United States District Court
For The District of Wyoming

[redacted] and [redacted],

Plaintiffs,

vs.

[redacted] WEST, INC,

Defendant.

Civil No. 07–CV–192–B

ORDER DENYING DEFENDANT'S MOTION TO SEVER PARTIES AND CLAIMS PURSUANT TO F.R.C.P. 21

THIS MATTER having come before the Court on defendant's Motion to Sever Parties and Claims Pursuant to F.R.C.P. 21, and the Court having carefully considered the motion and response thereto, and being fully advised in the premises, FINDS:

1. This matter originally comes before the Court on plaintiffs' claims for gender discrimination, retaliation, and intentional infliction of emotional distress stemming from sexual harassment that allegedly occurred when plaintiffs worked for defendant from September 2002 through 2007. Specifically, plaintiffs allege that their co-worker Joseph [redacted]k created a sexual hostile working environment by making jokes, using vulgar language, and inappropriately touching plaintiffs; plaintiffs state that other co-workers witnessed [redacted]k's actions and

sometimes engaged in similar behavior. Plaintiffs state that [redacted] reported [redacted]'s behavior to defendant and that defendant investigated [redacted]'s report but also attempted to find evidence that plaintiffs and other female employees engaged in sexually inappropriate behavior. Plaintiffs assert that defendant ultimately concluded that [redacted] created a sexually hostile environment but took few steps to remedy the situation; in addition, plaintiffs state that defendant's management told plaintiffs that they were at least partly responsible for the sexually charged atmosphere and embarrassed plaintiffs in front of other employees. Plaintiffs state that defendant never instituted any sexual harassment training and assert that their co-workers continued to create a hostile environment, stopped speaking to plaintiffs, and blocked plaintiffs' radio calls from being heard. Plaintiffs state that at least one of their co-workers wrote graffiti about [redacted] in a company table, keyed [redacted]'s car, and mooned [redacted]. [redacted] states that as a result of this conduct, [redacted] took short term disability leave in May 2006 and also switched jobs within the company; plaintiffs state that [redacted] remains employed by defendant to this day.

Plaintiffs contend defendant violated their civil rights by engaging in illegal discrimination against them on the basis of gender, that defendant retaliated against plaintiffs when plaintiffs complained about such discrimination, and that defendant intentionally inflicted emotional distress upon plaintiffs. Plaintiffs seek a declaratory judgment that defendant's violated plaintiffs' rights, compensatory damages, back pay, punitive damages, and attorney's fees and costs.

2. In the instant motion, defendant requests that the Court sever plaintiffs' claims.

Defendant argues that plaintiffs make divergent allegations in the complaint, noting that the two plaintiffs allege different forms of sexual harassment and retaliation by defendant's employees and asserting that evidence of harassing conduct toward one plaintiff is irrelevant to the other plaintiff's claims. Defendant also asserts that because plaintiffs must demonstrate that they each suffered emotional distress as a result of defendant's conduct to succeed on their intentional infliction of emotional distress claim, those claims are "highly individualized." Def.'s Mot. to Sever at 7. In addition, defendant contends plaintiffs' claims share few common questions of fact or law and would be prejudicial if tried jointly. Defendant argues plaintiffs' factual allegations differ because plaintiffs had separate working environments and allege different forms of harassment and retaliation as a result.

3. Plaintiffs object to defendant's motion and request that said motion be denied. Plaintiffs assert that their claims arise out of the same transactions and occurrences because they both worked in the same mine during an overlapping period, they were both harassed by the same supervisor and other co-workers, they both reported the alleged harassment to management around the same time, and they both allegedly suffered retaliation as a result of that reporting. Plaintiffs further state that the allegedly sexually harassing environment qualifies as a common question of law or fact, and they argue that they need not have suffered the same damages to have their claims joined. Plaintiffs also note that during discovery and trial there will be much overlap because they both wish to depose and call to testify certain of defendant's employees.

4. Federal Rule of Civil Procedure 20 states that "[p]ersons may join in one action as

plaintiffs" if (1) "they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences" and (2) "any question of law or fact common to all plaintiffs will arise in the action." Fed. R. Civ. P. 20(a). Under Rules 21 and 42(b), a court may sever claims in the interest of convenience or to avoid prejudicing one party. Fed. R. Civ. P. 21, 42(b). However, courts should allow "[t]he broadest possible scope of action consistent with fairness to the parties." *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 724 (1966). In this case, the early stages of litigation limits the Court's consideration of whether plaintiffs' claims are properly joined, and for purposes of this motion, the Court assumes the allegations contained in plaintiffs' complaint are true. *Lee v. Dell Products, L.P.*, 2006 WL 2981301 at *5 (M.D. Tenn. Oct. 16, 2006). Based on the analysis below, the Court concludes that plaintiffs are properly joined under Rule 20.

Same Transaction or Occurrence

Courts consider a variety of factors to determine if the facts alleged constitute a series of transactions or occurrences. *Lee*, 2006 WL 2981301 at *7. These factors include: the time period during which the alleged acts occurred, whether the discriminatory acts are related, whether there were differing types of employment actions, whether more than one type of discrimination is alleged, whether the same supervisors were involved, whether employees worked in the same department, whether employees were at different geographical locations, and whether a company-wide policy is alleged. *Id.* In *Lee*, the court found eight of ten plaintiffs properly joined in a racial discrimination suit because they presented "common elements of practice and conduct" by defendant that amounted

to alleging a "widely held policy of discrimination." *Id.* at *9. Specifically, the court found that the time period alleged by plaintiffs overlapped greatly and that the type of discrimination alleged was very similar, despite the fact that the eight plaintiffs did not all work in the same jobs, have the same supervisors, or work in the same departments. *Id.* at *9-10. By contrast, the court severed two plaintiffs who were claiming wrongful termination based on discriminatory practices because those claims were unrelated to the other eight plaintiffs' contentions that they were denied training and promotion based on race. *Id.* at *8.

In the present case, plaintiffs bear far more resemblance to the eight *Lee* plaintiffs who were joined than the two who were severed. Plaintiffs both worked at defendant's [redacted] Mine site for four overlapping years; they both allege that [redacted], among others, sexually harassed them; they both reported the sexual harassment to management in January 2006; they both state that management conducted an inquiry into the allegations shortly after plaintiffs' reporting; and they both claim they were retaliated against as a result of that reporting. Furthermore, though they may arise from slightly different conduct, plaintiffs' legal basis for their sexual harassment and retaliation claims are identical; in addition, plaintiffs' allegations give rise to a contention that defendant had company-wide policies and practices of harassment. This amount of overlap not only touches upon several of the *Lee* factors but also gives rise to the logical assumption that there will be significant overlap in the types of discovery plaintiffs will undertake, particularly the witnesses being deposed, which will in turn save time and judicial resources. Therefore, the Court finds that based on plaintiffs' complaint, there was a common series of transaction and occurrences.

Common Question of Law or Fact

The second requirement of Rule 20 is that plaintiffs' claims share a common question of law or fact. Courts do not "require that all question of law and fact raised by the dispute be common," and "common questions have been found to exist in a wide range of context." *Mosley v. General Motors Co.*, 497 F.2d 1330, 1334 (8th Cir. 1974). In employment discrimination claims brought under Title VII, "the fact that the individual class members may have suffered different effects from the alleged discrimination is immaterial." *Id.* "Although the actual effects of a discriminatory policy may thus vary throughout the class, the existence of a discriminatory policy threatens the entire class. And whether the Damoclean threat of a racially discriminatory policy hangs over the racial class is a question of fact common to all members." *Id.* (quoting *Hall v. Werthan Bag Co.*, 251 F. Supp 184, 186 (M.D. Tenn. 1966)).

A similar threat, albeit one based on gender rather than race, "hung over" plaintiffs' heads in this case. While plaintiffs identify separate and distinct incidents of sexual harassment they endured, there exists a common question of fact as to whether defendant had certain practices and policies in place that allowed a discriminatory environment to flourish in the conduct of [redacted]k and other employees. Plaintiffs also raise a common question of law as to whether they experienced retaliation stemming from their January 2006 reporting; while the effects of the alleged retaliation may differ, the response to the reporting–beginning with defendant's joint investigation and continuing through the responses of defendant's employees to that investigation–constitutes sufficient overlap. Defendant argues for severance based on *Smith v. North*

American Rockwell Co.-Tulsa Division, 50 F.R.D. 515 (N.D. Okl. 1970), in which the court severed plaintiffs' racial discrimination claims based on failure to promote, but that case is inapposite to the present one. There, the four plaintiffs worked in distinct and separate departments of defendant's company and presumably reported to different managers in charge of evaluating plaintiffs for promotions. *See id. at 517-18.* By contrast, here plaintiffs worked in the same allegedly discriminatory environment perpetuated by the same co-workers, reported the harassment to the same management, and were allegedly subject to retaliation stemming from a joint investigation conducted in response to their complaints. To be sure, the *Smith* court favored a stricter interpretation of Rule 10, but in the thirty-eight years since that case was decided, several other courts have offered a far more liberal interpretation of Rule 20's requirements. *See, e.g., Hawkins v. Groot Industries, Inc.*, 210 F.R.D. 226 (N.D. Ill. 2002); *Mosley*, 497 F.2d 1330; *Lee*, 2006 WL 2981301. Therefore, based on the foregoing analysis, the Court finds there exist common questions of law and fact.

Accordingly, the Court finds that plaintiffs' claims are properly joined, and defendant's motion is denied.

NOW, THEREFORE, IT IS ORDERED that defendant's Motion to Sever Parties and Claims Pursuant to F.R.C.P. 21 is DENIED.

Dated this 31st day of March, 2008.

William C. Beaman
United States Magistrate Judge