

EMPLOYMENT-RELATED CLASS ACTIONS, COLLECTIVE ACTIONS, AND OTHER COMPLEX LITIGATION

By Steven W. Moore

and

Stacy D. Mueller¹

Employment-related class actions, collective actions, and other multi-plaintiff cases are high-stakes litigation for both employees and employers alike. Many of these cases involve hundreds, if not thousands, of class members. They also present unique and expensive challenges in discovery and the development of evidence needed for the prosecution or defense of the cases, with many traps for the unwary practitioner along the way. In a typical class action under Fed. R. Civ. P. 23, the battle is often won or lost at the class certification stage because defendants cannot fathom the risk of losing a class case at trial or because class counsel has lost the incentive to continue in a case if the theory relies heavily on statistical evidence and the use of costly experts. But, as will be explained more fully below, not all employment-related “class cases” follow the traditional certification paradigm of Rule 23.

This paper addresses the different standards employed by the courts in addressing various employment-related claims where relief is sought for a large group of applicants or employees, including Rule 23 discrimination class actions, collective actions that arise under the Fair Labor Standards Act and related statutes, as well as large-scale enforcement actions by the U.S. Equal Employment Opportunity Commission.

Rule 23 Class Actions

As mentioned above, the primary focus in a Rule 23 employment class action is whether the named plaintiffs can satisfy the certification requirement. District Courts have the discretion to certify or deny certification of a class.² The named plaintiff must clearly satisfy four prerequisites contained in Rule 23(a) to certify a class: (1) the class is so numerous that joinder of all members is impracticable (“numerosity”); (2) there are

¹ Steven W. Moore (steven.moore@ogletreedekins.com) is a shareholder and Stacy D. Mueller (stacy.mueller@ogletreedekins.com) is an associate with Ogletree, Deakins, Nash, Smoak & Stewart, P.C. in Denver, Colorado. Both represent companies in class and collective actions and other complex employment litigation matters.

² *Shook v. El Paso County*, 386 F.3d 963, 968 (10th Cir. 2004); *Patton v. New Mexico Highlands Univ.*, 275 F.3d 1274, 1278 (10th Cir. 2002).

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 will fairly and adequately protect the interests of the class (“adequacy of representation”).

In deciding the question of class certification, courts apply a rigorous analysis to determine whether these four prerequisites of Rule 23(a) have been satisfied.³ If the named plaintiff satisfies these four prerequisites, then the court determines if the matter falls within one of the categories identified in Rule 23(b), again under the same rigorous standard.⁴

Under Rule 23(b)(1) (A), plaintiffs must establish that: “prosecuting separate actions by or against individual class members would create a risk of inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class.” Under Rule 23(b)(2), plaintiffs must establish that “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.” Under Rule 23(b)(3), plaintiffs must establish both that “questions of law or fact common to class members predominate over any questions affecting only individual members,” and that “a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.”

In analyzing the question of class certification, district courts should not delve deeply into the merits of the parties’ claims or defenses. Instead, courts should analyze whether the named plaintiff has satisfied his or her burden based on the substantive allegations in the complaint along with the evidence submitted in support of the motion for class certification.⁵ In addition, a certified class may be altered, expanded, subdivided, or even abandoned as the case develops.⁶

Rule 23 class actions in the employment context generally have been filed in situations where an employer’s policy, practice, or procedure has systemically affected a group of applicants or employees based on their race, gender, or some other protected characteristic. These class actions have focused on hiring, examinations, qualification standards, promotions, training, compensation, benefits, drug and alcohol testing, discipline, reductions in force, and other terminations from employment. Perhaps the most common employment-related class actions under Rule 23 are those filed under theories that Title VII of the Civil Rights Act of 1964 has been violated with respect to a

³ *Shook*, 386 F.3d at 968.

⁴ *In re Initial Pub. Offering Sec. Litig.*, 471 F.3d 24, 33 n.3 (2d Cir. 2006).

⁵ *J.B. v. Valdez*, 186 F.3d 1280, 1290 n.7 (10th Cir.1999) (“We recognize that, when deciding a motion for class certification, the district court should accept the allegations contained in the complaint as true.”); *see also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974) (“We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.”); *Cook v. Rockwell Int’l Corp.*, 151 F.R.D. 378, 380-81 (D. Colo. 1993) (noting that inquiry into the merits is “inappropriate” when determining whether action meets the requirements of Rule 23).

⁶ *Daigle v. Shell Oil Co.*, 133 F.R.D. 600 (D. Colo. 1990); *Dubin v. Miller*, 132 F.R.D. 269 (D. Colo. 1990).

class of applicants or employees on the basis of their race or gender. As the demographics are changing in America with increased immigration, class claims based on national origin discrimination will likely increase. Class actions under Rule 23 may also be brought under other employment-related claims such as racial discrimination under 42 U.S.C. § 1981, disability discrimination under the Americans with Disabilities Act, employee benefit claims under Employee Retirement Income and Security Act, constitutional violations under 42 U.S.C. § 1983, as well as myriad state law claims.

Although a number of theories have been used to litigate class-wide discrimination claims, plaintiffs typically bring class-wide claims alleging violations of Title VII and other related civil rights statutes under two primary theories. First, claims alleging intentional discrimination on a class-wide basis have generally followed the pattern and practice theory first articulated by the Supreme Court in *International Brotherhood of Teamsters v. United States*, 431 U.S. 329 (1977), wherein the discrimination was alleged to be so pervasive that it was the standard operating procedure of the employer. Additionally, many class actions in this area of law are filed under an adverse impact theory in line with *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), wherein a neutral practice or policy was alleged to adversely impact a protected group.⁷ Both theories rely heavily on statistical analyses performed by labor economists or statisticians, as well as anecdotal evidence.

The certification question in discrimination suits often turns on the analysis of Rule 23's commonality and typicality requirements. The leading case in this area is *General Telephone Co. v. Falcon*, 457 U.S. 147 (1982) where the court stated that there is a "wide gap" between, on the one hand, an individual's claim that he was discriminated against with respect to a personnel action and an otherwise unsupported allegation that the company has a policy of discrimination, and on the other hand, the existence of a class of persons who have suffered the same injury as that individual. For a plaintiff to bridge that gap, the plaintiff must allege "facts not only establishing the validity of his own claim, but also facts sufficient to justify the additional inference of class-wide policy of discrimination."⁸ In many cases, courts will deny class certification under a *Falcon* analysis if there is no common policy or practice that is uniformly applied throughout a company's various divisions, departments, facilities, stores, or other geographical locations.

On the question of adequacy of representation, some courts have been hesitant to certify a class where the named plaintiff has inherent conflicts of interest with certain putative class members. For example, depending on the allegations in the suit, conflicts of interest may arise in situations where the class is proposed to include supervisory and non-supervisory employees, applicants and employees, and employees and former employees. Another example might be a civil action involving both racial and gender discrimination claims where some of the putative class members would be both male and diverse, possibly creating a conflict of interest within the class with respect to the issue of gender discrimination.

⁷ See also 42 U.S.C. § 2000e2(k).

⁸ *Atwell v. Gabow*, 248 F.R.D. 588 (D. Colo. 2008).

Even if a named plaintiff can satisfy Rule 23(a)'s numerosity, commonality, typicality, and adequacy of representation prerequisites, courts may still deny class certification if the named plaintiff cannot satisfy either Rule 23(b)(2) or (b)(3). A class may be certified under Rule 23(b)(2) if appropriate final injunctive or declaratory relief is actually being sought and if the monetary award is merely incidental to that relief. With the passage of the Civil Rights Act of 1991,⁹ which made available compensatory and punitive damages in Title VII litigation, questions have arisen whether Title VII class actions can be certified under Rule 23(b)(2) where compensatory and punitive damages are being sought.¹⁰ Certification under this rule should be denied where the "appropriate final relief relates exclusively or predominantly to money damages."¹¹

Because of the hurdles with Rule 23(b)(2), many times plaintiffs seek to certify an employment class action under Rule 23(b)(3), which has generally been used in the context of money-damage class actions. Rule 23(b)(3) certification imposes additional notice requirements and opt-out rights to class members. These opt-out rights stand in contrast to Rules 23(b)(1) and 23(b)(2), under which class members are not given the opportunity to opt out and are automatically bound by any class rulings. As mentioned above, Rule 23(b)(3) requires that "questions of law or fact common to class members predominate over any questions affecting only individual members," and that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." However, if the remedies are too individualized, then a court may decline to certify a class under Rule 23(b)(3).¹²

Hostile work environment claims generally are not well suited for class treatment under Rule 23's certification framework due to the individualized analysis necessary for each putative plaintiff. That being said, some litigants have been successful in advancing class-wide sexual harassment claims based on allegations of widespread sexual harassment caused by an employer's institutionalized neglect in preventing and responding to complaints of such harassment.¹³

Disability discrimination plaintiffs also have not fared well in obtaining Rule 23 class certification for Title I claims under the ADA, as such cases entail individualized determinations on a case-by-case basis regarding whether each class member meets the ADA's definition of a disability.¹⁴

Collective Actions

In recent times, collective actions under the Fair Labor Standards Act of 1938 have been one of the fastest growing areas of representational litigation, far outpacing Title VII class actions in terms of case filings across the nation. These FLSA collective actions, however, do not follow the traditional certification paradigm of Rule 23 and its

⁹ 42 U.S.C. § 1981a.

¹⁰ *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998); *Robinson v. Metro-North Commuter RR Co.*, 267 F.3d 147 (2d Cir. 2001); *Atwell v. Gabow*, 248 F.R.D. 588 (D. Colo. 2008).

¹¹ *Atwell*, 248 F.R.D. at 595.

¹² *Atwell*, 248 F.R.D. at 590.

¹³ See e.g., *Jenson v. Eveleth Taconite Co.*, 139 F.3d 657 (D. Minn. 1991).

¹⁴ *Davoll v. Webb*, 194 F.3d 1116 (10th Cir. 1999); *Chandler v. City of Dallas*, 2 F.3d 1385 (5th Cir. 1993).

opt-out procedures under Rule 23(b)(3). Instead, Section 216(b) of the FLSA provides for an opt-in class action where the complaining employees are “similarly situated.”¹⁵

In a Rule 23 class action, each person who falls within the definition of a class member is bound by the judgment, whether favorable or not, unless the case is under Rule 23(b)(3) and the person has opted out. By contrast, in a FLSA collective action, a putative plaintiff must affirmatively “opt in” to the action in order to be considered to be a class member and to be bound by the outcome of the action, by filing a written consent with the court.¹⁶ Another major difference between Rule 23 class actions and collective actions is that the commencement of a collective action does not toll the statute of limitations for putative class members as in a Rule 23 class action.¹⁷ But perhaps the most substantive difference between Rule 23 and Section 216(b) is the lenient standard employed in collective actions to conditionally certify a class under the “similarly situated” analysis, compared to Rule 23’s rigorous analysis for certification.

In this regard, the Tenth Circuit has approved a two-step “ad hoc” approach in determining whether plaintiffs are “similarly situated” for purposes of Section 216(b).¹⁸ Under this approach, a court typically makes an initial “notice stage” determination of whether plaintiffs are “similarly situated.”¹⁹ In other words, the district court determines whether a collective action should be certified for purposes of sending notice of the action to potential class members. For conditional certification at the notice stage, a court requires nothing more than substantial allegations that the putative class members were together the victims of a single decision, policy, or plan.²⁰ At the end of the discovery period, the court then revisits the certification issue and makes a second determination (often in response to a motion to decertify filed by the defendant employer) of whether the plaintiffs are “similarly situated” using a stricter standard.²¹ During this “second stage” analysis, a court reviews several factors, including the disparate factual and employment settings of the individual plaintiffs; the various defenses available to the defendant which appear to be individual to each plaintiff; and fairness and procedural considerations.²²

In FLSA collective action litigation, employee challenges have focused on two primary theories. First, employees have alleged that they have been misclassified as exempt when in fact they are really non-exempt employees who are owed overtime compensation for hours worked in excess of 40 in a given workweek. These claims are generally premised upon the theory that the employees at issue do not fall within one of the white-collar exemptions for executive, administrative, or professional employees, or the theory that they were not paid on a true salary basis as the FLSA requires. Second, non-exempt employees have alleged that they have not been paid for off-the-clock

¹⁵ 29 U.S.C. § 216(b).

¹⁶ *Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208, 1216 (11th Cir. 2001).

¹⁷ 29 U.S.C. § 256(b).

¹⁸ *Thiessen v. General Elec. Capital Corp.*, 267 F.3d 1095, 1105 (10th Cir. 2001).

¹⁹ *Thiessen*, 267 F.3d at 1102 (citing *Vaszlavik v. Storage Tech. Corp.*, 175 F.R.D. 672, 678 (D. Colo. 1997)).

²⁰ See *Thiessen*, 267 F.3d at 1102 (quoting *Vaszlavik*, 175 F.R.D. at 678).

²¹ *Thiessen*, 267 F.3d at 1102-03.

²² *Thiessen*, 267 F.3d at 1103.

compensable work ordinarily in the context of pre-shift and post-shift work or during meal and rest periods. In recent times, there has been a steady increase of “donning and doffing” cases where employees claim that the time spent putting on and taking off their work-related clothing and/or other gear is compensable time under the FLSA. While donning and doffing theories first became popular in the poultry industry, the theory has been expanded to other industries where workers customarily wear protective gear.

Although FLSA collective actions are all the rage these days, collective actions can also be brought under other federal labor and employment laws. For example, collective actions under the Age Discrimination in Employment Act are authorized by 29 U.S.C. § 626(b), which incorporates the opt-in mechanism of the FLSA requiring that the employees at issue be “similarly situated.” Additionally, Equal Pay Act claims can be brought under the collective action mechanism, as the EPA’s remedies are the same as for those of the FLSA.

Because the opt-in mechanism traditionally has been believed to result in lower participation rates for class members compared to Rule 23 class actions, some named plaintiffs in collective actions have also sought to certify state law claims under Rule 23, in order to gain a larger participation rate for putative plaintiffs. These actions are known as “hybrid” collective actions. Some courts, however, have been reluctant to certify such state claims, finding that Section 216(b)’s opt-in mechanism is incompatible with a class action under Rule 23.²³ Courts that have denied Rule 23 certification of the state law claims have done so by declining supplemental jurisdiction on the basis that the state law claims would predominate over the federal claims or by finding that the named plaintiff could not satisfy Rule 23(b)’s requirement that a class action be the superior method for fair and efficient adjudication of the controversy.

EEOC Enforcement Actions

A third type of employment-related class action are the large-scale pattern or practice cases brought by the U.S. Equal Employment Opportunity Commission. EEOC pattern or practice class actions have a number of distinguishing features, and can be brought under different statutory provisions.

The majority of pattern or practice actions brought by the EEOC are pursuant to Section 706 of Title VII.²⁴ While investigating a charge of discrimination, if the EEOC finds reasonable cause to believe that an employer’s conduct has gone beyond the employee filing the charge, and that the employer has engaged in a pattern or practice of discrimination, then a pattern or practice case may result. A pattern or practice lawsuit is even more likely if the EEOC has received numerous charges from employees of one employer that are similar in nature.

²³ See, e.g., *In re American Family Mutual Ins. Co. Overtime Pay Litigation*, 638 F. Supp. 2d 1290 (D. Colo. 2009); *Otto v. Pocono Health Sys.*, 457 F. Supp. 2d 522, 524 (M.D. Pa. 2006); *McClain v. Leona’s Pizzeria, Inc.*, 222 F.R.D. 574, 577 (N.D. Ill. 2004); *Leuthold v. Destination America, Inc.*, 224 F.R.D. 462 (N.D. Cal. 2004); *Bartelson v. Winnebago Indust., Inc.*, 219 F.R.D. 629 (N.D. Iowa 2003); *De Asencio v. Tyson Foods, Inc.*, 342 F.3d 301 (3d Cir. 2003).

²⁴ See 42 U.S.C. § 2000e-5.

An EEOC pattern or practice case brought under Section 706 is subject to certain limitations, however. First, a suit under Section 706 must be based upon an individual charge of discrimination that was timely filed by the individual. Second, under Section 706, the EEOC is barred from seeking relief for any alleged act of discrimination occurring more than 300 days (or 180 days) prior to the filing of the underlying charge. (Courts generally allow the EEOC to present evidence of alleged discrimination going back more than 300 days before the charge, however.) Third, the EEOC must exhaust all of its administrative remedies prior to bringing suit under Section 706. This means not only that an individual charge must first have been filed, but that the EEOC must have investigated and conciliated (i.e. attempted to settle) the charge. Moreover, any claim brought by the EEOC in a pattern or practice suit must be within the scope of, and reasonably related to, the underlying charge and the EEOC's subsequent investigation and conciliation of the charge. For example, if the underlying charge of discrimination alleged discrimination at one location of a nationwide employer, and the EEOC investigated only that location and attempted to conciliate with regard to only that location, then the EEOC will be barred from later filing a pattern and practice claim bringing nationwide claims.

Under Section 706, the EEOC may seek economic, emotional distress and punitive damages on behalf of the class, in addition to equitable relief.

The EEOC also may bring a pattern or practice action under Section 707 of Title VII.²⁵ Section 707 actions are more rare, and typically arise in the context of a "Commissioner's Charge." By virtue of a Commissioner's Charge, an EEOC Commissioner is given the authority to file a charge on his or her own initiative, without an individual charge having been filed and without having first exhausted administrative remedies. The Commissioner may choose to bring a Commissioner's Charge where the Commission has flagged certain data compiled from an employer's EEO surveys, or where the Commissioner believes that a particular industry might be fostering a certain type of discrimination, for example.

Although Commissioners' Charges are rare – only a handful are filed each year across the country – they give the EEOC carte blanche to proceed with a regional or even nationwide class action without having conducted a prior investigation. In addition, under Section 707, the EEOC is not subject to the 300-day (or 180-day) statute of limitations that limits it under Section 706 (although the EEOC remains subject to the doctrine of laches).

A Section 707 action also is subject to certain limitations, however. Although there is no statutory requirement that the EEOC exhaust administrative remedies under Section 707, courts nonetheless uniformly apply the requirement to conciliate to Section 707 suits. In addition, the main disadvantage to the EEOC in a Section 707 action is that the EEOC may not seek emotional distress or punitive damages. It is for this reason that the EEOC files most of its pattern or practice cases under Section 706.

²⁵ See 42 U.S.C. § 2000e-6.

As a side note, it is the U.S. Attorney General, not the EEOC, who is authorized to bring a pattern or practice suit against a government entity, under either Section 706 or Section 707.

The primary distinguishing feature of an EEOC pattern or practice action is that the EEOC is not subject to Rule 23. That is, the EEOC does not have to demonstrate numerosity, commonality, typicality, or adequacy of representation in order for a class to be certified. The reasoning behind permitting the EEOC to file class actions without being subject to Rule 23 is that the EEOC is guided by “the overriding public interest in equal employment opportunity” and acts not only for the benefit of specific individuals, but “to vindicate the public interest in preventing employment discrimination.”²⁶

Without the limits imposed by Rule 23, EEOC pattern or practice actions can result in extremely large classes which are litigated quite differently than Rule 23 class actions. For instance, whereas the initial focus in a Rule 23 class action is the issue of class certification, certification plays no part in a pattern or practice action. An additional consideration is that although pattern or practice cases do not have a class representative (as there is no need for one without Rule 23), individual plaintiffs typically intervene in the litigation once the EEOC files suit. These plaintiff-intervenors usually are the employees who filed the initial EEOC charge(s), are represented by their own counsel, and make their own settlement demands separate from the relief requested by the EEOC.

Pattern or practice cases also are decided under a completely different framework than are individual discrimination cases. Instead of using the traditional *McDonnell-Douglas* burden-shifting framework or mixed motives burden-shifting test, courts apply the bifurcated, two-phased burden-shifting paradigm adopted by the Supreme Court in the seminal case of *International Brotherhood of Teamsters v. United States*, 431 U.S. 329 (1977).

Under *Teamsters*, pattern or practice cases are evaluated in two phases. In Phase I, the plaintiff bears the burden of proving that that discrimination has been “a regular procedure or policy” followed by an employer. The plaintiff must prove more than the mere occurrence of isolated or sporadic discriminatory acts, but must establish that discrimination was the company’s “standard operating procedure.” This is typically proved by offering a combination of statistical and anecdotal evidence. For example, in *Teamsters*, the plaintiff presented statistical evidence comparing the rates of minorities hired by the employer into certain positions with the total minority population of the area. Statistical evidence can then be bolstered by anecdotal evidence that brings “the cold numbers convincingly to life” to demonstrate the existence of a pattern or practice of discrimination. Once the plaintiff meets its burden, the burden then shifts to the employer to defeat the plaintiff’s prima facie showing by demonstrating that the plaintiff’s proof is either inaccurate or insignificant. In essence, the employer must show that the EEOC’s statistical analysis was flawed or provide a nondiscriminatory explanation.

²⁶ *Gen. Tel. Co. of the Northwest, Inc. v. EEOC*, 446 U.S. 318, 326 (1980).

If the plaintiff successfully meets its burden in Phase I, it creates a rebuttable presumption that all individual employment decisions made during the period of the pattern or practice were discriminatory. This presumption then carries into Phase II, which addresses the award of individual damages to individual claimants. Because of the inference from Phase I that any particular employment decision was made in pursuit of a discriminatory policy, the burden rests on the employer in Phase II to demonstrate that the employment decision for each individual employee was not the product of discrimination, but was taken for lawful reasons. Phase II is essentially a series of individual mini-trials, which often can take several weeks or months and several juries depending on the number of class members.