Orlowski v. Dominick's Finer Foods

United States District Court for the Northern District of Illinois, Eastern Division
February 21, 1997, Decided ; February 24, 1997, DOCKETED
No. 95 C 1666

Reporter: 1997 U.S. Dist. LEXIS 1984
HELENE ORLOWSKI, MELBA J. KOCH, MARGARET MROZOWSKI, CAROL ANN SCHMALL, ALMA L. AGUIRRE, ROANN D. KEATY, GEORGINE ARVANITES, JANET M. TRIPP, and MAUREEN GLEIXNER, on behalf of themselves and all other persons similarly situated, Plaintiffs, v. DOMINICK'S FINER FOODS, INC., Defendant.

Disposition: [*1] Plaintiff's Motion for Class Certification granted in part, and denied in part.

Counsel: For HELENE ORLOWSKI, plaintiff: Paul L. Strauss, Jeffrey Irvine Cummings, Miner Barnhill & Galland, Chicago, IL. Brian R Holman, Friedman & Holman, Chicago, IL, Jeffrey Mark Friedman, Friedman & Holman, Chicago, IL. For MELBA J KOCH, on behalf of themselves and all other persons similarly situated, plaintiff: Paul L. Strauss, (See above), Jeffrey Irvine Cummings, (See above). Brian R Holman, (See above), Jeffrey Mark Friedman, (See above). For MARGARET MROZOWSKI, plaintiff: Paul L. Strauss, (See above), Jeffrey Irvine Cummings, (See above). Brian R Holman, (See above), Jeffrey Mark Friedman, (See above). For CAROL ANN SCHMALL, plaintiff: Paul L. Strauss, (See above), Jeffrey Irvine Cummings, (See above). Brian R Holman, (See above), Jeffrey Mark Friedman, (See above). For ALMA L AGUIRRE, plaintiff: Paul L. Strauss, (See above), Jeffrey Irvine Cummings, (See above). Brian R Holman, (See above), Jeffrey Mark Friedman, (See above). For ROANN D KEATY, plaintiff: Paul L. Strauss, (See above). Brian R Holman, (See above), Jeffrey Mark Friedman, (See above).

For DOMINICK'S FINER FOODS, INC., defendant: [*2] John P. Lynch, Mark Steven Mester, Sylvia A. Stein, Latham & Watkins, Chicago, IL.

Judges: ARLANDER KEYS, United States Magistrate Judge. HONORABLE ELAINE E. BUCKLO, UNITED STATES DISTRICT COURT JUDGE

Opinion by: ARLANDER KEYS

Opinion

TO: THE HONORABLE ELAINE E. BUCKLO

UNITED STATES DISTRICT COURT JUDGE

REPORT AND RECOMMENDATION

This matter comes before the Court on Plaintiffs' Motion for Class Certification, pursuant to *Federal Rule of Civil Procedure 23*. For the following reasons, the Court recommends that Plaintiff's motion be granted in part, and denied in part.

BACKGROUND

Plaintiffs, present and former employees, brought this employment discrimination lawsuit, against Dominick's Finer Foods, Inc. ("Dominick's"), pursuant to Title VII of the 1964 Civil Rights Act, *42 U.S.C. § 2000e et seq.*, as amended ("Title VII"). Plaintiffs seek injunctive and declaratory relief, as well as backpay and damages. Dominick's operates approximately eighty-five stores in Northern Illinois and has about eighteen thousand employees. (Plaintiffs' Memorandum in Support of Motion for Class Certification [Pls.' Mem. Supp.], at Ex. 22.) Approximately half of those employees are women [*3] and approximately 12.5% are Hispanic. (Pls.' Mem. Supp., at Ex. 24.) Plaintiffs allege that Dominick's has discriminated against women and Hispanic employees in job assignments, hours of work, training, and promotions.

Plaintiffs seek certification of two separate subclasses: one for female employees and one for Hispanic employees. The proposed female employee subclass includes "all women who were or are employed in Dominick's stores and grocery store organization from September 23, 1993 to the present, including women employed in the Dominick's grocery stores and in store area positions." (Plaintiffs' Motion for Class Certification, at 1.) The proposed class specifically excludes "women employed only in Dominick's Omni stores" and "women solely employed in positions at Dominick's central headquarters and offices in Northlake." (Id.)

The proposed Hispanic employee subclass includes "all Hispanic employees who were or are employed in Dominick's stores and grocery store organization from May 21, 1994 to present, including Hispanic persons employed in the Dominick's grocery stores and in store area positions." (Id.) The proposed class specifically excludes "Hispanics employed only in [*4] Dominick's Omni stores" and "Hispanics solely employed in positions at Dominick's central headquarters and offices in Northlake." (Id.)

DISCUSSION

STANDARD FOR CLASS CERTIFICATION

There is broad judicial discretion in determining whether to allow the certification of a class action. CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY K. KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2d § 1785 (1986). The burden of showing that the requirements of *Rule 23* have been met, thereby demonstrating that certification is proper, rests with the plaintiff. *See General Tel. Co. of S.W. v. Falcon*, 457 U.S. 147, 161, 72 L. Ed. 2d 740, 102 S. Ct. 2364 (1982); *Trotter v. Klincar*, 748 F.2d 1177, 1184 (7th Cir. 1984); *Riordan v. Smith Barney*, 113 F.R.D. 60, 62 (N.D. Ill. 1986); *see also Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 177, 40 L. Ed. 2d 732, 94 S. Ct. 2140 (1974)(for purposes of determining certification, allegations made in support of certification taken as true and merits not examined).

Rule 23 establishes a two-step procedure to determine whether a class action is appropriate. Initially, the preliminary requirements set forth in *Rule 23(a)* must be met:

> (1) [*5] 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.If these criteria are satisfied, then, the Court must next consider whether the action falls within one of the three categories of class suits provided for in the subsections of *Rule 23(b)*. Here, Plaintiffs seek class certification under *Rule 23(b)(2)*.

For the reasons discussed herein, the Court finds that Plaintiffs have met the requirements of *Rule 23(a)* and *(b)(2)* as to the subclass of women, but have not met those requirements as to the subclass of Hispanic individuals. [1]

[*6] **I. REQUIREMENTS OF** *RULE 23(a)*

A. Numerosity

Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." Here, because the subclass of women could include thousands of individuals, Plaintiffs have shown that the potential subclass is so numerous that joinder of all members would be impracticable. Thus, Plaintiffs have met the numerosity requirement for the proposed subclass of women. *See In re Alcoholic Beverages Litig.*, 95 F.R.D. 321, 324 (E.D.N.Y. 1982)(class action may proceed upon estimates as to size of proposed class); *see also Hispanics United of DuPage County v. Village of Addison, Ill.*, 160 F.R.D. 681, 688 (N.D. Ill. 1995)(quoting *Patrykus v. Gomilla*, 121 F.R.D. 357, 361 (N.D. Ill. 1988), court is "entitled to make common sense assumptions" in determining numerosity); *Riordan*, 113 F.R.D. at 62 (approximately twenty-nine members sufficient for numerosity).

B. Commonality

Rule 23(a)(2) requires that there exist "questions of law or fact common to the class". A "common nucleus of operative fact is usually enough to satisfy the commonality requirement of *Rule 23(a)(2)*." *Rosario v. Livaditis*, [*7] 963 F.2d 1013, 1018 (7th Cir. 1992), *cert. denied*, *506 U.S. 1051, 122 L. Ed. 2d 127, 113 S. Ct. 972 (1993)*; *see also Meiresonne v. Marriott Corp.*, 124 F.R.D. 619, 622 (N.D. Ill. 1989)("Commonality is not a demanding requirement: It calls only for the existence of at least one issue of fact or law common to all class members . . . .").

Plaintiffs have provided the Court with sufficient evidence that Dominick's did not have a decentralized system, for personnel decisions and practices, during the relevant time period. [2] For example, the former Senior Vice President of Human Resources, Charles Brazik, testified during depostion that, while he worked at Dominick's (from July of 1991 through March of 1995), he had responsibility for

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[1] In light of the determination (*infra*, at part D) that the Hispanic subclass is inadequately represented, this Court does not reach the other *Rule 23(a)* and *(b)* requirements with respect to that subclass.

[2] Dominick's cites this Court's August 22, 1995 Memorandum Opinion and Order to support the proposition that Dominick's employment decision structure is decentralized. However, the statements to which Dominick's cites are obviously dicta, at best. That Opinion was rendered in the context of a ruling on a motion to compel, which was filed within the first few months after the Complaint was filed and during the very early stages of discovery. In discussing Dominick's organizational structure and whether certain requested information and documents should be produced, the Court noted -- in agreement with the position of Dominick's and without any evidence to the contrary -- that most of the employment decisions are made at the individual store level, with participation or input from area representatives. That observation does not bind the Court if subsequent information renders it questionable. Moreover, the Court notes that, even at such an early juncture, it was clear that individuals higher in the management structure -- area managers -- participated in personnel decisions.

"hiring, training, [and] recruiting. . . ." (Pls.' Mem. Supp., at Ex. _[Deposition of Charles Brazik], 11-12.) Though the extent to which the system is centralized is unclear and disputed, it is clear that the system is not decentralized (as it was in *Gorence v. Eagle Food Ctrs., Inc.*, 1994 U.S. Dist. LEXIS 11438, No. 93 C 4862, 1994 WL 445149, at *9 (N.D. Ill. Aug. 16. 1994)). *Compare Meiresonne*, 124 F.R.D. at 622-23 (discriminatory evaluation system [*8] used by one centralized group sufficient for commonality purposes) *with Gorence*, 1994 U.S. Dist. LEXIS 11438, 1994 WL 445149, at *9, *and Allen v. City of Chicago*, 828 F. Supp. 543, 552 (N.D. Ill. 1993). Additionally, Plaintiffs have shown sufficient proof of a subjective decision-making process to create a common issue of fact. *Falcon*, 457 U.S. at 159, n.15. [3] There exist common issues related to whether Dominick's centralized, subjective decision-making process resulted in discriminatory employment decisions based on sex. Thus, Plaintiffs have fulfilled the commonality requirement for the subclass of women. [*9]

C. Typicality

Rule 23(a)(3) requires that the "claims or defenses of the representative parties" be "typical of the claims or defenses [*10] of the class." The question of typicality is closely related to the question of commonality. *Rosario*, 963 F.2d at 1018. A class representative's claim is typical "'if it arises from the same . . . 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 v. Stokely-Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir. 1983)). For typicality, the representatives' claims need not be identical to the class members'; rather, it is sufficient if they are substantially similar. *See Binion v. Metropolitan Pier and Exposition Auth.*, 163 F.R.D. 517, 525 (N.D. Ill. 1995).

As discussed above, Plaintiffs share common issues related to whether Dominick's centralized, subjective decision-making process resulted in discriminatory employment decisions based on sex. Therefore, Plaintiffs' claims arise from the same practice or course of conduct giving rise to claims of other potential class members. The legal theory is the same -- Dominick's pattern and practice of violating Title VII. Thus, Plaintiffs' claims are typical of the claims of others who would be in [*11] the subclasses. [4]

The typicality of a representative's claim can be negated if she is subject to defenses which are: (1) arguable; (2) unique; and (3) "likely to usurp a significant portion of the litigant's time and energy." *McNichols v. Loeb Rhoades & Co., Inc.*, 97 F.R.D. 331, 334 (N.D. Ill. 1982)(citing *Koos v. First Nat'l Bank of Peoria*, 496 F.2d 1162, 1164 (7th Cir. 1974)).

Although promotion and hiring decisions are often made on individualized bases, it is not at all clear that such is the case here. Dominick's has given examples of the type of individualized defenses each class representative will be subject to; for example, "Ms. Keaty would not have been promoted because of weak interpersonal skills". (Dominick's Memorandum in Opposition to Plaintiffs' Motion for Class Certification [Mem. Opp.], at 19.) Undoubtedly, Dominick's will raise such defenses [*12] for every class representative, as well as every class member. However, the fact that such defenses may be raised, alone, does not negate typicality, because there is no "perfect plaintiff" requirement. [5] Further, the fact that such defenses exist with respect to the class representatives serves to reinforce the typicality of their claims. Thus, the subclass of women meets the typicality prerequisite.

D. Adequacy of Representation

Rule 23(a)(4) requires that the named plaintiff "fairly and adequately protect the interests of the class". Adequate representation has two components: (1) adequacy of the named plaintiff's attorney and (2) adequacy of the named plaintiff. *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 598 (7th Cir. 1993). The representative attorney must be "competent, experienced, qualified, and

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[3] Dominick's reliance on *Falcon* is misplaced. In *Falcon*, an employee who alleged he was discriminated against by being passed over for a promotion, brought a suit on behalf of job applicants who were never even hired. The class representative failed to specify common issues of law and fact. He also did not "bridge the gap" between the typicality of his own claims and those of the class. As *Falcon* notes, a class action concerning both applicants and employees could be justified if there was "significant proof" of a "general policy of discrimination" and "if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes." 457 U.S. at 159, n.15. Thus, the class representative in *Falcon* failed to support the inference that he (and the job applicants he sought to represent) were all discriminated against due to an employer policy or practice.

[4] The fact that different class members may be governed by different collective bargaining agreements does not negate commonality or typicality.

[5] Were this a *Rule 23(b)(3)* certification, "predomination" might be a concern, however, since this is a *Rule 23(b)(2)* certification, that need not be considered.

generally able [*13] to conduct the proposed litigation vigorously." *Chandler v. Southwest Jeep-Eagle, Inc.*, 162 F.R.D. 302, 309 (N.D. Ill. 1995). The named plaintiff must not have interests that are antagonistic to, or conflict with, those of the class. *Rosario*, 963 F.2d at 1018.

1. Counsel's Adequacy

The abilities of Plaintiffs' attorneys have not been challenged by Dominick's. Attorney Judson Miner has been practicing law for almost thirty years and has extensive experience in employment law and class action litigation. (Pls.' Mem. Supp., at Ex. 33.) Attorney Paul Strauss has been practicing law for almost twenty years and has extensive experience in employment law and class action litigation. Attorney Jeffrey Cummings has been practicing law for almost ten years and has extensive experience in employment law.

Plaintiffs' attorneys are all experienced, competent, qualified and able to conduct the proposed litigation vigorously. Accordingly, the Court concludes that counsel will be adequate representatives.

2. Plaintiffs' Adequacy

As to the Hispanic subclass, the Court finds that the sole named Hispanic woman is not an adequate class representative. There is a potential [*14] conflict of interest created by her status as a member of both subclasses. Moreover, that very dual subclass membership may affect her ability to represent men in the Hispanic subclass.

As to the subclass of women, the Court is convinced, at this stage, that individual defenses asserted against the class representatives are not so great or strong as to distract from their basic allegations of sex discrimination. The Court finds that the interests of the subclass' representatives do not conflict with the other potential class members' claims. Moreover, if, later on, Dominick's shows that the representatives are inadequate, then the proper course would be a motion to decertify the class or disqualify the representatives. The Court, therefore, finds the named Plaintiffs to be adequate representatives for the subclass of women.

II. REQUIREMENTS OF *RULE 23(b)(2)*

As to the subclass of women, because the prerequisites of *Rule 23(a)* have been satisfied, the analysis now moves to *Rule 23(b)(2)*'s requirement that "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 [*15] declaratory relief with respect to the class as a whole".

A. Conduct Generally Applicable to Class

This is interpreted as meaning that the party opposing the class has acted in a consistent manner toward class members, such that its actions may be viewed as part of a pattern of activity. *See* WRIGHT, MILLER & KANE, *supra* § 1775. Here, the allegations are that Dominick's centralized, subjective decision-making process has resulted in discrimination against women. Thus, the alleged conduct is generally applicable to the class.

B. Final Injunctive or Declaratory Relief Requested

Plaintiffs have requested injunctive and declaratory relief. Dominick's argues, however, that this action is not appropriately brought under *Rule 23(b)(2)*, citing *Gorence*, 1994 U.S. Dist. LEXIS 11438, 1994 WL 445149, at *6. *Gorence* is distinguishable because, among other things, injunctive relief was not even requested in the complaint. *Gorence*, 1994 U.S. Dist. LEXIS 11438, 1994 WL 445149, at *7. Moreover, "disputes over whether the action is primarily for injunctive or declaratory relief rather than a monetary award . . . . should be avoided. If the *Rule 23(a)* prerequisites have been met and injunctive or declaratory relief [*16] has been requested, the action usually should be allowed to proceed under subdivision (b)(2)." WRIGHT, MILLER & KANE, *supra* § 1775.

Finally, Dominick's relies upon *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293 (7th Cir. 1995), *cert. denied*, *133 L. Ed. 2d 122, 116 S. Ct. 184 (1995)*. [6] Dominick's apparently believes that *Rhone-Poulenc* decrees that "the parties are entitled to have a single jury hear the entire case." (Mem. Opp., at 29.) However, that is a misunderstanding of what *Rhone-Poulenc* held.

In that unusual case, the district court undertook an "innovative procedure for streamlining the adjudication of [a] 'mass tort'" [7] which upon appellate review, was determined to have "so far exceeded the permissible bounds of discretion in the management of federal litigation as to compel [the appellate court] to intervene and order [*17] decertification." *Rhone-Poulenc*, 51 F.3d at 1297. The Seventh Circuit stated that its determination rested on "three concerns, none of them necessarily

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[6] Dominick's initially cited this case in support of its argument against "manageability" and certification under *Rule 23(b)(3)*. (Mem. Opp., at 29.)

[7] The district judge had certified a nationwide class of all hemophiliacs infected with the AIDS virus as a consequence of using defendant drug companies' blood products.

sufficient in itself but cumulatively compelling. . . ." *Id.* at 1299.

The first factor was that defendants were forced to stake their companies on the outcome of a single jury trial or be forced by the fear of risk of bankruptcy to settle. The second factor was the applicability of differing state law standards. The district judge wanted the jury to determine negligence "under a legal standard that does not actually exist anywhere in the world"; therefore, the district judge proposed a general negligence instruction which was not necessarily the law of any state. *Rhone-Poulenc*, 51 F.3d at 1300. The third factor was that, because of the way the district judge divided up the trial [*18] issues, the same issues concerning the defendant's negligence would be reexamined by other juries during their determination of comparative negligence and proximate causation. Thus, the combination of all three of these factors formed the basis of the Seventh Circuit's opinion.

It is the third factor that Dominick's focuses on here; Dominick's argues that it is entitled to have one jury hear the entire matter. Dominick's argues that "the fact that a single jury would have to hear the entire case makes a class action unthinkable." (Surreply of Dominick's Finer Foods, Inc., at 3.) However, as the Seventh Circuit noted in *Rhone-Poulenc*, "bifurcation and even finer divisions of lawsuits into separate trials are authorized in federal district courts." 51 F.3d at 1302 (citing FED. R. CIV. P. 42(b)). Instead, what is important is that the district judge "carve at the joint." *Id.*

The situation here is different than in *Rhone-Poulenc*, where the problem was not that liability and damages would be separated, but that the same issues would be heard by different juries. In *Rhone-Poulenc*, the issue of proximate cause would have been decided by the first jury in order to [*19] determine whether or not the defendants were negligent, and then would have been decided again by other state court juries around the country in order to determine the related issues of contributory negligence and proximate cause. Thus, as the Seventh Circuit noted, it was likely that those separate juries could reach inconsistent results on the issue of the defendants' liability.

In contrast, here, the first stage of the case will determine whether or not Dominick's engaged in classwide discrimination on the basis of sex, as a result of a regime of subjective employment decision-making. That issue will not be reexamined by any subsequent jury. Similarly, with the punitive damages question, the jury will be concerned with the willfulness of any misconduct and the degree of deterrence necessary. Dominick's potential individual defenses against each class member have nothing to do with whether or not Dominick's engaged in sex based discrimination.

Some questions do arise regarding the backpay issue -- it is unclear as to whether there will be some overlap during the compensatory damages phase of the trial. In order to determine whether or not an individual is entitled to back pay, [*20] the Court would likely have to consider individualized defenses. Such consideration could overlap with the compensatory damages phase. However, a determination regarding the backpay issue should await further development of the record, since there is clearly a feasible class action under *Rule 23(b)(2)* that can go to judgment on the injunction. [8] Therefore, the Court recommends deferring the issue of whether backpay will be included in stage one or stage two of the trial.

CONCLUSION

The requirements of *Rule 23(a)* and *(b)* have been met as regards the subclass of women. However, the requirements of *Rule 23(a)* and *(b)* have not been met as regards the subclass of Hispanic individuals. Therefore, the Court recommends that Plaintiff's [*21] Motion for Class Certification be granted in part, and denied in part.

DATED: February 21, 1997

RESPECTFULLY SUBMITTED:

ARLANDER KEYS

United States Magistrate Judge

Counsel have ten days from the date of service to file objections to this Report and Recommendation with the Honorable Elaine E. Bucklo. See Fed. R. Civ. P. 72(b); *28 U.S.C. § 636(b)(1)*. Failure to object constitutes a waiver of the right to appeal. *Egert v. Connecticut Gen. Life Ins. Co.*, 900 F.2d 1032, 1039 (7th Cir. 1990).

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[8] Even if, *arguendo*, this division of the trial is not "well-carved". Dominick's would only have met one of the three factors upon which the Seventh Circuit's decision in *Rhone-Poulenc* was based. Thus, *Rhone-Poulenc* would not mandate that class certification be denied.