Majority Opinion >

U.S. District Court Central District of California

PINES, AMERICAN ASSOCIATION OF RETIRED PERSONS (AARP), and Other Similarly Situated Persons To Be Joined Pursuant to 29 U.S.C. Section 626 v. STATE FARM GENERAL INSURANCE COMPANY, et al.

No. SA CV 89-631 AHS (RWRx)

February 25, 1992

Barry L. Goldstein, Guy Saperstein, Lisa Honig, and Teresa Demchak (Saperstein, Mayeda, Larkin & Goldstein), Oakland, Calif., for plaintiffs. Cathy Ventrell: Monsees and Sally Dunaway, Washington, D.C, for plaintiff American Assn. of Retired Persons. Kirby Wilcox, San Francisco, Calif., and B. Scott Silverman and Janie Schulman (Morrison & Foerster), Los Angeles, Calif., for defendants.

ALICEMARIE H. STOTLER, District Judge--

FACTUAL BACKGROUND

A.

The Complaint and Plaintiff Barbara Pines' Experience

In her second amended complaint, plaintiff Barbara Pines alleges that she was denied the entry-level insurance sales position of Trainee Agent by defendants due to defendants' discriminatory practices based on age, bringing her claim under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. Section 626 She alleges that defendants' discriminatory practices "have similarly injured other persons over 40 years of age, nationwide, who have applied for, or would have applied for, the position of Trainee Agent."

Pines was born September 5, 1935. She applied for the Trainee Agent position on August 20, 1986. At the time of her application, she had worked as an office manager for one of defendants' insurance offices for a period of eight years. Agency Director Ken Stewart and Agency manager Denise Elliott evaluated Pines' application. As part of the application process, Pines took and received an "acceptable" score on the "Career Profile Questionnaire" (CPQ), as indicated in a letter from Manager Elliott to Pines dated September 12, 1986.

State Farm allegedly directly and overtly considered Pines' age to be a detriment to her selection as a Trainee Agent. This view was manifested in: (1) Director Ken Stewart's May 1987 letter to plaintiff which stated that there were two areas of concern with regard to Pines' application -- namely, (a) her age ("you need 20 years with the company with the last ten years as an agent to qualify for extended termination benefits. In your case, that would put you a few years past what is considered to be the normal retirement age.") and (b) her lack of a college degree; and (2) Ken Stewart's internal memo to John Westmoreland later in May 1987, which stated that "Barbara has found her way to the top of the [applicant] pool in spite of 'flags' in the area of age and lack of college degree." (The latter document, Ken

Stewart's memo, is not attached to or referred to within the complaint but appears in plaintiffs' papers.)

Pines alleges that there is no educational requirement for becoming a Trainee Agent nor is there a requirement that an applicant pass the Chartered Life Underwriter (CLU) exam (which Pines took and failed) in order to be appointed. Pines claims that her failure to have a college degree and her failure to pass the CLU exam were used as pretexts by defendants to reject her for the Trainee Agent position, when **[*2]** in fact they rejected her because of her age. She claims that such discriminatory practices continue to this day with regard to applicants over the age of 40.

B.

Plaintiffs' Submissions in Support of Motion for Court Facilitation of Opt-in Procedure

1. "Similarly Situated" Potential Opt-ins

Plaintiffs present declarations of 69 potential class claimants who called plaintiff AARP's phone number, all of which are attached to the declaration of plaintiffs' counsel Christopher Bakes. (Six of those declarations have been *withdrawn* since the filing of the opt-in motion. See reply Brief at 20, n.3.) Plaintiffs claim that the remaining 63 declarants present "substantial allegations" of other "similarly situated" individuals nationwide who have been discriminated against by defendants on the basis of their age and who applied to State Farm between 1975 and 1991. (All were 45 years old or over at the time of their application for positions with defendants.)

Plaintiffs' counsel divides these declarants' experiences into five categories: (1) those who were victims of overt age discrimination; (2) those who were asked age-based questions which led to an unexplained end to the application process; (3) those who were dispensed deliberately wrong information about application requirements which did not exist; (4) those whose follow-up inquiries were not responded to by defendants after one or more interviews; and (5) those who were rejected by use of the CPQ aptitude test which asked applicant to state their age range.

Some of the declarants whom plaintiffs' counsel places in the "overt discrimination" category are: (1) Jordan Daskal, Exh. 1, who states that in a 1987 interview, a State Farm manager in Illinois asked him his age and when he responded "55," the manager told him State Farm was "more interested in people who can give them a minimum of ten years' service" and that "there would be no point in [Daskal] pursuing the position further;" (2) Dorothy Taliaferro, Exh. 2, who was asked her age by a man at a State Farm office in California during a 1984 telephone inquiry regarding agent positions, and when she responded "55" was told that "by the time State Farm could train [her], [she'd] be ready to retire;" (3) Kathleen Classi, Exh. 3, who was told by a State Farm agent in 1987 or 1988 that it was 'company policy to hire younger people" since "State Farm puts so much training into its agents that [it] wants to get at least 20 years of work out of them;" and (4) Phyllis Kusnierek, Exh. 4, who was told by a "district manager" in Minnesota in 1988 that in addition to a lack of qualifications for an agent position, since she would be retiring in 15 years, "it would not be fair to the company to sign [her] on as an agent." See also, Exh. A to Exh. 4, Kusnierek decl. (letter explaining to the rejected applicant that any mention of the "20 year service requirement" for eligibility for extended termination payments was "a concern for the [one applying to be an] agent, not the agency manager"); Jeannette Pridgen, Exh. 9, age 45, Alabama (told that State Farm "usually did not hire over a certain age"); Exh. 10, James Lovell, age 52, Minnesota (**[*3]** told State Farm interested in "recent college graduates); Exh. 17, Gordon Williams (told that State Farm "did not hire people 45 years old or over"); Exh. 24, Ray Luper, age 47, Texas (asked during interview whether he felt he could "keep up with the young pups," to which he replied that unlike them he did not have to be housebroken).

Plaintiffs also group together those applicants who, once their age was known to State Farm hiring personnel, were, without explanation, never contacted by State Farm again. See Exh. 28, Mary Zerrussen, who once she passed the

CPQ was never contacted again and had her application file closed; Exhs. 29, 30, 31-37.

Plaintiffs categorize declarants into yet another group: those who were asked age-related questions and then were rejected on “false grounds.” See, e.g., those who were told that State Farm looked for college graduates to be their agents, or tht agent applicants “should be” college graduates -- Exhs. 12, 22, 27, 39, 40.

Finally, plaintiffs group together those who failed the CPQ, based on the theory that since the CPQ requests applicants to indicate their age range, State Farm uses the CPQ to elicit that age information and then either: (1) covertly rejects applicants on the basis of their age, telling them the basis for their rejection was failure of the CPQ; or (2) deliberately uses the CPQ, which is inherently biased towards younger age groups, to weed out applicants. See Exhs. 6, 11, 35, 46-55. Plaintiffs further rely on the declaration of former assistant agency manager Clifford Hitchcock, Exh. 21, in which he states that between 1962 and 1964, hiring personnel were instructed by State Farm to “use the aptitude test as a rejection tool, and to tell those who did not ‘fit the mold’ that they had failed the test.”

2. Evidence of a Common, Centralized Policy or Plan of Age Discrimination

To show that the policy of age discrimination in hiring came from the State Farm home office and management. Plaintiffs rely on the same agency training manuals and hiring documents they presented in their Motion for Reconsideration of the June 10, 1991 Order Re: Discovery to show that the policy of age discrimination in hiring came from the State Farm home office and management. Specifically, they present: (1) a 1955 document from the selection file of Westlake Region Manager Grover Dilsaver, which instructs those involved in the trainee agent selection process that a proposed agent should be between 25 and 45 years of age in order to be hired; (2) a 1975 “Agency Director's Guide and Text for Agency Manager Pre-Contract,” a State Farm publication purporting to give managers a “ ‘model’ or ‘picture’ of the type of individual to recruit,” which asserts that “. . . the best success range for agents in the insurance business lies between the ages of 24 and 45 . . . you will want to conserve your time and effort by looking for people who come from those groups;” and (3) the “Let's Hire the 1000 Point Man” document, which was included in the selection file of an individual selected in 1978 and another chosen in 1980, and specifically allocates fifty points to an agent candidate aged 20 to **[*4]** 40.

Plaintiffs further point to the centralized nature of the hiring process at State Farm, to indicate that a single uniform plan or policy of discrimination could be implemented. They assert that State Farm has a typical hierarchical management structure, with headquarters in Bloomington, Illinois, setting the standards for selection and recruiting of trainee agents. Thus, even though the regional agency managers and directors do the actual hiring, the entire selection process used by them is developed by company headquarters.

Plaintiffs also rely heavily on the statistics generated by their expert Dr. Marc Bendick, which indicate that State Farm hires many fewer people over age 45 than are available in the population. Dr. Bendick's calculations reveal that there existed a consistent state-to-state shortfall of hires 45 years old and over at State Farm from 1987 to 1991 of about 440 people, a difference quantified as twenty standard deviations, compared to the number of qualified applicants in that age group, as measured by the U.S. Census Bureau. Plaintiffs also rely on expert Richard Drogin, who calculates that from April 1987 to March 1991 there were 64 fewer hires than expected amongst those in the 45 and over age bracket who took the CPQ and passed it.

Plaintiffs also present a series of charts which track a few trainee agent hires to show that even amongst this small group a pattern of failures to appoint those over age 45 is evident. (See Decl. of Mr. Austen and attached exhibits.)

Plaintiffs also attach intra-State Farm letters recommending individuals for trainee agent positions which invariably state the age of the candidate within the first two sentences (indicating that age is a key concern company-wide). Some of the letters state, with regard to candidates in their 40s and over, that the State Farm letter-writer has “reservations” about their age.

C.

Defendants' Submissions in Opposition

1. Regarding Pines' Allegations

Defendants first attempt to neutralize the implications of Pines' own situation. Defendants point out that: (1) Pines knowingly provided false information regarding the extent of her college education and her grades in college during the application process; (2) Pines' age was referred to only in the context of her eligibility for extended termination benefits; and (3) Pines repeatedly (five times) failed the CLU exam. They present this evidence in order to indicate that Pines was validly rejected rather than discriminatorily rejected on the basis of her age.

2. The "Similarly Situated" Status Of Potential Optin-ins

Defendants present their own rebuttal evidence in response to plaintiffs' 69 declarations of potential plaintiffs, consisting of: (1) counter-declarations which cast doubt on the veracity of the declarations presented by plaintiffs; and (2) declarations of other trainee agent applicants over age 45 from 1974 to 1991, some of whom were actually hired, who state they felt no discrimination in the application process.

The counter-declarations designed to defeat **[*5]** plaintiffs' declarants do not address head-on the substance of the claims of plaintiffs' declarants. Instead, they alternately indicate that: some of plaintiffs' declarants failed the CPQ and therefore could not proceed in the selection process; some of the witnesses' recollections of the location of offices and the names of people they spoke to do not match actual StateFarm office locations and personnel, indicating that plaintiffs' declarants applied to another company, not State Farm; many of plaintiffs' declarations fail to allege a prima facie case of age discrimination; and many of the declarants' incidents occurred years before the filing date of Pines' EEO complaint, which means their claims are time-barred and they are ineligible to participate in the collective action here.

3. No One, Common, Centralized Campaign of Discrimination

Defendants emphasize the decentralized selection process, done at the regional level by agency managers, rather than defendants' headquarters' formulation of the selection procedures implemented by these regional managers. Defendants also refute plaintiffs' statistics with expert calculations of their own. Defendants' expert Joan Haworth concludes that the average "applicant flow rate" at State Farm is roughly equivalent to the availability of persons 45 and older in the workforce generally. (Haworth calculated the State Farm applicant flow rate by measuring the percentage of persons 45 and older who completed the CPQ.) Defendants' expert Sharon Kelly also refutes plaintiffs' expert's "statistical shortfall" analysis, by calculating her differentials on a region by region basis rather than on a nationwide basis. She concludes that within each region, there was no significant shortfall of hirees 45 and over.

II.

PROCEDURAL BACKGROUND

Plaintiffs filed their Motion for Court Facilitation of Opt-In Notice Procedure on September 23, 1991. Defendants filed opposition October 23, 1991. Plaintiffs filed supplemental declarations in support of their motion on October 28, 1991. They filed their reply on November 14, 1991. On December 2, 1991, defendants filed supplemental declarations in

support of their opposition.

Defendants filed a Motion to Strike Plaintiff's Evidence in Support of Plaintiff's Opt-In Motion on October 23, 1991. Plaintiffs filed opposition November 14, 1991. Defendants' reply was filed December 2, 1991.

Defendants also filed a Motion for Sanctions in Connection with Plaintiffs' Declarations Filed in Support of Opt-In Notice Motion on November 14, 1991. Plaintiffs filed opposition November 25, 1991. On December 2, 1991, defendants filed their reply.

The motions were originally set for hearing on the Court's December 9, 1991 calendar. The Court reset the hearing on the motions to December 16, 1991 so that arguments with regard to them could be heard at the same time as the mandatory status conference in the case. After oral argument, the Court took the motions under submission.

The Court now denies defendants' motion for sanctions and grants **[*6]** plaintiffs' motion for court facilitation of the opt-in notice procedure. The Court's ruling on defendants' motion to strike is contained in a separate order also issued this date.

III.

DISCUSSION

A.

The Motion for Sanctions

Defendants seeks sanctions against plaintiffs counsel Lisa Honig, Barry Goldstein and Christopher Bakes under Rule 11, 28 USC Section 1927 and Local Rule 27.1, in the amount necessary to compensate defense counsel for (1) their effort in refuting the declarations of Marcene Burke, David Sain and Phyllis Fort as well as the misstatements in attorney Bakes' summary chart of the 69 proposed plaintiffs' declarations and (2) their costs in bringing the sanctions motion.

Defendants contend that plaintiffs' counsel should be sanctioned for failing to make a reasonable inquiry into Burke, Sain and Fort's claims before appending them to this motion. Defendants point out that: (1) at deposition, Burke stated she had recently remembered that she had applied to Farmers Insurance, not State Farm; (2) the DEH found Fort's Department of Fair Employment and Housing (DFEH) complaint, based on the same facts as her declaration herein, had no merit because there was insufficient evidence that Fort applied to State Farm; and (3) Sain stated at his deposition that he applied for a claims position, not a trainee agent position as he had stated in his declaration. Defendants provide a highlighted copy of Bakes' chart, attached to defense attorney Scott Silverman's declaration, which indicates the areas of falsely-related or misleading summarization of the statements of plaintiffs' 69 declarants. Defendants further contend that some of the substantive mischaracterizations were included in the body of plaintiffs' argument in their opt-in motion.

Defendants argue that plaintiffs violated Rule 11 by failing to investigate Burke, Sain and Fort's allegations or to corroborate their allegations with credible direct evidence or reasonable inferences from other evidence, citing *California Architectural Building Products v. Franciscan Ceramics,* 818 F.2d 1466 , 1472 (9th Cir. 1987). Defendants also contend that under *Utz v. State Bar,* 21 Cal.2d 100 , 105 (1942) a lawyer must not present evidence to a court which he knows to be false. Further, according to In re *Disciplinary Action, Boucher,* 850 F.2d 597 , 599 (9th Cir. 1988) mischaracterizing a factual record in a brief is sanctionable conduct. Therefore, defendants contend, both the Bakes summary and plaintiffs' usage of its mischaracterizations in their brief violate Rule 11.

Defendants argue that plaintiffs' counsels' conduct also violates 28 U.S.C. Section 1927 , because by their reckless conduct in not checking the accuracy of the potential plaintiffs' declarations and Bakes' summary, they unreasonably

and vexatiously multiplied these proceedings. Finally, based on these Rule 11 and section 1927 violations, defendants seek sanctions under Local Rule 27.1.

Plaintiffs argue that there is no basis for sanctions here under the Rule 11 "reasonable inquiry" standard because: (1) at the time plaintiffs' counsel signed and submitted their motion papers along with the supporting declarations, they had no way of knowing that the three declarations were factually faulty, since the depositions of the declarants **[*7]** had not yet been taken, but that once plaintiffs' counsel knew of the inconsistencies, they withdrew these declarations; (2) counsel did not rely on these declarations alone in filing their motion; (3) since counsel themselves did not sign the declarations, they cannot be subject to Rule 11 sanctions for them -- they presumably could rely on the declarations of those with first-hand knowledge of defendants' discriminatory acts; and (4) Bakes' chart cannot constitute a basis for sanctions, because it only contains inadvertent mistakes and typographical errors, all of which are easily revealed by cross-checking with the actual 69 declarations themselves.

Specifically, as to the Burke, Sain and Fort declarations, plaintiffs' counsel point out: (1) they did not know that Burke had applied to Farmers instead of State Farm until the day before her scheduled deposition, when she visited the location to which she had applied in order to refresh her memory and found that the building contained Farmers Insurance offices, but that plaintiffs' counsel had her correct her testimony on the record and then withdrew her declaration; (2) they did not even know that Fort had filed a DFEH charge, much less that it had been rejected, until State Farm produced a copy of it at Fort's deposition; and (3) they reviewed Sain's personal file of his application to State Farm before his deposition, but it did not contain his original application which indicated that he applied for a claims position instead of a trainee agent position as he had recalled earlier. Plaintiffs' counsel contend that the "mere mistakes" both in the Bakes chart and the imperfect declarations are insufficient to support Rule 11 sanctions, and their good faith is indicated by their withdrawal of the questionable declarations, citing *Baranski v. Serhant,* 106 F.R.D. 247 (N.D. Ill. 1985).

In addition, plaintiffs counsel argue that there is no basis under 28 U.S.C. Section 1927 for sanctioning them since defense counsel has not shown that they acted with malicious intent, in bad faith or recklessly, citing *United States v. Associated Convalescent Enterprises, Inc.,* 776 F.2d 1342 , 1346 (9th Cir. 1985).

In reply, defense counsel contends that plaintiffs' attorneys should be held responsible for the misleading declarations and chart they submitted to the Court with their opt-in motion, citing *Greenberg v. Hilton International Co.,* 870 F.2d 926 , 938-39 [52 FEP Cases 627] (2d Cir. 1989). Moreover, they argue that plaintiffs' counsel's dishonesty and misrepresentations in the Bakes chart should not be excused, even though the misrepresentations could be discovered by comparing the full text of the filed declarations with the summaries in the chart, citing West Virginia State Bar Committee on Legal Ethics v. Farber, W. Va. Sup. Ct. no. 19909 (June 27, 1991) (considering the ethical rules violations stemming from similar conduct, not the sanctionable nature of such actions).

There is no indication that attorneys Goldstein and Honig had reason to know of the errors in the Burke, Sain and Fort declarations at the time they were submitted. Their reasonableness is indicated by the withdrawal of the declarations from consideration once counsel became aware of their defects. The Court therefore does not conclude that sanctions should be awarded **[*8]** on the basis of these declarations. Similarly, the defendants' request for sanctions against attorneys Goldstein, Honig and Bakes on the basis of Bakes' faulty chart is denied. Any errors in the chart appear to be the product of no more than negligence on Bakes' part. Accordingly, the Court denies defendants' motion for sanctions in its entirety.

B.

The Opt-In Procedure Motion

1. Standard Triggering Court Discretion to Facilitate Opt-In Procedures

Class claims under the ADEA need not comply with the strictures of Fed.R.Civ.P. 23 . The ADEA, in 29 U.S.C. Section 626(b) , incorporates the standards under 29 U.S.C. Section 216(b) , which provides that (1) a collective action may be maintained by a plaintiff and others "similarly situated" and (2) no one shall be deemed a party plaintiff "unless he gives his consent in writing to become [ ] a party and such consent is filed in the court where the action is brought." In *Hoffman-LaRoche, Inc. v. Richard Sperling,* 493 U.S. 165 [51 FEP Cases 853] (1989), the Supreme Court held that "district courts have discretion, in appropriate cases to . . . facilitat [e] notice to potential plaintiffs," and *affirmed* the district court's power to facilitate notice.

It appears that a court has discretion to facilitate opt-in notice procedures where it determines, preliminarily at least, that a plaintiff has presented "substantial allegations that the putative class members were together the victims of a single decision, policy, or plan infected by discrimination." *Sperling v. Hoffman-LaRoche, Inc.,* 118 F.R.D. 392 , 407 [48 FEP Cases 990] (D.N.J. 1988), *aff'd* in part on other grounds and *appeal dismissed* in part on other grounds, 862 F.2d 439 [48 FEP Cases 1010] (3d Cir.), *aff'd* and *remanded* on other grounds, 493 U.S. 165 [51 FEP Cases 853] (1989). A determination of whether proposed class members are "similarly situated" is a fact-specific one. See *Sperling,* 118 F.R.D. at 405 . A preliminary determination of "similar situations" may be *reversed* or *modified* later on in action, as new facts emerge. Id. at 407 .

2. Substantial Allegations of "Similarly Situated" Individuals Victimized by a Single Plan of Age Discrimination

Plaintiffs contend that they have provided substantial evidence of the possibility that more people like Pines exist and could become a member of her class. Plaintiffs define the relevant class at pages 41-42 of their brief as: "all persons who were at any time from June 12, 1968 to the present: age 45 older . . . applied for and were rejected for a Trainee Agent position on the basis of age . . . sought to apply for and were deterred from pursuing [the position] . . . or did not pursue their interest in pursuing the position because they [knew] State Farm was not interested in hiring people [over age 45]." This definition is somewhat narrower than the one set forth in the complaint, which states that Pines seeks to represent those over 40 years of age who applied for or were deterred from applying for the trainee agent position.

Plaintiffs point to their statistical evidence, agency training manuals and agency declarations of direct discrimination to prove that a single plan of age discrimination existed. They further point to *Kraszewski v. State Farm General Insurance Co.,* 38 FEP Cases 197 , *204-07* , *257* (N.D. Cal. 1985), in which the Court found that from 1974 to 1985 State Farm had a centralized personnel system and hiring procedure. They argue that a policy of discrimination has been perpetuated since, unlike with women and minority applicants, **[*9]** State Farm has failed to implement an affirmative recruiting policy towards older people. Finally, they contend that their 63 declarations of potential class plaintiffs are "similarly situated" to Pines, in that they all either applied for and were rejected for a trainee agent position or were deterred from continuing with the application process because they felt State Farm was not interested in them due to their age.

Defendants argue that there is no evidence of a company-wide policy of discrimination, pointing to internal State Farm memoranda and more recent agency manuals which (1) expressly state that the company does not discriminate on the basis of race, sex, age, or national origin and (2) train hiring agency managers to ask neutral questions in interviews. They point out that the selection process is performed regionally, rather than centrally at headquarters. They argue that their institution of affirmative hiring practices with regard to minorities does not automatically indicate that by not formulating such a policy with regard to older applicants they allow any pre-ADEA discriminatory policy to remain in place. Defendants also argue that the Court should not facilitate notice because it would create the "largest hiring collective action in the history of the ADEA" and render the case unmanageable, citing *Adams v. United States,* 21 Cl.Ct. 795 , 797 [30 WH Cases 70] (1990). At the hearing, defendants specified that their concern with plaintiffs' motion is indeed two-fold: they believe this action would be rendered "unmanageable" if the broad notice plaintiffs seek is allowed, and they question the propriety of court facilitation of opt-in notice under the circumstances presented here.

Finally, defendants assert: (1) plaintiffs have not satisfied their "heavy burden" of establishing that "similarly situated" potential class plaintiffs exist; (2) plaintiffs' declarants are unpersuasive; and (3) defendants have produced approximately a dozen declarants of their own who state that they felt no discrimination in the application process.

Plaintiffs have produced sufficient evidence to support a preliminary determination that "similarly situated plaintiffs" to Pines exist. They have presented evidence that State Farm has engaged in a policy of nationwide discrimination in the hiring of trainee agents, substantiated by the uniform selection process used by all agency managers in hiring trainee agents and the 63 declarations of other individuals over age 45 who applied for the trainee agent position and were either rejected or discouraged from continuing with the selection process. Although these individuals are not identically situated to Pines, they are "similarly situated" victims of an apparent policy or plan arising from the uniform rubric for the State Farm trainee agent hiring process, which is all that is required to support court facilitation of opt-in notice. See *Church v. Consolidated Freightways, Inc.,* 137 F.R.D. 294 , 308 [55 FEP Cases 1390] (N.D. Cal. 1991).

Moreover, Adams and Lusardi, which defendants cite for the proposition that prospective unmanageability of an action may militate against a court facilitating **[*10]** opt-in notice, are inapposite here. Adams involved four distinct recovery theories, including one under the Fair Labor Standards Act, some of which were employee-specific and prompted the court to refuse to facilitate a collective action. Lusardi involved the decertification of an ADEA class which had been preliminarily certified, based on new evidence that employment decisions were made on a decentralized, ad hoc basis. The instant case does not carry the earmarks of unmanageability present in Adams and Lusardi. Plaintiff Pines' class is composed of applicants and deterred applicants for one position, that of trainee agent, for which uniform selection process criteria is generated by State Farm headquarters. Accordingly, the Court grants plaintiffs' motion for court facilitated opt-in notice.

3. The Proposed Opt-In Notice

a. Temporal Scope of the Class

Plaintiffs argue that the temporal scope of the class should extend from June 12, 1968, the date that the ADEA went into effect, to the present. They rely on the continuing violation theory, under which a "systematic policy of discrimination is actionable even if some or all of the events evidencing its inception occurred prior to the limitations period." *Williams v. Owens-Illinois, Inc.,* 665 F.2d 918 , 924 [27 FEP Cases 1272] (9th Cir. 1982). The ordinary temporal limitation for the class claims here would be either 180 or 300 days prior to the filing of representative plaintiff Pines' EEOC charge. Id .

Plaintiffs contend that *Domingo v. New England Fish Co.,* 727 F.2d 1429 , 1443 [34 FEP Cases 584] (9th Cir. 1984) held that the continuing violation doctrine may be employed where individuals can prove that the policy or practice at issue had an impact on them or they are a member of a group exposed to discrimination during the liability period of either 180 or 300 days prior to the class representative's EEOC filing. Plaintiffs seem to argue that the theory is applicable here because the agency manuals embodying State Farm's discriminatory policies which were promulgated before the enactment of the ADEA were never replaced with an active affirmative recruiting policy like that implemented for women and minorities. This failure to replace the old policies allowed them to continue in effect, plaintiffs reason. Finally, they point out that the continuing violation theory has already been applied to an ADEA case, citing *EEOC v. City of Chicago,* 51 FEP Cases 503 , 509-11 (N.D. Ill. 1989).

In EEOC, the Court found the continuing violation theory applicable because the City discriminatorily administered an examination for police applicants in 1981, and formed a roster from successful applicants which was used until 1986. Based on the roster's continued usage, the EEOC court allowed the ADEA discrimination claim to encompass incidents from 1981 to 1986.

The instant case is distinguishable. Here, the agency manuals were altered over time to delete any reference to age.

Accordingly, unlike in EEOC, there is no evidence that the older manuals with discriminatory statements were continually relied upon by those involved in the trainee agent hiring process at State Farm.

Defendants argue that the theory should not and does not apply to hiring cases under Williams and Domingo. These **[*11]** cases, however, merely state that the theory is most applicable to placements or promotions rather than hirings, not that it can never be applied in hiring cases.

In light of the absence of evidence that the pre-ADEA manuals embodying discriminatory policies were acted on during the alleged liability period, the Court finds that the continuing violation theory does not apply here.

Plaintiffs concede that if the continuing violation theory is not employed, the opt-in plaintiffs should consist of those similarly situated who either filed a timely EEOC charge or who could have filed a timely charge on the same date as the named plaintiff (in other words, those who suffered from incidents which occurred 180 days or 300 days before Pines' EEOC charge was filed, depending on the state where it occurred, see 29 U.S.C. Section 626(d) , 633(b)).

Plaintiffs and defendants differ, however, as to which of Pines' EEOC charges they count from. Plaintiffs contend that the first charge filed July 1, 1988 should be the measuring filing date; defendants argue that the filing of the second amended charge on August 18, 1989 should be the measuring date, since it was the first to contain explicit class allegations.

Defendants assert that the second amended charge should be the benchmark because: (1) the first one does not clearly indicate that Pines' allegations extended to a class; and (2) the second cannot as a matter of law relate back to the first, analogizing from cases such as *Owens v. Bethlehem Mines Corp.,* 630 F.Supp. 309 , 311 [40 FEP Cases 1474] (S.D. W. Va. 1986), which state that the relation back doctrine does not apply to the filing of ADEA court actions themselves. Thus, defendants' proposed class dates would be: February 20, 1989 for states with a 180 day requirement and October 23, 1988 for states which allow 300 days.

Plaintiffs assert that the relation back doctrine does apply to Pines' EEOC charges, citing 29 C.F.R. Section 1626.8(c) , and that at any rate her initial charge is sufficient to put defendants on notice that her claim could extend class-wide.

Plaintiffs prevail on the basis of the relation back doctrine, which specifically applies to EEOC charges for violations of the ADEA under 29 C.F.R. Section 1626.8(c) Accordingly, the Court finds that the temporal scope of notice should extend from January 1, 1988 in states which adopt the 180 day requirement and September 1, 1987 in those which follow the 300 day requirement.

b. Geographical Scope

Plaintiffs assert that the class should be extended nationwide, since the 63 declarants evidence a discriminatory policy which impacts applicants nationwide. Defendants argue that the class should not be so expanded because (1) the AARP magazine notice, distribute nationwide, produced only 63 declarations, and (2) there is no statistical nationwide pattern of under-representation of older persons in State Farm trainee agent positions on a regional basis.

Plaintiffs' position prevails. The testimony of the 63 potential class member declarants indicates that State Farm's uniform trainee agent selection process policies equally impact applicants in all states. Accordingly, notice should be distributed on a nationwide basis.

c. Inclusion [*12] of Those Who Were Deterred from Applying for the Position

Defendants argue that those who were deterred from applying to State Farm at all are not similarly situated to Pines, since she applied and was rejected. Plaintiffs counter that others potentially in the class need not have been subject to identical discriminatory situations.

Defendants' position prevails here. Those who were entirely dissuaded from applying for the State Farm trainee agent position are not "similarly situated" to class representative Pines. They suffered the indirect residual effects of State Farm's selection process policy, whereas Pines suffered directly and tangibly from her actual encounters with State Farm's allegedly age-based questions and age discrimination policy. Accordingly, the Court finds that notice need not be given to those who were merely deterred from applying for the State Farm trainee agent position.

d. Propriety of Parties' Proposed Notices

The court adopts defendants' proposed notice in light of its clear indication that the Court has not yet determined the ultimate merit of the plaintiffs' claims.

e. Propriety of Requiring State Farm to Provide Names and Addresses of Other Potential Plaintiffs

Defendants argue that this request is too burdensome on them, since the pertinent records are scattered across the country. Moreover, they indicate that it would be impossible for them to identify those who were only "interested" in applying for the trainee agent position, much less obtain their addresses. They note that in the district court treatment of Sperling, addresses for current and former employees were requested and granted, but no "hypothetical" ones for people who were merely "interested" in the relevant positions employment were considered or granted. Plaintiffs counter that if the Court denies this portion of their motion upon the bases of "overburdensomeness" advanced by defendants, they would never be able to prove their case.

The Court grants plaintiffs' request in part and denies it in part. The Court orders defendants to produce to plaintiffs the names and addresses of those persons aged 45 and over who applied for the State Farm trainee agent position. However, in light of the Court's determination that those who were merely deterred from applying for the trainee agent position are not "similarly situated" to plaintiff Pines, the Court denies plaintiff's request that the Court order defendants' production of names and addresses of those deterred from applying.

f. Notices in State Farm Internal publications

Plaintiffs request the Court to order defendants to post the proposed notice, mail it to agency directors and managers as well as publish it in various specified internal publications. Defendants contend that this is inappropriate, since there is no evidence that this practice will further a legitimate purpose. They argue that no spurned trainee agents would be reading these publications and agency directors would not be eager to incite further litigation against **[*13]** their employer. Defendants also argue that plaintiffs are not specific enough about where the notices are to be posted. Plaintiffs contend that spurned trainee agent applicants would at least have access to State Farm bulletin boards, since they may include State Farm secretaries or other employees who were rejected for the trainee agent position, but not for employment by State Farm altogether.

The Court denies plaintiffs' request. To require defendants to post the notice on bulletin boards and mail it to State Farm agency managers and directors would not increase measurably plaintiffs' audience, and would enable plaintiffs to gain some increased exposure at defendants' cost instead of their own. Accordingly, the Court denies plaintiffs' request for the Court to order defendants to post and mail the notice.

g. Proposed Cut-off for Mailing Consents

Plaintiffs propose that the cut-off for mailing consents should be 120 days from the date State Farm provides the names and addresses of potential class plaintiffs, since State Farm may not be able to provide all the information for some time. Defendants propose a cut-off 120 days from the date of this Order. The Court adopts plaintiffs' proposed cut-off date, as it ensures that all potential plaintiffs are given adequate time to return their consents.

h. Other Mailings of This Notice Outside the Confines of the Court's OrderDefendants contend that plaintiffs should not be allowed to mail out the court-approved notice here to those people not already specifically noted in this Order. By this, they seem to mean that plaintiffs should not be allowed to mail their notice to others not included in the list of addresses this Order requires State Farm to provide. Plaintiffs contend that such a restraint would violate their First Amendment rights. The Court declines to adopt defendants' proposed restriction, since it would allow defendants exclusively to determine exclusively the pool of potential plaintiffs to whom notice may be sent.

IV.

CONCLUSION

The defendants' motion for sanctions under Rule 11, 29 U.S.C. Section 1927 and Local Rule 27.1 is denied.

The Court grants plaintiffs' motion for court-facilitated opt-in notice. Plaintiffs have produced "substantial allegations that the putative class members were together the victims of a single decision, policy or plan infected by discrimination." *Sperling v. Hoffman-LaRoche, Inc.,* 118 F.R.D. 392 , 407 [48 FEP Cases 990] (D.N.J. 1988), *aff'd* in part on other grounds and *appeal dismissed* in part on other grounds, 862 F.2d 439 [48 FEP Cases 1010] (3d Cir.), *aff'd* and *remanded* on other grounds, 493 U.S. 165 [51 FEP Cases 853] (1981). The agency manuals and seminars which provide a uniform rubric for the trainee agent hiring process support a preliminary finding of the existence of a "single policy or plan." Moreover, the sixty-three declarations submitted by plaintiffs containing allegations of age discrimination similar to those of plaintiff Pines indicate that the apparent policy or plan rendered several individuals over the age of 45 "similarly situated." Accordingly, the Court grants plaintiffs' motion for court facilitation of the opt-in notice procedure with modifications to the scope **[*14]** of the class and the terms of the order plaintiffs would propose.

The Court finds that the wide-ranging locales of plaintiffs' declarants warrants nationwide notice. However, the temporal scope of the class should extend from either 180 or 300 days before the filing of Pines' first EEOC charge on July 1, 1988, depending on the state, since the class allegations in her second EEOC charge relate back to the time of her first filing. 29 C.F.R. Section 1626.8(c) . Moreover the Court finds that the class should not include those aged 45 and older who were merely discouraged from applying for trainee agent positions because they are not "similarly situated" to plaintiffs Pines.

The Court adopts defendants' proposed notice form, declines to order defendants to post, publish or mail the notice internally, orders defendants to provide the names, addresses and telephone numbers of other potential plaintiffs forthwith, and finds that the cut-off date for mailing opt-in consents should be 120 days from the date plaintiffs receive the above information from defendants.

The Court's ruling with regard to defendants' motion to strike is contained in a separate order issued contemporaneously herewith.

The Court resets the status conference in this action to March 9, 1992 at 1:30 p.m. The parties' Joint Status Report should be filed not later than March 2, 1992. The Court also orders hearing on defendants' Motion to Compel Deposition of Mary Zerussen continued to the same date and time, *vacating* the hearing now set for March 2, 1992.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that the Clerk shall serve a copy of this Order on counsel for all parties.