

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

MICHAEL F. DUFFY, et al.,	:	CIVIL ACTION
	:	
Plaintiffs,	:	NO. 05-5428
	:	
v.	:	
	:	
SODEXHO, INC.,	:	
	:	
Defendant.	:	

MEMORANDUM

BUCKWALTER, S. J.

October 20, 2006

Presently before the Court are Plaintiffs’ Motion for Provisional Class Certification and Court-Supervised Notice to Potential Opt-in Plaintiffs (Docket No. 4), Defendant’s response thereto (Docket No. 8), Plaintiffs’ response in support (Docket No. 11), and Defendant’s Surreply (Docket No.12). For the reasons stated below, Plaintiffs’ Motion for Provisional Class Certification and Court-Supervised Notice to Potential Opt-in Plaintiffs is **DENIED**.

I. BACKGROUND

On October 17, 2005, Plaintiffs Michael F. Duffy, Richard Simpson, and Diane Anderson, filed a Complaint (Docket No. 1) individually and on behalf of all persons similarly situated, thereby commencing this action against the Defendant, Sodexho, Inc., alleging that the Defendant discriminated against the named plaintiffs and class plaintiffs on account of their age in violation of the Age Discrimination in Employment Act (“ADEA”), 29 U.S.C. §621, et seq.,

and the Pennsylvania Human Relations Act (“PHRA”), 43 P.S. §955, et seq. Specifically, Plaintiffs allege that the Defendant failed to consider them and other management level employees for open positions for which they were fully qualified; the Defendant failed to promote and retain Plaintiffs and other older management level employees while promoting and retaining younger, less qualified employees; and the Defendant maintained a pattern and practice of age discrimination.

On January 18, 2006, Plaintiffs moved, pursuant to Federal Rules of Civil Procedure 23(c), Local Rule of Civil Procedure 23.1(c), and Section 16(b) of the Fair Labor Standards Act (“FLSA”), 29 U.S.C. §216(b), as incorporated by Section 7 of the ADEA, 29 U.S.C. §626(b), for provisional class certification and court-supervised notice to potential opt-in plaintiffs (Docket No. 4).¹ The Court recognizes that the parties here are well-versed with the facts and law regarding class certification. Therefore, the Court will limit its discussion to the specific reasons for not certifying Plaintiffs’ proposed class.

II. DISCUSSION

A. Notice of Class Claims

Plaintiffs claim that their Equal Employment Opportunity Commission (“EEOC”) charges were sufficient to put the Defendant on notice of class claims. In support of this position, Plaintiffs contend that (1) issues of class-based discrimination were raised during the administrative process and (2) Plaintiffs should not be precluded from pursuing class claims as a

1. Plaintiffs have provided no argument or support for class certification pursuant to Federal Rule of Civil Procedure 23(c) or Local Rule of Civil Procedure 23.1(c), but rather have limited the arguments in their pleadings to class certification based on Section 16(b) of the FLSA, 29 U.S.C. §216(b). The Court will therefore only address class certification based on this section.

result of “the EEOC’s failure to formally include those allegations in the body of the charges or to investigate those allegations.” (Pls’ Rep. 10). Despite Plaintiffs’ assertions, however, the fact remains that Plaintiffs’ EEOC charges failed to provide the Defendant with notice of potential class claims.

The Third Circuit has held that “plaintiffs who had not filed charges with the EEOC could opt into an ADEA class action suit only if the original complainant’s EEOC charge gave the employer notice of class-based age discrimination.” Lockhart v. Westinghouse Credit Corp., 879 F.2d 43, 53 (3d Cir. 1989), citing Lusardi v. Lechner, 855 F.2d 1062, 1077-78 (3d Cir. 1988). The scope of the civil complaint is limited to claims that are reasonably within the scope of the charge filed with the EEOC. Hicks v. ABT Associate, Inc., 572 F.2d 960, 967 (3d Cir. 1978). “Otherwise, the charging party could greatly expand an investigation simply by alleging new and different facts [once] contacted by the Commission following [the] charge.” Id.

In support of their first claim, Plaintiffs provide evidence in the form of a factual statement by Plaintiff Michael F. Duffy (Pls’ Ex. C) and various rebuttal statements and letters by all named plaintiffs (Pls’ Ex. D, E, F, G, H, and I) that were submitted to the EEOC during their investigation and arguably alluded to class-based discrimination by the Defendant. This evidence, however, fails to overcome the absence of class-based allegations in the formal charges filed with the EEOC. It is evident that Plaintiffs are relying on materials submitted subsequent to the filing of their EEOC charges in an effort to establish prior notice of class allegations. There is no language in Plaintiffs’ actual charges suggesting anything other than individual claims of discrimination. There is also no evidence indicating the Defendant received notice of any class-based claims prior to Plaintiffs filing this cause of action. Likewise, there is no evidence to

support a finding that the subsequent allegations of class discrimination are reasonably within the scope of the original charges. For the reasons stated above, the Court cannot grant provisional class certification.

Secondly, in what appears to be an anticipatory response, Plaintiffs contend that they should not be precluded from pursuing class claims as a result of “the EEOC’s failure to formally include those allegations in the body of the charges or to investigate those allegations.” (Pls’ Rep. 10). Plaintiffs are correct in that an unreasonably narrow EEOC investigation does not prevent them from bringing claims growing out of their original charges of discrimination Hicks v. ABT Associate, 572 F.2d at 966, citing Ostapowicz v. Johnson Bronze Co., 541 F.2d 394, 398-99 (3d Cir. 1976). However, as previously stated, the Court cannot in this case reach the conclusion that allegations of class discrimination are within the scope of the original charges. Plaintiffs’ argument, shifting the responsibility to the EEOC to allege class-based discrimination, is without merit. Despite who may have drafted the charges, Plaintiffs had ample opportunity to review and edit the charges, and Plaintiffs effectively adopted the chosen language found in the charges by signing and filing them.² Given these circumstances, the EEOC is not to blame for the absence of class discrimination allegations in the charges. The Defendant is entitled to notice, and that notification has not occurred. Due to Plaintiffs’ failure to allege class-based discrimination in their EEOC charges and the resulting lack of notification to the Defendant of potential class claims, the Court cannot grant provisional class certification

2. See Novitsky v. American Consulting Engineers, L.L.C., 196 F.3d 699 (7th Cir. 1999), noting that, “Complainants are free to draft and file charges on their own, or hire attorneys to do so, and a charge drafted by the EEOC’s staff is not filed unless the complainant signs it.”

B. Similarly Situated Proposed Class

Plaintiffs claim that they are similarly situated to other potential class members.³

In their most recent filing, Plaintiffs identify the proposed class as “all management employees of the defendant who are age 40 or over and who are now or have been employed by the defendant in the United States in its diverse business from January 1, 2002 to date.” (Pls’ Rep. 2).⁴

Plaintiffs support their claim of being similarly situated to the proposed class by purporting that (1) the Defendant maintains a uniform hiring system subject to nation-wide guidelines and procedures, (2) the Defendant adopted a company-wide policy of age discrimination, and (3)

Plaintiffs provided testimony regarding the existence of other potential class members. The court is unpersuaded by Plaintiffs’ arguments and finds that Plaintiffs have failed to demonstrate even a modest factual showing that they are similarly situated to the proposed class.

In considering whether potential class members are “similarly situated,” the district courts within the Third Circuit are divided as to the appropriate standard to be applied.⁵

Some courts require merely allegations of class-based discrimination, while others require a basic factual showing of similarly situated class members. This Court feels it most appropriate to

3. Despite the lack of notice of class allegations independently defeating Plaintiffs’ claim for provisional class certification, the Court will address Plaintiffs’ claim of being similarly situated to the proposed class for purposes of completeness.

4. Plaintiffs originally identified the proposed class as “all management employees of the defendant who are age 40 or over and who are now or have been employed by the defendant in the United States in its diverse business from **2000 to date.**” (Pls’ Mem. Class Cert. 2). The Defendant’s reply addressed confusion as to the period encompassing the proposed class, prompting Plaintiffs to modify the proposed class to the period “from January 1, 2002 to date.” (Pls Rep. 2).

5. See Smith v. Sovereign Bancorp, Inc., No. Civ. A. 03-2420, 2003 WL 22701017, *2 (E.D. Pa. Nov. 12, 2003), where the Court discussed the varying standards applied in other districts and circuits. Some courts have granted motions for preliminary certification and notice based solely on plaintiff’s allegations of class-based discrimination, while other courts “apply a more stringent-although nonetheless lenient-test that requires the plaintiff to make a ‘modest factual showing’ that the similarly situated requirement is satisfied.” Id.

adhere to the latter, requiring plaintiffs to make a basic factual showing that they are similarly situated to the proposed class before granting certification. While this standard necessitates only modest evidence to support Plaintiffs' claim of a broad discriminatory policy on the part of the Defendant, it nonetheless allows the court to manage the potential for abuse often inherent to class action suits. Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165 (U.S.N.J. 1989). The Court believes this approach "provides a more efficient and effective means of managing FLSA litigation and comports with the Supreme Court's case-management recommendation and the Congressional intent behind FLSA." See Smith v. Sovereign Bancorp, Inc., No. Civ.A. 03-2420, 2003 WL 22701017, *3 (E.D. Pa. Nov. 12, 2003). Recognizing that there has already been discovery to determine the scope of the class in this case, the need for requiring some basic factual support is further justified.

A careful review of the record demonstrates that Plaintiffs have failed to bring forward any factual evidence to support their contentions that they are similarly situated to the proposed class. Plaintiffs first argue that the Defendant maintains a uniform hiring system subject to nation-wide procedures. The Defendant claims that this database is limited to sourcing candidates, and that actual selection decisions are made by a local hiring manager and address the needs of the local individual account. (Def's. Surrep. 6). Plaintiffs contend that the decisions of the local hiring managers are nevertheless subject to the same guidelines and procedures nation-wide. (Pls'. Rep. 15). The Court is not persuaded that the mere presence of this job posting database represents an "identifiable factual nexus which binds the named plaintiffs and the potential class members together as victims of a particular alleged discrimination." Heagney v. European American Bank, 122 F.R.D. 125, 127 (E.D.N.Y. 1988). Therefore, it is necessary to

look to Plaintiffs second and third arguments in search of evidence establishing that the Defendant implemented universal screening measures of discrimination.

Plaintiffs' second argument states that the Defendant adopted a company-wide policy of age discrimination. Plaintiffs point to the July 2002 issue of "Best Of," a publication of the Defendant's parent company, Sodexho Alliance, where the second of six stated strategic objectives was "Improving our management planning and succession by revitalizing our management teams with younger people..." (Pls' Ex. J). To support the claim that this stated objective of Sodexho Alliance was incorporated by the Defendant, Plaintiffs note that the publication was widely distributed to all of the Defendant's employees, featured photographs of the Defendant's then CEO and another top executive, and listed several other top executives of the Defendant as contributors. (Pls' Ex. J; Duffy Dep., pp. 242-246). Despite the existence of Sodexho Alliance's publication, the Court views the link—that the Defendant therefore systematically discriminated against older workers—as mere speculation. As the Defendant points out, Plaintiffs provide no evidence indicating that the Defendant adopted and/or implemented the strategic objective of their parent company. Absent additional evidence, the Court is unwilling to jump to the conclusion that the Defendant may have implemented an age-based discriminatory policy affecting the entire proposed class.

Plaintiffs' third argument claims that they have provided testimony regarding the existence of similarly situated class members. Plaintiffs' support this contention by referencing Plaintiff Diane Anderson's testimony stating, "when I was down Fort Hood, Texas, there was a bunch of managers, older, down there that were sent temporarily trying to find positions" (Pls' Ex. K, p. 241), and Plaintiff Michael Duffy's testimony referring to another employee he had met

while stationed at the Philadelphia Zoo “who was already there in the same situation as floating.” (Pls’ Ex. M, pp. 46-48). The Court finds it difficult to reason how these statements made by the Plaintiffs constitute a basic factual showing of being similarly situated to the proposed class. As the Defendant points out, the employee Plaintiff Duffy spoke of was ultimately successful in obtaining another position with the Defendant. (Def. Rep. 7). Likewise, the Defendant notes that Plaintiff Anderson later testified that she had no knowledge as to whether the managers she spoke of had found other positions with the Defendant. (Def. Rep. 7-8). The Court is not convinced of a broad implementation of discriminatory screening procedures based on the unascertained fate of several employees coupled with Plaintiffs’ allegations. Without the existence of any statistical or factual support, there is simply insufficient evidence to justify conditionally certifying the proposed class of all management employees of the Defendant who are age 40 or over.

III. CONCLUSION

For the foregoing reasons, Plaintiffs’ Motion for Provisional Class Certification and Court-Supervised Notice to Potential Opt-in Plaintiffs is Denied.

An order follows.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

MICHAEL F. DUFFY, et al.,	:	CIVIL ACTION
	:	
Plaintiffs,	:	NO. 05-5428
	:	
v.	:	
	:	
SODEXHO, INC.,	:	
	:	
Defendant.	:	

ORDER

AND NOW, this 20th day of October, 2006, upon consideration of Plaintiffs' Motion for Provisional Class Certification and Court-Supervised Notice to Potential Opt-in Plaintiffs (Docket No. 4), Defendant's response thereto (Docket No. 8), Plaintiffs' response in support (Docket No. 11), and Defendant's Surreply (Docket No. 12), and a careful review of the entire record, it is hereby **ORDERED** that Plaintiffs' Motion for Provisional Class Certification and Court-Supervised Notice to Potential Opt-in Plaintiffs is **DENIED**.

BY THE COURT:

s/ Ronald L. Buckwalter, S. J.
RONALD L. BUCKWALTER, S.J.