

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION

*Km* FILED  
FEB 22 2000  
U. S. DISTRICT COURT  
E. DIST. OF MO.  
ST. LOUIS

LESLIE MORGAN, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 4:94-CV-1184 (CEJ)
	)	
UNITED PARCEL SERVICE OF	)	
AMERICA, INC., and UNITED	)	
PARCEL SERVICE, INC.,	)	
	)	
Defendants.	)	

**MEMORANDUM AND ORDER**

This matter is before the Court on the defendants' "Motion for a Protective Order Regarding Contact with Division Manager Level and Higher Employees." The plaintiffs have filed a response in opposition to the motion, and the issue has been fully briefed.

Plaintiffs bring this action pursuant to the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. ("Title VII"), and 42 U.S.C. § 1981, alleging individual and class claims of employment discrimination. In addition to compensatory and punitive damages, plaintiffs seek equitable relief including an order enjoining defendants from continuing their discriminatory policies.

On October 30, 1996, the Court conditionally certified four classes of present and former United Parcel Service, Inc. (UPS) employees. In certifying the classes, the Court noted that the

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named plaintiffs were center managers, and discussed the potential conflicts that would arise if center managers attempted to represent persons below the level of center manager or managerial employees at higher levels. As to the managers at higher levels, the Court found that plaintiffs could not represent those managers while at the same time challenging their actions. Thus, the Court found that plaintiffs could adequately represent only center managers.

The Court stated that it would bifurcate the trial, severing the issues of liability and injunctive relief from the damages phase of the litigation. Furthermore, the Court stated that it would certify only the issue of liability and request for injunction as a Rule 23(b)(2) class action. If liability is established, then the Court will consider certifying the damages phase as a Rule 23(b)(3) class action. On December 2, 1996, the Court denied defendants' motion for reconsideration of its October 30, 1996 order. On April, 25, 1997, the Court issued an order further clarifying the scope of the four classes.

UPS argues in support of the motion for a protective order that individuals who have been promoted beyond the center manager level cannot be included in any of the classes certified by the Court because inclusion of such individuals would create intra-class conflicts. The individuals who have been promoted to higher

level positions, defendants argue, have participated in the decisions about which class members complain. UPS argues that inclusion of these members in the class would prevent it from communicating with its own managers, and would effectively prevent UPS from defending itself.

Plaintiffs argue that individuals who have been promoted beyond the center manager level remain members of the class. Thus, plaintiffs argue they may contact those individuals, and UPS may not have ex parte contact with them.

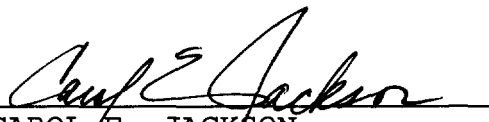
The Court certified the classes in this action pursuant to Fed. R. Civ. P. 23(b)(2), which requires that injunctive relief be appropriate with respect to the class as a whole. If an individual has been promoted beyond the center manager level, injunctive relief will no longer benefit that individual. Moreover, because injunctive relief is no longer appropriate for the individuals who have been promoted, they no longer satisfy the commonality, typicality, and adequacy of representation requirements of Rule 23(a). Thus, the Court finds that individuals who have been promoted beyond the center manager position should be excluded from the class. See Petrovic v. Amoco Oil Co., Nos. 98-3816/99-1334, slip op. at 6 (8<sup>th</sup> Cir. Dec. 30, 1999) (district court has duty to assure that class once certified continues to be certifiable under Rule 23(a)).

Because individuals who have been promoted are no longer proper members of the plaintiff class, the Court will grant defendants' motion for a protective order, and will order plaintiffs to cease any ex parte contact with UPS managerial employees who are not class members. See United States ex rel. O'Keefe v. McDonnell Douglas Corp., 132 F.3d 1252, 1253-54 (8<sup>th</sup> Cir. 1998).

Accordingly,

**IT IS HEREBY ORDERED** that defendants' motion for a protective order [Doc. # 318] is **granted**. Plaintiffs are directed to cease any ex parte contact with any current or former managerial employee of UPS above center manager level.

**IT IS FURTHER ORDERED** that defendants' motions for leave to substitute original affidavits [Docs. ## 350, 354] are **granted**.

  
CAROL E. JACKSON  
UNITED STATES DISTRICT JUDGE

Dated this 22nd day of February, 2000.

UNITED STATES DISTRICT COURT -- EASTERN MISSOURI  
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