1993 WL 153828
United States District Court, N.D. Illinois, Eastern Division.

Glenn KOSKI, Owen Reeves, Fred Winterroth, Jesse Bean, Jerry Myers, Anthony Bishop, and Michael Mobley, individually,
and
Aaron Booker, individually and as a member of a class of persons similarly situated, Plaintiffs,
v.
Terrance GAINER, Harry Orr, John Rednour, David P. Schippers, Richard T. Mitchell, Nancy Beasley, Fred E. Inbau, James E. Seiber, James Redlich, and the State of Illinois, Defendants.

No. 92 C 3293. | May 6, 1993.

Opinion

MEMORANDUM OPINION AND ORDER

LEINENWEBER, District Judge.

***1** Plaintiff, Aaron Booker ("Booker"), the proposed class representative, has moved for class certification under Rule 23. Plaintiff is a white male applicant for the state police who alleges the Illinois State Police ("ISP") discriminates against white males in its hiring process. Plaintiff asserts that the ISP has an affirmative action program for new employees under which it aims to hire 50 percent white males and 50 percent minorities and females. Under the affirmative action program, separate matrices or lists are kept for white males, black males and other racial minorities, and females. Each matrix has a "cutoff" based on the written examination scores and persons below the "cutoff" are not hired. The cutoff score for female and black candidates is lower than that for white candidates. Plaintiff contends that defendants kept secret the fact that they had separate lists based on race and sex and he only learned of the separate lists and cutoff scores when a motion was filed in a case pending in federal court against the ISP.[1]

DISCUSSION AND ANALYSIS

Plaintiff alleges he and other white men were passed over for hiring because of preferences given to minorities (plaintiff uses the term "minorities" to refer to persons of all races and sex other than white males). This preference was manifested through the imposition of a higher cutoff scores for white men than for minorities on the written entrance test. In 1985, plaintiff scored lower than the cutoff for hiring white male candidates but higher than the cutoff for male minority candidates. Because his score was lower than the white male cutoff, plaintiff was not permitted to complete the application process.

Plaintiff filed this action alleging violations of 42 U.S.C. § 2000e *et seq.* ("Title VII"), and the equal protection clause of the Fourteenth Amendment. Plaintiff also alleges the existence of a conspiracy to violate the equal protection clause of the Fourteenth Amendment and requests injunctive and declaratory relief.[2] In addition, plaintiff seeks monetary damages for white male applicants who should have been hired or whose hire dates were delayed by the use of the different cutoff scores. The proposed class consists of:

> all white male applicants for hire with the Illinois State Police, from 1975 to the present, who were eliminated from contention, or whose hire date was delayed, by the imposition of a higher cut-off score for white male applicants on the written entrance test than for applicants of all other race/sex groups.

When seeking class certification, plaintiff bears the burden of proving the action satisfies the four prerequisites of Rule 23(a) and one of the sections of Rule 23(b). *Trotter v. Klincar,* 748 F.2d 1177, 1184 (7th Cir.1984). For purposes of a Rule 23 motion, the allegations of the complaint are taken as true and the court does not consider the merits of the case. *Eisen v.*

Carlisle & Jacquelin, 94 S.Ct. 2140, 2152–53 (1974); *Retired Chicago Police Ass'n v. City of Chicago,* 141 F.R.D. 477, 484 (N.D.Ill.1992). Rule 23(a) sets out four prerequisites for a class action:

> ***2** (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 and defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed.R.Civ.P. 23(a). In addition to meeting these prerequisites, a potential class representative must also show that the class satisfies one of the subsections of Rule 23(b). Defendants argue plaintiff does not have standing and that he is not a suitable class representative.

A. Numerosity

The class must be "so numerous that joinder of all class members is impracticable." Fed.R.Civ.P. 23(a)(1). Plaintiff estimates there are over 6000 white male applicants who fit the class definition. Defendants have not disputed this figure. A class of 6000 is so numerous that joinder would be impracticable. *See Hochschuler v. G.D. Searle & Co.,* 82 F.R.D. 339, 343 (N.D.Ill.1978) (class of over 1,000 is obviously sufficient).

B. Commonality

The commonality requirement requires questions of law or fact common to the class. The common issues of whether the imposition of a race/sex based cutoff and the use of quotas impermissibly discriminated on the basis of race and sex predominate here. *Armstrong v. Chicago Park Dist.,* 117 F.R.D. 623, 628 (1987) (question whether the District's promotion policies impermissibly discriminated on the basis of sex is common to the class). *See also Alliance to End Repression v. Rochford,* 565 F.2d 975, 979 (7th Cir.1977) (presence of an unconstitutional pattern and practice is a common issue that will satisfy the Rule 23(a)(2) prerequisite).

C. Typicality

The claims of the representative party must be typical of the claims of the class. For class certification, a named plaintiff need not have suffered precisely the same injury as every member of the class, so long as he has been adversely affected by the same practice or policy. Therefore, the court must focus on the nature of the class claims and whether they are "fairly encompassed by the named plaintiff's claims." *General Telephone Co. of the Northwest v. EEOC,* 100 S.Ct. 1698, 1706 (1980).

The complaint alleges two related discriminatory hiring practices: first, the use of race/gender quotas and, second, the imposition of different cutoff scores based on gender and race. "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." *De La Fuente v. Stokely–Van Camp, Inc.,* 713 F.2d 225, 232 (7th Cir.1983). All the claims contain the common factual allegations of being discriminated against by these hiring practices. *See E. v. Lane,* 530 F.Supp. 930, 942 (N.D.Ill.1981) (claims were typical where complaint alleged systemic behavior and harm). The underlying basis of plaintiff's individual claims is essentially coextensive with the claims of the class generally. The named plaintiff's claim is, therefore, typical of the claims of unnamed class members.

***3** Defendants argue that the named plaintiff must have standing to satisfy this element and that Booker lacks standing. They contend Booker is not qualified to be a class representative because he has not been injured nor is he a member of the class. Defendants argue Booker, the aspiring class representative, lacks typicality because the possibility of his employment by the ISP was too remote regardless of the higher cutoff score for white males and that, therefore, Booker was not injured by defendant's hiring practices. Defendants contend that a written examination score, if above the cutoff, only enabled an applicant to continue through the application process. Applicants are ranked on the basis of their test scores, and 519 white men also affected by the disparate cutoffs in 1985 ranked ahead of Booker and would have been hired ahead of him. Defendants argue that plaintiff's score, not the differing cutoffs, was the reason Booker was not hired because he would not have been hired even had the cutoffs been the same. Therefore, according to defendants, Booker was not injured.

Defendants misconstrue the action. Booker alleges he was injured by being denied the opportunity to compete for a job because of his race and sex. The injury was not being allowed to compete. Those 519 white males who had written scores higher than Booker are among a group of 598, which includes Booker, all of whom were deprived of the opportunity to proceed to other phases of the hiring process although they scored higher than the minority cutoff score on the written test in 1985.

Title VII provides that "it shall be an unlawful employment practice for an employer—(2) to limit, segregate, or classify his employees or *applicants* in any way which would deprive or *tend to deprive* any individual of *employment opportunities* ... because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e(2)(a) (emphasis added). As the Eighth Circuit explained, "every kind of disadvantage resulting from discrimination in the employment setting is outlawed." *Bibbs v. Block,* 778 F.2d 1318, 1322 (8th Cir.1985). 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.[3] The Civil Rights Act of 1991 added to Title VII a specific prohibition against the use of disparate cutoff scores:

> It shall be an unlawful employment practice for a respondent in connection with the selection or referral of applicants or candidates for employment or promotion to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.
> 42 U.S.C. § 2000e–2(l).

If the issue of liability is separated from that of the remedy—whether the plaintiffs were discriminated against rather than whether they should be hired—it is evident that plaintiff has standing. Plaintiffs do not seek to be directly hired but rather want the right to engage in the hiring process.

***4** Defendants also argue a class action is inappropriate because plaintiffs seek individual damages. However, where a common fact of injury can be established throughout a class, the fact that it is necessary to determine the quantum of damages on an individual basis does not preclude class certification. *Sterling v. Velsicol Chemical Corp.,* 855 F.2d 1188, 1197 (6th Cir.1988).

D. Adequacy of Representation

The fourth element, adequacy of representation, requires that plaintiff's attorney be experienced and qualified to represent a class and that the named plaintiff not have interests adverse to the class. *Fisher v. Plessy Co. Ltd.,* 103 F.R.D. 150, 157 (S.D.N.Y.1984). Defendants have not disputed the qualifications of the attorney nor have they argued that any conflict exists between the named and unnamed class members.

However, defendants have argued that Booker does not have standing to seek injunctive relief under Rule 23. Drawing together subsections (a)(3) and (a)(4), courts have consistently held that a class action may not be certified unless the named plaintiff has the standing to seek the relief requested. *See Robinson v. City of Chicago,* 868 F.2d 959 (7th Cir.1989), *cert. denied,* 110 S.Ct. 756 (1990).

A plaintiff seeking injunctive relief must show that he is currently suffering some injury or there is some immediate danger of a direct injury. *Robinson,* 868 F.2d at 966. Past exposure to illegal conduct is insufficient to establish a present case or controversy regarding injunctive relief unless accompanied with continuing adverse effect. *Magnusson v. City of Hickory Hills,* 730 F.Supp. 1439, 1442 (N.D.Ill.1990), *aff'd,* 933 F.2d 502 (7th Cir.1991). A party that cannot show that an injunction will accomplish some tangible good in its favor has no standing to seek the injunction. *Mann v. Hendrian,* 871 F.2d 51, 52 (7th Cir.1989).

Here, plaintiff and the other class members have lost the opportunity to compete for a job based on their race and sex. Furthermore, plaintiff alleges the ISP has a written policy authorizing and encouraging the use of quotas in the future. There is a continuing adverse effect from being excluded from consideration for employment. An injunction would afford class members the opportunity to complete the hiring process and perhaps be hired. Plaintiff is seeking, in part, a positive injunction, mandating that he and other class members be given the opportunity to continue with other phases of the hiring process. *See also Evans v. City of Evanston,* 1885 WL 4100 (N.D.Ill.1985) (injunctive relief appropriate for class if allegations in complaint that physical test had disparate impact on women and amounted to unlawful sex discrimination were true).[4]

E. Rule 23(b)

Plaintiff has asserted that this action meets the requirements of all three subsections of Rule 23(b) but asks that the court certify this action under Rule 23(b)(2). The court, therefore, will first address whether plaintiff meets the Rule 23(b)(2) requirement. Rule 23(b)(2) provides that a class action may be maintained where "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."

***5** Class actions under subsection (b)(2) have been found particularly appropriate in civil rights settings. *Jenkins v. United Gas Corp.,* 400 F.2d 28 (5th Cir.1986). Plaintiff, here, challenges defendants' hiring policy and practices, in particular, the use of race and sex as factors in hiring. It is apparent that, according to the allegations in the complaint, defendant has acted on grounds generally applicable to the class. It is also apparent that the setting is appropriate for final injunctive or declaratory relief as to the class.

In fact, the Advisory Committee Note indicates that plaintiff's allegations fall directly within the ambit of subdivision 23(b)(2), which includes "actions in the civil rights field where a party is charged with discriminating unlawfully against a class." Advisory Committee Note, Report of the Judicial Conference on the Proposed Rules of Civil Procedure for the United States District Courts, 39 F.R.D. 98, 102 (1966).

CONCLUSION

Plaintiff has satisfied all of the requirements to maintain a class action. Accordingly, plaintiff's motion for class certification is granted.

IT IS SO ORDERED.

Parallel Citations

63 Fair Empl.Prac.Cas. (BNA) 936

Footnotes

1 *See Dixon v. Margolis,* 765 F.Supp. 454, 457 (N.D.Ill.1991) (promotional policies of ISP challenged and court described the ISP's affirmative action program for new employees).

2 Plaintiff seeks an injunction to allow white males who have had the same or higher scores than hired minorities the opportunity to continue with other phases of the hiring process. Plaintiff also seeks an injunction against the use of race and sex-based score cutoffs on future tests.

3 A class action was the appropriate legal vehicle where "what the class members lost was not a job but a long-shot chance at a job." *Evans v. City of Evanston,* 881 F.2d 382, 386 (7th Cir.1989) (class action brought on behalf of women applicants who failed physical agility test for city fire-fighting positions).

4 In the end, the district court ordered the City to pay damages rather than ordering a hiring remedy. This was due to the importance of the physical fitness exam in the preliminary screening process and the fact that five years had passed since plaintiffs had taken the physical agility test and no evidence had been offered that their agility had not decreased in the interim. *Evans v. City of Evanston,* 941 F.2d 473, 474 (1991); *Evans v. City of Evanston,* 881 F.2d 382, 385 (7th Cir.1989).