harm is imminent. Appellants further argue injunctive relief is not appropriate against Appellant Advance under theories of successor liability.[11] The only response provided by Appellees to Appellants' argument was to note Appellee Drayton has requested reinstatement.

Appellants challenge whether Drayton has a valid reinstatement claim. It is undisputed Drayton was offered a position, for a greater salary, at Western after her job was initially terminated, and she refused to accept it. "Once [a good-faith] offer is made, claimants forfeit their right to reinstatement unless their refusal of the employer's offer is reasonable." *Stanfield v. Answering Serv., Inc.,* 867 F.2d 1290, 1295-96 (11th Cir.1989). Even assuming Western's job offer was unreasonable, Drayton now seeks injunctive relief from an entity Appellees do not claim engages in a policy of discrimination. All allegations of discrimination set forth in Appellees' operative complaint concern Western and its alleged policy of segregation. Western, however, no longer exists; it has been acquired by Advance. Thus, any potential future injury would be speculative.

Furthermore, the likelihood Drayton is subject to a real and immediate threat of injury from Advance is too tenuous and hypothetical to establish standing to seek injunctive relief on behalf of a class. *Shotz,* 256 F.3d at 1081-82 ("because injunctions regulate future conduct, a party has standing to seek injunctive relief only if the party alleges ... a real and immediate-as opposed to a merely conjectural or hypothetical-threat of future injury"). Having failed to allege a real and imminent threat of future discrimination, Appellees do not have standing to pursue a Rule 23(b)(2) class action for injunctive relief.

B. *Adequacy of Class Representatives*

Appellants argue Appellees should not be designated class representatives because they will not "fairly and adequately protect the interests of the class." Fed.R.Civ.P. 23(a)(4). To determine the adequacy of Appellees, it is necessary to examine whether (1) the class representatives have common interests with the unnamed members of the class, and (2) the interest of the class will be vigorously prosecuted through qualified counsel. *See Gonzales v.. Cassidy,* 474 F.2d 67, 72 (5th Cir.1973).[12] Only the first criteria of this test is challenged by Appellants.

The Civil Rights Act of 1991 provided plaintiffs with the right to a jury trial, as well as to seek compensatory and punitive damages from an employer who engaged in unlawful intentional discrimination. *See* 42 U.S.C. § 1981(a); *Allison v. Citgo Petroleum Corp.,* 151 F.3d 402, 407-09 (5th Cir.1998). Appellants challenge the adequacy of Appellees to represent the class because they have chosen to forego compensatory and punitive damages for the class while they pursue such damages for themselves on an individual basis. Both parties agree that, in this case, Appellees could not seek compensatory or punitive damages for the class. *See Allison,* 151 F.3d at 425 (holding a class of plaintiffs seeking compensatory and punitive damages may render class certification inappropriate if issues common to the proposed class do not predominate individual issues). Appellees contend they are in a "Catch 22" situation if they cannot seek such damages on behalf of the class and, yet, failing to do so renders them inadequate.

***6** While Appellees' interests in proving the disparate treatment and disparate impact claims may be aligned with the interests of the class members, Appellees are still pursuing remedies for themselves they are not seeking for the class; that is a conflict. As just one example of the potential conflict, Appellees could be influenced by their desire to maximize their individual gains in any negotiations for a class settlement. As representatives of a class, Appellees need to protect the interests of the class first and foremost; we cannot say Appellees "posses the

same interest" in the litigation as the class. *Falcon,* 102 S.Ct. at 2370.

Appellees may pursue their individual claims for compensatory and punitive damages, or they may pursue the class claims. In their briefs and at oral argument, Appellees represented they are willing to abandon their individual claims, if asked by the court, in order to represent the class. We affirm based on Appellees' representation.

C. *Rigorous Analysis*

Appellants assert the district court failed to perform the appropriate analysis and applied the wrong legal standard in certifying this case when it accepted the substantive allegations contained in Appellees' complaint as true. [13] In determining whether the Rule 23 requirements have been met for class certification purposes, however, a district court does not address the merits of the claims. *See Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 94 S.Ct. 2140, 2152-53, 40 L.Ed.2d 732 (1974). It, therefore, is proper to accept the substantive allegations contained in the complaint as true when assessing Rule 23 requirements.

Nonetheless, the district court stated it carefully reviewed "the pleadings, motions, declarations, affidavits, depositions, statistical analyses, and other materials in the court file." The district court also acknowledged a class action "may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." The district court appropriately analyzed all the evidence before it in determining whether class certification was appropriate under the requirements of Rule 23.

III. CONCLUSION

We reiterate the importance of monitoring class certification and making any necessary modifications. Nonetheless, Appellees have standing to raise the majority of their claims; Appellees do not have standing to raise the claims of applicants, or to seek injunctive relief under 23(b)(2). Additionally, Appellees must abandon their individual claims seeking compensatory and punitive damages if they seek to represent the class. Accordingly, the district court's certification of the class under Rule 23(b)(3) is affirmed to the extent (1) Appellees abandon their individual claims seeking compensatory and punitive damages, and (2) the class is defined to exclude job applicants. We reverse the district court's certification of the class under Rule 23(b)(2).

AFFIRMED in part, REVERSED in part, and REMANDED.

All Citations

Not Reported in F.3d, 2002 WL 32508918

Footnotes

* Honorable Walter K. Stapleton, U.S. Circuit Judge for the Third Circuit, sitting by designation.

1 Rule 23(f) provides: "A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders."

2 Appellee Rich quit before his job was otherwise terminated.

3 *Appellee Bridget Drayton:*

Bridget Drayton was hired as a cashier with Western in 1989. As alleged in the complaint, Drayton complained to management about her wages in 1990, claiming she was paid less than another cashier who was white, and also claimed a white manager called her racially derogatory names. As a result of her complaint to management, Drayton was suspended; thereafter, she quit. In 1991, she reapplied for a position with Western and was rehired. Due to Western's conversion to Parts America stores, Drayton's job was terminated in 1998.

Drayton asserts she made several attempts to be promoted above the level of cashier during her term of employment with Western, but was unsuccessful because Western failed to provide training, did not post job openings, and utilized a subjective decision-making process. Drayton also alleges she was subjected to a racially hostile work environment.

Appellee Wanda Gibbs Mitchell:

Wanda Gibbs Mitchell was hired as a part-time cashier with Western in 1985. She later became a full-time cashier before being promoted to lead cashier. As alleged in the complaint, during the early 1990's, and again in 1997, Mitchell

was called racially derogatory names by a white manager, although she never complained to management. She did complain to management regarding her wages. Mitchell was paid less than a white cashier; however, when the white cashier left Western, Mitchell became the highest paid cashier in the store. Due to Western's conversion to Parts America stores, Mitchell's job was terminated in 1998.

Mitchell asserts she made several attempts to be promoted above the level of cashier during her term of employment with Western, but was unsuccessful because Western failed to post job openings and utilized a subjective decision-making process. Mitchell also alleges she was subjected to a racially hostile work environment.

Appellee Anthony Rich:

Anthony Rich was hired as a mechanic with Western in 1995. Shortly thereafter, Rich complained to management about his wages, claiming he was paid less than a white mechanic. Based on his complaint to management, Rich's wage was increased to equal that of the white mechanic's wage. As alleged in the complaint, Rich expressed interest in applying for a management position, but was not provided with the necessary training. After the conversion to Parts America stores was announced, management positions in Rich's area were no longer available and, in 1997, he left his job.

Rich asserts his promotion attempts were unsuccessful because Western failed to post job openings and utilized a subjective decision-making process. Rich also alleges he was subjected to a racially hostile work environment.

4 The alleged policy of segregation consisted of matching the racial composition of a store to the racial composition of the neighborhood in which the store was located.

5 Rule 23(a) provides: “One or more members of a class may sue or be sued as representative parties on behalf of all 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.”

6 Rule 23(b) provides:

> An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
> (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
> (3) 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.

7 Rule 23(c) provides: “As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.”

8 We do not express an opinion as to whether Appellees would, in fact, be able to meet such a stringent standard of proving Western's policy of segregation affected both employees and applicants in the same general fashion.

9 Each of the Appellees specifically complained to management regarding wage discrimination. According to Appellants, these complaints were rectified long before the limitations period expired for two of the Appellees. Thus, those two Appellees reasonably should have known they were being discriminated against long before they were required to file an EEOC claim, and equitable tolling would not apply to save their claim under Title VII.

10 This class was certified under both Rule 23(b)(2) and (b)(3). Only the Rule 23(b)(2) class certification has been directly challenged on the grounds injunctive relief is not appropriate for this class. Certification under Rule 23(b)(3) is applicable where “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.”

11 Whether a successor corporation should be liable for the unfair labor practices of its predecessor is a fact-specific balancing-of-interests analysis. *See In re Nat'l Airlines, Inc.,* 700 F.2d 695, 698 (11th Cir.1994). This appeal addresses class certification and, therefore, we need not determine the issue of successor liability at this time. *See Carter,* 225 F.3d at 1262 ("We agree with plaintiffs that Rule 23(f) limits our review to the district court's order granting class certification.").

12 In *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir.1981)(en banc), this Court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to close of business on September 30, 1981.

13 Appellants also assert a collateral consequence of the district court's acceptance of Appellees' substantive allegations was the district court's acceptance of the statistical analysis presented by Appellees. Appellants challenge Appellees' statistical evidence as methodologically infirm, and contend the district court should have performed its gatekeeping responsibility by performing a *Daubert* analysis. *See Daubert v. Merrill Dow Pharm., Inc.,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). In addressing the statistical evidence proffered by both parties' experts the district court stated: "The parties in this case present a battle of statistical experts. The Court finds it inappropriate to determine the ultimate correctness of either parties contentions in the context of class certification." Appellants assert the district court "abdicated its duty to evaluate the reliability of [the expert's] methodology" and requests that we do so *de novo.* We will not do so. Appellants have presented no authority establishing a court must perform a *Daubert* inquiry of scientific evidence at this early stage of a class action proceeding. The district court indicated it will address this issue as this case progresses, which we find sufficient.

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