

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRUCE DONALDSON, et al. : CIVIL ACTION
: :
v. : :
: :
EXELON CORP., et al. : NO. 05-1542

MEMORANDUM

Dalzell, J.

September 14, 2006

Four of the five named plaintiffs¹ in this matter seek to certify the case as a class action under Fed. R. Civ. P. 23(b)(2) on behalf of a class defined as consisting of "All Caucasian Male² employees of Exelon Corporation, its subsidiaries, affiliates and operating units." Pl. Proposed Order at ¶ 1.

Seeking to champion the 11,400 white males employed at Exelon and its subsidiaries as a single class, plaintiffs spent the bulk of their substantial filings on this motion arguing neither applicable law nor specific facts, but instead making vague and unsubstantiated claims about the effects of defendants' diversity policies.³ Having carefully considered the merits of

¹ The motion is brought on behalf of all named plaintiffs except John P. Daly, presumably because Daly is no longer an Exelon employee and is thus not a member of the proposed class.

² At one point in their brief, plaintiffs describe the class as "all male employees" of Exelon and its subsidiaries. Pl. Br. at 1. Based on the arguments provided, we assume this statement is an error and address the motion as we have framed it above.

³ In these filings, we regret to say that plaintiffs seem to have taken the old lawyerly advice that if the law is against you, argue the facts; if the facts are against you, argue
(continued...)

these submissions, we conclude that plaintiffs have failed to demonstrate that Exelon and its subsidiaries have "acted or refused to act on grounds generally applicable" to that class, Fed. R. Civ. P. 23(b)(2). As will be seen, the named plaintiffs have not shown that their claims are sufficiently common or typical to warrant certification, and neither have they allayed our concerns about whether they can fairly and adequately represent the interests of the class.

The class action device is appropriate in cases where it "saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23." General Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 155 (1982) (quoting Califano v. Yamasaki, 442 U.S. 682, 701 (1979)). It is designed not to penalize defendants, but to facilitate the resolution of complex claims affecting potentially large numbers of similarly situated litigants.

Here, plaintiffs desire to have a class certified under Fed. R. Civ. P. 23(b)(2). They seek a declaration that the diversity policies of Exelon and its subsidiaries are in violation of Title VII,⁴ the PHRA,⁵ and 42 U.S.C. § 1981. They

³(...continued)
the law; if both the law and the facts are against you, attack the other side.

⁴ 42 U.S.C. § 2000e, et seq.

⁵ 43 Pa. C.S. § 951, et seq.

also request an injunction against the enforcement of those policies, as well as various other forms of relief.

In order to be certified as representatives of a class, the named plaintiffs must show that:

(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 or 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, the class action must be of one of the types identified in Rule 23(b). As noted, plaintiffs seek to certify this class under Rule 23(b)(2), which provides for class actions against defendants who have "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." Fed. R. Civ. P. 23(b)(2).

A. Rule 23(a) Requirements

Rule 23(a) imposes four now-familiar requirements on parties who seek class status for their claims: numerosity, commonality, typicality, and adequacy. We will address each in turn below.

1. Numerosity

Although we have concerns about the breadth with which plaintiffs have defined their proposed class, it is clear that, as proposed, it is "so numerous that joinder of all members is

impracticable." Fed. R. Civ. P. 23(a)(1). While defendants cite a number of cases that have refused to certify broadly defined classes such as the one here, we read those cases to be concerned primarily with commonality and typicality, not numerosity. If the injuries are sufficiently common to warrant class certification, a group of approximately 11,400 employees unquestionably satisfies the numerosity requirement. See Wolgin v. Magic Marker Corp., 82 F.R.D. 168, 171 (E.D. Pa. 1979) ("[C]ourts are quite willing to accept common sense assumptions in order to support a finding of numerosity.") (quoting 5 Newberg on Class Actions § 8812 (1977)).

2. Commonality

The commonality requirement has been held to present a relatively low bar because, in general, the proponent of class status need only show a single common issue of law or fact. Baby Neal ex rel. Kanter v. Casey, 43 F.3d 48, 56 (3d Cir. 1994). In employment discrimination cases, however, the Supreme Court has made clear that an abstract policy of discrimination is not sufficient to satisfy the commonality requirement as to all affected employees. Falcon, 457 U.S. at 159 n.15. The proponent of class certification must show that a discriminatory practice affects all members of the class in some common way.

Because of the vast differences among the class members, it is hard to find a sufficient common thread of law or fact with which to tie them together. Plaintiffs point out, quite correctly, that "racial discrimination in an employment

context, arising out of the employer's standard operating procedure, is well-suited to class adjudication." Ellis v. Elgin Riverboat Resort, 217 F.R.D. 415, 422 (N.D. Ill. 2003) (citing Falcon). If plaintiffs then went on to identify a "standard operating procedure" that applied to all white male employees, we might be able to find sufficient commonality. Instead, however, plaintiffs go on to challenge Exelon's "diversity initiatives," a category of policies that they never fully enumerate. Pl. Br. at 60.

In attempting to lay out the common injury that all class members have suffered, plaintiffs attach the depositions of seven members of the putative class.⁶ Pl. Br. Ex. 7. Each of them says, in identical language,⁷ that "[f]rom at least April, 2003, to the present, [he has] continued to be intentionally discriminated against by Exelon based on [his] race and age" and "'diversity' within Exelon is known to mean discrimination against older white males." Pl. Br. at 43 n.19. As evidence of a common question of law or fact that more than 11,000 men supposedly share, this is exceptionally weak. When we compare this case with Love v. Johanns, 439 F.3d 723 (D.C. Cir. 2006), where the Court of Appeals upheld a denial of class certification

⁶ As noted above, the eighth declarant, Mr. Daly, is no longer an Exelon employee and is, therefore, not a member of the proposed class.

⁷ Defendants have filed a motion to strike many paragraphs from the declarations attached to plaintiffs' motion. Because we deny plaintiffs' motion to certify the class even without striking the disputed declarations, we need not reach defendants' motion and will deny it as moot.

on commonality grounds despite the submission of 1,481 declarations, all alleging one of two specific injuries in a class consisting of "not less than 3,000" women, id. at 725, it is difficult to see how we can find a common question of law or fact on the basis of the evidence plaintiffs have submitted.

Equally distressing is the failure of plaintiffs to allege any shared injury with specificity.⁸ We are asked to certify a class based on white male employees' shared "belief[] that they have and continue to be [sic] discriminated against by Exelon's application of its company wide policy of preferring minority and women employees and applicants over white male employees." Pl. Br. at 43. Falcon left open the possibility that a "general policy of discrimination" could justify the certification of a broad class if plaintiffs offered "[s]ignificant proof." 457 U.S. at 159 n.15. But the "bald allegation that the declarants and non-declarants alike are unified by a 'common policy' of ... discrimination is insufficient...." Love, 439 F.3d at 729.

Goodman v. Lukens Steel Co., 777 F.2d 113 (3d Cir. 1985), is instructive as to the quantum of evidence required to meet the Supreme Court's threshold of "significant proof." In Goodman, plaintiffs sought to certify a class consisting of all black employees of the defendant corporation any time after June 16, 1975. Id. at 122. The Goodman plaintiffs were able to

⁸ It is not lost on us that identifying the injury any more specifically would almost certainly make it impossible to certify such a broad class, but that is not a reason to overlook plaintiffs' vagueness.

produce significant evidence, both statistical and anecdotal, that white employees were given more desirable initial assignments, were transferred to desirable jobs more frequently, received more incentive pay, were discharged less frequently, received more promotions to management, and were led to believe that discrimination against black employees would not be punished. Id. at 117. Nevertheless, the Court of Appeals found that this was not "significant proof" of a general policy of discrimination. Id. at 124. The Court of Appeals found that, because the District Court rejected some of plaintiffs' claims, the injuries were no longer common to all members of the class.

When compared with Love and Goodman, both of which refused to certify classes on commonality grounds, the evidence produced here is inadequate.⁹ Plaintiffs have produced seven declarations of potential class members, none of which talk about a particularized injury the class shares. Further, while there are allegations of a general policy of discrimination, there is no "significant proof." Indeed, there is far less anecdotal evidence than was present in Goodman, and there is no statistical proof at all.¹⁰

⁹ We hasten to add that plaintiffs have produced over 100 pages of briefing and three binders of exhibits attempting to show a variety of discriminatory acts on the part of Exelon and its subdivisions. The variety, however, is precisely the problem. While many allegedly discriminatory acts have been shown, there is nothing that serves to tie together the vast class that plaintiffs ask us to certify.

¹⁰ Not only have plaintiffs not produced any statistical evidence of their own, they have sought to preclude our consideration of the statistical evidence defendants

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Further, it is not clear that plaintiffs have successfully alleged that all white male employees suffered any injury at all, much less that their injuries share a common question of law or fact. The fact that Exelon and its business units seek to diversify their workforce is, by itself, plainly insufficient to represent a legally cognizable injury to non-diverse employees. The Supreme Court has noted with approval that "major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints." Grutter v. Bollinger, 539 U.S. 306, 330 (2003); see also Iadimarco v. Runyon, 190 F.3d 151, 164 (3d Cir. 1999) ("An employer has every right to be concerned with the diversity of its workforce, and the work environment.").

¹⁰(...continued)

submitted. While plaintiffs are correct that statistical evidence is not required in order to demonstrate company-wide discrimination, it is certainly probative. Plaintiffs' citation to Connecticut v. Teal, 457 U.S. 440 (1982), in their reply brief is particularly inapt. Pl. Reply at 17. In Teal, the Supreme Court held that a bottom-line statistical result could not be used to disprove a prima facie showing of a particular discriminatory act against a particular individual or group of individuals. See Teal, 457 U.S. at 455 ("Title VII does not permit the victim of a facially discriminatory policy to be told that he has not been wronged because other persons of his or her race or sex were hired."). Where, however, plaintiffs attempt to show that all white male employees were discriminated against, statistical evidence seems particularly apt. Because the putative class here contains both "the victim" and the "other persons of his or her race or sex" that the Court discussed in Teal, the prohibition the Court laid down there is inapplicable. See also Krodell v. Young, 748 F.2d 701, 709-10 (D.C. Cir. 1984) (discussing differences between the use of statistics in individual cases and in pattern and practice cases).

Against such a benign backdrop, a "belie[f] that Exelon managers understand 'diversity' to be a code term for discrimination against white male employees," Donaldson Decl. at ¶ 17, simply cannot be credited as alleging a legally cognizable injury, particularly not one that affects more than 11,000 employees in a common way. "Conclusory allegations of discrimination on a class-basis are not enough." Zapata v. IBP, Inc., 167 F.R.D. 147, 158 (D. Kan. 1996). Plaintiffs cannot "simply leap from the premise that they were the victims of discrimination to the position that others must also have been." Morrison v. Booth, 763 F.2d 1366, 1371 (11th Cir. 1985).

We therefore find that plaintiffs have failed to satisfy the commonality requirement of Fed. R. Civ. P. 23(a)(2).

3. Typicality

In addition to showing a common question of law or fact, which plaintiffs have failed to do, the proponent of class certification must demonstrate that the claims of the named parties are typical of all the claims of the class.

"[T]ypicality entails an inquiry whether 'the named plaintiff's individual circumstances are markedly different or ... the legal theory upon which the claims are based differs from that upon which the claims of other class members will perforce be based.'" Eisenberg v. Gagnon, 766 F.2d 770, 786 (3d Cir. 1985) (quoting Weiss v. York Hospital, 745 F.2d 786, 809 n.36 (3d Cir. 1984)).

Typicality presents a number of problems here for certifying the class. First, and most notably, the individual

plaintiffs are primarily claiming discrimination based on age and race¹¹, whereas the class being proffered for certification asserts claims based on sex and race. Because of the added age discrimination issue, the claims of the named plaintiffs may be in conflict with the claims of the class, particularly where, for example, a young, white male was promoted over one of the named plaintiffs. This sort of conflict generally defeats a named plaintiff's claim to typicality. See Baby Neal, 43 F.3d, at 57 ("The typicality criterion is intended to preclude certification of those cases where the legal theories of the named plaintiffs potentially conflict with those of the absentees by requiring that the common claims are comparably central to the claims of the named plaintiffs as to the claims of the absentees.").

In addition, a named plaintiff who is subject to a unique defense will destroy typicality. See Gary Plastic Packaging Corp. v Merrill Lynch, Pierce, Fenner and Smith, Inc., 903 F.2d 176, 180 (2d. Cir. 1990); Ritti v. U-Haul Int'l Inc., Civ. No. 05-4182, 2006 WL 1117878 (E.D. Pa. 2006). Here, as defendants point out in their brief, each of the named plaintiff proposed class members is subject to one or more unique defenses. See Def. Mem., at 44 (noting that Donaldson had been demoted for cause, Ferry and Jackson may have been untimely with their EEOC filings, Ferry did not apply for a Foreman position, and Taylor

¹¹ It is true that the individual plaintiffs also allege sex discrimination but, because it appears that nearly all the applicants for the Foreman and Supervisor positions were men, the gravamen of the named plaintiffs' claims deals with race and age.

admits that he was not qualified for a Foreman position). While it is true that, as regards any relief that could be awarded to the entire class, these individual questions are not relevant, they will almost certainly become the focus of the case if the class action is tried together with the specific claims of the named plaintiffs. Thus, trying these individual claims together with the proposed class action renders class treatment both unnecessary and inefficient. Cf. Baby Neal, 43 F.3d at 55 ("The requirements of Rule 23(a) are meant to assure both that class action treatment is necessary and efficient and that it is fair to the absentees under the particular circumstances.").

Finally, courts have generally held that at least one named plaintiff must have a claim against each defendant. See Thompson v. Bd. of Educ. of Romeo Cmty. Sch., 709 F.2d 1200, 1204-05 (6th Cir. 1983); La Mar v. H & B Novelty & Loan Co., 489 F.2d 461, 466 (9th Cir. 1973); Clark v. McDonald's Corp., 213 F.R.D. 198, 222 (D.N.J. 2003). It is not clear from the pleadings exactly which corporate entity each of the defendants works for,¹² but it does not appear that, between them, they have claims against all three named defendants. Further, since the proposed class includes employees of all "subsidiaries, affiliates and operating units," it is a near certainty that the named plaintiffs collectively fail to meet the requirement of having a claim against each defendant.

¹² The pleadings and exhibits refer almost exclusively to the generic name for all defendants, "Exelon."

For all of these reasons, plaintiffs' claims are not sufficiently typical to meet the requirements of Fed. R. Civ. P. 23(a)(3).

4. Adequacy

Many of the issues we addressed in the previous section also go to the question of adequacy. The adequacy inquiry "serves to uncover conflicts of interest between named parties and the class they seek to represent." Amchem Prods., Inc. v. Windsor, 521 U.S. 592, 625 (1997). Because we have already addressed a number of possible conflicts between named plaintiffs and the rest of the proposed class, we will not belabor the point here.

Suffice it to say that there are many potential conflicts between named plaintiffs -- whose factual situations are quite similar -- and such a large class -- which encompasses a huge variety of employers, union memberships, diversity policies, ages, and levels of experience. While these potential conflicts, taken alone, might not preclude class certification, taken together with the concerns raised above, they raise insuperable barriers to the successful litigation of this matter as a class action.

B. Rule 23(b)(2) Requirements

In order to proceed under Rule 23(b)(2),¹³ plaintiffs must demonstrate some action on the part of Exelon and its subsidiaries that applies to all 11,400 members of the putative class, despite the fact that they "work for ten companies at 116 facilities or offices in nine states and the District of Columbia." D. Mem. at 1. Because none of the specific policies at issue applies to all employees in the putative class, plaintiffs instead base their certification motion on an allegation that "Exelon has created a corporate culture which discriminates against white males." Pl. Br. at 3. Although plaintiffs correctly point out that employment discrimination allegations are prime examples of the kinds of actions typically certified under Rule 23(b)(2), id. at 56-57, Title VII "contains no special authorization for class suits maintained by private parties" and potential class representatives suing under Title VII must still meet the requirements of Rule 23. Falcon, 457 U.S. at 156.

In order to succeed in its motion, therefore, plaintiffs must identify a harm that all white males suffer at all Exelon sites as a result of the Exelon corporate culture. They have not done this. While a class of white males who applied for and were denied foreman positions in 2003, or a class

¹³ Plaintiffs also address, in a footnote, the suitability of this class for certification under Rule 23(b)(1). First, on a matter as important as class certification, we are loathe to place much weight on a legal argument given such cursory treatment by the moving party. Second, as the preceding pages should show, we find that on these facts certification of such a broad class under any subsection of Rule 23(b) is unwarranted.

of all white males who applied for promotions to exempt positions while the AIP was in effect, or possibly even a class of all white males who heard John Rowe's speech at the 2003 corporate meeting could plausibly allege a shared harm, the experiences of the employees in this proposed class are simply too vague and diverse for a class action to facilitate adjudication of claims. Put another way, this proposed class encompasses both the 40-year veteran who has been passed over for a promotion many times and the new hire of last week¹⁴ who is unaware that Exelon has a diversity policy at all.

In the absence of a specific policy applicable to all employees, this proposed class simply lacks the commonality of interest that Rule 23(b)(2) requires.

C. Conclusion

Because we find on multiple grounds that plaintiffs have failed to meet the requirements of both Rule 23(a) and Rule 23(b)(2), plaintiffs' motion for class certification must be denied. An Order to this effect follows.

BY THE COURT:

¹⁴ Actually, it is not clear whether plaintiffs seek to certify a class consisting of all white male employees over a period of time or as of a particular date. We assume, only for purposes of the illustration above, that a white man hired last week would be part of the proposed class.

/s/ Stewart Dalzell, J.

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ORDER

AND NOW, this 14th day of September, 2006, upon consideration of plaintiffs' motion for class certification (docket entry # 44), defendants' memorandum in opposition (docket entry # 52), plaintiffs' reply (docket entry # 55), defendants' motion to strike (docket entry # 53), and plaintiffs' response to that motion (docket entry # 56), and for the reasons articulated in the accompanying Memorandum of Law, it is hereby ORDERED that:

1. Plaintiffs' motion for class certification is DENIED;
2. Defendants' motion to strike is DENIED AS MOOT;
3. All merits discovery regarding the named plaintiffs' claims, including any required expert reports, shall be COMPLETED by December 1, 2006;
4. On December 1, 2006, the parties shall jointly REPORT to the Court by fax whether they believe a settlement conference with the Court or with Judge Hart would be productive; and
5. Motions for summary judgment shall be FILED by December 15, 2006, with responses due January 11, 2007.

BY THE COURT:

/s/ Stewart Dalzell, J.

