THE HONORABLE ROBERT S. LASNIK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KHALIL NOURI, et al.,

Plaintiffs,

v.

THE BOEING COMPANY, a Delaware corporation,

Defendant.

NO. C99-1227L

DEFENDANT'S MOTION TO DECERTIFY CLASS

NOTE FOR MOTION CALENDAR:
Friday, April 2, 2004

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I. INTRODUCTION

Pursuant to Fed. R. Civ. P. 23(c)(1)(C), Boeing respectfully requests that the Court decertify the class in this case. The class was certified based on the Court's understanding that plaintiffs were seeking to litigate "over-arching, systemic issues that are applicable to all class members with little if any variation between individuals." Order Denying Plaintiffs' Renewed Motion for Class Certification (Dkt #209) at 4. At this stage, however, it is plain that plaintiffs propose a proceeding mired in the details of 1,850 individual claims for compensatory and punitive damages and back pay. Even if plaintiffs succeeded in establishing pattern and practice liability during an initial trial phase, the remaining portion of the liability phase would be unmanageable. The proceedings would devolve into individualized examinations of thousands of compensation and retention rating decisions for employees from seven different nationalities, in two different paycodes, over a period of nearly eight years. No constitutionally sound procedural mechanism exists to avoid this inescapable reality. Further, the damages phases of this case, however constituted, must permit Boeing to challenge the extent to which any individual was harmed by numerous compensation or retention decisions, each of which would likely involve numerous and changing comparators over time. Common questions plainly will not predominate, and the class action device will create no meaningful efficiencies. The class should therefore be decertified in its entirety.

In addition, portions of the class are separately unmaintainable at this stage because the class representatives for two of the ethnicities are demonstrably inadequate. Specifically, the complaints of Bao Trinh, the Vietnamese representative, relate exclusively to his initial placement at the company, and he has no actionable complaints regarding his retention rating or compensation, the only two class claims certified. Raul Aballe, the Filipino representative, concealed this lawsuit as an asset in his bankruptcy proceeding, and

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therefore is judicially estopped from pursuing his claim for monetary relief now. He also has no claim for injunctive relief because he is no longer employed at Boeing and does not seek reinstatement. For these reasons, the Vietnamese and Filipino representatives are not adequate and their claims are not typical. These portions of the class are separately unmaintainable as class claims and should be decertified.

II. ARGUMENT

A. THE CLASS SHOULD BE DECERTIFIED BECAUSE IT DOES NOT MEET THE REQUIREMENTS OF RULE 23(b)(3).

In ruling on a motion to decertify a class, the court should apply the same standard as used in evaluating a motion to certify. O'Connor v. Boeing N. Am., Inc., 197 F.R.D. 404, 410 (C.D. Cal. 2000). As Plaintiffs' Motion to Bifurcate Trial makes even more clear, plaintiffs do not meet the requirements for class certification under Rule 23(b)(3). Their proposed trial plan unmistakably illustrates: (1) that common questions of law and fact do not predominate over issues facing only individual members of the class, and (2) that a class action is not superior to other available methods. Fed. R. Civ. P. 23(b)(3). The class should be decertified.

1. Common Questions Do Not Predominate.

Although the Court may have allowed plaintiffs the benefit of all possible favorable inferences with respect to the predominance requirement after plaintiffs' third attempt at class certification, plaintiffs' proposed trial plan now definitively establishes that common issues do not predominate. For common questions of law or fact to predominate over individualized questions "'the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, must predominate over those issues that are subject only to individualized proof.'" Rutstein v. Avis Rent-A-Car Sys., 211 F.3d 1228, 1233 (11th Cir. 2000) (citations omitted). Predominance does not exist where an analysis of

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"plaintiffs' claims will require distinctly case-specific inquiries into the facts surrounding each alleged incident of discrimination." Jackson v. Motel 6 Multipurpose, Inc., 130 F.3d 999, 1006 (11th Cir. 1997); see also Reid v. Lockheed Martin Aero. Co., 205 F.R.D. 655, 683-85 (N.D. Ga. 2001); Reap v. Cont'l Cas. Co., 199 F.R.D. 536, 548-49 (D.N.J. 2001); Robertson v. Sikorsky Aircraft, 2001 U.S. Dist. LEXIS 11662, *32 (D. Conn. July 5, 2001). With respect to liability, this certainly is the case here. Even if plaintiffs can show proof of a discriminatory pattern and practice in the liability phase, this would establish only a rebuttable presumption that any individual employment decision was discriminatory. International Bhd. of Teamsters v. United States, 431 U.S. 324, 359 n.45, 361, 362 (1977). Boeing would then have "the right to demonstrate that it would have treated any given member of the plaintiff class exactly as it did absent the discrimination." Reid, 205 F.R.D. at 684. The jury would be required to assess Boeing's idiosyncratic defenses for each compensation and retention rating decision over several years for thousands of individuals (plaintiffs and comparators alike). See Allison v. Citgo Petroleum Corp., 151 F.3d 402, 420 (5th Cir. 1998); Motel 6, 130 F.3d at 1006; see also Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1189 (9th Cir. 2001), as amended by 273 F.3d 1266.

With respect to damages, a similarly intractable problem exists. Here plaintiffs seek compensatory and punitive damages, both of which would require highly individualized testimony to determine each classmember's right to each type of damages. Determination of emotional distress damages requires examination of "what kind of discrimination was each plaintiff subjected to; how did it affect each plaintiff emotionally and physically, at work and at home; what medical treatment did each plaintiff receive and at what expense; and so on and so on." Allison, 151 F.3d at 419; see also Williams v. Owens-Ill., Inc., 665 F.2d 918, 929 (9th Cir. 1982), modified on other grounds, 1982 U.S. App. LEXIS 18481 (9th Cir. June 11, 1982). Determination of punitive damages is likewise extremely individualized.

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The jury would have to hear hundreds of hours of testimony to determine who, if anyone, suffered actual harm due to intentional willful discrimination, and in what amount, before it could make a reasoned assessment of punitive damages awards. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 580-81 (1996); Allison, 151 F.3d at 419; Reid, 205 F.R.D. at 682-86. Obviously, jury deliberations regarding entitlement to and amount of punitive and compensatory damages for each individual classmember would focus almost entirely on facts and issues specific to individuals rather than the class as a whole. Allison, 151 F.3d at 417, 418-19; Reid, 205 F.R.D. at 684; Robertson, 2001 U.S. Dist. LEXIS 11662, at *27, *32-33; Faulk v. Home Oil Co., 186 F.R.D. 660, 664 (M.D. Ala. 1999).[1]

The backpay determination presents a similar problem, although for Title VII claims, the Court, not a jury, would face this issue. Where, as here, separate employment actions underlie plaintiffs' claims, determination of backpay requires individualized inquiries similar to those for compensatory and punitive damages claims. Robertson, 2001 U.S. Dist. LEXIS 11662, at *28-29. Because trial of this case would require thousands of minitrials on individual issues, completely overwhelming any common issues, Rule 23(b)(3) certification is not appropriate, and the class should be decertified.[2]

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[1] For the reasons set forth in Boeing's Opposition to Plaintiffs' Motion to Bifurcate Trial, the bifurcation plaintiffs propose is unconstitutional. Dkt. #321 at 9-12. Even if constitutional, however, bifurcation would not resolve the problems inherent in the highly individualized nature of the claims. See, e.g., O'Connor, 197 F.R.D. at 415; Pickett v. IBP, Inc., 182 F.R.D. 647, 659 (M.D. Ala. 1998).

[2] Plaintiffs' allegations in this case are similar to those in Robertson. However, the multiple, individualized determinations of backpay that would be required here are even more problematic. Members of the plaintiff class may all have different qualifications, different experience levels, different job assignments, different job classifications, different starting salaries, different skill and performance levels, and they have worked at Boeing for differing amounts of time, all of which may factor into the determination of an appropriate salary for any individual, and accordingly, what an appropriate backpay remedy would be. Appropriate factual determinations for each classmember against relevant comparators would be highly individualized, "an overwhelming task." Id. at *33. Plaintiffs' contrary assertion in their Reply in Support of Motion to Bifurcate Trial at 4 n.4 (Dkt. #322) that lost wages for the class can be determined by a formula is completely unsupported, and they do not even begin to suggest how this could be accomplished.

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2. The Class Action Device Is Not Superior.

A class action must advance "efficiency and economy of litigation." General Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 159 (1982). When either individual liability questions exist or the determination of each class member's damages cannot be proved by a formulaic calculation, but instead requires individual proof of damages through a trial before a jury, the class action is not superior. Zinser, 253 F.3d at 1192. Here, as explained above, individualized hearings simply cannot be avoided. The plaintiffs' request for backpay and compensatory and punitive damages make the proposed class action unmanageable. These determinations will depend on the circumstances of each individual case and cannot be computed on a group-wide basis. Allison, 151 F.3d at 419.[3]

Plaintiffs' demand for a jury further complicates the management of this case. Because liability and compensatory and punitive damages issues are inextricably interwoven, the Seventh Amendment requires that the same jury must hear both liability and damages. See, e.g., id. at 425. To have one jury hear testimony on liability and compensatory and punitive damages for 1,850 class members—as is Boeing's constitutional right—is totally unrealistic. Cooper v. Southern Co., 2001 U.S. Dist. LEXIS 16809, at *114-15 (N.D. Ga. Oct. 11, 2001) ("The prospect of trying possibly two thousand . . . claims before a single jury is simply absurd."); Reap, 199 F.R.D. at 550 (where same jury

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[3] See also Andrews v. AT&T Co., 95 F.3d 1014, 1025 (11th Cir. 1996) (individual determinations of liability and damages defeat the underlying purposes of Rule 23); Burrell v. Crown Cent. Petroleum, Inc., 197 F.R.D. 284, 291-92 (E.D. Tex. 2000) (class action device not superior because plaintiffs would have to present evidence of actual injury for each plaintiff and court would be forced "to engage in a highly individualized inquiry into the specific circumstances of each plaintiff's claims"); Reyes v. Walt Disney World Co., 176 F.R.D. 654, 658 (M.D. Fla. 1998) (recognizing "the very real danger of certifying a large class action which will thereafter most likely splinter into an unmanageable plethora of individualized claims"); Gorence v. Eagle Food Ctrs. Inc., 1994 U.S. Dist. LEXIS 11438, at *34 (N.D. Ill. Aug. 16, 1994) (class action not efficient or economical where court could be "forced to hold a series of mini-trials to determine whether each class member suffered discrimination, as well as individualized damages"); Butt v. Allegheny Pepsi-Cola Bottling Co., 116 F.R.D. 486, 492 (E.D. Va. 1987) (computation of damages would be a complex, highly individualized task, and class certification would impose an intolerable burden).

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must hear evidence of liability and damages for 5,000 class members, "class resolution would be too prolonged and complicated, and would not be superior to other available methods for the fair and efficient adjudication of this case."). Plaintiffs' proposal for bifurcation—even if it were constitutional—would not solve these intractable case management issues and "would prove to be no more expedient than the traditional handling of civil cases". McKnight v. Circuit City Stores, Inc., 168 F.R.D. 550, 553 (E.D. Va. 1996), aff'd sub nom., Lowery v. Circuit City Stores, 158 F.3d 742 (4th Cir. 1998), vacated and remanded on other grounds, 527 U.S. 1031 (1999); Celestine v. Citgo Petroleum Corp., 165 F.R.D. 463, 471 (W.D. La. 1995), aff'd, Allison, 151 F.3d 402 (5th Cir. 1998) (bifurcation would not eliminate the complexities or practical problems with the proposed class action, in light of Seventh Amendment concerns); Burrell, 197 F.R.D. at 292 ("[I]t would be difficult to avoid violating the Seventh Amendment if the court were to move forward with Plaintiffs' plan and allow one jury to pass on the issue of punitive damages while allowing potentially hundreds of subsequent juries to decide whether and to what extent each individual plaintiff is entitled to compensatory damages. On this basis alone, Plaintiffs' trial plan is not a superior method of resolving this controversy.").[4]

Moreover, even after litigating 1) pattern and practice liability concerning compensation and retention ratings, 2) backpay for 1,850 classmembers, and

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[4] Plaintiffs have in the past insisted incorrectly that punitive damages may be awarded prior to compensatory damages, citing Hilao v. Estate of Marcos, 103 F.3d 767 (9th Cir. 1996), and that punitive damages may be awarded without an award of compensatory damages, citing Passantino v. Johnson & Johnson, 212 F.3d 493 (9th Cir. 2000) and Gill v. Manuel, 488 F.2d 799, 802 (9th Cir. 1973). Plaintiffs ignore the Ninth Circuit's mandate in Hilao that compensatory damages should be determined first, and that it was only in the extremely unusual circumstances of Hilao that a divided Ninth Circuit affirmed the district court's approval of the plaintiffs' unorthodox damages scheme. Further, in Passantino, the Ninth Circuit stated that "we need not decide if punitive damages may be awarded under Title VII in the absence of a compensatory or nominal damage award, because the jury did award compensatory damages." 212 F.3d at 515. Gill was an individual Section 1983 action, and the Ninth Circuit has limited its applicability to Section 1983 cases in which the plaintiff "has shown that the defendant violated a federally protected right." Passantino, 212 F.3d at 514.

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3) compensatory and punitive damages for 1,850 classmembers, Boeing still could be subject to a host of individual lawsuits by classmembers with potential claims of hostile work environment, failure to promote, misclassification as a technical worker, retaliation, discriminatory layoff, and numerous other claims which were, but no longer are, part of this lawsuit. Indeed, the claims of approximately 25 individuals who were named as class representatives in the original Nouri and Sharma actions include such allegations. Given the threat of multiple individual suits regardless of whether this case proceeds as a class action, a class action is not superior.[5] Even after four years of unprincipled manipulation of the class representatives and class definition, plaintiffs still fail to meet the requirements for class certification. The class should be decertified.

B. THE CLASS SHOULD BE DECERTIFIED WITH RESPECT TO VIETNAMESE AND FILIPINOS.

Even if the Court declines to decertify the entire class, the class claims of two ethnic groups involved in this lawsuit should be decertified because their class representatives' claims are not typical and the class representatives are not adequate.

1. Because the Vietnamese Representative's Claims Are Not Typical, He Lacks Standing to Represent the Class.

According to Rule 23(a)(3), the claims or defenses of the representative parties must be "typical of the claims or defenses of the class." A class representative "must possess the

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[5] One of the most compelling rationales for finding superiority in a class action is the existence of a "negative value" suit, where plaintiffs with individual claims worth only a small amount would face financial barriers to bringing suit separately. Allison, 151 F.3d at 420; Reap, 199 F.R.D at 550. Indeed, certification under Rule 23(b)(3) was intended for "vindication of the rights of groups of people who individually would be without effective strength to bring their opponents into court at all." Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) (internal quotations and citations omitted). In contrast, a class action is not needed in cases such as this, where proposed class members have the incentive and the ability to protect their interests through pursuit of significant monetary damages and where full recovery of attorneys' fees is allowed. Allison, 151 F.3d at 420; Reap, 199 F.R.D. at 550; Miller v. Hygrade Food Prods. Corp., 198 F.R.D. 638, 643 (E.D. Pa. 2001). Because each plaintiff has an interest in individually controlling the prosecution of his or her claim, Rule 23(b)(3) certification is not appropriate. Fed. R. Civ. P. 23(b)(3)(A); Allison, 151 F.3d at 420; Reap, 199 F.R.D. at 549-50.

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same interest and suffer the same injury shared by all members of the class." Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 216 (1974); see also E. Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 403 (1977); O'Connor,197 F.R.D. at 412. An employee who was not aggrieved by a particular policy lacks standing to challenge that policy. Berger v. Iron Workers Reinforced Rodmen Local 201, 843 F.2d 1395, 1409 (D.C. Cir.), clarified on reh'g, 852 F.2d 619 (D.C. Cir. 1988). See also Lierboe v. State Farm Mut. Auto. Ins. Co., 350 F.3d 1018, 1022 (9th Cir. 2003) (vacating class certification because the named plaintiff had no claim regarding insurance "stacking" and could not serve as class representative for others who might have such claims); O'Connor, 197 F.R.D. at 412, 415 (granting motion to decertify class; where named plaintiffs' claims were time-barred, they were not adequate representatives and their claims were not typical).

Here, Bao Trinh, the Vietnamese class representative, does not allege that he has suffered the same injury as those he wishes to represent. Trinh's allegations center around the fact that when he came to Boeing in 1997, he was placed in a Manufacturing Engineering ("ME") planning group in which he was the only professional engineer. Pursuant to the collective bargaining agreement for professional engineers, Trinh was rated for purposes of salary and retention ratings against other *engineers* with the same primary skill code as he had. Trinh believes that because of his assignment in ME planning, he was not able to compete well against engineers in other ME groups. He does not, however contend that he was assigned to the ME planning group because of his race or national origin. Nor, of course, is there any assignment claim in the present case. The following deposition excerpt summarizes Trinh's testimony:

> Q. Did you feel that you were at a disadvantage in salary exercises because of where you were assigned?
>
> A. Yes.

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Q. And you felt that you were at a disadvantage in retention exercises because of where you were assigned?

A. Yes.

* * *

Q. Is that the primary thrust of your Complaint?

A. Yes.

* * *

Q. Do you believe that you were assigned to the manufacturing engineering planning group because of your race or national origin?

A. I don't know.

Q. Do you have any facts to suggest that to you?

A. No.

Q. Do you believe that you were provided the retention ratings you were when you were in manufacturing engineering because of your race or national origin?

A. I don't know.

Q. Do you have any facts to suggest that you were?

A. I don't know.

Q. Does that mean, no, you don't have any facts?

A. I don't have.

Q. Okay, and do you believe that you were – that the reason you were given the salary adjustments you were given when you were in manufacturing engineering was because of your race or national origin?

A. I don't know.

Q. Do you have any facts to suggest that that was the reason?

A. No.

Deposition of Bao Trinh ("Trinh Dep.") at 419:15-421:5 (SL 26-28); see also id. at 77:23-78:19 (SL 7-8). Because Trinh admits that he does not have a claim for race or national origin discrimination in compensation or retention rating, his claims in this case are not typical of those of the classmembers he seeks to represent, and he does not satisfy the requirements of Rule 23(a)(3). See Falcon, 457 U.S. at 158-59 (named plaintiff who had no failure to hire complaint could not represent class of Mexican-Americans alleging discrimination in hiring because his claims were not typical). Similarly, Trinh is not an

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adequate class representative because his interests are not aligned with the class, as required by Rule 23(a)(4). O'Connor, 197 F.R.D. at 412, 415. Accordingly, the class should be decertified with respect to the Vietnamese members.

2. The Filipino Portion of the Class Should Be Decertified Because Their Representative Cannot Bring a Claim for Monetary Damages or Injunctive Relief.

On May 29, 2001, Filipino class representative Raul Aballe filed a Voluntary Petition for Bankruptcy under Chapter 13 of the United States Bankruptcy Code. Deposition of Raul Aballe at 21:5-11 (SL 32); Voluntary Petition (SL 34-58). In the schedule attached thereto, Aballe did not list this lawsuit as an item of personal property. (Schedule B to Voluntary Petition (SL 37-39)). A Chapter 13 plan was approved. Chapter 13 Plan (SL 59-61); Order Confirming Chapter 13 Plan (SL 62-66); Docket of U.S. Bankruptcy Court, Western District of Washington at Tacoma, Bankruptcy Petition #01-45328-PBS (SL 67-71). Aballe never amended his Voluntary Petition or any of his bankruptcy schedules to list this lawsuit as an asset.

A debtor seeking protection of the bankruptcy laws must disclose all assets or potential assets to the bankruptcy court. Hamilton v. State Farm Fire & Cas. Co., 270 F.3d 778, 783-86 (9th Cir. 2001); DeLeon v. Comcar Indus., Inc., 321 F.3d 1289, 1291-92 (11th Cir. 2003); Burnes v. Pemco Aeroplex, Inc., 291 F.3d 1282, 1288 (11th Cir. 2002). This duty is continuing, and the debtor must update the disclosure if circumstances change. Hamilton, 270 F.3d at 784. Complete and honest disclosure is "crucial to the effective functioning of the federal bankruptcy system." Burnes, 291 F.3d at 1286 (internal quotations omitted). Aballe—who was represented by counsel in his bankruptcy proceeding *and* represented by plaintiffs' counsel in this action at the time he signed his bankruptcy papers under penalty of perjury—did not list this lawsuit as an asset as is required by the bankruptcy laws. Failure to list this action as an asset is inconsistent with Aballe's pursuit of

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monetary relief in this action, and judicial estoppel therefore bars Aballe from pursuing monetary damages here. Hamilton, 270 F.3d at 783-86; DeLeon, 321 F.3d 1291-92; Burnes, 291 F.3d 1288; Schertz-Nelson v. AT&T Corp., 2003 WL 22047646, at *5-7 (D. Ariz. July 8, 2003).[6]

The fact that Aballe is judicially estopped from bringing claims for monetary damages renders him inadequate as a class representative and renders his claims atypical. Estoppel is a "unique defense" that, if assertable against a class representative, negates typicality or adequate representation, thereby precluding class certification. See, e.g., Hanon v. Dataproducts Corp., 976 F.2d 497, 508 (9th Cir. 1992) (affirming denial of class certification; typicality not met because there was "danger that absent class members will suffer if their representative is preoccupied with defenses unique to it") (internal quotations omitted); Guenther v. Pacific Telecom, Inc., 123 F.R.D. 333, 337-39 (D. Or. 1988) (typicality requirement not met where plaintiffs subject to the unique defenses of waiver, estoppel, and ratification); Monroe v. Hughes, Civ. No. 90-152-MA, 1990 WL 267361 *2-3 (D. Or. Dec. 18, 1990) (same). Here, Aballe's susceptibility to the unique defense of judicial estoppel vitiates typicality and his adequacy of representation.

Not only is Aballe judicially estopped from seeking monetary damages; he also has no claim for equitable relief. Because he is no longer employed at Boeing, he could not be the beneficiary of the injunctive relief pertaining to employment practices at Boeing that the class seeks, and he has made no claim for other injunctive relief such as reinstatement.[7] In sum, lacking claims for either monetary or equitable relief, Aballe is an inadequate class

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[6] Judicial estoppel is an equitable doctrine precluding a party from asserting a claim in one legal proceeding that is inconsistent with a claim of that party in a previous proceeding. New Hampshire v. Maine, 532 U.S. 742, 750 (2001); Hamilton, 270 F.3d at 782. It is intended to protect the integrity of the judicial process. New Hampshire, 532 U.S. at 749-50.

[7] See Fifth Amended Consolidated Class Action Complaint (Dkt. # 269).

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representative and his claims are not typical. See, e.g., Johnson v. Board of Regents of Univ. of Georgia, 263 F.3d 1234, 1268 (11th Cir. 2001) (affirming decertification; because plaintiffs did not have standing to assert claims for injunctive relief, the remedy sought by the class, they could not act as class representatives); Jordan v. Hawaii Gov't Employees' Ass'n, 472 F. Supp. 1123, 1132 n. 30 (D. Haw. 1979) (class certification denied where class representative had no standing to seek injunctive relief because he was retired). Accordingly, the Filipino portion of the class should be decertified.

III. CONCLUSION

For the reasons set forth above and in Boeing's prior briefing, the entire class should be decertified.

DATED: March 18, 2004.

s/ Rima Hartman
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CERTIFICATE OF SERVICE

On March 18, 2004, I caused to be served upon counsel of record, at the address stated below, via the method of service indicated, a true and correct copy of the following documents:

Defendant's Motion to Decertify Class

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Harish Bharti Law Offices of Harish Bharti & Associates, LLC 5516 17th Avenue NW Seattle, WA 98107 Attorneys for Defendants	___ ___ ___ ___ X	Via hand delivery Via U.S. Mail, 1st Class, Postage Prepaid Via Overnight Delivery Via Facsimile Via E-filing

DATED at Seattle, Washington, this 18th day of March, 2004.

s/ Rima Hartman
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