UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

H. CRISTINA CHEN-OSTER, LISA PARISI, SHANNA ORLICH, ALLISON GAMBA, and MARY DE LUIS,

Plaintiffs,

-against-

GOLDMAN, SACHS & CO. and THE GOLDMAN SACHS GROUP, INC.,

Defendants.

10 Civ. 6950 (AT) (JCF)

ORDER

ANALISA TORRES, District Judge:

In this employment discrimination case, Plaintiffs, H. Christina Chen-Oster, Lisa Parisi, Shanna Orlich, Allison Gamba, and Mary De Luis, allege that their former employer, Defendants Goldman, Sachs & Co. and the Goldman Sachs Group, Inc. (collectively, "Goldman Sachs"), violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"), and the New York City Human Rights Law, N.Y.C. Admin. Code § 8-101 *et seq.* ("NYCHRL"), by systematically disfavoring female employees and denying them equal compensation and advancement opportunities based on their gender. Defendants moved to dismiss Gamba's and De Luis' claims for injunctive and declaratory relief. ECF Nos. 441, 457. By order dated April 12, 2017, the Court denied Defendants' motion. ECF No. 479 (the "Order"). Defendants now move to certify for interlocutory appeal two issues raised in the Order. ECF No. 484.

For the reasons stated below, Defendants' motion is GRANTED. The following questions are certified for interlocutory appeal: (1) whether former employees lack standing to seek injunctive or declaratory relief against their former employer, and (2) whether a former

employee who has not alleged unlawful discharge can seek the remedy of reinstatement under Title VII.[1]

BACKGROUND

The relevant facts and prior proceedings are set forth in the Order and familiarity is presumed. *See* Order 1-4. In their motions to dismiss, Defendants argued that, pursuant to the Supreme Court's holding in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), Gamba and De Luis lack standing to seek injunctive and declaratory relief because they no longer work for Goldman Sachs. The Court disagreed, holding that a former employee may have standing to sue where she is seeking reinstatement and would face the same allegedly discriminatory policy once reinstated. Order 5-11. The Court also concluded that Gamba and De Luis may plausibly seek reinstatement even if they fail to allege unlawful discharge. Order 12-14.

DISCUSSION

I. Legal Standard

Pursuant to the three-pronged test set forth in 28 U.S.C. § 1292(b), a district court may certify an order for interlocutory appeal where: (1) "[the] order involves a controlling question of law," (2) "as to which there is substantial ground for difference of opinion," and (3) "an immediate appeal from the order may materially advance the ultimate termination of the litigation." *See also Flo & Eddie, Inc.*, 2015 WL 585641, at *1. The moving party bears the burden of establishing the three factors. *Bellino v. JPMorgan Chase Bank, N.A.*, 14 Civ. 3139, 2017 WL 129021, *1 (S.D.N.Y. Jan. 13, 2017). Because interlocutory appeals are strongly disfavored, "only 'exceptional circumstances [will] justify a departure from the basic policy of

[1] Following the practice of other courts in this Circuit, the Court has identified controlling questions of law to certify to the Second Circuit, but the Court acknowledges that the "the statutory procedure specifies appeal of the order, rather than certification of the questions." *Flo & Eddie, Inc. v. Sirius XM Radio Inc.*, No. 13 Civ. 5784, 2015 WL 585641, at *3 (S.D.N.Y. Feb. 10, 2015) (quoting *United States v. Banco Cafetero Panama*, 797 F.2d 1154, 1157 (2d Cir. 1986)).

postponing appellate review until after the entry of a final judgment.'" *Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro In Amministrazione Straordinaria*, 921 F.2d 21, 25 (2d Cir. 1990) (alteration in original) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978)).

II. Application

a. Controlling Question of Law

There is a controlling question of law when: "(1) reversal of the district court's opinion could result in dismissal of the action, (2) reversal of the district court's opinion, even though not resulting in dismissal, could significantly affect the conduct of the action, or (3) the certified issue has precedential value for a large number of cases." *Flo & Eddie, Inc.*, 2015 WL 585641, at *1 (quoting *In re Lloyd's Am. Trust Fund Litig.*, No. 96 Civ. 1262, 1997 WL 458739, at *4 (S.D.N.Y. Aug. 12, 1997)); *see also Klinghoffer*, 921 F.2d at 24.

This first prong weighs in favor of interlocutory appeal. Whether a former employee seeking reinstatement under Title VII has standing to seek injunctive or declaratory relief in a Title VII action is a threshold question that affects the scope of remedies sought in this lawsuit, which would significantly "affect the conduct of the action." *See Bellino*, 2017 WL 129021, at *2. Similarly, whether a former employee can seek reinstatement when the party has not alleged a wrongful discharge is a controlling question of law that could alter "the conduct of the action." *Cf. Kubicek v. Westchester County*, 08 Civ. 372, 2013 WL 5423961, at *9 (S.D.N.Y. Sept. 27, 2013). In addition, as discussed below, there is growing disagreement on this issue, and "[r]eceiving authoritative guidance from the Second Circuit . . . will help resolve [similar] actions quickly and consistently." *Flo & Eddie, Inc.*, 2015 WL 585641, at *2.

b. Substantial Ground for Difference of Opinion

A substantial ground for difference of opinion exists where "(1) there is conflicting authority on the issue, or (2) the issue is particularly difficult and of first impression for the Second Circuit." *In re Goldman Sachs Group, Inc. Securities Litigation*, 10 Civ. 3461, 2014 WL 5002090, at *3 (S.D.N.Y. Oct. 7, 2014) (quoting *Capital Records, LLC v. Vimeo, LLC*, 972 F.Supp.2d 537, 551 (S.D.N.Y. 2013)). "Mere conjecture that courts would disagree on the issue" is insufficient. *Bellino*, 2017 WL 129021, at *3. Instead, "there must be substantial doubt that the district court's order was correct." *Century Pacific, Inc. v. Hilton Hotels Corp.*, 574 F. Supp. 2d 369, 372 (S.D.N.Y. 2008) (quoting *SPL Shipping Ltd. v. Gujarat Cheminex Ltd.*, No. 06 Civ. 15375, 2007 WL 1119753, at *2 (S.D.N.Y. Apr. 12, 2007)) (internal quotation marks omitted).

There is a substantial ground for difference of opinion on the issue of whether *Wal-Mart* "categorically foreclosed former employees from seeking injunctive and declaratory relief." Order 10. Courts in this circuit have found that a former employee seeking reinstatement has standing to seek prospective relief, *see, e.g.*, *Kassman v. KPMG LLP*, 925 F. Supp. 2d 453, 466 (S.D.N.Y. 2013), and that a former employee may be granted reinstatement without alleging wrongful discharge, *see, e.g.*, *Muller v. Costello*, 187 F.3d 298, 315 (2d. Cir 1999) (finding that "reinstatement and back pay may be ordered to remedy unlawful retaliation" where plaintiff's "retaliation claim was not limited to his discharge but could include any adverse actions throughout his employment"); *Shea v. Icelandair*, 925 F. Supp. 1014, 1033-34 (S.D.N.Y. 1996) (granting reinstatement to make plaintiff whole by returning him "to the same position as if he had never been subject to adverse employment action.").

However, Defendants are correct that courts outside this circuit have held to the contrary. For instance, although the Ninth Circuit held in 2011 that "only current employees have standing

to seek injunctive relief," *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 988 (9th Cir. 2011), district courts have continued to apply a 2006 Ninth Circuit case that recognized the reinstatement exception, *see, e.g.*, *Furtado v. United Rentals Inc.*, 14 Civ. 4258, 2015 WL 4452502, at *7 (N.D. Cal. Jul. 20, 2015) ("In [*Walsh v. Nev. Dept. of Human Resources*, 471 F.3d 1033, 1037 (9th Cir. 2006)], the Ninth Circuit held that a former employee with no indication in her complaint that she wanted to return to work with the defendant could not satisfy the requirement that she is 'likely to be redressed by the relief she seeks.'"). The Eleventh Circuit has similarly held that a former employee lacks standing to bring prospective relief because the injury is too tenuous and hypothetical. *Drayton v. W. Auto Supply Co.*, No. 01-10415, 2002 WL 32508918, at *4 (11th Cir. Mar. 11, 2002) (citing *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1007 (11th Cir. 1997)).

There is also substantial disagreement as to whether wrongful discharge is necessary for a claim of reinstatement. *See, e.g.*, *Taylor v. FDIC*, 132 F.3d 753, 767 (D.C. Cir. 1997) ("Similarly, wrongful discharge (either actual or constructive) is a necessary element of a claim for reinstatement—discrimination and voluntary resignation are not enough."); *EEOC v. L.B. Foster Co.*, 123 F. 3d 746, 755 (3d Cir. 1997) (same); *Feit v. Ward*, 886 F.2d 848, 857 (7th Cir. 1989) (same).

Accordingly, there is conflicting authority on these issues, which have not been squarely addressed by the Second Circuit since *Wal-Mart*. There exists, therefore, a substantial ground for difference of opinion.

c. Materially Advance the Ultimate Termination of the Litigation

In determining whether certification will materially advance the ultimate termination of the litigation, "courts must consider the institutional efficiency of both the district court and the

appellate court." *Tocco v. Real Time Resolutions, Inc.*, No. 14 Civ. 810, 2015 WL 5086390, at *2 (S.D.N.Y. Mar. 4, 2015). Out of the three factors, this prong is given more weight by the courts. *Transp. Workers Union of Am. v. N.Y.C. Transit Auth.*, 358 F. Supp. 2d 347, 350 (S.D.N.Y. 2005).

Were the Second Circuit to reverse the Order, finding that Plaintiffs lack standing to bring the 23(b)(2) action, the parties would be saved from the burden of having to go through an extensive discovery process. *See Flaherty v. Filardi*, No 03 Civ. 2167, 2007 WL 1827841, at *1 (S.D.N.Y. June 26, 2007) ("In determining whether the third requirement has been satisfied, district courts should consider whether an appeal would 'literally accelerate the action as a whole.'" (quoting *Genentech, Inc. v. Novo Nordisk A/S*, 907 F. Supp. 97, 100 (S.D.N.Y. 1995))). The parties have not completed meaningful discovery of Defendants' current policies and practices, and the need to do so would be obviated should the Second Circuit reverse. Discovery on the complex matters presented here would be burdensome, lengthy, and costly. *In re Lloyd's Am. Trust Fund Litig.*, 1997 WL 458739, at *4 ("Because the district court's efficiency concerns are greatest in large, complex cases, certification may be more freely granted in so-called 'big' cases."). Finally, although the parties would also have an opportunity pursuant to Rule 23(f) to seek appellate review following this Court's decision on class certification, immediate interlocutory appeal will "remove a cloud of legal uncertainty" over these proceedings and may "significantly affect the parties' bargaining positions and may hasten the termination of this litigation through settlement." *Fed. Hous. Fin. Agency v. UBS Americas, Inc.*, 858 F. Supp. 2d 306, 338 (S.D.N.Y. 2012).

This last prong, therefore, weighs in favor of interlocutory appeal.

III. Stay Pending Appeal

"The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Flo & Eddie, Inc.*, 2015 WL 585641, at *4 (quoting *Nederlandse Erts-Tankersmaatschappij, N.V. v. Isbrandtsen Co.*, 339 F.2d 440, 441-42 (2d Cir. 1964)).

The Court finds that a stay of all further proceedings is not necessary. There remains a considerable number of independent issues that should proceed while awaiting the Second Circuit's decision. Accordingly, consideration of injunctive and declaratory relief is stayed and all other issues—including the forthcoming briefing addressing the Honorable James C. Francis IV's Report and Recommendation as to Rule 23(b)(3) Class Certification and Judge Francis' Memorandum and Order Concerning *Daubert* and Evidentiary Motions—shall proceed.

To the extent the parties believe that a broader stay would be appropriate, they may raise the issue by joint letter-motion at any time.

CONCLUSION

For the reasons stated above, Defendants' motion is GRANTED and the Order at ECF No. 479 is certified for interlocutory appeal. Defendants shall have ten days from the entry of this order to apply to the Second Circuit for leave to proceed with the appeal.

The Clerk of Court is directed to terminate the motion at ECF No. 484.

SO ORDERED.

Dated: June 14, 2017
New York, New York

ANALISA TORRES
United States District Judge