

United States District Court
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

GREGORY HALL, et al.,
Plaintiffs,

v.

APARTMENT INVESTMENT AND MANAGEMENT
COMPANY; AIMCO CAPITAL, INC.; FORTNEY
& WEYGANDT, INC.; IMR CONTRACTOR
CORPORATION; BAY BUILDING SERVICES;
AND BAY AREA CONSTRUCTION FRAMERS,
INC.,
Defendants.

No. C 08-3447 CW

ORDER GRANTING
PLAINTIFFS'
MOTION FOR LEAVE
TO FILE A FOURTH
AMENDED COMPLAINT

_____ /

Plaintiffs move for leave to file a fourth amended complaint after the deadline set by the Court for adding new claims or parties. Defendants oppose the motion. The matter was taken under submission on the papers. Having considered all of the papers submitted by the parties, the Court grants the motion.

BACKGROUND

The following allegations are contained in the Third Amended Complaint, the operative pleading. On approximately May 23, 2006, the Bayview-Hunters Point Redevelopment Plan (BHPRP) was approved for funding with state bonds. Bayview-Hunters Point is a predominantly African-American neighborhood in San Francisco,

1 California. Defendants Apartment Investment and Management Company
2 (AIMCO) and AIMCO Capital, Inc. are real estate developers for the
3 BHPRP. Defendant Fortney & Weygandt (F&W) is the BHPRP general
4 contractor and Defendants IMR, Bay Building Services, Inc. (BBS)
5 and Bay Area Construction Framers, Inc. are other BHPRP
6 contractors. Plaintiffs are African-American and Hispanic
7 individuals who worked or attempted to work at sites under the
8 supervision of Defendants.

9 Defendants allegedly maintained a discriminatory workplace by
10 taking adverse employment actions against African-American
11 construction employees such as assigning them less desirable work,
12 segregating them from Hispanic workers and assigning them fewer
13 hours and inadequate tools. Defendants allegedly failed to hire
14 qualified African-American workers for the project, and instead
15 gave preference to Hispanic workers. Supervisors allegedly
16 fostered a racially hostile work environment by encouraging
17 African-American and Hispanic workers to compete against each other
18 and by making derogatory comments to African-American employees.
19 At times, Defendants allegedly provided work instructions and
20 safety warnings to the African-American Plaintiffs only in Spanish
21 and would not provide them in English when requested to do so.

22 Hispanic Plaintiffs were allegedly pushed to work in unsafe
23 conditions and were denied meal periods, rest periods and overtime
24 pay. Furthermore, Hispanic Plaintiffs allegedly had portions of
25 their wages withheld and were paid reduced wages in cash. Some
26 Hispanic Plaintiffs were allegedly required to pay a portion of
27 their wages to supervisors in cash after depositing their
28 paychecks.

1 BHPRP supervisors allegedly retaliated against, and in some
2 cases terminated, Hispanic and African-American Plaintiffs who
3 complained to Defendants or to the union about Defendants' unlawful
4 practices.

5 The Third Amended Complaint lists twenty-one causes of
6 action.¹ The claims include violations of the California Labor
7 Code's wage and hour provisions; violations of the California Fair
8 Employment and Housing Act (FEHA); intentional infliction of
9 emotional distress; discriminatory termination in violation of
10 public policy; and retaliatory termination in violation of public
11 policy.

12 Pursuant to the case management order entered by the Court on
13 December 29, 2008, the deadline for adding additional parties or
14 claims was March 16, 2009. Plaintiffs filed the present motion for
15 leave to amend the complaint on April 2, 2009. The proposed Fourth
16 Amended Complaint would add a claim under California Government
17 Code § 12940(i) for aiding and abetting discrimination. Of the
18 existing Defendants, this claim would be asserted against AIMCO,
19 AIMCO Capital and F&W. The proposed Fourth Amended Complaint would
20 also add four new parties to this action: All Hallows Preservation,
21 L.P., Bayview Preservation, L.P., La Salle Preservation, L.P. and
22 Shoreview Preservation, L.P. (collectively, the Owners). According
23 to Plaintiffs, the Owners are "subsidiaries and/or affiliates of
24 AIMCO and own the property at BHPRP," "contracted with F&W to
25 perform the construction services at BHPRP" and "have been
26 represented by employees of AIMCO and/or AIMCO Capital with respect

27
28 ¹The Court previously dismissed four of these causes of
action.

1 to the development at BHPRP." Proposed 4th Am. Compl. ¶ 8.
2 Plaintiffs seek to assert claims against the Owners for
3 discriminatory termination in violation of public policy;
4 retaliatory termination in violation of public policy; intentional
5 discrimination, hostile work environment and retaliation in
6 violation of FEHA; and aiding and abetting discrimination.

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8 LEGAL STANDARDS

9 Pursuant to Federal Rule of Civil Procedure 16(b)(4), a
10 scheduling order "may be modified only for good cause and with the
11 judge's consent." Where a schedule has been filed, a party's
12 ability to amend its pleading is governed by this good cause
13 standard, not the more liberal standard of Rule 15(a)(2). Johnson
14 v. Mammoth Recreations, Inc., 975 F.2d 604, 608 (9th Cir. 1992).
15 In order to determine whether good cause exists, courts primarily
16 consider the diligence of the party seeking the modification. Id.
17 at 609; see also Coleman v. Quaker Oats Co., 232 F.3d 1271, 1294
18 (9th Cir. 2000). "[N]ot only must parties participate from the
19 outset in creating a workable Rule 16 scheduling order but they
20 must also diligently attempt to adhere to that schedule throughout
21 the subsequent course of the litigation." Jackson v. Laureate,
Inc., 186 F.R.D. 605, 607 (E.D. Cal. 1999).

22 DISCUSSION

23 As noted above, Plaintiffs seek to amend the complaint in two
24 respects. The first proposed amendment would add the Owners as
25 Defendants and would assert a number of the existing claims against
26 them. The second proposed amendment would add a claim against
27 certain of the existing Defendants, as well as the Owners, for
28 aiding and abetting discriminatory conduct. Plaintiffs explain

1 that they did not move for leave to amend before the March 16
2 deadline because their counsel failed to add the deadline to his
3 personal calendar and was under the mistaken impression that
4 Plaintiffs could seek leave to amend until May 1.

5 Defendants correctly note that Plaintiffs were aware as early
6 as April 9, 2008 that the Owners owned the properties at issue.
7 However, Plaintiffs maintain that they lacked a good faith basis
8 for asserting claims against the Owners before March 16, 2009
9 because they lacked sufficient information to connect the Owners to
10 the alleged unlawful practices until their counsel reviewed certain
11 documents on March 21, 2009 that connected the Owners to Don Maloy,
12 an AIMCO supervisor who allegedly was responsible for much of the
13 discriminatory conduct described in the complaint. In addition,
14 the Owners have been on notice of this lawsuit since it was filed.
15 They also apparently share an address with AIMCO and are
16 represented by the same counsel. They will not be prejudiced by
17 the approximately two-week delay in Plaintiffs' filing the present
18 motion. Nor will any of the Defendants be prejudiced by the
19 addition of a claim for aiding and abetting discrimination two
20 weeks after the deadline, in that such a claim is based on the same
21 nucleus of fact as the existing claims and is not likely to require
22 additional discovery.

23 The Court concludes that good cause exists to modify the case
24 management order to permit Plaintiffs to add the Owners as
25 Defendants and to add a claim for aiding and abetting
26 discrimination. However, the proposed Fourth Amended Complaint
27 contains virtually no allegations concerning the Owners, and on
28 this basis may fail to state a claim against them. In the interest

1 of avoiding the delay that would accompany an additional motion to
2 dismiss, the Court will require Plaintiffs to revise their proposed
3 Fourth Amended Complaint, before filing and serving it, to add
4 factual allegations sufficient to state claim against the Owners.

5 CONCLUSION

6 For the foregoing reasons, the Court GRANTS Plaintiffs' motion
7 for leave to amend the complaint (Docket No. 49). The May 7, 2009
8 hearing is VACATED. Before filing, Plaintiffs must amend their
9 proposed Fourth Amended Complaint to add factual allegations in
10 support of the claims that are asserted against the Owners.
11 Plaintiffs may make no other changes to the proposed Fourth Amended
12 Complaint. The revised Fourth Amended Complaint must be filed
13 within five days of the date of this order and must be served on
14 the Owners within five days thereafter. Plaintiffs' counsel is
15 advised to ensure that all future deadlines have been properly
16 calendared. The remaining deadlines in the case management order
17 will remain in effect, but may be continued if necessary after the
18 Owners appear.

19 IT IS SO ORDERED.

20 Dated: 5/6/09



21 CLAUDIA WILKEN
22 United States District Judge
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