Shah v Wilco Systems, Inc.
2003 NY Slip Op 30193(U)
December 13, 2003
Supreme Court, New York County
Docket Number: 113231/02
Judge: Marilyn Shafer
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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: HON. MARILYN SHAFER **PART 36**
Justice

SONA SHAH, et al

Plaintiffs,

-against-

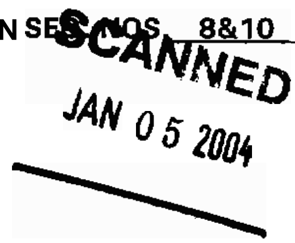
Wilco SYSTEMS, INC.

Defendant.

INDEX NO. 113231/02

MOTION DATE

MOTION SEQ. NOS. 8&10



The following papers, numbered 1 to 19, were read on this motion for class certification and partial summary judgment:

	PAPERS NUMBERED
Notices of Motion – Affidavits – Exhibits – Memorandum of Law	1.2
Answering Affidavits – Exhibits – Memorandum of Law	3.4. 5, 6. 7, 8, 9, 10, 14, 16
Replying Affidavits – Memorandum of Law	11, 12, 13, 15, 17. 18
Exhibits filed under seal pursuant to protective order	19

Cross-Motion: __ Yes √ No

Upon the foregoing papers, it is ordered that motion sequence nos. 8 and 10 are combined herein for decision. It is further ordered that plaintiff's motion for class certification and defendant's motion for partial summary judgment are denied.

Backeround

These motions stem from an employment discrimination case. Plaintiff Sona Shah ("Shah") and plaintiff Kai Barrett ("Barrett") are former employees of defendant Wilco Systems, Inc. ("Wilco'?. Ms. Shah, who is an United States citizen, was employed by Wilco from September 15,1996 to April 1, 1998. Mr. Barrett, who is a Brittish citizen, was employed by Wilco from January 1, 1998 to May 5, 1998. Wilco is the wholly owned subsidiary of Automatic Data Processing, Inc., or ADP, a software company with offices around the world including New York, London, Hong Kong and India. Wilco provides brokerage processing and related services, including software development, to the financial brokerage industry. Wilco's main product is a proprietary software program called GLOSS. Most of Wilco's employees are and have **been** computer programmers, who develop, write, and customize defendant's GLOSS software products for **use** by clients. Ms. Shah was one of those programmers; Mr. Barrett was a systems administrator who maintained Wilco's internal computer systems. Plaintiffs bring the above-captioned action against Wilco for exploiting and discriminating against its employees by, ***infer alia,*** under-paying its employees who are non-citizens, and denying training and work assignments to its employees who are **U.S.** citizens.

Defendant's **Motion** for Partial Summary Judement

Defendant moves for partial summary judgment pursuant to CPLR 3212 to dismiss: the second cause of action for disparate pay discrimination based on citizenship status against Mr. Barrett under the New **York** City Human Rights Law; and the portion of plaintiffs' first cause of action for discriminatory discharge based on citizenship status against Ms. Shah under the New

York City Human Rights Law. Defendant further moves to dismiss the third cause of action pursuant to CPLR 3211 for failure to state a cause of action for breach of contract against **Ms.** Shah.

Disparate Pay Claim

To establish a prima facie case of citizenship discrimination based on disparate pay, plaintiff Barrett must **show** that : (1) he was a member of a protected class – in this case, a non-U.S. citizen; (2) he **was** paid less than similarly situated non-members of his protected class; and (3) evidence of discriminatory **animus** (*Dorrilus v St Rose's Home,* 234 F.Supp2d 326,333 **[SDNY** 20021; Quarless **v** Bronx-Lebanon Hospital Center, 228 F.Supp2d 377 [SDNY 20021). Defendant **seeks** summary judgment dismissal of this claim on the grounds that plaintiffs cannot establish the second element – that Barrett was paid less than similarly situated **U.S.** citizens.

It is well settled that on a motion for summary judgment, the movant must establish that it is entitled to judgment **as** a matter of law *(Alvarez v Prospect Hospital,* 68 NY2d 320 [1986]). Once the movant has established its prima facie entitlement to summary judgment, the burden shifts to the opposing party to demonstrate that there are material issues of fact that preclude summary judgment (*Zuckerman v. City of New York,* 49 NY2d *557* [1980]).

Defendant alleges that Barrett was hired as a junior systems administrator, and that after he quit in April 1998, Wilco hired other junior systems administrators, who were all **U.S.** citizens, and paid them less than it had paid Barrett. Barrett worked **as** a programmer in Wilco's London office and was transferred to the New York City office in 1997. Defendant submits evidence that Barrett's starting salary in the New York office was $45,5000, and subsequently rose to $47,5000. When Barrett left, his position was filled by **Kurt** Lemmon ("Lemmon"),

whose starting salary in October 1998 was $40,000, and subsequently rose to $43,500. After Lemmon left, defendant hued Virginia Tam, whose starting salary in August 2000 was $35,000, and subsequently rose to $37,500. Barrett alleges that his contract provisions, training and job responsibilities were consistent with a programmer/systems administrator, and that the proper comparison of wages is with the other systems administrator, Kwok Chan, a U.S. citizen, who, at one point during Barrett's employment, was paid more than Barrett. Defendant argues that Mr. Chan was Mr. Barrett's supervisor and therefore his salary should not be compared with Barrett's. Plaintiff alleges that he was not hired as a "junior" systems administrator but as a programmer/systems administrator to work along with Mr. Chan, and not "under" him. Barrett alleges that he did not report to Mr. Chan but rather often trained and instructed Mr. Chan on areas which he was not skilled. Defendant further argues that it paid for an apartment for Barrett whose cost, when added to Barrett's salary, would have exceeded Mr. Chan's salary. Barrett disputes this inflated compensation claim, alleging that the rented apartment was already occupied by another Wilco employee, he stayed for only two nights because it was in unlivable condition, and subsequently Wilco used the apartment to house another employee. On a motion for summary judgment, the key inquiry is issue finding, not issue determination (*Grullon v. City of New York,* 297 AD2d 261 [1st Dept 20021). Plaintiff has sufficiently demonstrated that there are material issues of fact in dispute regarding whether or not Barrett was paid less than someone similarly situated as there are facts raised as to Barrett's title, actual role, and the nature of his responsibilities and assignments, and regarding the amount of his compensation, to render summary judgment inappropriate as to plaintiffs' second cause of action.

Discriminatory Discharge Claim

Defendant alleges that Ms. Shah's wrongful termination claim is not cognizable under the New York City Human Rights Law ("Human Rights Law") because at the time she was terminated, her job assignment was located in New Jersey, and not New York City. Ms. Shah was hired as a programmer in September **1996.** At the end of September, Ms. Shah was sent to the London office for Wilco's orientation/training for new employees. She was returned to New York in June **1997.** Wilco sends its programmer employees out to the location of its client facilities. While assigned to a project, programmers would report to work at the client site, not at Wilco's office. Depending on the length of the particular project, programmers may remain on site at the client location for months **or** years. Ms. Shah alleges that after **she** retumed from training in London, she reported to work every morning at Wilco's office, located at 17 State Street in New York County, but did not receive requested training or work assignments. She remained idle for months, along with other American programmers, often sitting on windowsills around the office and having her skills deteriorate from lack of ongoing training and hands-on work. Meanwhile, she observed foreign workers on temporary non-immigrant visas come from England and Hong Kong being immediately assigned to work at client sites in New York City and New Jersey. Finally Ms. Shah approached Wilco's Chief Executive Officer Craig Spendiff and asked for work opportunities. Ms. Shah alleges that she was told that there wasn't any work, that she was not the only programmer sitting idle, to which she asked how foreign programmer employees could be brought to the United States if there was a lack of work opportunities. Subsequently she started receiving assignments, although she was eventually replaced at each assignment by a foreign employee. In June **1997,** Wilco's managing director informed Ms. Shah

that Wilco was seeking foreign workers for placement in its New York offices and asked if she would assist in the recruitment of Indian workers under a program referred to by Wilco as "Operation Delhi Belly." Plaintiffs allege that Ms. Shah was told that foreign workers were needed because "Americans don't make quality workers – they're stupid, they're too expensive and difficult to control (Complaint ¶26). In early 1998, several American workers were terminated after workers recruited from India had completed their training. On April 1, 1998, **Ms.** Shah was terminated. Plaintiffs allege that Ms. Shah was fired in retaliation for her discussions and statement to other workers regarding Wilco's employment practices and as a reprisal for her efforts to give the foreign employees information about their rights which Wilco allegedly withheld. Defendant alleges that **Ms.** Shah was fired for "insubordination," actions that could potentially "damage the reputation of ADP," "poor or inappropriate attitude," and an "inability to work in a team environment" (Termination letter from Wilco to Shah dated April **1,** 1998). From January 1998 to April 1998, Ms. Shah was assigned to work on a client project called IN located in Jersey City, New Jersey.

Defendant argues that claims made under New York City's Human Rights Law can only be maintained if the adverse employment actions occur within the geographic boundaries of New York City, and because Ms. Shah was working for a Wilco client located in New Jersey at **the** time she was fired, New York City's Human Rights Laws do not apply. "... the [Human Rights Law] only applies where the actual impact of the discriminatory conduct or decision is felt within the five boroughs, even if a discriminatory decision is made by an employer's New York City office" ***(Wuhlstorm v Metro-North Commuter R.*** Co., 89 F.Supp2d 506, 527-28 [SDNY 2000]). Unlike the cases cited by the defendant, the alleged incidents of discrimination did not take place

only outside New York City. The grounds alleged for firing Ms. Shah was not a singular event that began only when Ms. Shah started to work on the IN project in New Jersey, but termination for behavior that Wilco deemed inappropriate for Ms. Shah to engage in at Wilco and with Wilco employees that was not limited to the **INA** temporary project. Wilco did not merely make a decision to terminate Ms. Shah's work on the temporary work assignment located in New Jersey, but terminated **her** employment with their company located in New York, a decision which impacted Ms. Shah in New York. Further, Ms. Shah was not working in other branches of Wilco's offices, having only tangential contact with Wilco's New York City office. In fact, the New York City office was Wilco's sole branch office in the United States.

For all the foregoing reasons, defendant's motion to for summary judgment to dismiss the cause of action alleging wrongful termination is denied.

Breach of Implied Contract

Defendant moves to dismiss plaintiffs' third cause of action pursuant to CPLR 3211(a)(7) for failure to state a claim, alleging that the pleading is too vague to support a cause of action for breach of contract. Plaintiffs contend that defendants are collaterally estopped from seeking to dismiss plaintiffs' breach of implied contract claim because the issue was already fully litigated and decided in federal court, who held that plaintiffs had stated a proper claim under New York state law. In *Shah v Wilco Systems, Inc.*, in response to Wilco's motion to dismiss **for** failure to state a claim for breach of contract, Judge Schwartz held:

> Shah also states that there was an implied term in her employment agreement that she, like other computer programmers, be "kept current" *(citations omitted)*. Specifically, "in the [computer] field, it is understood and is a term of all employment contracts that employees will **be** provided with work in line with their level of skill and will be provided with sufficient training to facilitate

> maintenance of skill levels in the face of changing technology and to provide employees with a reasonable expectation of improving their skill levels." Plaintiffs state that Shah did not receive adequate training or work experience. while employed at Wilco, which resulted in damages by hampering her ability to locate work after her termination. Under New York law, a common and well-known custom or usage with respect to the subject matter of a contract may be read into it as an implied term. See, e.g., Kalmon Dolgin Co. v. Cushman & Wakefield, Inc., 231 N.Y.S.2d 43, 43 (N.Y. City Ct.1962) (stating that while custom and usage may not create a contract, "the parties may contract with reference with reference to a custom known to both, and then proof of the custom may explain and make definite what is otherwise vague ..."); B.M. Heede, Inc. v. Roberts, 303 N.Y. 385,389 (1952) (stating "parol evidence may be given as to the uniform, continuous, and well-settled usage and custom pertaining to the matters embraced in [a] contract, unless such usage and custom contravene a rule of law, or alter or) contradict the expressed or implied terms of a contract, free from ambiguity") (citations omitted); Stulsaft v. Mercer Tube & Mfg. Co., 288 N.Y. 255,259 (1942) ("The relations of the parties, the customs of the trade, or other facts and circumstances known to the parties, may give rise to a necessary inference that when agreement has been reached upon the terms which have been the subject of discussion, a common understanding and agreement has been reached in regard also to terms which were in the minds of all the parties, though not discussed.") ... Although Shah's breach of contract claim as to training and work experience is vague, conclusory, and inartfully drafted, reading the Fourth Amended Complaint liberally and drawing all inferences in Shah's favor, the Court finds that at this stage, Shah has set forth a short and plain statement sufficient to put Wilco on notice of such claim. She identifies her employment agreement and sets forth the allegedly implied terms. She alleges that she performed by being available and fully qualified to do the work that foreign workers were performing, but that Wilco denied her the training that would have enabled her to so perform. Finally, Shah alleges monetary damages as a result of being kept idle. Accordingly, the Court declines to dismiss the aspect of Shah's breach of contract claim that relates to her allegedly inadequate training and work experience while employed at Wiilco.

2001 WL 1006722, *7,8 (SDNY 2001). Defendant argues that the federal court's denial of the motion does not bar the relief Wilco seeks here "because Wilco's arguments were different and the notice pleading standard applicable in federal court is much less stringent than the CPLR's fact pleading standard" (Wilco Memorandum of Law, dated April 16,2003, footnote 4).

There is no evidence submitted by the defendant to suggest that the claim was not fully litigated, or that the defendant did not have an opportunity to fully litigate the claim in federal court.

In comparing pleading requirements, it is well settled that in evaluating the sufficiency of a claim in state court pursuant to CPLR 3211(a)(7), the factual allegations of the complaint are deemed true and the affidavits submitted on the motion are considered only for the limited purpose of determining whether the plaintiff has stated a claim, not whether plaintiff has one (***Wall Street Associates v Brodsky,*** 257 AD2d 526 [1st Dept 19991). A pleading shall be liberally construed and will not be dismissed for insufficiency merely because it is inartistically drawn (***Foley v D'Agostino,*** 21 AD2d 60 [1st Dept 19641) The relevant inquiry is whether the requisite allegations of any valid cause of action cognizable by the state courts can be fairly gathered from the four comers of the complaint ***(Id.).*** "Defects shall be ignored if a substantial right of a party is not prejudiced" (*Id.* at 65).

Similarly, on a federal Rule 12 motion to dismiss, the court must accept the factual allegations contained in the complaint as true, and draw all reasonable inferences in favor of the non-movant ***(Shah v Wilco Systems, Inc.,*** 2001 WL 1006722 [SDNY 2001]). It should not dismiss the complaint "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief' (***Conley v Gibson,*** 355 ***US*** 41, 4546 [1957]); ***see also Leather ' ' v Tarrant County Narcotics Intelligence and Coordination Unit,*** 507 US 163, 164 (1993) (noting that factual allegations in the complaint must be accepted as true on motion to dismiss). While the pleading requirements are liberally construed, "[l]iberal construction has its limits, for the pleading must at least set forth sufficient information for the

court to determine whether some recognized legal theory exists upon which relief could be accorded the pleader. If it fails to do so, a motion under Rule 12(b)(6) will be granted." (*Id.*).

This Court finds that, as under the federal standard, plaintiff has sufficiently plead under the state standard. Further, the federal court decision denying defendant's motion to dismiss plaintiffs cause of action of breach of implied contract is the law of the case and applies to bar its re-litigation here. Accordingly, defendant's motion to dismiss this claim is denied.

Plaintiffs' Motion for Class Certification

Plaintiffs bring this motion for an order certifying a class, pursuant to Article 9 of the CPLR, consisting of two sub-classes: (a) a sub-class of technically-skilled employees, who work or worked for Wilco as computer programmers, systems analysts, and specialists, and who worked with Wilco's GLOSS software program, and are or were American citizens or permanent residents; and (b) a sub-class of technically-skilled employees who work or worked for Wilco as computer programmers, systems analysts, and specialists, and who worked with the GLOSS software program, and are not or were not American citizens or permanent residents upon hire, and who came to work for Wilco on a non-immigrant temporary visa. Plaintiffs also move for an order compelling Wilco to provide plaintiffs with adequate and complete discovery, so that it can be comprehensively analyzed by an expert, to determine whether the employment data provided by Wilco support the charges of discrimination, based on citizenship and immigration status.

Plaintiffs assert that Wilco engaged in a systemic pattem and practice of discriminating against its employees, based on citizenship and immigration status, by engaging in a pattern and practice of misusing immigration and labor laws. Plaintiffs contend that their respective claims

are typical **of,** if not the same as, those of the other respective class members. Moreover, plaintiffs assert that the action satisfies the Class Action requirements of CPLR $901, as well as the additional criteria of CPLR $902.

In opposition, Wilco maintains that plaintiffs cannot and will not be able to meet the requirements **of** CPLR §901 concerning numerosity, predominance, typicality, superiority, and the additional criteria which arise under CPLR **$902.** Wilco further maintains, ***inter alia,*** that plaintiffs' motion for class certification **is** untimely and that class certification is not available for plaintiffs' New **York** City Human Rights Law claims.

As a preliminary matter, this Court finds that plaintiffs' motion for class certification is timely. CPLR §902 provides that a motion for class certification must be made within sixty days after the time to serve a responsive pleading on behalf **of** the last defendant. Here, it is undisputed that Wilco served its answer by mail on July **24,2002.** Where, as here, service is by mail, five days are added to the prescribed period **(see** CPLR **§2103[b][2]).**

In order to maintain a class action, the following criteria **of** CPLR $901 must be satisfied (1) ***numerosity:*** the class is so numerous that joinder **of** all members is impracticable; (2) ***commonality:*** questions **of** law or fact common to the class predominate over any question affecting only individual members; **(3)** ***typicality:*** the claims or defenses of the representative parties are typical of the claims or defenses of the class; (4) ***adequacy of representation***: the representative parties will fairly and adequately protect the interests of the class; and *(5)* ***superiority of method:*** a class action is superior to other available methods for the fair and efficient adjudication of the controversy. It is well settled that the determination granting class

action status rests in the sound discretion of the trial court and that these criteria should be liberally construed (*Lauer* v *New York Telephone Co.,* 231 AD2d 126 [3rd Dept 19971).

As the proponent for class certification, plaintiff bears the burden of demonstrating compliance with the requirements of CPLR §901 (*Ackerman* v *Price Waterhouse,* 252 AD2d 179 [1st Dept 19981). This Court finds that plaintiffs have not met their burden under the adequacy of representation criterion.

There are several factors for the Court to consider under the adequacy of representation requirement: "(1) whether any conflict exists between the representative and the class members; (2) the representative's familiarity with the lawsuit and his financial resources; and (3) the competence and experience of class counsel" (*Ackerman v Price Waterhouse,* 252 AD2d at 202; *see also Pruitt v Rockefeller Ctr. Props.,* 167 AD2d 14, 24 [1st Dept 19911). With the matter at bar, this Court finds that potential conflicts exist between plaintiffs and their counsel. Given that plaintiffs are represented by the same attorneys, there is a potential conflict of interest in that the attomeys might have to choose to favor the interests of one class over another. This would then lead to a potential conflict between the representative and the other class members.

With respect to plaintiffs' motion for further discovery, that branch of the motion is referred to a Special Referee. Since there are issues as to whether Wilco already produced the documents now being sought by plaintiffs and since there is a lack of specificity by both sides as to their respective positions, it is, therefore, inappropriate for the Court to resolve this portion of the motion on papers.

Conclusion

Accordingly, it is ORDERED that defendant's motion seeking partial summary judgment and dismissal is denied; and it is further

ORDERED that plaintiffs' request for class certification is denied without prejudice to renew upon resolution of the potential conflict of interest; and it is further

ORDERED that plaintiffs' motion for further discovery is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that this branch of plaintiffs' motion is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee.

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Judicial Support Office (Room 311) to arrange a date for the reference to a Special Referee; and it if further

ORDERED that counsel are directed to advise this Court what, if any, discovery issues, as raised in motion sequence no. 9, remain outstanding.

This reflects the decision and order of this Court.

Dated: 12/23/07

MARILYN SHAFER J.S.C.

J.S.C.

Check one: [ ] FINAL DISPOSITION [X √] NON-FINAL DISPOSITION