UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KHALIL NOURI, *et al.*,

Plaintiffs,

v.

THE BOEING COMPANY,

Defendant.

No. C99-1227L

ORDER DENYING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Plaintiffs seek certification of a class of "all current and former Asian American employees who have been employed at Boeing's facilities in the State of Washington as salaried employees below the level of first level manager at any time from July 29, 1996 through the present" under Fed. R. Civ. P. 23. Plaintiffs have asserted race and national origin discrimination claims against Boeing under Title VII and 42 U.S.C. § 1981.[1] In particular, plaintiffs allege that the delegation of hiring, promotion, and layoff decisions to first level managers, the use of primarily subjective criteria in making those decisions, and the use of "totem" groups to evaluate and rank employees has created statistically significant disparities between the salaries and promotion rates of potential class members and the rest of the Boeing

[1] Although plaintiffs acknowledge that any Title VII claim which arose prior to September 10, 1997, is time barred, they are seeking certification of a class period that coincides with their 42 U.S.C. § 1981 claims. As discussed in this Court's Order Denying Defendant's Motion to Strike Certain Claims Under 42 U.S.C. § 1981, of even date, section 1981 claims arising prior to October 12, 1996, are barred.

152

work force.[2]

Plaintiffs seek to certify a class of employees covering four groups or "paycodes:" engineers who are exempt from the Fair Labor Standards Act ("FLSA") (paycode 4), technical employees who are covered by the FLSA (paycode 2T), general salaried employees who are covered by the FLSA (paycode 2), and general salaried employees who are exempt from the FLSA (paycode 6). The engineers and technicians are represented by the Seattle Professional Engineering Employees' Association ("SPEEA") and are subject to collective bargaining agreements. Employees in paycodes 2 and 6, on the other hand, are unrepresented. The specific employees plaintiffs seek to represent within those four paycodes are "Asian Americans" employed in this state during a specific time period. For purposes of this motion, plaintiffs define "Asian American" to include any individual born in or who claims national origin from a country on the continent of Asia, with the exception of Russia and Turkey.[3] The named plaintiffs are all members of SPEEA, have worked predominately in the Puget Sound area, were employed for significant portions of the class period, and have identified themselves as Iranian, Indian, Cambodian, and Afghani.[4]

---

[2] The status of plaintiffs' discrimination claims regarding the assignment of retention ratings and their impact on layoffs is not clear. Plaintiffs acknowledge that the statistical evidence may not support such a claim. Plaintiffs' Reply at 10 n.15.

[3] The following 48 countries or political units may be represented in the class: Afghanistan, Armenia, Azerbaijan, Bahrain, Bangladesh, Bhutan, Brunei, Cambodia, China, Cyprus, Georgia, Hong Kong, India, Indonesia, Iran, Iraq, Israel, Japan, Jordan, Kazakhstan, North Korea, South Korea, Kuwait, Kyrgyzstan, Laos, Lebanon, Macao, Malaysia, the Maldives, Mongolia, Myanmar, Nepal, Oman, Pakistan, the Philippines, Qatar, Saudi Arabia, Singapore, Sri Lanka, Syria, Taiwan, Tajikistan, Thailand, Turkmenistan, the United Arab Emirates, Uzbekistan, Vietnam, and Yemen. All individuals from Russia and Turkey have been excluded from the class definition because those two countries extend across both Asia and Europe, making it difficult to identify an individual as "European" or "Asian."

[4] See Plaintiffs' Memorandum at 4-10.

Plaintiffs seek class certification under Fed. R. Civ. P. 23. Pursuant to Rule 23(a), members of a class may sue or be sued as representative parties if:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Title VII contains no special authorization for class-wide relief for private parties. Class actions brought under Title VII, "like any other class action, may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." General Telephone Co. v. Falcon, 457 U.S. 147, 161 (1982). Each of the rule's prerequisites is considered below.

(1) Numerosity

Plaintiffs allege, and defendants do not contest, that there are thousands of individuals who fall within the proposed class. Joinder of that many parties is practically impossible. Numerosity is established.

(2) Commonality

Pursuant to Fed. R. Civ. P. 26(a)(2), there must be questions of law and/or fact common to the proposed class in order to justify certification. Not all of the triable questions need be common, however. As long as there are some substantial questions which, if tried separately, would have to be answered as to each potential class member, this element is satisfied. See Walters v. Reno, 145 F.3d 1032, 1045-46 (9th Cir. 1998), cert. denied, 526 U.S. 1003 (1999). As the class was initially posited, there are common questions of both law and fact in this matter, such as:

a) Whether the hiring, promotion, and retention rating/layoff processes are so subjective that they show intentional discrimination under the disparate treatment analysis. See, e.g., Texas Dept. of Community Affairs v.

Burdine, 450 U.S. 248, 253 (1981).

b) Whether the hiring, promotion, and retention rating/layoff processes are so subjective that they "have effects that are indistinguishable from intentionally discriminatory conduct" under the disparate impact analysis. See, e.g., Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 990 (1988).

c) Whether there are statistically significant disparities between Boeing's treatment of class members and non-class members in hiring, promotions, and/or retention ratings/layoffs.

d) The effect of the various statutes of limitation.

(3) Typicality

Although typicality is often viewed as a restatement of the commonality requirement (see, e.g., Falcon, 457 U.S. at 157 n.13), in the context of this case, the Court is concerned that the claims of the representative parties are not typical of the claims of the class.[5] Plaintiffs have presented statistics which purport to show significant disparities based on a comparison of "Asians" with non-"Asians." As noted above, the term "Asians" is defined very broadly to include all individuals born in or otherwise originating from any of the 48 countries that comprise the continent of Asia. The named plaintiffs, however, hail from or otherwise identify themselves with only four of those countries, namely Iran, India, Cambodia, and Afghan.

The extraordinary variety of persons included in the proposed class raises concerns that the named plaintiffs' claims may be susceptible to attacks, or in the alternative may be successful, on grounds that are not applicable to others in the proposed class. Statistical analyses

---

[5] Contrary to defendant's argument, the fact that the named plaintiffs have asserted individual claims during their EEOC proceedings or in this litigation does not preclude class certification. See, e.g., Probe v. State Teachers' Retirement Sys., 780 F.2d 776, 780 (9th Cir.) (citing Fed. R. Civ. P. 23(c)(4)), cert. denied, 476 U.S. 1170 (1986).

tied to individual nationalities may reveal disparities which do not fit the overall contours of plaintiffs' class. For example, there is no reason to assume, and plaintiffs have offered no evidence to suggest, that a particular nationality, such as the Israelis, the Taiwanese, or the Uzbeks, has been adversely affected by the policies and practices of which they complain. With regard to any one or more nationalities, Boeing may be able to rebut whatever presumption of discrimination arises out of plaintiffs' continent-wide statistical showing. In light of this very real possibility, the typicality of the named plaintiffs' claims remains in doubt.[6] Plaintiffs have not met their burden of showing that their claims are typical of the diverse class they seek to represent.

(4) Adequate Representation

One of the main goals of Fed. R. Civ. P. 23 is to "focus court attention on whether a proposed class has sufficient unity so that absent members can fairly be bound by decisions of class representatives." Amchem Prod., Inc. v. Windsor, 521 U.S. 591, 621 (1997). A class defined by the contours of a geographic continent, rather than by any identifiable characteristics, cultural similarities, or sense of class identity, raises serious doubts regarding the unity of the class. In conjunction with some of the statements made by the proposed class representatives, the Court finds that the named plaintiffs would not be adequate representatives for the large and diverse group of individuals on whose behalf they want to pursue this litigation.

The lack of representatives from the vast majority of the national origins and races the named plaintiffs hope to represent is of grave concern. While courts have been willing to certify classes that include different races and/or national origins, in those cases the named plaintiffs generally reflect the diversity of the class being represented (see, e.g., Domingo v.

---

[6] While the typicality requirement does not mean that the representatives' claims must be identical to the rest of the putative class (see Hanlon v. Chrysler Corp., 150 F.3d 1011, 1020 (9th Cir. 1998)), where the named plaintiffs' claims may succeed or fail on grounds which may not apply to the rest of the class, the claims are not typical.

New England Fish Co., 727 F.2d 1429 (9th Cir. 1984) (Filipinos and Native Alaskans served as class representatives and represented the only minority groups employed by defendant)), the class' commonality rests to a large extent on some characteristic other than race/national origin (see Doe v. Los Angeles Unified Sch. Dist., 48 F. Supp. 2d 1233 (C.D. Cal. 1999) (class was unified by limited proficiency in English)), or the context of the case assures the court that the absent class members will be adequately represented. Such is not the case here. As noted above, only a few of the nationalities and races included within the proposed class are represented by the named plaintiffs. The theoretical concerns raised by that bare fact are heightened by the depositions of the named plaintiffs, which reflect no obvious sense of class consciousness, cohesiveness, or identity that transcends the various ethnic and cultural divisions apparent throughout Asia. In some instances, it is clear that the named plaintiffs do not know or care about the plight of other racial or ethnic groups at Boeing or may actually be antagonistic toward some of the very races or nationalities they are now asking to represent. See Golchin Dep. at 31:5 - 32:8 and 250:2-24; Lavi Dep. at 158:10 - 180:25; Namini Dep. at 21:20 - 25:2; Nouri Dep. at 211:22 - 212:14; Rizvi Dep. at 208:5 - 212:21; Taing Dep. at 68:3-25 and 84:19 - 85:8.

In addition, although the named plaintiffs have defined a class of persons with whom they share some generalized employment-related characteristics, their ability to represent otherwise distinct groups from locations with which they are not familiar is doubtful. See Golchin Dep. at 266:1 - 267:2; Lavi Dep. at 371:1 - 372:1; Nouri Dep. at 238:15-23; Rizvi Dep. at 214:5-15; Taing Dep. at 158:10-17. The named plaintiffs have not adequately explained, for example, how they, as unionized employees subject to the terms of a collective bargaining agreement, can accurately and fully litigate the work environment and hiring/promotion/layoff practices to which non-represented class members were subjected. See, e.g., Falcon, 457 U.S. at 156-58 (representative must possess the same interest and suffer the same injury as the class

members). Based on the record before it, the Court cannot conclude that the named plaintiffs will adequately represent the interests of the absent class members.

In light of the foregoing, the Court need not determine whether plaintiffs would be able to maintain a class under Fed. R. Civ. P. 23(b)(2) or (b)(3). Because plaintiffs have failed to establish typicality and adequate representation under Fed. R. Civ. P. 23(a), their motion for class certification is hereby DENIED. The class allegations in the Consolidated Amended Complaint are hereby STRICKEN.

DATED this 24th day of May 2001.

Robert S. Lasnik
United States District Judge