UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 1:10-cv-24166-CIV-UNGARO/SIMONTON

LOUDY APPOLON AND
MARIA OLIVERA,

Plaintiff,

v.

UNIVERSITY OF MIAMI,

Defendant.
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ORDER ON MOTION TO DISMISS

THIS CAUSE came before the Court upon Defendant's Motion to Dismiss, filed February 28, 2011. (D.E. 30.)

THE COURT has considered the Motion and pertinent portions of the record and is fully advised in the premises.

I. Background

This case arises from Defendant University of Miami's alleged practice of rescinding job offers based on applicants' credit history, which Plaintiffs contend has a disproportionate negative impact on African Americans and Latinos. Plaintiffs bring this action for declaratory and injunctive under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000(e) *et seq*., on behalf of themselves and others similarly situated.

Except for where the citations indicate otherwise, the following facts are taken from the First Amended Complaint. (D.E. 13.)

A. Plaintiffs' Factual Allegations

Defendant is a Florida non-profit corporation. It maintains control, oversight, and direction over the operation of the offices in which Plaintiffs applied for employment, including the offices' background screening practices.

Plaintiff Loudy Appolon is an African American resident of Miami, Florida. Appolon has worked in various capacities in the health care field. In her prior positions, Appolon performed clerical, secretarial, and collections work and regularly handled billing and other confidential information, including patient social security and credit card numbers. In June 2009, Appolon applied for a position as a Senior Medical Collector in the Department of Patient Financial Services at the University of Miami, Miller School of Medicine. In July 2009, Defendant offered Appolon the position, which she accepted. Defendant confirmed the job offer in a letter dated July 28, 2009, which stated that the offer was contingent upon a background check. The letter also stated that Appolon's first date of work would be August 10, 2009. Upon receiving this offer, Appolon resigned her prior position on July 31, 2009. On August 7, 2009, Defendant's Human Resource Department rescinded Appolon's job offer. A representative from the department told Appolon that she could not fill the position because her credit history was unsatisfactory. At the time of the rescission, Appolon's credit history showed no pending delinquencies and a few defaults from prior years that Appolon had remedied to the satisfaction of the lenders. On August 10, 2009, Appolon received a letter from Defendant enclosing a copy of her credit report. Appolon determined that the credit report contained errors. She corrected those errors with the credit-reporting agency, and she repeatedly tried to get in touch with Defendant to alert it to the errors but received no response.

Plaintiff Maria Olivera is a Latina resident of Miami, Florida. Olivera has approximately eight years of experience working in the health care industry, in various administrative and billing capacities. In July 2010, Olivera applied for the position of Patient Access Representative at the University of Miami, Miller School of Medicine.[1] Olivera understood that the position would involve scheduling physician referrals. In August 2010, Defendant's employee offered Olivera the Patient Access Representative position. In a letter dated August 17, 2010, Defendant confirmed the job offer. The letter stated that the offer was contingent upon a background check. Defendant did not inform Olivera that the job it offered her was related to financial. Defendant rescinded Olivera's job offer in a September 10, 2010 letter. The letter stated that information contained in Olivera's credit report "in whole or in part, influenced [Defendant's] employment decision." At the time of the rescission, Olivera's credit history showed no pending delinquencies and a bankruptcy filed almost ten year prior.

B. Disparate Impact Allegations

Plaintiffs state that credit ratings are notoriously inaccurate and that the credit reports that form the basis of the ratings frequently contain false delinquencies, inaccurate or outdated demographic information and/or inaccurate account information. Credit ratings of African Americans and Latinos are significantly lower than those of whites. African Americans and Latinos suffer higher rates of many of the financial events that negatively impact credit history than whites. African Americans and Latinos are disproportionately affected by predatory

[1] Plaintiffs' Amended Complaint alleges that Olivera applied for a position with Defendant in 2009 and that Defendant rescinded her offer in 2009. Plaintiffs' counsel has subsequently acknowledged that references to 2009 in the Amended Complaint were erroneous. Plaintiffs have stipulated that Olivera submitted her application in 2010 and that Defendant rescinded her offer in September 2010. (*See* D.E. 21 at 3.)

lending, foreclosures, general unemployment, and health-related bankruptcies, each of which can impact an individual's credit ratings. African Americans and Latinos across the country pay higher loan costs than whites, yet they have higher rates of unemployment than do whites. [2]

Plaintiffs allege that Defendant's hiring policy applies the racial and ethnic disparities present in the credit reporting system to exclude qualified African Americans and Latinos from employment opportunities. The impact of denials of employment based on credit history disproportionately affects not only the individual minority workers who are rejected or terminated, but also their families and entire communities.

According to Plaintiffs, credit ratings do not predict workplace crime and there is no correlation between poor credit and job performance. Plaintiffs allege that Defendant's practice of disqualifying job applicants based on credit history is bad public policy. Such policies needlessly frustrate the hiring of qualified African Americans and Latino applicants in Florida.

C. Class Action Allegations

Plaintiffs state their class allegations under the Federal Rule of Civil Procedure ("Rule") 23(a) and (b)(2) on behalf of the following class: All African American and Latino persons denied employment by Defendant in whole or in part because of credit background between June 24, 2009 and date of judgment in this action ("the Class"). Plaintiffs allege that Appolon and Olivera are members of this class.

Plaintiffs allege that the Class satisfies all the requirements under Rule 23(a) and (b)(2).

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[2] In the Miami-Fort Lauderdale-Pompano Beach Metropolitan Statistical Area in 2009, the year in which Defendant denied employment to Plaintiffs, the unemployment rate was approximately 15.4 percent for African Americans and 10.2 percent for Latinos, compared to 8.0 percent for whites.

First, Plaintiffs contend that members of the Class are so numerous that joinder of all of them is impracticable. Defendant has campuses throughout South Florida and employs over 13,000 people, approximately 10,000 of them as full time permanent employees. Currently, Defendant's Human Resources Career Opportunities website lists more than 160 current job vacancies. Second, Plaintiffs state that the following questions of law and fact are common to the Class and that these questions predominate over any questions affecting only individual members: (1) whether Defendant has a policy or practice of rejecting job applicants based on credit history; (2) what screening parameters Defendant uses to reject individuals based on their credit history; (3) whether Defendant's policy or practice of rejecting job applicants based on credit history has a disparate impact on Latino and African American applicants; (4) whether Defendant's policy or practice of rejecting individuals based on their credit history is job-related and consistent with business necessity; (5) whether less discriminatory alternative(s) exist that would equally serve any alleged necessity; and (6) what equitable and injunctive relief for the Class is warranted. Third, Plaintiffs contend that their claims are typical of the claims of the Class for the following reasons: (1) each plaintiff applied for a position with Defendant; (2) Defendant subjected each plaintiff to a credit check; (3) Defendant subjected each plaintiff to substantially the same screening device as other Class members; (4) Defendant revoked each plaintiff's offer after the credit check revealed that her credit history was unsatisfactory to Defendant; (5) each plaintiff has the same discrimination claim and seeks the same injunctive relief as other Class members based on disparate impact. Fourth, Plaintiffs contend that they will fairly and adequately represent and protect the interests of the Class members because they have no conflict with any class member and are committed to compelling Defendant to revise its hiring policy to eliminate

its discriminatory impact on African American and Latino applicants. Finally, Plaintiffs state that they have retained counsel competent and experienced in litigating complex employment discrimination class actions.

D. Defendant's Motion to Dismiss

Defendant moves to dismiss pursuant to Rule 12(b)(1) and (6), arguing the following: (a) Olivera has failed to exhaust her administrative remedies pursuant to Title VII thus the Court should dismiss her from the action; (b) Olivera's dismissal also mandates dismissal of the Latino members of the purported class for lack of standing; © the Amended Complaint fails to plead facts demonstrating a plausible basis for relief; and (d) the class allegations in the Amended Complaint are facially flawed and purely speculative.

II. Legal Standard

In order to state a claim, Rule 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." While a court, at this stage of the litigation, must consider the allegations contained in the plaintiff's complaint as true, this rule "is inapplicable to legal conclusions." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). In addition, the complaint's allegations must include "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Thus, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id*. (citing *Twombly*, 550 U.S. at 555).

In practice, to survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" *Id*. (quoting *Twombly*, 550 U.S. at 570). A claim has facial plausibility when the plaintiff pleads factual

content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id*. (citation omitted). The plausibility standard requires more than a sheer possibility that a defendant has acted unlawfully. *Id*. (citation omitted). Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief. *Id*. (internal quotations and citation omitted). Determining whether a complaint states a plausible claim for relief is a context-specific undertaking that requires the court to draw on its judicial experience and common sense. *Id*. (citation omitted).

III. Discussion

A. Olivera's Claims

Defendant argues that Plaintiffs have failed to establish that Olivera has exhausted all her administrative remedies under Title VII because Olivera failed to file an Equal Employment Opportunity Commission ("EEOC") charge of discrimination before bringing the instant action. Plaintiffs contend that Olivera can "piggyback" onto Appolon's EEOC charge and thus has exhausted all remedies.

Prior to filing a Title VII action, a plaintiff first must exhaust her administrative remedies by filing a charge of discrimination with the EEOC. *Gregory v. Ga. Dep't of Human Res.*, 355 F.3d 1277, 1279 (11th Cir. 2004). The plaintiff's action is limited to the scope of the agency's investigation that can reasonably be expected to stem from the charge of discrimination. *Id*. at 1280. Separate and discrete acts of discrimination not referenced in a claimant's EEOC charge are barred from judicial review in subsequent civil actions. *See, e.g. Belt v. Ala. Historical Comm'n*, 2005 WL 1653728, at * 7 (S.D. Ala. Jul. 12, 2005). Individuals who have not

themselves filed a charge of discrimination may "piggyback" onto another plaintiff's charge if: (1) at least one plaintiff has filed a timely EEOC charge that is not defective; and (2) the claim of the individual attempting to "piggyback" onto that charge arose out of similar discriminatory treatment in the same *time frame*. *Carter v. West Pub. Co*., 225 F.3d 1258, 1263 (11th Cir. 2000) (internal citations omitted) (emphasis added). In *Hipp v. Liberty Nat'l Life Ins. Co*., the Eleventh Circuit clarified that the "same time frame" requirement applies to the piggyback rule such that the "forward scope" of a representative charge ends on the date that it was filed. 252 F.3d 1208, 1225 (11th Cir. 2001). Thus, in order to piggyback "a plaintiff must have been able to file his or her charge of discrimination on the date the representative plaintiff filed the [EEOC] charge." *Id*. at 1214.

Appolon filed her EEOC charge on April 20, 2010, thus the forward scope of the piggyback rule ended on that date. Defendant submitted and rescinded Olivera's offer of employment in August 2010 and September 2010, respectively, and Olivera did not file an EEOC charge of her own. Thus, Olivera has failed to exhaust her administrative remedies and cannot piggyback onto Appolon's charge. Contrary to Plaintiffs' assertions, the "same time frame" holding of *Hipp* applies to the instant Title VII class action. *See Bradley v. Fla. Dept. of Transp.*, 2002 WL 32107945, at *2 n. 3 (N.D. Fla. Nov. 11, 2002) (applying *Hipp* holding to Title VII claim).[3] Although *Hipp* addressed a class action brought under the Age Discrimination

[3] The undersigned rejects Plaintiffs' argument that *Bardley* is inapplicable because it was not brought as a class action. *Bradley* is on point because it applied the same piggyback rule to a Title VII case that Plaintiffs seek to apply to the instant case. Plaintiffs fail to offer any logical reason for why the piggyback rule in a non-class action would be applied any differently to a class action. Just as illogical are Plaintiffs' arguments that the *Hipp* holding should not apply in the instant case because the class action procedures under the ADEA differ from those under Title VII. Plaintiffs fail to explain why those differences render the same time frame rule

in Employment Act (ADEA), the Eleventh Circuit noted that its analysis of the same timeframe requirement of the piggyback rule also applies to Title VII cases. *Id*. at 1221 n. 10.[4] Plaintiffs also incorrectly assert that the "continuing violation" exception applies in the instant case. Under the continuing violation exception, if a plaintiff's claims are related to or grew out of an EEOC charge, she can piggyback off that charge even if the charge was filed before she encountered discrimination. *Sheffield v. UPS*, 2010 WL 4721613, at *3 (11th Cir. Nov. 20, 2010). The Eleventh Circuit, however, has explicitly declined to adopt the continuing violation exception. *Id*. Accordingly, because Olivera failed to exhaust all the administrative remedies and cannot piggyback off of Appolon's EEOC charge, her Title VII claims fail as a matter of law, and the Court will dismiss her from the instant action.

B. Appolon's Standing to Bring Claims on Behalf of Latinos

Defendant argues that the dismissal of Olivera from the instant action also mandates dismissal of the Latino members of the purported class because Appolon, an African American, lacks standing to pursue Title VII disparate impact claims on behalf of class members of another race or ethnicity. Plaintiffs contend that Appolon has standing to represent Latino members because there is no fundamental conflict presented by such representation.

A plaintiff who brings a Title VII action on behalf of a class must satisfy two prerequisites: (1) the named plaintiff must have standing to bring the claim, and (2) the

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inapplicable.

[4] Given that the ADEA's EEOC exhaustion requirement is similar to that of Title VII and both the ADEA and Title II have the same piggybacking rule, the *Hipp* holding regarding the same time frame requirement is applicable to Title VII cases. *See Anderson v. Embarq/Sprint,* 379 Fed. App'x 924, 926 (11th Cir. 2010); *Calloway v. Partners Nat'l Health Plans*, 986 F.2d 446, 450 (11th Cir. 1993).

requirements of Rule 23 must be fulfilled. *Carter*, 225 F.3d at 1262. In order to establish standing, a plaintiff must establish that he has a personal stake in the alleged dispute. *Raines v. Byrd*, 521 U.S. 811, 819 (1997) (internal quotations omitted). The Court must analyze each claim separately, and parties cannot assert a claim on behalf of a class unless at least one named plaintiff has suffered the injury that gives rise to that claim. *Prado-Steinman v. Bush*, 221 F.3d 1266, 1279-80 (11th Cir. 2000).

Appolon lacks standing to bring claims on behalf of a minority group, Latinos, to which she does not belong. This case is akin to *Badillo v. Cent. Steel and Wire Co*., where the district court granted a motion to dismiss, holding that the plaintiff, who was not himself African American or female, did not have standing to assert Title VII discrimination claims on behalf of a class of African Americans and females. 495 F.Supp. 299, 305 (N.D. Ill. 1980) ("Merely because an individual complaint has triggered a broader discrimination investigation, the complainant is not thereby entitled to assert the rights of others-of a group to which the complainant does not belong…"); *see also Martin v. Safeway Trails, Inc*., 59 F.R.D. 683, 684 (D.D.C. 1973) (dismissing class action to the extent that it asserted claims on behalf of class based upon sex and national origin when plaintiff only had standing to raise race discrimination); *Rodriguez v. Pac. Tel. & Tel. Co.*, 70 F.R.D. 414, 416 (N.D. Cal. 1976) ("Title VII class representative must be an actual member of the sex, ethnic or racial group which he or she seeks to represent."). Accordingly, Appolon lacks standing to bring claims on behalf of Latinos, and the Court will strike those class allegations from the First Amended Complaint.[5]

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[5] None of the cases that Plaintiffs cite in support of their position address the specific question of whether Appolon has standing to represent Latinos. Moreover, Plaintiffs failed to distinguish the instant case from those that Defendant cites. Defendant's cases obviate the conclusion that

C. Plausibility of Plaintiffs' Allegations

Defendant argues that the Amended Complaint fails to plead facts demonstrating a plausible claim for relief. Plaintiffs disagree.

To state a plausible claim of disparate impact under Title VII, a plaintiff must allege that an employer's facially neutral practice led to a discriminatory impact on a particular group and that the practice cannot be justified as a business necessity. *Griggs v. Duke Power Co*., 401 U.S. 424, 431 (1971); *Stephen v. PGA Sheraton Resorts, Ltd.*, 873 F.2d 276, 279 (11th Cir. 1989). A plaintiff must identify a specific employment practice that leads to the disparate impact. *Fitzpatrick v. City of Atl.*, 2 F.3d 1112, 1117 (11th Cir. 1993). A plaintiff also must make a comparison of the racial composition of persons in the labor pool qualified for the position at issue with those persons actually holding that position, and he or she must demonstrate that the allegedly discriminatory practice is connected to the disparate impact. *Wards Cove Packing Co v. Atonio*, 490 U.S. 642, 657 (1989).

As to Olivera, Plaintiffs' claims fail for two reasons. First, Plaintiffs have failed to state facts sufficient to allege that the credit portion of the background check injured Olivera. Second, since Plaintiffs' allegations do not demonstrate that Defendant withdrew Olivera's offer of employment due to her credit report, Plaintiffs fail to connect Olivera to the asserted disparate impact on Latinos as a whole. Put simply, there is just no way to deduce from Plaintiffs' Amended Complaint how Defendant's practice disparately impacts Latinos.

Appolon lacks standing to represent Latinos.

As to Appolon, Plaintiffs have adequately alleged facts to demonstrate that Defendant rescinded her offer due to her credit report, thus Plaintiffs have adequately stated a claim that Defendant's practice disparately impacts Latinos.

D. Plaintiffs' Class Allegations

Defendant argues that the Court should strike Plaintiffs' remaining class allegations because they are facially insufficient. Plaintiffs argue that they allege the requisite Rule 23 criteria thus the Court should allow the case to proceed as a class action.

The Court will evaluate the sufficiency of Plaintiffs' remaining class allegations upon Plaintiffs' filing of a proper motion for class certification.[6]

For the foregoing reasons, it

ORDERED AND ADJUDGED that Defendant's Motion to Dismiss is GRANTED. IN PART. Plaintiff Maria Olivera is DISMISSED WITH PREJUDICE. It is further

ORDERED AND ADJUDGED that Plaintiffs' Class allegations with respect to Latinos are STRICKEN WITHOUT PREJUDICE. It is further

ORDERED AND ADJUDGED that Plaintiff's Second Amended Complaint is due on or before **March 24, 2011**.

DONE AND ORDERED in Chambers at Miami, Florida, this 14th day of March, 2011.

URSULA UNGARO
UNITED STATES DISTRICT JUDGE

[6]The undersigned notes that the class definition Plaintiffs have set forth in their Amended Complaint is imprecise and flawed.

copies provided: counsel of record