

FILED

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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Davis, J., dissenting:

The majority opinion found that the circuit court erred by refusing to permit discovery on the issue of class certification in this case.¹ I disagree, and therefore respectfully dissent.

The majority noted that “where issues related to class certification are present, reasonable discovery related to class certification issues is appropriate.” Maj. op. at 6. I agree that there is certainly ample authority for granting discovery on the issue of class certification. Indeed, “[c]ourts may permit discovery on the single issue of certification if it is shown to be desirable.” Franklin D. Cleckley, Robin J. Davis & Louis J. Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure* 474 (2002) (footnote omitted). *See, e.g., DeBruyne v. Equitable Life Assur. Soc’y*, 920 F.2d 457, 462 (7th Cir. 1990) (relating district court proceedings and acknowledging that district court had granted

¹The majority did not express an opinion as to whether the granting of class action status would ultimately be appropriate in this case.

request to conduct discovery of class certification issues).²

Importantly, however, the circuit court has discretion as to whether to allow discovery on the issue of class certification. *See Stewart v. Winter*, 669 F.2d 328, 331 (5th Cir. 1982) (“Whether discovery will be permitted in connection with a motion for a class certification determination ‘lies within the sound discretion of the trial court.’” (quoting *Kamm v. California City Dev. Corp.*, 509 F.2d 205, 209) (9th Cir. 1975))). Under the particular facts of this case, I do not believe the circuit court abused that discretion as Ms. Love failed to demonstrate that she would adequately protect the interests of the class as required by Rule 23(a)(4) of the West Virginia Rules of Civil Procedure. It has been explained that “[a]dequacy of representation’ means that the class representative has common interests with unnamed class members and will *vigorously prosecute the interests of the class* through qualified counsel.” *Piazza v. Ebsco Indus., Inc.*, 273 F.3d 1341, 1346 (11th Cir. 2001) (emphasis added). In this case there was clearly no attempt to vigorously prosecute the interests of the class. “Failure to timely move for certification of a class ‘bears

²Due to the similarities between our Rules of Civil Procedure and the Federal Rules, we often look to decisions of the Federal Courts interpreting their rules as persuasive authority on how to apply our own rules. *See State ex rel. Ball v. Cummings*, 208 W. Va. 393, 399, 540 S.E. 2d 917, 923 (1999) (observing the substantial similarity between West Virginia Rule of Civil Procedure 24(a)(2) and Federal Rule of Civil Procedure 24(a)(2), and commenting that, due to this similarity “‘we follow our usual practice of giving substantial weight to federal cases in determining the meaning and scope of our rules of civil procedure.’” (quoting *Lawyer Disciplinary Bd. v. Cunningham*, 195 W. Va. 27, 33 n.11, 464 S.E.2d 181, 187 n.11 (1995) (additional citation omitted))).

strongly on the adequacy of representation that those class members might expect to receive.”” *In re Folding Carton Antitrust Litig.*, 88 F.R.D. 211, 214 (N.D. Ill. 1980) (quoting *East Texas Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 405, 97 S. Ct. 1891, 1897, 52 L. Ed. 2d 453 (1977)). In this case there was a lapse of approximately four-and-one-half years during which there was no action in the case, other than the withdrawal of one of the plaintiffs in 1998. This represents a plain failure to adequately protect the interests of the class.³ Other courts have denied class certification under comparable circumstances. *See McCarthy v. Kleindienst*, 741 F.2d 1406, 1412 (D.C. Cir. 1984) (commenting, in case where motion for certification was filed three years after suit was filed, “we believe it was within the District Court’s broad discretion to rely upon the untimeliness of the class certification motion, and the unfavorable consequences caused by the delay, as grounds for denying

³This delay is made more troublesome by the fact that, during the period of delay, the Georgia-Pacific factory where Ms. Love was employed was closed, along with several other of its plants in West Virginia, relevant corporate records were moved and stored in various places, and many Georgia-Pacific employees were laid off or resigned. To the extent that there may be a requirement of prejudice caused by the delay, I believe these factors adequately demonstrate prejudice. *Compare In re Folding Carton Antitrust Litig.*, 88 F.R.D. 211, 214 (“Plaintiffs argue that untimeliness cannot justify denial of certification unless defendants can prove that they were prejudiced by the delay [The cases cited by Plaintiffs], however, were decided before *East Texas Motor Freight v. Rodriguez*, 431 U.S. 395, 97 S. Ct. 1891, 52 L. Ed. 2d 453 (1977), which did not require a showing of prejudice, and in light of the Supreme Court’s holding in that case, cannot be considered controlling.” (internal citations omitted)), *with Stolz v. United Bhd. of Carpenters and Joiners of Am.*, 620 F. Supp. 396, 402 (D. Nev. 1985) (“[I]t appears that a delay in filing the motion alone will not be cause for denial of certification. There must also be a showing that the delay has somehow prejudiced the party opposing the motion.” (citations omitted)), and *Sanders v. Faraday Labs., Inc.*, 82 F.R.D. 99, 102 (E.D.N.Y. 1979) (“We recognize the general principle that delay in seeking certification should not, absent other compelling circumstances, result in denial of certification.” (citations omitted)).

certification.”); *In re Folding Carton Antitrust Litigation*, 88 F.R.D. 211 (finding inadequate representation where motion to certify was filed more than four-years after the start of the litigation and two and one-half years from the court’s denial of an earlier motion to certify); *Sanders v. Faraday Labs., Inc.*, 82 F.R.D. 99, 103 (E.D.N.Y. 1979) (finding denial of class certification appropriate as delay of four years and eleven months “together with plaintiff’s failure to complete discovery and the potential change in class membership, . . . poses a substantial risk of misleading potential class members in the belief that their claims . . . were being vigorously pressed and their interests protected.”) (footnote omitted). *See also East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 404-05, 97 S. Ct. 1891, 1897, 52 L. Ed. 2d 453, 463 (finding class action status not proper on other grounds, but commenting that plaintiffs’ failure to move for class certification prior to trial was a “strong indicat[ion]” that plaintiffs would not “fairly and adequately protect the interests of the class.” (quoting from Fed. R. Civ. P. 23(a)). Due to the plaintiffs utter failure for more than four years to pursue this case, or to take any action to protect the interests of the putative class, I cannot conclude that the circuit court abused its discretion either by denying discovery or by declining to grant class certification.

In view of the foregoing, I dissent. I am authorized to state that Justice Maynard joins me in this dissenting opinion.