1998 WL 312021
United States District Court, N.D. Illinois.

James H. MASSIE, individually and on behalf of all those similarly situated, Plaintiff,
v.
ILLINOIS DEPARTMENT OF TRANSPORTATION, Kirk Brown, its secretary, in his official and personal capacities, and William Pearman, Chief of Bureau of Personnel Management, in his official and personal capacities, and Duane Carlson, District Engineer for IDOT's District 1, in his official and personal capacities, and John Does, Personnel Officers for IDOT's District 1, in their official and personal capacities, Defendants.

No. 96 C 4830. | June 5, 1998.

Opinion

OPINION AND ORDER

NORGLE, J.

***1** Before the court is Plaintiff's Motion for Class Certification. For the following reasons, Plaintiff's motion is granted.

I. BACKGROUND[1]

Plaintiff, James Massie ("Massie"), the proposed class-representative, is a black employee of the Illinois Department of Transportation ("IDOT"). IDOT is a state agency that was created in 1972 to administer the state's transportation systems and activities in every county throughout Illinois. Since 1974, Massie has held the position of Highway Maintainer ("Maintainer"), an entry level position, within Cook County of IDOT's District 1. On at least two occasions, IDOT has rejected Massie's application for a promotion, allegedly in favor of a white applicant with the same or lesser credentials. The positions that Massie sought were Heavy Construction Equipment Operator ("HCEO"), and Highway Maintenance Lead Worker ("Lead Worker").

Massie alleges that IDOT's promotional policies discriminate against black Maintainers stationed in Cook County. Specifically, Massie alleges that prior to December 1991, a Maintainer in Cook County was eligible for promotion directly to Lead Worker. Massie contends, however, that in December 1991 IDOT adopted a policy, applicable to Maintainers within Cook County only, allowing only HCEOs to be eligible for promotion to Lead Worker.[2] According to Massie, IDOT instituted these policies in order to restrict the promotion of otherwise qualified black Maintainers to the position of Lead Worker. In support of his allegations, Massie asserts the following:

- As of January 1, 1992, the month immediately following IDOT's adoption of the policies, none of the 41 HCEOs employed in Cook County were black.

- Since January 1992, only four out of 55 HCEOs have been black (7%), even though 17% of the Maintainer workforce is black.

- Since January 1992, IDOT has filled 17 Lead Worker positions in Cook County; none of the IDOT employees promoted to these positions were black.

Additionally, Massie alleges that IDOT adopted a policy requiring notices of vacant positions for HCEO and Lead Worker be posted only in the zone in which the vacant position was located, and that only employees in that zone would be eligible. This policy allegedly discriminated against black Maintainers because a high percentage of the approximately 70 black Maintainers stationed in Cook County are concentrated in one of five work zones. Consequently, Massie avers, black Maintainers are ineligible for any vacant position outside of their respective zones even though they are otherwise qualified. Massie contends that IDOT instituted this policy to limit the number of HCEO and Lead Worker positions to which black Maintainers could apply.

Alleging both intentional discrimination and disparate impact, Massie filed a two-count complaint against IDOT and several of its officials.[3] Count I is brought solely against IDOT pursuant to 42 U.S.C. § 2000e et seq. ("Title VII"); Count II is brought against several IDOT officials in both their official and individual capacities pursuant to 42 U.S.C. § 1981 and 42 U.S.C. § 1983.[4] Massie now moves for class certification. The proposed class consists of all black Maintainers stationed in Cook County for two or more years, who have not been promoted to the position of HCEO or Lead Worker.

II. DISCUSSION

A. Class Certification Generally

***2** Pursuant to Federal Rule of Civil Procedure 23(a), a party seeking class certification must establish four elements:

> (1) the class is so numerous that joinder of all members is impracticable ["numerosity"], (2) there are questions of law or fact common to the class ["commonality"], (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class ["typicality"], and (4) the representative parties fairly and adequately represent the interests of the class ["adequacy"].

Fed.R.Civ.P. 23(a).

Once the party seeking class certification satisfies the requirements of Rule 23(a), he must then demonstrate one of the following: (1) the prosecution of separate actions by the class members would create the risk of inconsistent adjudications or would impair the ability of members to protect their interests; (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive or declaratory relief with respect to the class as a whole; (3) or questions of law or fact common to the class predominate over any questions affecting only individual members, and a class action is superior to other methods of adjudication. Fed.R.Civ.P. 23(b).

When employing the two-step analysis (determining first, whether the proposed class satisfies the requirements of Rule 23(a); then, deciding whether the proposed class satisfies at least one of the requirements of Rule 23(b)), the court may not inquire into the merits of the plaintiff's claims. *See Retired Chicago Police Ass'n v. City of Chicago,* 7 F.3d 584, 593 (7th Cir.1993). Rather, the court is required to take the plaintiff's allegations in support of the class action as true. *Eisen v. Carlisle and Jacquelin,* 417 U.S. 156, 177, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974). Because the ultimate decision to certify a class sometimes requires a complex analysis of fact and law delicately balanced against the pragmatic considerations of judicial economy, the "district court has broad discretion to determine whether certification of a class-action lawsuit is appropriate." *Mira v. Nuclear Measurements Corp.,* 107 F.3d 466, 474 (7th Cir.1997).

B. Rule 23(a)

1. Numerosity

A proposed class must be so numerous that joinder of all members is impracticable. Fed.R.Civ.P. 23(a)(1). The court is not limited to considering merely the number of potential class members. *Patrykus v. Gomilla,* 121 F.R.D. 357, 360–61 (N.D.Ill.1988). The court may also consider factors such as judicial economy, the ability of members to bring an individual lawsuit, and the individual circumstances of a case in determining whether joinder is impracticable. *Patrykus,* 121 F.R.D. at 361.

In the instant case, the proposed class consists of 53 black Maintainers. Considering this large number of potential plaintiffs and judicial economy, the court concludes that joinder would be impracticable. *See Chandler v. Southwest Jeep–Eagle, Inc.,* 162 F.R.D. 302, 307 (N.D.Ill.1995) ("As a general proposition, although the numerosity analysis does not rest on any magic

number [citation], permissive joinder is usually deemed impracticable where the class members number 40 or more."). Accordingly, the proposed class satisfies the numerosity requirement of Rule 23(a)(1).

2. Commonality

***3** The commonality requirement requires questions of law or fact common to the class. Factual differences among the named plaintiff's and class members' claims "will not defeat a class action. A common nucleus of operative fact is usually enough to satisfy the commonality requirement of Rule 23(a)(2)." *Scholes v. Stone, McGuire & Benjamin,* 143 F.R.D. 181, 185 (N.D.Ill.1992) (*citing Rosario v. Lividatis,* 963 F.2d 1013, 1017–18 (7th Cir.1992)). "In fact, the commonality requirement has been characterized as a 'low hurdle' easily surmounted." *Scholes,* 143 F.R.D. at 185 (*quoting Wesley v. General Motors Acceptance Corp.,* 91 C 3368, 1992 WL 57948, at *3 (N.D.Ill. March 20, 1992)).

By definition, of course, racial discrimination is class discrimination. *See General Telephone Co. of Southwest v. Falcon,* 457 U.S. 147, 157, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982). Nonetheless, the Supreme Court has explained that simply asserting "across-the board" racial discrimination does not ensure that class certification under Rule 23 is appropriate:

> Conceptually, there is a wide gap between (a) an individual's claim that he has been denied a promotion on discriminatory grounds, and his otherwise unsupported allegation that the company has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class claims will share common questions of law or fact and that the individuals claim will be typical of the class claims.

Id; see also Allen v. City of Chicago, 828 F.Supp. 543, 551 (N.D.Ill.1993) ("[I]t is settled law that a person of a given racial group may not represent other members of the group merely because they were all subjected to the same broad type of discrimination by a common employer."); *Harris v. City of Chicago,* 96 C 3406, 96 C 7526, 1998 WL 59873, at *7 (N.D.Ill. Feb. 9, 1998) ("[Proposed] class members must have more in common than their race and employer.").

In this case, the court finds that Massie's allegations bridge that gap and thus satisfy the commonality requirement. Massie and the proposed class members are all black employees of IDOT who held the position of Maintainer for at least two years within Cook County. Massie alleges that specific policies of IDOT effectively made him and other black Maintainers ineligible for promotion to Lead Worker in violation of federal anti-discrimination laws. Accordingly, Massie's allegations refer to IDOT's standardized conduct that affected black Maintainers as a class, rather than "to individualized claims of discrimination which could not possibly present common questions of law or fact sufficient to justify class action treatment." *Patterson v. General Motors Corp.,* 631 F.2d 476, 481 (7th Cir.1980). Therefore, the court finds that a common nucleus of operative fact and law exists. Indeed, "[w]here 'broad discriminatory policies and practices constitute the gravamen of a class suit, common questions of law or fact are necessarily presented." ' *Hispanics United of DuPage County v. Village of Addison,* 160 F.R.D. 681, 688 (N.D.Ill.1995) (*quoting Midwest Community Council v. Chicago Park Dist.,* 87 F.R.D. 457, 460 (N.D.Ill.1980)).

3. Typicality

***4** The question of typicality in Rule 23(a)(3) is closely related to the question of commonality. *Rosario v. Lividitis,* 963 F.2d 1013, 1018 (7th Cir.1992). A representative's claims are typical of the class if they "have the same essential characteristics as the claims of the other class members." *Patrykus,* 121 F.R.D. at 361–62 (*citing De La Fuente v. Stokely Van Camp, Inc.,* 713 F.2d 225, 232 (7th Cir.1983)). In other words, "[a] 'plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory." ' *Rosario,* 963 F.2d at 1018 (*quoting De La Fuente,* 713 F.2d at 232). The typicality requirement may be satisfied even where there are some factual dissimilarities between the claim of the class representative and the claims of other class members. *Retired Chicago Police Ass'n,* 7 F.3d at 597. Typical does not mean identical, and the typicality requirement is liberally construed. *Hochschuler v. G.D. Searle & Co.,* 82 F.R.D. 339, 344 (N.D.Ill.1978).

Here, the court concludes that the claims of the named plaintiff, Massie, are typical of those of the prospective class

members. Massie has applied, and been rejected, for openings in the positions of HCEO and Lead Worker, respectively. Each time, IDOT allegedly filled the vacant position with a white applicant who had the same or lesser qualifications than Massie. The potential class members in this action would have similar claims. Accordingly, the court concludes that Massie's complaint satisfies Rule 23(a)(3).

One additional note is necessary. Contrary to IDOT's assertion, that some potential class members did not actually apply for openings does not necessarily negate the existence of typicality here. As Massie points out, the class allegations are primarily directed at IDOT's requirement that only HCEOs are eligible for promotion to Lead Worker. Put another way, IDOT refused to consider for promotion to Lead Worker otherwise qualified black Maintainers who did not hold the stepping-stone position of HCEO. The implementation of the HCEO prerequisite effectively barred the direct advancement of black Maintainers to the position of Lead Worker.[5] Therefore, applying for the Lead Worker position while a Maintainer would have been futile. Notably, when IDOT rejected Massie's application for a promotion to the Lead Worker position, its Director of Personnel allegedly informed Massie that he was not qualified because he was not a HCEO. Accordingly, the court concludes that the failure of some black Maintainers to actually apply for a Lead Worker position is inconsequential to the question of typicality. *Cf. Koski v. Gainer,* 92 C 3293, 1993 WL 153828, at *3 (N.D.Ill. May 6, 1993) ("A person is not merely injured when he is denied a job because of his race, he is also injured when he is denied the opportunity to compete for that job because of his race.").

4. Adequacy

***5** To be an adequate class plaintiff, a named plaintiff must: (1) not have claims which are antagonistic to or conflict with those of the other class members; (2) have sufficient interest in the outcome of the case to ensure vigorous advocacy; and (3) his or her attorneys must be competent, experienced, and generally able to conduct the litigation vigorously. *Gammon v. GC Services Ltd. Partnership,* 162 F.R.D. 313, 317 (N.D.Ill.1995).

Here, the court concludes that Massie meets these requirements. Massie's interests are consistent with those of the class and those interests are sufficient to ensure vigorous advocacy. Further, Massie's counsel is experienced in class and employment discrimination litigation and fully competent to vigorously pursue this case. IDOT does not challenge the adequacy requirement in any respect. For these reasons, the court concludes that the adequacy element of Rule 23(a)(4) is satisfied.

B. Rule 23(b)

Having found the four prerequisites of 23(a), the court now considers whether to certify the class pursuant to Rule 23(b). Massie attempts to satisfy Rule 23(b)(2), which provides in relevant part: "An action may be maintained as a class action if ... (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole...." Put simply, two basic requirements must be satisfied under Rule 23(b)(2): (1) the party opposing the class must have acted in a consistent manner toward members of the class so that its actions may be viewed as part of a pattern of activity; and (2) final injunctive or corresponding relief must be appropriate. *Edmondson v. Simon,* 86 F.R.D. 375 382–83 (N.D.Ill.1980) (citations omitted.)

With respect to the first requirement,

> [a]ll the class members need not be aggrieved by or desire to challenge the defendant's conduct in order for one or more of them to seek relief under rule 23(b)(2). What is necessary is that the challenged conduct or lack of conduct be premised on a ground that is applicable to the entire class.

Id. at 383 (citations omitted); *cf. Washington v. Walker,* 75 F.R.D. 650, 654 (S.D.Ill.1977) ("The language of [Rule 23(b)(2)] speaks not to the ultimate need for actual injunctive relief, but rather to the nature of the alleged conduct by the party opposing the class, which if proved, would make classwide equitable relief appropriate.") (internal quotation marks and citation omitted). That is the case here. The gravamen of this action is that IDOT allegedly denied promotional opportunities to black Maintainers stationed in Cook County, as a class, through its discriminatory policies. *See Koski,* 1993 WL 153828, at *4. Again, that some class members may not have been explicitly or directly denied a promotion because they did not actually

apply for one is not fatal to certification of the class. Indeed, " '[a]ction or inaction is directed to a class within the meaning of [Rule 23(b)(2)] even if it has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class." ' *Id.* at n .7 (*quoting* Fed.R.Civ.P. 23, Notes of Advisory Committee on Rules to the 1966 Amendment). Accordingly, the court concludes that Massie's complaint satisfies the first prong of Rule 23(b)(2).

***6** As for the second prong of Rule 23(b)(2),

> [I]njunctive or declaratory relief [must] be the predominant remedy requested for class members. This requirement does not preclude the award of monetary recoveries on a classwide basis when monetary relief for class members is either part of the equitable relief granted or is secondary or ancillary to the predominant injunctive or declaratory relief sought.

Id. (citations omitted). Here, Massie's complaint seeks both declaratory and injunctive relief which would benefit the entire class. In relevant part, the complaint asks the court to:

- Enter a declaratory judgment finding that defendant discriminated against the plaintiff and other similarly situated class members ...; and

- Enjoin the defendant from continuing its policy of discriminating against plaintiff and other similarly situated class members ... and require the defendant to promote plaintiff and the class into the position in which they would have been promoted if their promotion had not been wrongfully denied.

(Compl. at 8–9.)[6] And while the final relief sought also includes monetary damages, *e.g.,* back-pay and compensatory damages, those damages are merely ancillary to the prayers for injunctive and declaratory relief. *See Allen v. Isaac,* 99 F.R.D. 45, 56 (N.D.Ill.1983) ("The fact that back pay is also sought is not a bar to Rule 23(b)(2) certification."); *Coppotelli v. Howlett,* 76 F.R.D. 20, 21–22 (N.D.Ill.1977) ("Back pay may also be awarded" under Rule 23(b)(2) where the primary relief sought is injunctive or declaratory.); *Washington,* 75 F.R.D. at 654 (same); *Veizaga v. Nat'l Board for Respiratory Therapy,* 75 C 3430, 1979 WL 156, at *6 (N.D.Ill. Feb. 9, 1979) (same); *Edmondson,* 86 F.R.D. at 383 (certifying class under Rule 23(b)(2) even though compensatory and punitive damages were also sought). Therefore, the court concludes that Massie's complaint also satisfies the second prong of Rule 23(b)(2).

III. CONCLUSION

In sum, the court concludes that Massie's complaint satisfies Rule 23(a) and Rule 23(b)(2). Accordingly, the court grants Massie's Motion for Class Certification. The class shall consist of all black Maintainers stationed in Cook County for two or more years, who have not been promoted to the position of HCEO or Lead Worker.

IT IS SO ORDERED.

Parallel Citations

78 Fair Empl.Prac.Cas. (BNA) 111

Footnotes

1 This case was originally assigned to the Honorable Brian Barnett Duff. Subsequently, however, the Executive Committee of the United States District Court for the Northern District of Illinois re-assigned the case to this court. The court then granted Plaintiff's motion for referral to the assigned Magistrate Judge to conduct a settlement conference. Additionally, the court ordered a stay of the briefing of Plaintiff's Motion for Class Certification. Settlement efforts were unsuccessful, however, and Plaintiff's motion is now fully-briefed and ready for disposition.

2 The HCEO position is an intermediate position between the position of Maintainer and the position of Lead Worker. IDOT created the HCEO position only for Cook County. IDOT does not challenge Massie's assertion that experience as an HCEO is totally unrelated to, and unnecessary for, the performance of the duties of a Lead Worker.

[3] For purposes of this opinion, the court will collectively refer to all of the Defendants as IDOT.

[4] At this point, the court reserves comment on the viability of Massie's claims. This opinion merely addresses the issue of whether the class should be certified.

[5] As noted above, Massie also alleges that IDOT's promotion of blacks to the position of HCEO has been woefully inadequate and discriminatory. Consequently, Massie avers, the gross underrepresentation of blacks in the HCEO position furthers IDOT's discriminatory policy of failing to fill the position of Lead Worker with blacks.

[6] For purposes of this opinion, the remedies sought in Count I and Count II are essentially the same. (Compl. at 14–15.)