FRANCES GUZMAN, JESUSITA BURCIAGA, LETICIA P. ORTIZ, LAURA P. GIL, MARY GALVAN, SOCORRO VILLEGAS, and ROSA ALAMILLO, on behalf of themselves and all others similarly situated, Plaintiffs, v. OXNARD LEMON ASSOCIATES, LTD., Defendant.

CV 91-6957 Kn (Ex)

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

1992 U.S. Dist. LEXIS 20642; 60 Fair Empl. Prac. Cas. (BNA) 436

OPINION BY: DAVID V. KENYON

OPINION

ORDER Re Motion for Class Certification

The Court, having received and considered plaintiffs' Motion for Class Certification, the papers filed in support thereof and in opposition thereto, **GRANTS** plaintiffs' motion. In so ruling, the Court certifies plaintiffs' class as follows: All women who, in the four-year period prior to the filing of this action, and continuing in the future up to the date of trial, have worked for, applied to work for or were deterred from applying to work for Oxnard Lemon Associates, Ltd. ("Oxnard Lemon") as packinghouse workers, or who will work or apply for work or be deterred from applying for work at Oxnard Lemon as packinghouse workers.

At this time, the Court does not intend to divide the class into subclasses, but recognizes that for organizational purposes the class consists of three different groups: (1) women who have hiring claims; (2) women who have work assignment claims; and (3) women who have promotion claims.

I. *Background*

This is a sex discrimination action brought under Title VII of the 1964 Civil Rights Act, the California Constitution, and the California Fair Employment and Housing Act. Plaintiffs allege [*2] that defendant Oxnard Lemon Associates, Ltd. ("Oxnard Lemon") has systematically confined women to a single set of "women's jobs," refusing to hire, promote or assign women to jobs traditionally performed by men. With respect to hiring, Oxnard Lemon allegedly hires for two entry level jobs: a grader job and a general floor job. According to plaintiffs, women cannot get hired as a general floor employee. Plaintiffs contend that if a woman comes to apply while defendant is hiring general floor employees, she is told that the company is not hiring or that there are no openings; she is allegedly not given an application to fill out.

Plaintiffs also contend that women are treated differently than men with respect to work assignments, resulting in women receiving fewer hours of work, longer layoff periods, and lower earnings than men. According to plaintiffs, women working in "women's jobs" as graders and sample graders are allowed to work only when the production lines are running, whereas men are given additional tasks so that they can work a full eight-hour day. Plaintiffs also contend that the jobs have been structured so that once the production lines shut down for the season, [*3] all the work left to be done goes to the men in the "men's jobs" so that the men can work a longer season.

Finally, plaintiffs contend that defendant discriminates against women with respect to promotions. They argue that prior to the institution of this lawsuit, the only promotion available to women was to move from grader to sample grader. Plaintiffs contend that women were not promoted to the higher paying "men's jobs."

There are seven named plaintiffs in this case. These women allege that they were personally subject to discrimination in hiring, work assignment practices and promotion.

Two of the plaintiffs, Rosa Alamillo and Leticia Ortiz, contend that they have hiring claims. These women allege that they applied or attempted to apply to work for defendant in 1991. Ms. Alamillo allegedly went to the plant and asked for work in late February and early March 1991. Ms. Ortiz allegedly went to the plant to ask for work in early May 1991. They allege that although Oxnard Lemon was hiring men at the time, both women were told that the company was not hiring and were not given applications to fill out. [1]

1 According to plaintiffs, after Ms. Alamillo filed her EEOC charge, she was hired by defendant as a grader. Plaintiffs also assert that three other women filed EEOC charges alleging that they attempted to apply for work in April 1991 but were not given an application. It is alleged that these three women were also subsequently hired by defendant as graders.

[*4] Five of the plaintiffs assert that they have work assignment claims. Frances Guzman, Jesusita Burciaga, Laura Gil, Mary Galvan, and Soccoro Villegas have all worked at defendant's plant for 15 years or more. [2] Each of these women claims that she has been subject to work assignment discrimination, working as graders or sample graders and receiving fewer hours of work, longer layoffs and lower earnings as a consequence. [3]

2 Mary Galvan apparently resigned from Oxnard Lemon in 1992 for unrelated personal reasons.

3 After plaintiffs filed their EEOC charges in 1991, defendant posted general floor jobs, allegedly for the first time ever, and invited women to transfer into these jobs while allowing them to retain their seniority (usually, a transfer between grader and general floor jobs starts seniority accumulation anew). Plaintiff Guzman moved into a general floor job which she still holds today. Plaintiff Burciaga moved into a general floor job but was moved out of it after the company apparently concluded that she could not handle the heavy lifting which the company claims is required of all general floor employees.

[*5] Three of the plaintiffs have promotion claims. Frances Guzman, Laura Gil and Jesusita Burciaga each applied for forklift driver jobs in 1991 when the company, allegedly for the first time, notified women of the forklift opening and allowed women to bid on it. Plaintiffs bid, but the job was given to a man. [4]

4 In 1992, after this lawsuit was filed, Ms. Gil was promoted to forklift driver.

Each of the named plaintiffs has filed a timely charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") and the California Department of Fair Employment and Housing ("DFEH").

II. *Rule 23 Requirements*

A. *Requirements under Rule 23(a)*

Rule 23(a) of the Federal Rules of Civil Procedure sets forth the basic requirements for class certification as follows: (1) Numerosity - the class must be so numerous that it would be impractical to join all the class members as named plaintiffs; (2) Commonality - the case must present issues of fact or law common to the class; (3) Typicality - the claims [*6] of the class representatives must be typical of the claims of the class members; and (4) Adequacy - the named plaintiffs and their counsel must be adequately prepared and experienced to fairly and adequately represent the class.

Once the Court determines that these requirements are satisfied, then the Court must determine whether (1) failure to certify the case as a class action would present a risk of inconsistent adjudications or as a practical matter would dispose of or prejudice the interests of non-parties; *or* (2) the defendant has acted in a manner that makes final injunctive or declaratory relief appropriate with respect to the class as a whole; *or* (3) common questions of law or fact predominate over questions affecting only individual members, and a class action is superior to other methods available for the fair and efficient resolution of the controversy. Rule 23(b).

(1) *Numerosity*

Plaintiffs have asked to define the class in this action as women who work at Oxnard Lemon (affected by defendant's allegedly discriminatory work assignment and promotion practices) and women who have applied for or who have been deterred from applying for work at Oxnard Lemon [*7] (affected by defendant's allegedly discriminatory hiring practices). Plaintiffs contend that this group is too large to practically join each member as an individual plaintiff.

No exact numerical formula is used to determine whether a group of plaintiffs is sufficiently numerous to be certified as a class. The facts of each case must be examined. *Kraszewski v. State Farm Ins. Co.,* 27 FEP Cases (BNA) 27, 29 (N.D. Cal. 1981).

Plaintiffs have submitted a copy of Oxnard Lemon's Seniority List as of May 31, 1991 which shows that at that time the company employed approximately 56 women. Plaintiffs contend that this is a sufficient number to justify class certification. In addition to the women currently employed by defendant, plaintiffs wish to include women who have applied for work at Oxnard Lemon in the class. Plaintiffs argue that joinder of all class members is "impracticable" be-

cause the class includes deterred applicants and future applicants. "By definition, such members are unknown and cannot be readily identified. By definition, such members are impracticable to join." *Pollar v. Judson Steel Corp.,* 49 FEP Cases (BNA) 221, 222 (N.D. Cal. 1984). [*8]

The Court agrees and finds that plaintiffs' proposed class satisfies the numerosity requirement for class certification. The Court intends to certify plaintiffs' proposed class as a whole. However, with respect to the various legal and factual issues involved, the Court is aware that certain subclasses exist of women who were discriminated against in (a) hiring, (b) promotions, and (c) work assignments.

(2) *Commonality*

In order to justify class certification, there must be some issue which is "common to the class as a whole," and relief must "turn on questions of law applicable in the same manner to each member of the class." *General Telephone Co. v. Falcon,* 457 U.S. 147, 155, 72 L. Ed. 2d 740, 102 S. Ct. 2364 (1982). Additionally, the common issues of fact or law must be of sufficient importance to the case that the Court is convinced that the most efficient method of determining the rights of the parties is through a class action. *Califano v. Yamasaki,* 442 U.S. 682, 701, 61 L. Ed. 2d 176, 99 S. Ct. 2545 (1979).

In this case, the Court finds that the common issue of whether defendant's treatment of women is based on an intent to discriminate against women because of their sex [*9] is sufficient to satisfy the commonality requirement under Rule 23(a)(2).

(3) *Typicality*

Plaintiffs must also show that their claims are sufficiently representative of those of the class they intend to represent. The claims need not be identical to the claims of the other class members, but the class representative "must be part of the class and possess the same interest and suffer the same injury as the class members." *General Telephone Co.,* 457 U.S. at 157.

The named plaintiff purporting to represent the class must be able to prove an actual injury to herself or himself. *O'Shea v. Littleton,* 414 U.S. 488, 38 L. Ed. 2d 674, 94 S. Ct. 669 (1974). Usually, claims arising from different types of employment discrimination (e.g., hiring v. promotion) can defeat class certification. *General Telephone Co., supra.* However, where the central issue is intent to discriminate based on a shared class attribute (i.e., race or sex), and the discrimination is manifested in the same general fashion, class certification is appropriate despite factual differences in each claim. *Rossini v. Ogilvy & Mather, Inc.,* 798 F.2d 590 (2d Cir. 1986). [*10]

It appears to the Court that named plaintiffs Rosa Alamillo and Leticia Ortiz are representative of the class claims with respect to hiring. As to the class claims of discrimination in work assignments, the Court finds that named plaintiffs Frances Guzman, Jesusita Burciaga, Laura Gil, Mary Galvan, and Socorro Villegas represent those claims. The Court also finds that named plaintiffs Frances Guzman, Jesusita Burciaga and Laura Gil represent the class claims regarding discrimination in promotions.

(A) *Hiring*

Defendant argues that plaintiffs Alamillo and Ortiz do not represent women applicants who were discriminated against in hiring. Ms. Alamillo allegedly went to Oxnard Lemon to ask for work in late February 1991 and early March 1991. She alleges that she was told that no jobs were available, but that defendant was hiring men for general floor positions at that time. After she filed her EEOC charge, she was hired as a grader on July 2, 1991. Defendant apparently offered Ms. Alamillo the opportunity to transfer to a general floor position on July 26, 1991, which she declined. Based on this declination, defendant contends that Ms. Alamillo does not and never had any interest [*11] in being hired in the general floor category.

Ms. Alamillo has stated in her deposition that the reason she did not switch to a general floor position once one was offered was that she was not certain she could do the heavy lifting required of some general floor employees. She also indicated that she did not transfer because she was familiar with grading and knew she could do the work. Plaintiffs contend that, like many of the women at Oxnard Lemon, Ms. Alamillo's order of job preference is as follows: Rather than be unemployed, she would take and try to perform any job. She thinks she probably cannot do the heavy lifting assigned to some general floor employees, but when she was looking for a job in early 1991, she was willing to try any job offered. [5] Once employed, given the job structure at Oxnard Lemon, Ms. Alamillo preferred to work as a grader than as a general floor worker. [6]

5 The fact that Ms. Alamillo received a job after she filed her EEOC complaint does not moot her claim for discrimination in hiring based on her earlier denial of a position. *See Senter v. General Motors,* 532 F.2d 511, 519-20 (6th Cir.) *cert. denied,* 429 U.S. 870, 50 L. Ed. 2d 150, 97 S. Ct. 182 (1976).

[*12]

6 She also apparently has a work assignment claim since she contends that she would like to work longer hours and would happily do other tasks, including sweeping and painting, if she were permitted to do such assignments.

Based on the foregoing, it appears that Ms. Alamillo adequately represents women in the class who were discriminated against in hiring on the basis of their sex.

Ms. Ortiz allegedly applied for work at Oxnard Lemon in May 1991. Like Ms. Alamillo, she was allegedly told there were no openings while the company was hiring men. Defendant claims that in January 1992, defendant informed Ms. Ortiz's counsel that it was accepting applications and solicited an application by Ms. Ortiz at that time. Additionally, at Ms. Ortiz's deposition on March 5, 1992, Ms. Ortiz was informed by counsel for defendant that if she was interested in applying for work at Oxnard Lemon, she could call the company and apply. Defendant contends that since Ms. Ortiz never responded to either solicitation, she has denied her status as an applicant for a job with defendant.

Ms. Ortiz has submitted a declaration [*13] stating that she was unable to submit an employment application in January 1992 because she had to leave the country to tend to a family emergency in Mexico. She also explains why she did not apply for a job with defendant upon her return. In any event, the mere fact that defendant solicited an application from Ms. Ortiz after she was allegedly denied the initial right to apply, does not eliminate her claim of discrimination in hiring. At most, an offer of employment [7] would cut off the accrual of backpay.

7 This was apparently just a solicitation of an employment application, not an offer of a position.

Therefore, it appears that Ms. Ortiz can represent women in the class who were discriminated against in hiring on the basis of their sex.

It also appears that Ms. Alamillo and Ms. Ortiz can represent women who were deterred by Oxnard Lemon's allegedly discriminatory policies from applying for employment with defendant. *See Phillips v. Joint Legislative Committee on Performance and Expenditure Review,* 637 F.2d 1014, 1024 (5th Cir. 1981); [*14] *Pollar v. Judson Steel Corp., supra.*

(B) *Work assignments*

As stated above, plaintiffs contend that the named plaintiffs Frances Guzman, Jesusita Burciaga, Laura Gil, Mary Galvan, and Socorro Villegas represent those women in the class who claim that they were discriminated against in work assignments. In particular, plaintiffs challenge defendant's requirement that women who transfer to the general floor job be able to engage in heavy lifting because plaintiffs contend that not all male general floor employees engage in heavy lifting. These named plaintiffs represent the women who would like the opportunity to work more hours and for a longer season. These plaintiffs contend that they have been wrongfully denied the right to do so because of defendant's discriminatory system of job classification and work assignment allocation.

(C) *Promotions*

Defendant argues that it only had two job openings for positions which plaintiffs consider promotions during the applicable statute of limitations period. In March 1991, the company posted openings for citrus clamp operator and forklift operator positions. None of the plaintiffs or any other woman [*15] bid on the citrus clamp operator opening. Three women, all plaintiffs, bid on the forklift operator opening. Defendant contends that these three women who were denied a promotion on an allegedly discriminatory basis are the only women who have promotion complainants, and therefore, do not meet the typicality requirements since there is no one that they represent.

On the other hand, plaintiffs contend that many women did not bid for the promotions in question because they thought it would be futile to do so in light of Oxnard Lemon's discriminatory policies. Additionally, plaintiffs contend that there was no opportunity for women to bid for promotions into typical "men's jobs" prior to 1991 because there was no regular system of posting jobs and accepting bids until that time. Plaintiffs also claim that defendant has consistently enforced a policy of not considering women for any promotions. This alleged policy, if it exists, affects all women who work for defendant and the interests of these women are represented by the named plaintiffs.

Based on the above, it appears that the named plaintiffs have met the typicality requirement under Rule 23(a)(3) for class certification.

[*16] (4) *Adequacy*

The parties representing the class must be persons who will "fairly and adequately protect the interests of the class." Rule 23(a)(4). This means that the named plaintiffs' interests must be coextensive with those of the class and counsel must be qualified and competent to handle a class action suit.

In this case, the interests of the named plaintiffs are coextensive with the remainder of the class. These named plaintiffs appear to have a sufficient interest in this action to ensure that they will vigorously prosecute this action on behalf of the class.

There does not appear to be any challenge to the adequacy of plaintiffs' counsel. Based on counsel's previous experience with cases of this nature and in the legal profession in general, counsel appear to be well qualified to handle this suit.

B. *Requirements under Rule 23(b)*

Plaintiffs claim that this action meets the requirements for certification under Rule 23(b)(2) in that defendant has acted "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." Rule 23(b)(2). Plaintiffs are seeking [*17] final injunctive and declaratory relief in this case which would, among other things, enjoin defendant from continuing to discriminate in the future.

Defendant argues that the injunctive relief requirements under Rule 23(b)(2) are not appropriate in this case. Defendant contends that it entered into a proposed settlement agreement with the EEOC to resolve all claims by these plaintiffs involving sex discrimination charges. Defendant also claims that it has instituted formal hiring procedures, modified its transfer policy and offered all the women in the putative class the opportunity to transfer to general floor positions.

As plaintiffs point out, the mere fact that defendant has taken some curative steps does not render injunctive relief inappropriate. *See E.E.O.C. v. Hacienda Hotel,* 881 F.2d 1504, 1519 (9th Cir. 1989); *E.E.O.C. v. Goodyear Aerospace Corp.,* 813 F.2d 1539, 1545 (9th Cir. 1987); *Pollar v. Judson Steel Corp., supra.* Defendant's actions do not establish that there "is no reasonable expectation that the alleged [discrimination] will recur." *Pollar, supra* [*18] (quoting *County of Los Angeles v. Davis,* 440 U.S. 625, 631, 59 L. Ed. 2d 642, 99 S. Ct. 1379 (1978)).

The Court finds that plaintiffs have met the requirement for class certification under Rule 23(b)(2). Plaintiffs complaint is primarily seeking injunctive and declaratory relief. While plaintiffs are seeking both back pay and compensatory damages, such damages can be viewed as ancillary to the equitable relief being sought here.

C. *Class definition*

(1) *Cutoff period for Title VII claim*

The Court finds that the women within the class who are entitled to assert a claim under Title VII include those who at any time since August 7, 1990, have been, continue to, or may in the future be denied employment, work assignments or promotions by Oxnard Lemon on the basis of their sex. Contrary to defendants' arguments, the Court does not believe that the class of Title VII plaintiffs cuts off as of the time this action was filed. *See Domingo v. New England Fish Co.,* 727 F.2d 1429, 1442 (9th Cir. 1984), *modified,* 742 F.2d 520 (9th Cir. 1984).

(2) *Pendent party plaintiffs*

The Court recognizes that the class, as certified, [*19] contains members who, because of the applicable statute of limitations, may not be able to maintain a federal claim under Title VII. The Court intends to exercise its supplemental jurisdiction over these class members pursuant to 28 U.S.C. ß 1367.

28 U.S.C. ß 1367(a) provides as follows:

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same

case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

The Report of Federal Courts Study Committee [8] states the following:

Abolishing or radically curtailing pendent and ancillary jurisdiction would eliminate some cases and claims from the federal courts, but this is a situation in which it is unwise to do so. Rather, [*20] we recommend that Congress expressly authorize federal courts to hear any claim arising out of the same "transaction or occurrence" as a claim within federal jurisdiction, including claims, within federal question jurisdiction, that require the joinder of additional parties, namely, defendants against whom that plaintiff has a closely related state claim. In order to minimize friction between state and federal courts, however, Congress should direct federal courts to dismiss state claims if these claims predominate or if they present novel or complex questions of state law, or if dismissal is warranted in the particular case by considerations of fairness or economy.

Report of Federal Courts Study Committee, 1990, pp. 47-48.

8 This is the committee appointed pursuant to an Act of Congress to study pendent and ancillary jurisdiction and make recommendations.

From this report, it appears that supplemental jurisdiction was primarily intended to allow plaintiffs with a federal claim to bring a related state claim against [*21] an additional defendant, one over whom the federal court would ordinarily not have jurisdiction. However, the broad wording of the statute on its face permits this Court to exercise jurisdiction over the state claims of additional plaintiffs whose claims clearly arise out of the same "transaction or occurrence" such as defendant's alleged discrimination here. Accordingly, the Court finds that it is in the interests of judicial economy to exercise its supplemental jurisdiction over the related state law claims of the pendent party plaintiffs.

Additionally, the Court finds that none of the grounds, as set forth in 28 U.S.C. ß 1367(c), for declining to exercise such jurisdiction are present.

IT IS SO ORDERED.

DATED: August 28, 1992

DAVID V. KENYON

UNITED STATES DISTRICT JUDGE