SHELLEY HNOT, et al., Plaintiffs, v. WILLIS GROUP HOLDING LTD., WILLIS NORTH AMERICA INC., Defendants.

01 Civ. 6558 (GEL)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

August 10, 2004, Decided
August 10, 2004, Filed

DISPOSITION: [*1] Plaintiffs' motion to file second amended complaint granted in part and denied in part.

COUNSEL: Lawrence J. Profeta, Warshaw Burstein Cohen Schlesinger & Kuh, LLP, New York, New York; Linda P. Nussbaum, Cohen, Milstein, Hausfeld & Toll, P.L.L.C., New York, New York; Joseph M. Sellers, Christine E. Webber, Jessica M. Glick, Cohen, Milstein, Hausfeld & Toll, P.L.L.C., Washington, D.C., for plaintiffs Shelley Hnot and Heidi Scheller, on behalf of themselves and all others similarly situated.

Bettina B. Plevan, Proskauer Rose LLP, New York, New York, for defendants Willis Group Holding Ltd. and Willis North America, Inc.

JUDGES: GERARD E. LYNCH, United States District Judge.

OPINION BY: GERARD E. LYNCH

OPINION

OPINION AND ORDER

GERARD E. LYNCH, District Judge:

In this long-running employment discrimination putative class action, plaintiffs charge defendants with discriminating against women in high-level positions with respect to the terms and conditions of their employment. The complaint was filed more than three years ago, discovery has been essentially completed, and motions by plaintiffs to certify a class and by defendants for summary judgment have been made and are in the process of being briefed. Nevertheless, at [*2] this late stage of the lawsuit, plaintiffs seek permission to file a second amended complaint. Still more surprisingly, the briefing on that motion indicates that the parties purport to disagree about what they've been litigating for the past three years. The motion will be granted in part and denied in part.

The parties agree on the legal standard to be applied. Although leave to amend "shall be freely given when justice so requires," *Fed. R. Civ. P. 15(a)*, where a motion to amend is brought after expiration of a deadline set in a scheduling order, the requirement of *Fed. R. Civ. P. 16(b)* that scheduling orders "shall not be modified except upon a showing of good cause" applies. *Parker v. Columbia Pictures Indus., 204 F.3d 326 (2d Cir. 2000)*. In evaluating whether good cause exists, and exercising its discretion whether to permit the amendment, a court should focus primarily on the diligence of the moving party, *id. at 340*, and may also consider such factors as the reasons for delay, the interests of justice to be served by the amendment, considerations of judicial efficiency, [*3] and any prejudice to the opposing side. See, e.g., *NAS Electronics, Inc. v. Transtech Elecs. Pte Ltd., 262 F. Supp. 2d 134, 150-51 (S.D.N.Y. 2003)*; *Topps Co. v. Cadbury Stani S.A.I.C., 2002 U.S. Dist. LEXIS 16758, 99 civ. 9437, 2002 WL 31014833, at *1 (S.D.N.Y. Sept. 10, 2002)*; *Zomba Recording Corp. v. MP3.com, Inc., 2001 U.S. Dist. LEXIS 9647, 00 Civ. 6831, 2001 WL 770926, at *1 (S.D.N.Y. July 10, 2001)*. In this case, a scheduling order proposed by the parties and signed by the Court set a deadline of December 31, 2002, for motions to amend the pleadings.

Plaintiffs now seek to amend their complaint in three respects. First, they seek to delete allegations relating to former class representatives who have settled their claims or who no longer desire to serve as class representatives. This proposed amendment comes reasonably timely after the events that have occasioned it, the course of the litigation will not be adversely affected, and no prejudice to defendants appears. Defendants do not oppose these amendments, and leave to amend in this respect is granted.

Second, plaintiffs seek to add to their Title VII claims parallel claims under state and local anti-discrimination laws in New York, [*4] New Jersey and Massachusetts. According to plaintiffs, they had deliberately omitted state and local laws in drafting their complaint, because they intended to seek certification of a nationwide class, and the many disparate state and local laws involved in national litigation would have made the case too unwieldy. (P. Mem. 3, 6-7.) Adverse discovery rulings have led the plaintiffs to abandon claims on behalf of employees outside the defendants' Northeast Region, which encompasses these three states. Given the limited number of jurisdictions involved, plaintiffs now deem it feasible to pursue claims under the laws of the states involved.

Plaintiffs argue that their efforts to pursue

nationwide discovery regarding defendants' employment practices and records were only finally rebuffed in an order denying their renewed motion to compel production of such materials entered on January 9, 2004. [1] The motion to amend the complaint was not made, however, until June 4, 2004, nearly five months later. Plaintiffs contend that the litigation will not be complicated by these additional claims, since the substantive standards for liability under the state and local laws in question are allegedly [*5] the same as those under Title VII. (P. Mem. 8-9.) Thus, they argue, no additional discovery will be required, and no prejudice to defendants or additional proceedings will ensue. Defendants do not dispute that the liability standards governing the state law claims parallel those under Title VII. They counter, however, that the state laws permit broader damages, and that had the complaint not been limited to Title VII claims they would have sought broader discovery of the named plaintiffs. (D. Mem. 11.)

1 Defendants argue that the Court's first ruling on this subject came much earlier in the litigation, at a conference on November 13, 2002. But plaintiffs are quite correct that this was a provisional decision, subject to reconsideration depending on the fruits of discovery that was ordered at that time, and an Order entered on December 2, 2002, made explicit that the motion for discovery of a nationwide database was denied "without prejudice to renew." Accordingly, plaintiffs' tactical reassessment of its decision to forego state claims was not occasioned until their motion was finally denied on January 9, 2004.

[*6] Defendants' argument is unpersuasive. The additional discovery with respect to the named plaintiffs is relatively limited, plaintiffs make no objection to conducting it, and the pendency of the class certification motion, which will not even be fully briefed until late September, ensures that the litigation will not be further delayed by any modest additional discovery on plaintiffs' damages claims. [2] There is thus no particular prejudice to defendants or to the efficient administration of justice in permitting the amendment. Although plaintiffs may have been less than expeditious in seeking to amend, and their reasons for not pursuing these claims in the first place were purely tactical, neither issue necessitates a finding of lack of good cause. In the end, plaintiffs seek to assert the same claims of gender discrimination under state law as under federal law, and if they can prove their claims on the merits, absent prejudice to the defendants, there is no reason in justice for holding that they have waived any additional damages they may be entitled to under state law merely because at an earlier stage of the litigation they pursued a different tactical objective. Accordingly, [*7] plaintiffs will be permitted to amend their complaint to assert state causes of action.

2 Defendants also make reference to additional discovery on the individual damages of class members; however, such discovery is not appropriate at this stage of the litigation in any event. See, e.g., *Southern District Local Rule 33.3*; *McCarthy v. Paine Webber Group, Inc., 164 F.R.D. 309, 313 (D. Conn. 1995)*; Manual for Complex Litigation, § 32.436 (4th ed. 2004).

Third, plaintiffs seek to amend the operative language of their complaint to assert that defendants discriminated against female officers "or equivalents." Although this amendment was discussed in plaintiffs' motion only in a footnote, and presented as a non-controversial attempt to conform the language of the paragraphs asserting causes of action with the paragraph describing the proposed class (P. Mem. 1 n.1), this proposal has elicited the most extensive opposition from defendants, and has been fully briefed via the plaintiffs' reply brief [*8] and letters submitted by both sides in the nature of a sur-reply and sur-sur-reply.

The parties disagree about the effect of the proposed amendment, and about whether the litigation to date has or has not been conducted as if the language was contained in the present complaint. Plaintiffs contend that the complaint itself put defendants on notice that their claims of discrimination were not limited to persons holding particular titles, because the complaint sought certification of a class of women "employed by the defendants *at levels equivalent to* Assistant Vice President, Vice President and Senior Vice President" during the proposed class period. (Am. Compl. P25; emphasis added.) They also argue that various discovery demands and answers on both sides make clear that the parties exchanged information about a broader class of employees than merely those who held specific job titles. (P. Reply 6-9; July 29, 2004, Letter.)

Defendants counter that both the factual allegations and the charging language of the complaint refer to discrimination against "officers," defined quite specifically by job title, and not to a potentially broader and more elusive class of "equivalents." This [*9] is entirely accurate. Except for the class allegation cited above, the complaint consistently and repeatedly refers to discrimination against "officers." Thus, in the very first paragraph, plaintiffs describe their case as charging "a pattern and practice of sex discrimination and retaliation . . . against current and former female employees . . . at the level of Assistant Vice President, Vice President and Senior Vice President (hereinafter referred to collectively as 'officers')." (Am. Compl. P1.) The complaint goes on th allege that "female Assistant Vice Presidents, Vice Presidents and Senior Vice Presidents (collectively 'officers') are routinely subjected to . . . sex discrimination" (id. P17), and to describe the paucity of female "officers" (id. P19), disparity between the pay of "male officers" and "female officers" (id. P21), "discrimination against female officers seeking . . . either lateral moves or promotions" (id. P22(a)), directing better

work "to male officers and away from female officers" (id. P22(b)), and a host of other indignities visited on "female officers" or "women officers" (id. P23(a)-(e)). Even within the class allegations, plaintiffs [*10] allege that the questions common to the class involve the treatment of "female officers." (Id. P29(c)-(f).) Plaintiffs do not seek to amend any of these references, but only to amend the actual statements of their causes of action, which in the present complaint allege claims of discrimination and retaliation against "female officers." (Id. PP111, 114, 115, 120, 124, 127.) Defendants also refer the Court a different set of discovery materials that they contend show that the litigation has in fact been conducted within these narrow confines. (D. Mem. 2, 12-13; July 19, 2004, Letter.)

The parties thus disagree about whether the proposed amendment is a mere clerical correction to reflect what the case has always been about, or a revolutionary restructuring of the case. Resolution of this disagreement is made more difficult by the fact that plaintiffs provide no real definition of "equivalents," and thus no convincing explanation of whether including "equivalents" in the allegations of the complaint will add a small, easily-identified or well-understood class of employees indistinguishable from those who hold officer titles, or a large and indistinct mass of employees whose status [*11] is subject to dispute and who have been selected either tendentiously (in order to influence the outcome of statistical studies) or arbitrarily (by their inclusion in certain databases or employee records).

Under these circumstances, the issues presented by this aspect of the plaintiffs' motion are not best resolved by the expedient of amending the complaint. If plaintiffs are correct that the proposed amendment merely makes explicit what the complaint always alleged, it is unnecessary; if defendants are correct that the amendment would dramatically change the terms of the litigation, it should not be permitted. The real issues raised by the motion will be better settled in the more concrete contexts of the class certification and summary judgment motions. In both contexts, plaintiffs will attempt to demonstrate, on the basis of the evidence that has been compiled, that the court should certify a definable, coherent class, as to which there is sufficient evidence to raise a genuine issue of material fact about whether its members have been subjected to the legal harms alleged in the complaint. Any dispute about whether persons other than those who hold the specific titles defined [*12] in the present complaint should be included in the class, or in statistical studies allegedly proving discrimination, is best addressed in the context of those motions. Accordingly, the motion to amend the complaint by including the words "or equivalents" at various places is denied.

CONCLUSION

Plaintiffs' motion to amend the complaint is granted with respect to the deletion of certain class representatives and the addition of causes of action based on state law, and denied with respect to the addition of the words "or equivalents" in describing the victims of the alleged discrimination and retaliation.

SO ORDERED:

Dated: New York, New York

August 10, 2004

GERARD E. LYNCH

United States District Judge