Blocking Certification

Defending Employment Discrimination Class Actions

by Harold Pinkley and Todd Presnell

You have seen the headlines. In 1997, Home Depot settled a sex discrimination class action for $65 million. In 1997, Texaco settled a race discrimination class action for $176.1 million, including the payment of $29 million in attorneys' fees. In 2000, The Coca-Cola Company settled a race discrimination case for $192.5 million, including the payment of $20.7 million in attorneys' fees and the implementation of various programs and policies in the human resources department. There is clearly an upward trend in the amount of monies companies pay to settle employment discrimination class actions. A $5 billion race discrimination class action recently filed against Microsoft shows that there is no foreseeable end for either employment discrimination class actions in general or the amounts paid to settle these class actions in particular.

With no foreseeable end to this trend, companies with a large number of employees should anticipate being the next target of class action plaintiffs' lawyers. In most situations, companies and their lawyers become aware of an anticipated class action before an actual administrative or court action is filed. Moreover, even after suit is filed, employers will find themselves in litigation for some period of time before the issue of class certification is addressed by the court. It is in this initial, critical time period, therefore, that companies and defense lawyers must begin to gather the information necessary to defeat class certification. This information and data, whether used in pre-suit settlement negotiations or in response to a motion for class certification, may be the reason that keeps a company's name out of the next headline. This article, therefore, will provide a general overview of class actions in the employment discrimination arena and offer pre-suit investigatory tips for the employment defense lawyer.

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Representative Actions in Employment Discrimination Cases

Although the employment discrimination statutes have a common goal of deterring employers from taking inappropriate or illegal steps, not all employment discrimination class actions are analyzed under the same legal framework. For example, class actions filed under Title VII of the Civil Rights Act of 1964 or the Americans with Disabilities Act are certified, or not certified, under Rule 23 of the Federal Rules of Civil Procedure. By contrast, class actions under the Equal Pay Act or the Age Discrimination in Employment Act are pursued under section 216(b) of the Fair Labor Standards Act as "collective actions," which operate under a somewhat different framework. Accordingly, a brief overview of class actions and collective actions is important in knowing how to handle pre-suit investigations.

Rule 23 Class Actions

A person seeking to represent a class may do so "only if (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). It is well established, therefore, that "[a]n individual litigant seeking to maintain a class action under Title VII must meet the 'prerequisites of numerosity, commonality, typicality, and adequacy of representation' specified in Rule 23(a)." *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 156 (1982).

The Supreme Court's decisions in *Falcon* and *East Texas Motor Freight System Inc. v. Rodriguez*, 431 U.S. 395 (1977), emphasized the necessity for representative plaintiffs to strictly comply with the prerequisites of Rule 23. In rejecting the certification of class actions simply because the complaint contained an allegation of "across-the-board" discriminatory employment practices, the Court "reiterated that 'careful attention to the requirements of Fed.Rule Civ.Proc. 23 remains nonetheless indispensable' and that the 'mere fact that a complaint alleges racial or ethnic discrimination does not in itself ensure that the party who has brought the lawsuit will be an adequate representative of those who may have been victims of that discrimination.'" *Falcon*, 457 U.S. at 157, quoting *Rodriguez*, 431 U.S. at 405-06. In other words, simply alleging a discriminatory practice of the employer does not meet the Rule 23(a) requirements.

Satisfying the requirements of Rule 23(a), however, does not end the analysis. If the Rule 23(a) prerequisites are met, the potential class representative still must show that the class action may be maintained either under Rule 23(b)(2) or 23(b)(3). A class action may be certified under 23(b)(2) when "the party op-

posing 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." Generally speaking, therefore, class claims seeking injunctive or declaratory relief are appropriately certified under Rule 23(b)(2). Rule 23(b)(3), on the other hand, applies in cases seeking non-equitable relief, *i.e.*, money. Before, however, a class may be certified under Rule 23(b)(3), "the court [must find] that the questions of law or fact common to the members of the class *predominate* over any questions affecting only individual members, *and* that a class action is *superior* to other available methods for the fair and efficient adjudication of the controversy." Rule 23(b)(3) (emphasis added).

The distinction between Rule 23(b)(2) and 23(b)(3) classes, and the added requirement under Rule 23(b)(3) that common questions of law and fact *predominate* over individual ones, has become increasingly significant since the passage of the 1991 Civil Rights Act. Prior to these 1991 amendments to Title VII, most class actions were certified under Rule 23(b)(2) because the only remedies available were the equitable creatures of back pay and reinstatement. Indeed, the Advisory Committee Notes to Rule 23(b)(2) state that this subsection is appropriate for "actions in the civil-rights field where a party is charged with discriminating unlawfully against a class."

The Civil Rights Act of 1991, however, dramatically altered the available remedies for plaintiffs by permitting compensatory damages, including relief for "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses." 42 U.S.C. §1981a(b)(3). In addition, the amendment permitted recovery of punitive damages where the employer acts with malice or reckless indifference with respect to the plaintiff's rights. §1981a(b)(1)(2). Finally, the amendments entitled either party to a jury trial where compensatory or punitive damages were sought. §1981a(c).

While the availability of compensatory and punitive damages increased the incentive for plaintiffs' lawyers to pursue class actions, these damages also provided ammunition for companies and their counsel to defeat these new class actions. If a plaintiff pursuing class certification seeks compensatory and/or punitive damages, then the class more than likely will not be certified under Rule 23(b)(2) as that subsection applies only where equitable relief predominates. Thus, the class action plaintiff must seek certification under Rule 23(b)(3); however, the predominance and superiority requirements of this subsection make it difficult to have a class certified.

The Fifth Circuit's decision in *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998), is the leading case in post-1991 class actions sought to be certified under Rule 23(b)(3), and provides a roadmap for defendants seeking to defeat class certification. In *Allison*, the appellate court upheld the district court's denial of class certification to African-American employees who had alleged that Citgo engaged in racially discriminatory practices with respect to hiring, promoting, compensating, and training. *Id.* at 407. The court first denied certification of this class under Rule 23(b)(2) because the compensatory and punitive damages sought predominated over the equitable relief. *Id.* at 416-17. Similarly, the court found that Rule 23(b)(3) certification was inappropriate because, where compensatory and punitive damages are sought, individual issues predominate over any common questions of law or fact. *Id.* at 419. These individual issues include: "what kind of discrimination was each plaintiff subjected to; how did it affect each plaintiff emotionally and physically, at work and at home; [and] what medical treatment did each plaintiff receive and at what expense." *Id.* These individual issues, moreover, detracted from the superiority of a class action and implicated Seventh Amendment concerns. *Id.* at 419-20.

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Other circuits have followed *Allison* and upheld the refusal to certify class actions under Rule 23 based on the individualized nature of the relief sought by the various class members and representatives, and the fact that such relief predominated over the injunctive relief, making Rule 23(b)(2) an inappropriate vehicle for class certification. See *Lemon v. International Union of Operating Engineers*, 216 F.3d 577 (7th Cir. 2000); *Jefferson v. Ingersoll International Inc.*, 195 F.3d 894 (7th Cir. 1999); *Coleman v. General Motors Acceptance Corp.*, 296 F.3d 443 (6th Cir. 2002); *Basco v. Wal-Mart Stores, Inc.*, ___ F.Supp.2d ___ (E.D.La. May 9, 2002), 2002 Westlaw 975674, 2002 U.S.Dist.LEXIS 8732.

Although some courts have outright denied class certification and employment cases based on the individualized request for monetary relief, a growing number have taken a more creative approach and certified employment discrimination classes under Rule 23(b)(2) solely on the question of liability, while denying certification on the issue of damages. See *Robinson v. Metro-North Commuter Railroad Co.*, 267 F.3d 147 (2d Cir. 2001); *McReynolds v. Sodexho Marriott Services, Inc.*, 208 F.R.D. 428 (D.D.C. 2002); *Osgood v. Harrah's Entertainment, Inc.*, 202 F.R.D. 115 (D.N.J. 2001). In light of these decisions, some plaintiffs have argued for the certification of a hybrid Rule 23(b)(2) / 23(b)(3) class, wherein liability to the class is determined under the provisions of Rule 23(b)(2) and then damages are analyzed under Rule 23(b)(3). While some courts have recognized this as a potential method of certifying an employment discrimination class where monetary relief is sought, courts will still impose the more rigorous requirements of Rule 23(b)(3) to the request for monetary relief, including that common issues predominate over individual ones.

Since, in most employment discrimination cases, issues of economic and emotional damages vary from class member to class member, employers have generally been successful at defeating efforts to certify the damages portion of a class action under Rule 23(b)(3). That being said, no employer wants a finding of liability against it on behalf of thousands of current and former employees, followed by thousands of individual hearings on the issue of damages.

Section 216(b) Collective Actions

Unlike other discrimination class actions, Rule 23 of the Federal Rules of Civil Procedure does not govern potential class actions under the Age Discrimination in Employment Act or the Equal Pay Act. Rather, the ADEA and EPA require that class claims be brought as a collec-

tive action under the requirements set forth in similar actions under the Fair Labor Standards Act. See, *e.g.*, 29 U.S.C. §626(b) and 29 U.S.C. §216(b). Under section 216(b), an action may be brought "by any one or more employees for and in behalf of himself or themselves and other employees similarly situated."

Another difference between a Rule 23 class action and a section 216(b) collective action is the opt-in/opt-out requirement. Under Rule 23, all persons within the defined class are deemed to be in the class and bound by the judgment unless they affirmatively opt out of the class. See Fed.R.Civ.P. 23(c)(3); *Grayson v. K Mart Corp.*, 79 F.3d 1086 (11th Cir. 1996). By contrast, the "putative plaintiff must affirmatively opt into a §216(b) action by filing his written consent with the court in order to be considered a class member and be bound by the outcome of the action." *Hipp v. Liberty National Life Insurance Co.*, 252 F.3d 1208, 1216 (11th Cir. 2001).

In order to maintain an opt-in collective action, the plaintiffs must show that the members of the projected class are similarly situated. Many district courts have ruled that the determination of whether employees are similarly situated so as to be included in a collective action involves an analysis of three factors. These factors are: "(1) the disparate factual and employment settings of the individual plaintiffs; (2) the various defenses available to defendant which appear to be individual to each plaintiff; and (3) fairness and procedural considerations." *Thiessen v. General Electric Capital Corp.*, 996 F.Supp. 1071, 1081 (D.Kan. 1998). See *Bayles v. American Medical Response of Colorado, Inc.*, 950 F.Supp. 1053 (D.Colo. 1996); *Brooks v. Bellsouth Telecommunications, Inc.*, 164 F.R.D. 561 (N.D.Ala. 1995).

Courts have developed several guidelines in determining whether the three factors have been met and that the proposed class members are, in fact, similarly situated. For example, in analyzing the individual plaintiffs' disparate factual and employment settings, the lack of similarity "in age, salary, organization employment, and geographic location by city and state" generally mandate that the proposed plaintiffs are not similarly situated. *Thiessen*, 996 F.Supp. at 1081, quoting *Lusardi v. Xerox Corp.*, 118 F.R.D. 351, 358 (D.N.J. 1987). If the claimant seeks to represent a class of employees residing in different offices of the defendant, then it is less likely that plaintiffs are similarly situated. Moreover, the differences in plaintiffs' salary or pay grade may render plaintiffs too dissimilar to warrant one collective action. *Brooks v. Bellsouth, supra,* 164 F.R.D. at 569. Plaintiffs with different supervisors or working in different departments of a company will generally be too dissimilar as well. *Id.* See also, *Ulvin v. Northwestern National Life Insurance Co.*, 141 F.R.D. 130 (D.Minn. 1991). Furthermore, whether the termination decision-making process is centralized or decentralized is an important consideration. The more decentralized the company's decision-making process, the more likely that individual plaintiffs are not truly in similar situations. See *Lusardi v. Xerox Corp.*, 122 F.R.D. 463, 465 (D.N.J. 1988).

In addition to these guidelines, the potential defenses that could be asserted by the company in each individual case must also be considered. For example, if a company implements different reductions in force (RIFs), then it may very well impose different objective criteria in each RIF. See *Lusardi v. Xerox*, 122 F.R.D. at 465. Other defenses would involve criteria imposed by different supervisors as well as special criteria for particular departments or divisions of a company. *Thiessen*, 996 F.Supp. at 1081. Whether on a departmental, location, or employee-level basis, if the company can and will assert different defenses to the claims of different employees, then certification as a collective action is inappropriate.

In making collective action certification decisions, the more favored methodology is for courts to utilize a two-tiered approach. Under this analysis, the court first performs the similarly situated analysis at the "notice stage." At this stage, the court makes an initial determination, usually based on the pleadings and any evidence (such as affidavits), of whether notice should be given to potential class members. Because this analysis is viewed as a "fairly lenient standard," courts generally conditionally certify a collective action at this stage and allow the notice measures to proceed. See *Mooney v. Aramco Services Co.*, 54 F.3d 1207 (5th Cir. 1995). If conditionally certified, the action proceeds through discovery. The second analysis generally comes on a motion for decertification by the defendant following discovery.

With discovery essentially complete, "the court has much more information on which to base its decision, and makes a factual determination on the 'similarly situated' question." *Thiessen*, 996 F.Supp. at 1080, quoting *Brooks v. Bellsouth*, 164 F.R.D. at 568. This second determination carries a higher standard of proving the similarly situated requirement, and is where defendants will defeat certification, if at all. See *Hipp*, 252 F.3d at 1218.

Pre-suit Activity to Defeat Class Certification

Whether a Rule 23 class action or a section 216(b) collective action, the ability to defeat class certification will depend heavily on the type and amount of pre-suit activity by the targeted defendant and its defense counsel. While not all defendants have the luxury of knowing ahead of time that a class action lawsuit is coming, the prudent employer (at the urging of its attorney) will, however, take steps to prepare itself for that eventuality, especially if it appears that plaintiffs' lawyers have that company in their sights. There are, in fact, several steps an employer can take before the class action lawsuit is filed. Not only will these steps make the lawsuit easier to defend, they amount to good human resource practices that should be utilized on a daily basis.

Employment Policies

First, it is a good idea to conduct a thorough review of your client's employment practice policies. This review should include EEO polices (including those forbidding all types of prohibited discrimination), wage-and-hour policies, and any employee manuals or handbooks. As a part of this process, it is also a good idea to ensure that the company has in place procedures to enforce all of these policies, and actually does enforce them. As we all know, a policy that is unknown to employees, or which is not enforced, is no better than no policy at all.

It is further worthwhile to issue communications both to management and to non-management employees reinforcing the message of the employment policies. Just a reminder that the company does not tolerate discrimination or harassment of any kind can be very helpful not only in defending a later lawsuit, but also, perhaps, in persuading plaintiffs' counsel that your client may be savvier than the other potential target next door.

The company's lawyer should look back over the past few years of experience with the company's various employment policies. Depending on which state the employer is in, the statute of limitations for state fair employment practices claims can be as much as six

years. Analyze just how the policies you are about to rely so heavily on have been enforced.

Listen to Employees

To some extent, your client employer will be unable to determine the effectiveness of its policies unless it listens to its employees—and, often, the employees will speak only if they are asked. Thus, formal or informal listening sessions with small groups of employees can be a valuable tool to take the temperature of a company's workforce. Most companies do not have the expertise in-house to conduct these sessions, but there are many resources available to assist employers in this area.

Make sure that the information obtained from the listening sessions is used. The lawyer will attempt, of course, to protect the confidentiality of this information by arguing that it is attorney work-product. While that is probably true, especially if litigation is indeed imminent, do not overlook the possibility that you may want to disclose at least some of this information voluntarily. If, for example, the employees tell the company that it is falling woefully short in some critical area, the company would be wise to take immediate steps to rectify that situation and not worry quite so much about whether the confidentiality of the information might be compromised.

The client company needs to make sure that the avenues of communication among its employees are open. This may mean reminding the managers of their obligations to deal with relevant information, such as employee complaints, or pass it along to someone who can deal with it. Another avenue of communication that must be established and kept open is a hotline to top management, or a position in the company, such as an ombudsman, to whom employees can directly communicate their concerns. When the employees do complain, the lawyer should do what he or she can to make sure that the client employer listens, and not just with half an ear.

The employer must not have blinders on; that is, it must be sensitive to all kinds of employee complaints, not just those stemming from perceived or actual discrimination or other legally prohibited conduct. In the authors' experience, employees who become plaintiffs do not know at first what their legal rights are—they just know they have been, in their view, grievously mistreated. Then, they go see a lawyer. Many times, this lawyer will be smart enough to know that what these potential clients are complaining about is not itself actionable, but, during the course of speaking with the employees she may unearth evidence of something that really is actionable.

Training

Ask the company client to provide you with a schedule of all of the training it has conducted, or has had someone else conduct, for its management and non-management employees over the past couple of years. Ask the employer if it knows how many of its employees, especially those in management, have attended any training at all during this period. If it hasn't conducted training, or if it doesn't know how many employees have attended, the employer would be well-advised to start the training process right away.

The ability to defeat class certification will depend heavily on the type and amount of pre-suit activity by the targeted defendant and its defense counsel.

A history of regular training sessions not only looks good when defending a class action. If it is really effective training, the company may not be sued in the first place. As corny as it sounds, if the employees believe they are being well trained and are not that upset with the company, they are not nearly as likely to pursue a class lawsuit. Once the class action is filed, however, there is probably no going back. Everyone has too much time, money, and emotion invested in the litigation. The time to make a favorable impression on the employees, to solidify their loyalty to the company through effective training and communication programs is *before* the class action is filed.

Employment Statistics

The company should have a clear and complete written record of all employment related matters as it begins to gather information to defend against the employees' class action. Some allegations of discrimination, such as hostile environment and the like, are inherently incapable of quantification. Others, however, can be countered with an accurate written record of basic employment practices such as hiring, promotions, imposition of discipline, and terminations. Whenever appropriate, these statistics should probably include information on employees' age, gender, race, ethnicity, and possible disabilities.

To analyze written employment data, you will need a labor statistician. Hire one early and use him or her often. If you know your client's record on hiring, promotion, etc., you will be better off in many respects. First, if the numbers show a possible pattern of inappropriate discrimination, you can work with your client to start to fix it. Second, your strategy for defeating class certification will manifest itself once you begin to understand the numbers. Once you understand how Division A differs in what respects from Division B, and how in Division A, branch X differs from branch Y, you will begin to see how to show the court that the claims of the named plaintiffs are not typical of the putative class, how the claims of one part of the putative class are in common with another part of the class, or how the members of the putative class are not similarly situated.

Having this work done, and digested by counsel, before the class lawsuit is filed is of enormous importance. Once filed, there are both procedural and practical barriers to obtaining the necessary information. For example, employees may be unwilling to talk, even if they are allowed to do so under the court's orders. The time and relative leisure needed to gather and analyze all of this information is simply lacking once the complaint has been filed.

Conclusion

Whether a company is a target to be the next Coke or Microsoft class defendant, or simply another potential victim of class allegations, class action plaintiffs' lawyers have the monetary and publicity-based incentive to pursue class actions that allege employment discrimination. While the official determination of class status will not be made by a court until long after litigation has begun, for defense lawyers and their employer clients the unofficial, pre-suit strategic moves will be the critical, deciding factor. Not only will following the tips outlined above be invaluable in responding to a certification motion, they should also be helpful in resolving a potential class action before suit is filed. Knowing the class or collective action rules, combined with implementation of these strategies, will go a long way in keeping your client's company out of the headlines. FD