

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

ANTOINETTE GONZALES, et al.,)	
)	
Plaintiffs,)	
)	
vs.)	
)	
THE CITY OF ALBUQUERQUE, et al.,)	
)	
Defendants.)	
)	
)	Case No. 1:09-cv-00520-JB-RLP
)	

**DEFENDANTS’ MEMORANDUM OF LAW IN OPPOSITION TO
MOTION TO INTERVENE**

Defendants, by and through their attorneys, state the following in opposition to J. Michael Barnes, Celia Loveland, Carol McCoy, and Donna Saya’s (collectively, “Intervenors”) Motion to Intervene and Memorandum in Support of Motion to Intervene.

BACKGROUND

A. The Parties

Antoinette Gonzales, Nicole Bordlemay, Nicole Foster, Yolanda Garcia, James Pescetti, Caroll Austin, Annette Mora, Sarah Clover, Keri Waites, Arthur Otero, and Roberta Gutierrez¹ (collectively “Plaintiffs”) are former employees of the City of Albuquerque’s (“City”) 311 Citizen Contact Center (“311 CCC”). Plaintiff Gonzales was a salaried supervisor at the end of her tenure with the 311 CCC, while the other ten plaintiffs were hourly employees. The

¹ Plaintiffs Arthur Otero and Roberta Gutierrez were joined as Plaintiffs on September 20, 2010 (*see doc. 72*), pursuant to the Court’s August 21, 2010 Memorandum Opinion and Order denying Plaintiffs’ Motion for Class Action Certification and granting Plaintiffs leave to amend the Complaint to join additional plaintiffs (“August 21 Order”) (Doc. 69). The Parties agree that Arthur Otero, as named in the caption, should actually be Alfred Otero.

Interveners are current employees of the 311 CCC. *See* Compl. in Intervention at ¶ 1 (Doc. 74-1). All four are supervisors at the 311 CCC. *Id.*

The City is a municipality and public employer. Defendant Ed Adams is the former Chief Administrative Officer (“CAO”) for the City. Defendant Esther Tenenbaum is the 311 CCC Division Manager.

B. The Court’s Ruling on Plaintiffs’ Motion for Class Action Certification Allows Plaintiffs to Join Only *Former* Employees

Plaintiffs moved for class action certification on May 12, 2010, seeking to certify a class of past, present, and future 311 CCC employees in an action to determine whether 311 CCC employees should be “classified” employees. *See* August 21 Order at 1. Following briefing and argument, this Court denied Plaintiffs’ motion for class action certification. *Id.*

Defendants argued, and the Court agreed, that an intra-class conflict defeated the typicality and adequacy requirements of Fed. R. Civ. P. 23(a) and certification of a class of current and former employees was, therefore, inappropriate. *Id.* at 23-29. “Specifically, the Court believes that there is a conflict of interest between the former 311-CCC employees and the current 311-CCC employees....” *Id.* at 23. Although the Interveners summarily conclude that they “share with the terminated Plaintiffs an interest in being ‘classified’ employees,” the Court found otherwise.

All Plaintiffs in the case at the time this Court denied Plaintiffs’ motion for class action certification were *former* 311 CCC employees. *Id.* at 2. This Court held that the former-employee Plaintiffs have a conflict with, and cannot adequately represent, the more than 60 current employees whom Plaintiffs sought to include in the class. The Court further held that

without the current employees, the potential class of 27 former employees was not large enough to satisfy Rule 23's numerosity requirement. *Id.* at 29-30.

Although the Court found the requirements of Rule 23 were not satisfied, it did indicate that it would be appropriate to adjudicate together, the claims of the former 311 CCC employees. Toward that end, it stated, "[b]ecause the Court finds that a class is inappropriate, and that it is not impracticable to join the other potential plaintiffs, the Court believes it is appropriate to grant the Plaintiffs time to join *additional terminated employees.*" *Id.* at 34 (emphasis added).

Despite the Court's clear instruction that Plaintiffs may add additional *terminated* employees to the litigation, Plaintiffs now attempt to end-run the Court's order, seeking "intervention" on behalf of additional *current* employees. Given that the Court found a conflict between current and former employees, and given that it granted Plaintiffs leave to amend their complaint to join additional *former* employees as plaintiffs, this motion is not only legally and procedurally inappropriate, but it is in contravention of the Court's order.

ARGUMENT

I. PLAINTIFFS CANNOT SATISFY FED. R. CIV. P. 24(A)'S REQUIREMENTS FOR INTERVENTION OF RIGHT

Fed. R. Civ. P. 24(a) provides:

On a timely motion, the court must permit anyone to intervene who:

....

(2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

The Interveners cannot meet this standard. They summarily conclude that they are entitled to intervention of right, however, they do nothing to explain how the standard of Fed. R.

Civ. P. 24(a) is met. *See* Mem. in Support of Mot. to Intervene, at 2-3 (Doc. 75). There is no indication whatsoever that the Intervener's ability to protect their interests would be impaired or impeded if this litigation is resolved without their involvement. In fact, the Interveners would not be bound by the decision, and could bring their own separate lawsuits.² *See Wheeler Peak, LLC v. L.C.I.2, Inc.*, No. CIV 07-1117 JB/WDS, 2010 WL 520552, at *4-5 (D.M. Jan. 25, 2010) (denying intervention as of right where intervener had another forum to adjudicate her claim).

The Interveners appear to ignore the standard of Fed. R. Civ. P. 24(a), and substitute their own standard. They state, "Interveners individual and personal interests in securing their overtime pay will not be represented in this case unless intervention is allowed." Mem. in Support of Mot. to Intervene at 4. (Doc. 75). This is irrelevant. There is of course no requirement that the Interveners' interests be represented in this lawsuit. Rather, the standard of Fed. R. Civ. P. 24(a) asks whether the Interveners' interests would be impaired or impeded if they are *not* allowed to intervene in this matter. They would not.

II. PLAINTIFFS CANNOT SATISFY FED. R. CIV. P. 24(B)'S REQUIREMENTS FOR PERMISSIVE INTERVENTION

Fed. R. Civ. P. 24(b) provides:

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

....

- (3) In exercising its discretion, the court must consider whether the intervention will unduly prejudice the adjudication of the original parties' rights.

² Defendants do not waive any right to assert any available defenses should the Interveners bring separate suit(s).

Thus, a movant may intervene as a matter of right if: “(1) the motion is timely, (2) the movant claims an interest relating to the property or transaction which is the subject of the action, (3) the movant’s interest may be impaired or impeded, and (4) the movant’s interest is not adequately represented by existing parties.” *Oklahoma ex rel. Edmondson v. Tyson Foods, Inc.*, No. 09-5134, 2010 WL 3637041, at *7 (10th Cir. Sept. 21, 2010).

Here, the motion to intervene is not timely. Under a scheduling order entered by the Court, Plaintiffs had until February 15, 2010 to join additional parties (Doc. 42). The Court, in its August 21 Order, granted Plaintiffs limited leave to join a specific and narrow group of individuals (*i.e.*, former 311 CCC employees). It did not grant carte blanche for others to join in the litigation, at this late stage, and following the deadline to join additional parties. It is also worth noting that Plaintiffs have already amended their pleading in a piecemeal fashion, joining additional Plaintiffs on October 8, 2009 (Docs. 19, 20), and February 18, 2010 (Docs. 35, 40).

Further, discovery has closed and it would prejudice Defendants and cause delay if the Interveners now join the lawsuit. Although the Interveners argue that there would be no prejudice because two additional Plaintiffs have recently joined the litigation, this ignores that the new Plaintiffs’ claims are different from those of the Interveners. The Interveners apparently focus on their misclassification claims, which do not apply to the new Plaintiffs.

Defendants have already filed a Motion for Summary Judgment, (Doc. 56), to which Plaintiffs have responded. Defendants’ Memorandum in Support laid out extensive facts and argument regarding the exempt status of Plaintiff Antoinette Gonzales. Whether an employee is exempt is a fact driven analysis, and if the Interveners were to join the litigation, seeking adjudication of their alleged misclassification claims, it would be a substantial setback in the discovery process, as these facts would need to be developed as to the four Interveners.

Defendants should not be forced to go back to square one and develop these facts, following the passage of the date to join parties, and following filing a motion for summary judgment.

Further, as explained above, the Interveners' interests will not be impaired if they do not join this litigation. They will not be bound by it and may bring their own lawsuit(s). Most importantly though, as explained below, the Court should exercise its discretion to deny the Interveners' motion because it ignores the letter and spirit of the Court's August 21 Order.

III. PLAINTIFFS' MOTION TO INTERVENE DIRECTLY CONTRAVENES THIS COURT'S ORDER

As explained above, this Court found a conflict of interest between former employees and current employees of the 311 CCC. All Plaintiffs were former employees, and the Court granted Plaintiffs permission to amend the Complaint to join additional *former* employee plaintiffs. Although Plaintiffs did not "join" current employees, the effect is the same. Essentially, the Interveners, *represented by the same counsel as Plaintiffs*, ignore the Court's August 21 Order and attempt to bring current employees into the litigation through the back-door.

Indicative of the fact that the Interveners wholly ignore the part of the Court's August 21 Order which finds a conflict between current and former employees and allows joinder of *only former* employees, the Interveners state they, "have concluded that despite their status as current employees [the Interveners] share Plaintiffs' claim to a property interest in their employment." Mot. to Intervene at ¶ 4. In fact, current and former employees *do not* share an interest. This Court explicitly held that "terminated 311-CCC employees have a conflict of interest with current 311-CCC employees...." August 21 Order at 1. Further, although the Interveners' motion alleges that they are entitled to relief, *see* Motion to Intervene at ¶ 6, Plaintiffs through

the same counsel that now represents the Interveners, conceded at oral argument that the current employees and former employees would not be seeking the same relief. August 21 Order at 10.

Despite extensive oral argument and briefing, there was never, at any time, discussion of intervention on behalf of current employees. Moreover, the Interveners are supervisors, and there was no indication at oral argument from Plaintiffs that counsel would attempt to litigate this case on behalf of additional supervisors. In fact, a major part of the Interveners' Complaint in Intervention, centers on their alleged misclassification claim. *See* Complaint in Intervention ¶¶ 5-13. Finally, because there is a conflict of interest between current and former employees, the City also has concerns about the same counsel representing current and former employees in the same litigation. If Plaintiffs' motion to intervene is granted, the City has concerns that Plaintiffs' counsel, Mr. Livingston, would run afoul of his ethical obligations to both groups.

The Interveners' Motion is nothing more than an attempt to derail this case. Defendants consider it inappropriate under all the circumstances that, after argument and briefing on the class certification issue, the Court's order on joinder, and the passage of the deadline to join additional Parties, Plaintiffs' counsel now attempts to add new individuals to this lawsuit. This Motion is nothing more than an attempt to end-run the Court's August 21 Order.

CONCLUSION

For the reasons explained herein, Defendants respectfully request that the Court deny the Interveners' Motion to Intervene.

Respectfully Submitted

CITY OF ALBUQUERQUE

Robert J. Perry
City Attorney

s/ Edward W. Bergmann

Michael I. Garcia
City of Albuquerque Legal Department
P.O. Box 2248
One Civil Plaza
Albuquerque, New Mexico 87102

Edward W. Bergmann
Seyfarth Shaw LLP
131 S. Dearborn Street
Chicago, Illinois 60603
312-460-5000

I HEREBY CERTIFY that on the 5th day of October, 2010, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means:

Paul Livingston
Attorney for Plaintiffs
P.O. Box 250
Placitas, NM 87043

s/ Edward W. Bergmann