

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

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

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)	1:07-cv-01428 LJO JLT
	)	
Plaintiff,	)	ORDER DENYING MOTION TO INTERVENE
	)	
ERIKA MORALES and ANONYMOUS PLAINTIFF’S ONE THROUGH EIGHT	)	[Doc. 150]
	)	
Plaintiff-Intervenors	)	
	)	
v.	)	
	)	
ABM INDUSTRIES INCORPORATED, et al.	)	
	)	
Defendants.	)	

---

Before the Court is a “Motion for Leave to Intervene” brought by Maria Socorro Zapien and Anonymous Plaintiffs Nine through Ten. The prospective plaintiffs assert that they are entitled to intervene in the action as of right or, alternatively, seek permission to intervene. The EEOC filed a statement of non-opposition to the motion on February 11, 2010. The defendants (referred collectively here as “ABM”) oppose the motion on several grounds.

The Court held oral argument on this motion on March 2, 2010. After considering the moving and opposing papers and the argument of counsel, for the reasons set forth below, the Court DENIES the motion to intervene.

///

1 **BACKGROUND**

2 The EEOC initiated this action on September 28, 2007 against Defendants ABM Industries, Inc.  
3 and ABM Janitorial Services, Inc. (Doc. 1.) ABM Janitorial Services-Northern California was added  
4 as a defendant through the EEOC's First Amended Complaint filed on July 17, 2009. (Doc. 118.) The  
5 amended complaint alleges that ABM engaged in a pattern or practice of subjecting Erika Morales and  
6 a class of other similarly situated individuals to a sexually harassing, hostile work environment and quid  
7 pro quo sexual harassment at various ABMNC work sites. (Id.) The complaint alleges further that ABM  
8 failed to exercise reasonable care to prevent and correct the sexually harassing behavior promptly. (Id.)  
9 Finally, the complaint alleges that Erika Morales and others similarly situated were constructively  
10 discharged for complaining about or rebuking the sexual harassment. (Id.)

11 On March 7, 2008, Erika Morales and Anonymous Plaintiffs one through eight filed their  
12 complaint in intervention after having been granted leave to do so on two days earlier. (Docs. 25, 27)  
13 Anonymous plaintiffs seven and eight were dismissed by the Court on May 6, 2009. (Doc. 106) The  
14 instant motion was filed on January 29, 2010 seeking to add Zapien and Anonymous Plaintiffs Nine and  
15 Ten.

16 Discovery in this case was bifurcated. Initially, the parties proceeded as if a Rule 23 certification  
17 motion would be required. As a result, the Court ordered the parties to conduct discovery as to class  
18 issues first. This discovery concluded on March 20, 2009. Non-expert discovery concluded on February  
19 12, 2010, with some exceptions set forth in the Court's earlier orders. At this time, all non-expert  
20 discovery is complete. From earlier motions, the Court is aware that a significant amount of discovery  
21 occurred during this period. Likewise, expert discovery is due to conclude on April 9, 2010. Dispositive  
22 motions are due to be filed by May 7, 2010 and heard by June 14, 2010. Trial is scheduled on August 23,  
23 2010. It is against this backdrop and in this stage in the litigation that the moving parties seek to  
24 intervene.

25 **DISCUSSION**

26 **A. Intervention as of Right**

27 Zapien and the other anonymous moving parties seek to intervene as a matter of right pursuant  
28 to Rule 24, Federal Rules of Civil Procedure, which states, in pertinent part,

1           **(a) Intervention of Right.** On a timely motion, the court must permit anyone to  
2 intervene who:

- 3                   **(1)** is given an unconditional right to intervene by a federal  
4 statute; or
- 5                   **(2)** claims an interest relating to the property or transaction  
6 that is the subject of the action, and is so situated that  
7 disposing of the action may as a practical matter impair or  
8 impede the movant’s ability to protect its interest, unless  
9 existing parties adequately represent that interest.

10           Title VII of the Civil Rights Act of 1964, as amended, allows that persons aggrieved by a  
11 violation of the Act “shall” have the right to intervene in a civil action instituted by the EEOC. 42 U.S.C.  
12 § 2000e-5(f)(1). See EEOC v. Brotherhood of Painters, Decorators and Paperhangers of America, 384  
13 F. Supp. 1264, 1266-67 (D.S.D. 1974) (clause restricting intervention to cases involving government,  
14 government agency or political subdivision applies only to cases filed by Attorney General; in cases filed  
15 by the EEOC itself, “the statute grants the person aggrieved an unconditional right to intervene”).

16           **1. Timely Intervention**

17           Rule 24(a) presupposes a “timely” motion. NAACP v. New York, 413 U.S. 345, 365 (1973).  
18 Timeliness must be determined from all of the circumstances and is left to the sound discretion of the  
19 court whose determination will not be disturbed on appeal absent an abuse of discretion. Id. at 365-66.  
20 Generally, three factors are weighed in determining whether a motion to intervene is timely: (1) the stage  
21 of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the  
22 reason for the length of delay. U.S. v. State of Washington, 86 F.3d 1499, 1503 (9<sup>th</sup> Cir. 1996). The  
23 rules for intervening are to be construed broadly in favor of intervention. Id.

24           **a. The litigation is in the late stage of the proceedings.**

25           Despite that this case was filed more than two years ago, the motion to intervene was not filed  
26 until the last court day in January 2010, just two weeks before the close of discovery. This delay is  
27 significant in light of the fact that non-expert discovery has been completed and expert discovery is due  
28 to complete within a month’s time. Dispositive motions are due to be filed within about two months.

          Nevertheless, the moving parties assert that the “key question” in determining the timeliness of  
this motion is whether substantive proceedings on the merits have occurred. They argue that where no  
dispositive motions have been heard, there would be no prejudice to the parties if intervention is allowed

1 The moving parties seem to limit the definition of “substantive proceedings” to rulings on dispositive  
2 motions. Toward this end, the moving parties rely upon Mountain Top Condo. Ass'n v. Dave Stabbert  
3 Master Builder, 72 F.3d 361, 370 (3d Cir. 1995). However, in Mountain Top, the court found significant  
4 that, “while some written discovery and settlement negotiations had occurred between the MTCA and  
5 the contractors prior to the [intervenors’] motion, there were no depositions taken, dispositive motions  
6 filed, or decrees entered during the four year period in question. Under these circumstances, we cannot  
7 say that intervention at this stage of the litigation would prejudice the current parties.”

8 Contrary to the factual situation in Mountain Top, here, previous filings by the parties makes  
9 clear that significant discovery has occurred. (Doc. 148) Upwards of 40 depositions have been taken.  
10 Written discovery has been extensive. The EEOC has propounded to the defendants “six rounds of  
11 document requests, and three rounds of requests for admissions. The EEOC has made propounded a total  
12 of 233 document requests and 196 requests for admissions.” (Doc 148 at 7-8.) Unlike the in Mountain  
13 Top, where only “some written discovery” and no depositions had occurred , here non-expert discovery  
14 is complete.

15 Although the moving parties assert that they have no objection to continuing discovery deadlines  
16 to accommodate the defendants’ discovery needs as to the proposed plaintiffs, this would require  
17 *reopening* discovery and, based thereon, would require continuing all of the remaining dates outlined  
18 in the Scheduling Order, including trial. Given this, the likelihood that intervention will cause potential  
19 delay weighs against finding that the motion was filed timely. United States EEOC v. Taylor Electric  
20 Co., 155 F.R.D. 180, 182 (N.D. IL 1994).

21 In League of United Latin American Citizens v. Wilson, 131 F.3d 1297, 1304 (9<sup>th</sup> Cir. 1997),  
22 the Court held,

23 [A]dditional delay is not alone decisive (otherwise every intervention motion would be  
24 denied out of hand because it carried with it, almost by definition, the prospect of  
25 prolonging the litigation). However, in a case like this one, in which the proposed  
26 intervenor waited twenty-seven months before seeking to interject itself into the case,  
27 only to move the court for full-party participation at a time when the litigation was, by  
28 all accounts, beginning to wind itself down, we believe that the additional delay caused  
by the intervenor's presence is indeed relevant to the timeliness calculus, and counsels  
against granting [the] motion.

Notably, the League Court observed that because the moving party had waited 27 months after the action

1 was commenced, “it fights an uphill battle in its effort to intervene.” Id. at 1303. Here, the moving  
2 parties have waited two months longer than in League.<sup>1</sup> Likewise, League found significant the delay  
3 of the moving parties in seeking to intervene after others had successfully done so. League, 131 F.3d  
4 at 1304. Here, the previous intervenors were granted leave almost exactly two years ago and nearly 23  
5 months passed before the current moving parties filed their motion for the same relief, again, without  
6 any explanation for their delay.

7         Given the plaintiffs’ complete failure to explain their delay in seeking leave to intervene, the  
8 Court concludes that the procedural posture of this litigations mitigates against allowing intervention  
9 at this late stage in the proceedings.

10                   **b.         Allowing intervention will prejudice the other parties**

11         Although at least two of the moving parties here have been deposed, the defendants assert that  
12 these depositions were not sufficient in light of the additional claims brought in the complaint-in-  
13 intervention that were not at issue when the depositions were taken. At that time, the defendants assert  
14 that they were aware only of the Title VII claims. In fact, Zapien and the Anonymous Plaintiffs Nine  
15 and Ten were identified to the defendants in the EEOC’s third and fourth supplemental disclosures. The  
16 defendants provide copies of these disclosures and both indicate that the EEOC was seeking damages  
17 under only “Title VII of the Civil Rights Act and Title I of Civil Rights Act of 1991.” Neither disclosure  
18 indicates that the EEOC would seek damages for other common law or statutory torts.<sup>2</sup>

19         The Court is unclear as to how the factual bases for the claims brought under California’s Fair  
20 Employment and Housing Act differ from those brought under Title VII. However, the moving parties  
21 fail to counter this evidence or to explain how the depositions that have been taken were probative on  
22 these new state law claims. To the contrary, the moving parties seem to agree that additional depositions  
23 would be required when they reiterate the fact that they offered to allow ABM to re-take the depositions  
24 of two of the moving parties. The moving parties admit that this would have allowed ABM to “touch

---

25  
26                   <sup>1</sup> Although the length of time that the litigation has been in existence is not a significant fact, because the moving  
27 parties have failed to provide the Court any evidence to make a determination as to the operative fact--when the prospective  
28 intervenors learned that their interests were no longer being adequately represented--the Court has little else to rely upon.

<sup>2</sup> This is consistent with the EEOC’s First Amended Complaint that does not seek any relief for violations of state  
law or any common law torts.

1 on matters not already covered in the previous depositions.” (Doc. 176 at 4)

2 Similarly, the moving parties fail to provide cogent argument that the defendants would not be  
3 prejudiced by intervention at this late date. Instead, the moving parties seem to assert that because ABM  
4 was aware that Jose Vasquez and the other alleged harassers supervised employees and because the  
5 moving parties could have been deposed/redeposed that prejudice does not exist. (Doc. 150, Martinez  
6 Dec.; Doc 176, at 4-5)) This novel approach to discovery—using limited discovery resources to gather  
7 evidence about potential plaintiffs who have not sued and about causes of action that have not been  
8 alleged—is one that the Court would be surprised is followed by any defendant. Because the moving  
9 parties have failed to support their conclusions with evidence, the Court cannot conclude that the  
10 defendants’ claims that they would suffer prejudice are unsupported.

11 **c. The putative plaintiffs have failed to explain the reason for their delay**

12 In evaluating whether the moving party has delayed, the Court is required to measure the delay  
13 “from the date the proposed intervenor should have been aware that its interests would no longer be  
14 protected adequately by the parties, not the date it learned of the litigation.” Officers for Justice v. Civil  
15 Serv. Comm'n of San Francisco, 934 F.2d 1092, 1095 (9th Cir. 1991). This has been described as “the  
16 crucial date” for determining the timeliness of a motion to intervene. Smith v. Marsh, 194 F.3d 1045,  
17 1052 (9<sup>th</sup> Cir. 1999). Although the length of the delay is not determinative, any substantial lapse of time  
18 weighs heavily against intervention. Officers for Justice, at 1095.

19 If the Court was to assume that the EEOC no longer will adequately represent the moving parties’  
20 interests, they fail to attest to when they learned this fact. As noted above, Zapien and Anonymous  
21 Plaintiff Nine were identified to the defendants as claimants “on or about May 22, 2009.” Anonymous  
22 Plaintiff Ten was disclosed to the defendants “on or about September 30, 2009.” Instead, the moving  
23 parties assert, although without any evidence to support it that, “During the course of class discovery  
24 additional claimants became aware of this litigation and some, like the proposed intervenors, have  
25 chosen to intervene to assert and protect their rights.” (Doc. 150 at 3.) At most this explains that the  
26 moving parties became aware of the litigation by no later than April 2009.

27 Likewise, they offer no explanation why they failed to file their motion to intervene until a mere  
28 two weeks before the non-expert discovery deadline. Instead, they note, “In this case any delay has been

1 minor and has resulted from the fact that intervenors did not realize that the action was pending until  
2 they learned of the discovery and investigation efforts conducted by counsel.” (Doc. 150 at 4.) This  
3 statement is not supported by a declaration. In any event, at most, this statement explains when and how  
4 the moving parties learned of the litigation which, as noted above, are not significant facts that are to this  
5 motion.

6 On the other hand, in League, 131 F.3d 1297, 1304 the Court found greatly important, the  
7 moving party’s failure to explain the delay. The Court observed, “Even more damaging to ACNFARI’s  
8 motion than the twenty-seven month delay itself, however, is its failure adequately to explain - either  
9 in its original motion to the district court, in its opening or reply briefs to this court, or at oral argument  
10 - the reason for its delay.”

11 Therefore, the Court finds that there is no evidence that the EEOC will no longer adequately  
12 represent their interests. Likewise, there is no evidence upon which the Court can rely to determine the  
13 extent of the moving parties’ delay or the justification for it. This failure militates against granting the  
14 motion for leave to intervene.

#### 15 **4. Conclusion**

16 For the reasons set forth, the late stage of the proceedings, the prejudice that would be suffered  
17 by ABM if intervention is permitted and the complete dearth of evidence explaining the moving parties’  
18 failure to take more timely action leaves the Court little option but conclude that the motion to intervene  
19 was not timely filed. Therefore the Court DENIES the motion to intervene.

#### 20 **B. The moving parties’ interests are adequately represented by the EEOC.**

21 If the moving parties fail to establish that their interests are not adequately already represented  
22 by the EEOC, the motion to intervene must be denied. Southwest Ctr. for Biological Diversity v. Berg,  
23 268 F.3d 810, 817-818 (9th Cir. 2001); Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525, 527 (9th Cir.  
24 1983). To make this determination, the Court must consider,

- 25 (1) Are the interests of a present party in the suit sufficiently similar to that of the  
26 absentee such that the legal arguments of the latter will undoubtedly be made by the  
27 former; (2) is the present party capable and willing to make such arguments; and (3) if  
permitted to intervene, would the intervenor add some necessary element to the  
proceedings which would not be covered by the parties in the suit.

28 Blake v. Pallan, 554 F.2d 947, 954-955 (9th Cir. 1977). When the existing representation is by “a

1 governmental body or officer charged by law with representing the interests of the absentee,” there is  
2 a presumption of adequacy. Doe v. Schwarzenegger, 2007 U.S. Dist. LEXIS 8501, \*7-9 (E.D. Cal. Jan.  
3 17, 2007) In Prete v. Bradbury, 438 F.3d 949, 957-58 (9<sup>th</sup> Cir. 2006), the Court noted that when the  
4 government represents the proposed intervenor, the representation is presumed to be adequate and “[i]f  
5 the applicant's interest is identical to that of one of the present parties, a compelling showing should be  
6 required to demonstrate inadequate representation.” Id. at 957.

7 The moving parties failed to address this topic in any substantive way. The moving parties do  
8 not contend that some event, ruling or postural change by the EEOC caused them to realize that the  
9 EEOC’s interests were no longer compatible with theirs. Instead, they assert that because the defendants  
10 sought to strike Anonymous Plaintiff Ten (who had been identified either as claimant 19, 20 or 21),  
11 intervention would allow her “to participate directly in the litigation and protect her rights.”<sup>3</sup> (Doc 150,  
12 Martinez Dec.) Clearly this is true but what this moving party fails to demonstrate is that the EEOC’s  
13 interests have diverged from her own.

14 The only other discussion of this topic was made in the reply papers in which they assert, without  
15 any citation to any authority or evidentiary support that “the EEOC does not and cannot represent any  
16 individual litigant.” They assert also that “the EEOC will litigate principally in the interest of the  
17 government.” Finally, Zapien claims that because ABM, in its opposition to this position, argues that  
18 she is not an “aggrieved” person for purposes of intervention—because her alleged harassment occurred  
19 in Fresno rather than Bakersfield, this demonstrates “that applicants’ interests *may no longer be*  
20 *adequately protected as class members.*” (Doc. 176 at 6, emphasis added.) Why ABM’s active defense  
21 of this case means that the EEOC no longer will zealously represent the claimants in this case is  
22 unexplained. Likewise, even Zapien does not contend that the EEOC will no longer represent her; only  
23 that the EEOC *may* not do so.

24 Rather than presenting any evidence on this topic, the moving parties seem to rest their vague  
25 contentions on their apparent belief that there is an inherent lack of authority in the EEOC to obtain relief  
26 for those who have suffered discrimination. Not only is this a misstatement of the law but it ignores  
27

---

28 <sup>3</sup>Notably, this effort failed. (Doc. 156.)



1 the moving parties' burden to "produce something more than speculation to the purported inadequacy  
2 in order to justify intervention as of right." League, 131 F.3d at 1307.

3 To the contrary in General Tel. Co. v. EEOC, 446 U.S. 318, 324-325 (1980), the Court held, "We  
4 do no more than follow a straightforward reading of the statute, which seems to us to authorize the  
5 EEOC to sue in its own name to enforce federal law by obtaining appropriate relief for those persons  
6 injured by discriminatory practices forbidden by the Act." The EEOC has admitted that they have this  
7 authority and would continue to zealously represent the interests of the moving parties if intervention  
8 was not permitted.

9 In fact, during oral argument on this motion, the attorneys for the moving parties and the EEOC  
10 admitted, in essence, that the EEOC and the moving parties have the same "ultimate objective" in this  
11 litigation. This equals a finding that presumes the adequacy of the representation by the EEOC. League  
12 of United Latin Am. Citizens v. Wilson, 131 F.3d at 1305. The only concrete advantage of intervention  
13 that the attorneys for the moving parties could articulate was the ability to plead state causes of action  
14 so to avoid the damages cap placed on Title VII awards. 42 U.S.C. § 1981a(b)(3). However, Zapien and  
15 the Anonymous Plaintiffs Nine and Ten fail to outline the bases for their individual claims and their  
16 proposed complaint in intervention fails to provide any clarity as to the unique and individual factual  
17 bases for the moving parties' claims.<sup>4</sup> Thus, the Court cannot determine whether their allegations, if  
18 true, could support a damage award for each plaintiff in excess of \$300,000.

19 The Court finds that the moving parties have failed to demonstrate that their interests are not  
20 adequately represented without intervention. Therefore, as a separate and independent basis, the Court  
21 DENIES the motion to intervene on these grounds.

22 **C. The Court need not decide whether the moving parties are "aggrieved" persons for**  
23 **purposes of intervention as of right**

24 Because the Court finds that the motion was not timely and, the Court need not determine the  
25 other issues outlined by Rule 24.

---

26 <sup>4</sup>This difficulty was further compounded by the moving parties failure to file a proposed intervenor complaint that  
27 was separate from the one in existence for the current intervenors. In doing so, it appears that the current intervenors are  
28 seeking to bootstrap their expanded claims onto the proposed intervenor complaint without filing a motion for leave to amend  
their current complaint.

1 Timeliness is "the threshold requirement" for intervention as of right. United States v. Oregon, 913 F.2d 576, 588 (9th Cir. 1990). In other words, if we find "that the motion to intervene was not timely, [we] need not reach any of the remaining elements of Rule 24." Washington, 86 F.3d at 1503.

2  
3  
4 League, 131 F.3d at 1302. Therefore, the Court will not determine at the is time whether the moving  
5 parties are "aggrieved persons" because it is unnecessary to the Court's order.

6 **D. The motion for permissive intervention is denied as untimely.**

7 As discussed above, the Court has determined that the motion for leave to intervene was not  
8 timely filed. As in intervention as of right, permissive intervention too requires a timely motion. Federal  
9 Rules of Civil Procedure 24(b)(1) reads,

10 On timely motion, the court may permit anyone to intervene who:  
11 (A) is given a conditional right to intervene by a federal statute; or  
12 (B) has a claim or defense that shares with the main action a common question  
13 of law or fact.

14 [¶]

15 (3) Delay or Prejudice. In exercising its discretion, the court must consider whether the  
16 intervention will unduly delay or prejudice the adjudication of the original parties' rights.

17 To determine whether permissive intervention should be granted, the Court considers the same three  
18 factors outlined above. League, 131 F.3d at 1308. However, "In the context of permissive intervention,  
19 however, we analyze the timeliness element more strictly than we do with intervention as of right." Id.  
20 A finding that the motion for intervention as of right was not filed timely defeats a motion for permissive  
21 intervention. Id. Because the Court has already determined that the motion was not made timely, the  
22 motion for permission to intervene is DENIED.

23 **CONCLUSION**

24 For the reasons set forth above, the Court DENIES the motion to intervene.

25 IT IS SO ORDERED.

26 Dated: March 3, 2010

27 /s/ Jennifer L. Thurston  
28 UNITED STATES MAGISTRATE JUDGE