

Employment “Class” Actions

Three Primary Areas

- Fed. R. Civ. P. 23 Class Actions
- Section 216(b) collective actions
- EEOC enforcement actions under Section 706 and 707

Rule 23 Class Actions

- Title VII claims focusing on race and sex discrimination but national origin discrimination claims are on the rise
- Disparate impact: a neutral policy adversely impacts a protected group
- Intentional discrimination: the pattern and practice theory (discrimination is so pervasive that it is the company's standard operating procedure)
- Statistical and anecdotal evidence

Types of Class Actions

- Hiring
- Examinations
- Qualification Standards
- Promotions
- Training
- Compensation
- Benefits
- Drug & Alcohol Testing
- Reductions in Force
- Discipline
- Terminations

Battle is won or lost at the class certification stage

Must comply with both Rule 23(a) and (b)

Rule 23(a) requirements

- The class is so numerous that joinder of all members is impracticable (“numerosity”)
- There are questions of law or fact common to the class (“commonality”)
- The claims or defenses of the representative parties are typical of the claims or defenses of the class (“typicality”)
- The representative parties will fairly and adequately protect the interests of the class (“adequacy of representation”)

General Telephone Co. v. Falcon, 457 U.S. 147 (1982)

- Typicality and commonality problems
- There is a “wide gap” between an individual’s claim, on the one hand, 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 the existence, on the other hand, of a class of persons who have suffered the same injury as that individual.
- No common policy or practice that is uniformly applied throughout a company’s various divisions, departments, facilities, stores, or other geographical locations.

Rule 23(b)(2)

- 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.”
- With the introduction of compensatory and punitive damages, the Civil Rights Act of 1991 has changed the landscape with regard to class certification under this rule
- Some courts say Title VII money damages constitute the primary relief, not injunctive or declaratory relief
- *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998)

Rule 23(b)(3)

- 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.”
- Relief for compensatory damages may be too individualized

Certification is generally denied

- Disability discrimination claims
- Sexual harassment or other hostile work environment claims

Section 216(b) of the FLSA

- FLSA
- Equal Pay Act
- Age Discrimination in Employment Act
- FLSA provides for an opt-in class action where the complaining employees are “similarly situated.”

FLSA Overtime Claims

- 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.
- Non-exempt employees have alleged that they have not been paid for off-the-clock compensable work ordinarily in the context of pre-shift and post-shift work or during meal and rest periods.
- Donning and doffing claims

Major Differences

- 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 person has opted out.
- By contrast, in a FLSA collective action, a putative plaintiff must affirmatively opt into the action by filing a written consent with the court in order to be considered to be a class member and be bound by the outcome of the action.
- The commencement of a collective action does not toll the statute of limitation for putative class members as with a Rule 23 class action.

Most Significant Difference

- 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.

2-Step “Ad Hoc” Approach

- An initial notice stage whether plaintiffs are similarly situated under lenient standard
- Nothing more than substantial allegations that the putative class members were together the victims of a single decision, policy, or plan
- Motion to Decertify at the end of discovery
- Stricter standard is used
- Disparate factual and employment settings of the individual plaintiffs; the various defenses available to defendant which appear to be individual to each plaintiff; and fairness and procedural considerations.

Hybrid Collective Actions

- Both FLSA collective action and Rule 23 class for a state claim
- Reason for including state claim is to increase participation rate
- But some courts say the state claims conflict with the FLSA opt-in mechanism
- Decline supplemental jurisdiction under theory that state claims will predominate
- 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.

Pattern or Practice Enforcement Actions

- Section 707 of Title VII provides:

Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a **pattern or practice** of resistance to the full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States

Title VII, [42 U.S.C. § 2000e-6\(c\)](#)

Section 706

- In 1972, Congress amended Title VII to empower the EEOC to bring suits under Section 706 of Title VII.
- In 1980, the Supreme Court held that the litigation authority Congress granted the EEOC under Section 706 was meant to be coextensive with the Attorney General's existing authority under Section 707.

General Telephone Co. v. EEOC, 446 U.S. 318, 328-29 (1980).

Section 706 v. Section 707 Claims

- Section 707

upsides: statute of limitations

EEOC v. Mitsubishi Motor Manu. of Am., 990 F. Supp. 1059, 1083-85 (C.D. Ill. 1999)

Scolari Warehouse Markets, Inc., 488 F. Supp. 2d 1117, 1136 (D. Nev. 2007)

no charge needed

EEOC v. Milgard Manu. Inc. (D.C. Colo. 2002).

downside: remedies

- Section 706

upside: compensatory and punitive damages available

downsides: valid charge required and relief limited to 300 (180) days prior to the filing of the underlying charge of discrimination

Rule 23

- Rule 23 does not apply to the EEOC when it proceeds with a Pattern or Practice enforcement action

General Tel. Co. v. EEOC, 446 U.S. 318 (1980)

- Courts have resoundingly rejected the argument that sexual harassment claims are unsuitable for a pattern or practice enforcement action.

EEOC v. Burlington Medical Supplies, Inc., 536 F.Supp.2d 647, 655 (E.D. Vir. 2008);
Employees Committed for Justice v. Eastman Kodak Co., 407 F.Supp.2d 423, 431 (W.D.N.Y. 2005);
EEOC v. Foster Wheeler Constructors, Inc., 1999 U.S. Dist. 11226 at **5-6 (N.D. Ill. 1999);
EEOC v. Mitsubishi Motor Mfg. of Am., Inc., 990 F. Supp. 1059, 1070 (C.D. Ill. 1998).

EEOC's Burden

- To establish a pattern or practice of discrimination, the EEOC must “prove more than the mere occurrence of isolated or ‘accidental’ or sporadic discriminatory acts. [The EEOC must] establish by a preponderance of the evidence that ... discrimination [is] the company's standard operating procedure the regular rather than the unusual practice.”

International Brotherhood of Teamsters v. United States, 431 U.S. 324, 336 (1977)

Bifurcated Trial

- 2 Stage Process
 1. Liability Stage
 2. Damages Phase

International Brotherhood of Teamsters v. United States, 431 U.S. 324, 360 (1977)

Phase I

- At the initial, “liability” stage of a pattern-or practice suit the Government is not required to offer evidence that each person for whom it will ultimately seek relief was a victim of the employer’s discriminatory policy. Its burden is to establish a prima facie case that such a policy existed.

Teamsters, 431 U.S. at 360-61.

Phase I – Establishing Pattern or Practice

- Statistics OR
- Anecdotal Evidence OR
- Both

Hostile Work Environment Cases

- *EEOC v. Dial Corp.*, 156 F.Supp.2d 926 (N.D. Ill. 2001)
- *EEOC v. Mitsubishi Motor Mfg. of Am., Inc.*, 990 F. Supp. 1059, 1071 (C.D. Ill. 1998)
- *Jenson v. Eveleth Taconite Co.*, 824 F. Supp. 847, 875-76 (D. Minn. 1993)
- *EEOC v. Burlington Medical Supplies, Inc.*, 536 F. Supp.2d 647, 661 (E.D. Va. 2008) (finding pattern or practice of discrimination based on testimony of six claimants)
- *EEOC v. International Profit Associates, Inc.*, 2007 WL 844555 at *1 n.3 and *2 (N.D. Ill., March 16, 2007) (although Defendant employed more than 40,000 employees, EEOC represented 113 claimants)
- *EEOC v. Scolari Warehouse Markets, Inc.*, 488 F.Supp.2d 1117 (D. Nev. 2007) (rejecting the defendant's argument that the EEOC could not prove a pattern or practice where it presented the testimony of only 17 employees out of a total of 5200 employees)
- *EEOC v. Corrections Corporation of America*, 06 cv 1956 (D. Colo. 2009) (Blackburn, J.) (denying summary judgment despite Defendant CCA's argument that SJ should be granted because EEOC only presented testimony from and sought relief for 2.9% of the female employees).

Defendant's Burden

- Under *Teamsters*, once the plaintiff establishes a pattern or practice of discrimination, the burden of proof shifts to the defendant.
- When the burden shifts, it is the employer's burden to "defeat the prima facie showing of a pattern or practice by demonstrating that the [plaintiff's] proof is either inaccurate or insignificant."

Teamsters, 431 U.S. at 360.

Defendant's Burden

- Assertions that the company may have investigated individual cases of sexual harassment are not a defense to pattern or practice liability.

A systemic remedy is necessary to correct a company-wide problem. Situation-specific responses will not suffice

EEOC v. Mitsubishi Motor Manu. Of Am., Inc., 990 F.Supp. 1059 (C.D. Ill. 1998).

Burden Shifting

- If the defendant is unable to demonstrate that the government's proof is inaccurate or insignificant, then a rebuttable presumption arises that individual claimants were discriminated against because of their status in the protected group and are entitled to recover

Teamsters, 431 U.S. at 359 and n. 45

Stage II

- In Stage 2, EEOC needs only to make the showing that any person for whom it seeks relief was affected by the unlawful employment decision
- the burden rests on the employer to demonstrate that the individual was, in fact, not subjected to discrimination

Teamsters, 431 U.S. at 362

Stage II - HWE Cases

■ Split in Authority as to Presumptions

- The individual claimant only needs to testify that she found the alleged conduct to be hostile or abusive. Burden of Production shifts to ER to demonstrate a former employee welcomed the harassment

Mitsubishi, Dial and Jensen

- EEOC carries burden to prove that the individual subjectively found the harassment so severe or pervasive as to alter her employment and create an abusive work environment

EEOC v. Burlington Medical Supplies, Inc., 536 F.Supp.2d 647 (2008)

- EEOC has burden of proof to show that each individual claimant experienced sex-based harassment that an objectively reasonable woman would find severe or pervasive and that she subjectively perceived the harassment she experienced to be hostile or abusive

EEOC v. International Profit Associates, Inc., 2007 WL 3120069 (N.D. Ill. 2007).

Open Issues

- Bifurcation – discovery
- Evidence of Punitive Damages