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FACTS AND PROCEDURAL HISTORY

In *Jefferson v. Windy City Maintenance, Inc.*, Windy City Management, Inc. ("Windy City") oversaw housekeeping work at McCormick Place and Navy Pier.[1] The plaintiffs worked for Windy City as janitors.[2] Windy City's predecessor, MPEA, employed five of the six named plaintiffs for several years before the takeover.[3] These employees all worked at McCormick Place and Navy Pier during their employment with MPEA and were members of Local 25 of the Service Employees International Union.[4] The sixth named plaintiff, Kenny Bledsoe, worked for Windy City before it took over operations from MPEA and was not a union member.[5] In June 1996, Windy City assigned him to supervise operations at Navy Pier.[6]

The union-member plaintiffs alleged several acts of racially discriminatory conduct by defendant.[7] Plaintiffs initially filed charges with the Equal Employment Opportunity Commission and received notices of the right to sue.[8] One plaintiff alleged that the defendant terminated him on the basis of a false charge. He was later reinstated without back pay.[9] Another claimed management assigned him an excessive workload and terminated him for not completing the work.[10] Windy City reinstated this plaintiff but refused to grant back pay.[11] The next plaintiff complained of a demotion from a low level managerial position to janitorial duties.[12] Defendant reinstated the plaintiff to her managerial position and later suspended her for fighting.[13] Plaintiff contended it was self-defense.[14] Management also demoted another plaintiff who then walked off the job.[15] Subsequently, he was fired, then reinstated without back pay.[16] Thereafter, management wrote this plaintiff up several times and fired him without giving a reason.[17] The last union-member plaintiff alleged that she was harassed and given demeaning janitorial work because of her race. The final plaintiff, Kenny Bledsoe alleged that defendant forced him to terminate two African-American employees, and that management used strong racial slurs to refer to those employees.[18]

In response to the above conduct, plaintiffs accused defendant of having a past and current policy that discriminated against African-Americans who worked in the Housekeeping Department at McCormick

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[1] Jefferson v. Windy City Maintenance, Inc., No. 96 C 7686, 1998 WL 474115, at *2 (N.D. Ill. Aug. 4, 1998).
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Id.* at *4.
[7] *Id.* at *2.
[8] *Id.* at *2 (citing 2d Am. Compl. ¶ 27.).
[9] *Id.* at *3.
[10] *Id.* at *4.
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.* at *4 (It is the policy of the *R.E.A.L. Journal* not to publish specific derogatory comments.)

Place and Navy Pier.[19] Their complaint alleged violations of 42 U.S.C. § 1981 and Title VII of the Civil Rights Act.[20] Among the allegations common to all plaintiffs' claims were: defendant assigned work to employees in a discriminatory manner, disproportionately terminated African-American employees, and created a hostile work environment for African-American employees.[21] One count, which alleged termination in retaliation for opposing discriminatory practices, was only brought by Kenny Bledsoe.[22]

As part of its takeover, Windy City assumed MPEA's employee obligations.[23] Thereafter, plaintiffs alleged that the collective bargaining agreement between MPEA and the plaintiffs' union obligated Windy City to follow a "progressive disciplinary system."[24] This system had five steps: "(1) oral warning; (2) written warning; (3) suspension #1; (4) suspension #2; (5) discharge."[25] Plaintiffs claimed that the management officials responsible for all disciplinary actions implemented this system in a racially adverse manner.[26]

The disciplinary system created two categories of possible rules violations- "major" and "minor."[27] Windy City defined major violations as "willful or deliberate violations of company or safety rules of such a degree that continued employment of the individual may not be desirable, includes excessive tardiness or absenteeism, acts that might endanger the safety of others, fighting on company premise, and numerous other factors."[28] These violations did not require management to follow the progressive system.[29] Management either automatically suspended or fired an employee causing a major rule violation.[30] The agreement defined minor rule violations as those that "may not appear to be of a serious nature, but cannot and will not be tolerated if repeated."[31] Violations included loafing, failure to notify supervisor of absence, unsatisfactory work performance, and other items.[32] The collective bargaining agreement required defendant to implement the progressive discipline system for these minor violations.[33]

Plaintiffs alleged that management enforced Windy City's disciplinary system in a racially motivated manner.[34] Thus, plaintiffs petitioned the district court to consolidate their claims against the defendant in a class action.[35] It proposed that the court certify the following class: "all present and

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[19] *Id.* at *2 (citing 2d Am. Compl. ¶ 1).

[20] *42 U.S.C. § 1981(a)* provides: "All persons within jurisdiction of the United States shall have the same right in every state and territory to . . . to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings . . ."

*42 U.S.C. § 2000e, Title VII,* provides: "It shall be an unlawful employment practice for an employer . . . to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individuals race, color, religion, sex, or national origin."

[21] *Jefferson*, 1998 WL 474114, at *2 (citing 2d Am. Compl. ¶ 4.).

[22] *Id.* at *2.

[23] *Id.* at *3.

[24] *Id.*

[25] Id. at *3 (citing Pls.' Ex. F.).

[26] *Id.* at *3 (citing Pls.' Mem. at 13).

[27] *Id.* at *3.

[28] *Id.* at *3 (citing Pls' Ex. F.).

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.* at *3 (citing Pls' Ex. F.).

[33] *Id.*

[34] *Id.* at *2.

[35] *Id.* at *5.

former African-American persons employed by defendant who have worked in the Housekeeping Department of McCormick Place and Navy Pier on or after June 1, 1996."[36]

HOLDING

The district court held that plaintiffs satisfied the requirements for class certification of Federal Rule of Civil Procedure 23(a)[37] and 23(b)(2).[38] It granted certification of the proposed class with a slight modification of the class definition.[39] The court certified the following class: "All present and former African-American *union-member* janitorial workers employed by Windy City in the Housekeeping Department of McCormick Place and Navy Pier on or after June 1, 1996."[40]

ANALYSIS

The question before the district court was whether the Rule 23 certification requirements were met.[41] In order for a class to qualify for certification, Federal Rule of Civil Procedure 23 requires that plaintiffs satisfy all the conditions of subsection (a) and, in addition, plaintiffs must fulfill one of the elements of Federal Rule of Civil Procedure 23(b).[42] When certification issues arise, the court should focus on whether the certification requirements of the two subsections are satisfied rather than consider the merits of the case.[43] Thus, the court only determines whether the plaintiffs *assert* a claim that would satisfy the requirements of Rule 23.[44] Policy considerations necessitate that the court should certify the class in borderline situations.[45]

A. Rule 23(a)

The district court discussed the four requirements of Fed. R. Civ. P. 23(a):

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[36] *Id.* at *1.

[37] *Fed. R. Civ. P. 23(a).* "One or more members of a class may sue or be sued as representative parties on behalf of all 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."

[38] *Fed. R. Civ. P. 23(b)(2).* "[T]he 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 declaratory relief with respect to the class a whole." *See also Jefferson*, 1998 WL 474115, at *1.

[39] *Jefferson*, 1998 WL 474115, at *1.

[40] *Jefferson*, 1998 WL 474115, at *10.

[41] *Id.* at *1 (citing Am. Compl. ¶ 12.).

[42] *See* Retired Chicago Police Ass'n v. City of Chicago, 7 F.3d 584, 596 (7th Cir. 1993) (citing Harriston v. Chicago Tribune Co., 992 F.2d 697, 703 (7th Cir. 1993)); Alliance to End Repression v. Rochford, 565 F.2d 975, 977 (7th Cir. 1977).

[43] Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 178 (1974) (Rule 23 does not "give [] a court any authority to conduct a preliminary inquiry into the merits of a suit to determine whether it may be maintained as a class action.").

[44] The court assumed all of the allegations in the complaint were true. *See* Johns v. DeLeonardis, 145 F.R.D. 480, 482 (N.D. Ill. 1992) ("For the purposes of a motion to certify a class, we do not reach the merits of the claim or weigh evidence. Rather, we must take the allegations of the complaint as true"). *See* H. NEWBERG, NEWBERG ON CLASS ACTIONS, § 24.13 at 60 (3d ed. 1992). (Some situations will require that the court still decide a factual or legal issue of the plaintiffs' cause of action. For instance, when conclusory allegations must be replaced with a showing of underlying facts which would support, prima facie, a showing that the case is appropriate for class action.) Coopers & Lybrand v. Livesay, 437 U.S. 463, 469 (1978).

[45] *Jefferson*, 1998 WL 474115, at * 2 ("[Courts] should err in favor of maintaining class actions"). *See* King v. Kansas City S. Indus., 519 F.2d 20, 26 (7th Cir. 1975) (favoring maintenance of class actions).

numerosity, commonality, typicality, and adequacy of representation.[46]

1. Numerosity

Rule 23(a) requires that "the class is so numerous that joinder of all members is impracticable."[47] Because the defendant did not dispute numerosity and employed more than two hundred African-Americans during the alleged violation period, the court held that plaintiffs' claims fulfilled this requirement of the rule.[48] The court did not extensively analyze the facts before making this numerosity ruling, but the court thoroughly examined every other component of 23(a).

2. Commonality

According to Rule 23(a)(2), in order to satisfy the commonality requirement, the class members must have at least one question of law or fact in common.[49] In determining whether the plaintiffs had a question of law or fact in common the district court first looked to precedent. The Seventh Circuit held that a "common nucleus of operative facts" is sufficient to uphold class certification.[50] However, the United States Supreme Court has held that the fact that a person is a member of an identifiable class is not a valid reason for the person to litigate all possible discrimination claims on the class' behalf.[51] However, the Court also held that if an employer operated under a general policy of discrimination manifested in hiring or promotion practices, then both applicants and employees qualified under the same class.[52]

The district court held it should inquire about "whether the plaintiffs suffered injury from a specific discriminatory practice of the employer in the same manner as the members of the proposed class."[53] The court held that plaintiffs alleged more than just a common race or employer.[54] The common legal and factual issues raised by the plaintiffs were whether defendant's disciplinary system discriminated against African-American employees under a disparate impact or disparate treatment theory.[55] Furthermore, all plaintiffs claimed defendant implemented the disciplinary system in a discriminatory manner, and that defendant violated Title VII and section 1981. The court held that when a complaint alleges that all plaintiffs were subjected to the defendant's discriminatory practice, the commonality requirement has been met.

The court discounted defendant's argument that *Patterson v. General Motors Corporation*[56] required the denial of class certification based on lack of commonality.[57] *Patterson* involved an individual employee who claimed discrimination by his employer and alleged classwide discrimination without substantiating any "factual allegations of classwide discrimination."[58] The district court distinguished *Patterson* because the plaintiffs

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[46] *Jefferson*, 1998 WL 474115, at *5.

[47] FED. R. CIV. P. 23(a)(1).

[48] *Jefferson*, 1998 WL 474115, at *5.

[49] *Id.* *See also* Whitehall Convalescent and Nursing Home, 164 F.R.D. 659, 663 (N.D. Ill 1996); Franklin v. City of Chicago, 102 F.R.D. 944, 949 (N.D. Ill 1984).

[50] Rosario v. Lividitis, 963 F.2d 1013, 1017-18 (7th Cir. 1992), *cert. denied*, 506 U.S. 1051 (1993).

[51] General Tel. Co. v. Falcon, 457 U.S. 146, 159 n.15 (1982).

[52] *Id.* at 159 n.15.

[53] *Jefferson*, 1998 WL 474115, at *6.

[54] *Id.*

[55] *Id.*

[56] Patterson v. G.M. Corp., 631 F.2d 476 (7th Cir. 1980).

[57] *Jefferson*, 1998 WL 474115, at *7.

[58] *Patterson*, 631 F.2d at 480.

in the present case substantiated factual allegations of classwide discrimination by alleging "systematic discrimination" and supporting it with evidence.[59] The court also focused on statistical evidence of disparate treatment between African-American and other employees.[60] It held that plaintiffs "alleged a specific policy and practice of discrimination with regard to implementation of the disciplinary system" which is beyond mere allegations of commonality based on sharing the same employer and being a member of the same race.[61] The court compared this situation to the one in *Hispanics United of Dupage County v. Village of Addison*[62] which held that, "[w]here 'broad discriminatory policies and practice constitute the gravamen of a class suit, common questions of law or fact are necessarily presented.'"[63]

Defendant argued that plaintiffs misrepresented the facts about the centralization of the disciplinary process and its application to all employees.[64] The court disagreed. It found that defendant's own affidavits indicated that low level managers could not discipline without permission from upper level management.[65] The court also used these affidavits to find that the disciplinary system was enforced by five managers.[66] Indeed, the court decided that it should not delve into these types of facts too deeply while determining a Rule 23 motion, but that it should focus on the plaintiffs' allegations.[67]

However, the court was persuaded by defendant's argument that the progressive disciplinary system only applied to union-member janitorial employees.[68] Because the plaintiffs acknowledged that managers were not union members, and therefore, not subject to the progressive disciplinary system, the court found that Kenny Bledsoe could not directly be affected by the policy.[69] The court held that Bledsoe was not affected by the program in the same manner as the other plaintiffs.[70] He might have felt just as uncomfortable as non-African-American managers who were required to implement the discriminatory program, but this did not accord him commonality with the rest of the proposed class. To maintain commonality, the court modified the proposed class definition to exclude managers while including union member janitorial employees.[71]

3. Typicality

Typicality requires that the named plaintiffs' claims are typical of the whole class of plaintiffs.[72] It is related to the commonality requirement.[73] Commonality requires that there be at least one issue common to all members while typicality "requires the named plaintiffs' claims to be typical of the class."[74] However, plaintiffs need not present the same

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[59] *Id.* at *7.
[60] *Id.*
[61] *Id.* at *6.
[62] 160 F.R.D. 681 (N.D. Ill. 1995).
[63] *Id.* at 688 (quoting Midwest Community Council v. Chicago Park Dist., 87 F.R.D. 457, 460 (N.D. Ill. 1980)).
[64] *Jefferson,* 1998 WL 474115, at *7.
[65] *Id.*
[66] *Id.* at *7.
[67] *Id.* at *7 n.5 *See Eisen,* 417 U.S. at 177.
[68] *Id.* at *7.
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] FED. R. CIV. P. 23(a)(3).
[73] *Falcon,* 457 U.S. at 157 n.13 ("The commonality and typicality requirements of Rule 23(a) tend to merge.").
[74] *Jefferson,* 1998 WL 474115, at *5, *8.

factual circumstances.[75]

Defendant argued that each claim must be analyzed individually. In other words, defendant contended that plaintiffs' claims were "uniquely personal" because each plaintiff was discharged for different reasons.[76] In response, the court cited *De La Fuente v. Stokely-Van Camp, Inc.*,[77] to support its finding that the claims must only "have the same essential characteristics as the claims of the class at large."[78] The court concluded that the plaintiffs fulfilled the typicality prerequisite because the plaintiffs' claims "have the same essential characteristics as the claims of the class at large."[79]

4. Adequacy of Representation

The named plaintiffs must adequately protect and furnish fair representation of the interests of the entire class.[80] The courts analyzed this requirement by examining two factors: "(1) the adequacy of the named plaintiffs' counsel and (2) whether the named plaintiffs had interests antagonistic to those of the class."[81] Defendant did not dispute the adequacy of counsel but attacked whether the named plaintiffs were adequate representatives of the class.[82] It reasoned that the class representatives included union members as well as non-union/management employees, and some of the plaintiffs were full-time while others were part-time.[83] Defendant claimed that the disparity in the types of employees that were to serve as class representatives was per se inadequate representation.

Because defendant offered no evidence that part-time employees were non-union members,[84] the court included these individuals in the class. But, as the court already ruled, non-union members, like Kenny Bledsoe, were excluded from the definition of the class.[85]

The defendant also argued that because another named plaintiff disciplined those she supervised, she was not an adequate representative either.[86] The court noted the tension that might occur, but decided the alleged personal discrimination to the supervisor plaintiff was enough to overcome the tension.[87] Therefore, the supervisor plaintiff remained a member of the class. Another argument by the defendant was that it only discharged one of the plaintiffs by the progressive disciplinary system.[88] The court concluded that even if this was true, it did not rebut plaintiffs' allegations of discriminatory disciplining action.[89]

Defendant's final argument against representation attacked the credibility and honesty of the named plaintiffs. Defendant specifically alleged that a named plaintiff testified during her deposition that she was not currently employed, but evidence existed to

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[75] Allen v. Isaac, 99 F.R.D. 45, 54 (N.D. Ill. 1983).
[76] *Jefferson,* 1998 WL 474115, at *8.
[77] 713 F.2d 225 (7th Cir. 1983).
[78] *Id.* at 232.
[79] *Jefferson*, 1998 WL 474115, at *8 (citing *De La Fuente*, 713 F.2d at 232).
[80] FED. R. CIV. P. 23(a)(4).
[81] *See Rosario*, 963 F.2d at 1018; Secretary of Labor v. Fizsimmons, 805 F.2d 682, 697 (7th Cir. 1986) (en banc).
[82] *Jefferson,* 1998 WL 474115, at *8.
[83] *Id.* at *8.
[84] *Id.* at *6 n.8.
[85] *Id.* at *7.
[86] *Id.* at *9.
[87] *Id.*
[88] *Id.*
[89] *Id.* at *9 ("Discipline, under the defendant's policy, includes oral warnings and suspensions as well as termination").

the contrary.[90] This same plaintiff also denied having problems with MPEA while records showed otherwise.[91] The court responded that "[c]ourts have found that a named plaintiff's honesty is a relevant consideration to allowing her to represent a class."[92] The court decided, however, that the inconsistencies in the plaintiffs' testimony did not contradict plaintiffs' claims, and that other alleged inconsistencies were insignificant.[93]

B. Federal Rule of Civil Procedure 23(b)

The final requirement that the plaintiffs must satisfy is one of the subsections of Rule 23(b). Plaintiffs maintained that they satisfied Rule 23(b)(2). This subsection provided for certification if "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 declaratory relief with respect to the class as a whole."[94] Cases that seek equitable relief such as an injunction or a declaratory judgment to class wide discrimination are brought appropriately under Rule 23(b)(2).[95] Also, courts interpret this subsection of the rule to mean that "the party opposing the class must have acted in a consistent manner toward members of the class so that [its] action may be viewed as part of a pattern of activity."[96] However, the policy need not affect all class members.[97]

The court found that plaintiffs mainly sought equitable relief such as a declaration stating that defendant violated Title VII and section 1981.[98] They also requested that the court issue an injunction requiring Windy City to remedy these violations.[99] Some members of the potential class also could be reinstated.[100] The court held that these types of equitable relief fall under subsection (b)(2).[101] Therefore, plaintiffs satisfied the second requirement of class certification.[102] The court ruled that although some plaintiffs were seeking back pay, this did not bar certification under 23(b)(2).[103]

CONCLUSION

*Jefferson* is a thorough road-map for practitioners who are trying to certify a class in a discrimination class action suit. It outlines all of the requirements of Rule 23 except numerosity. The case's biggest contribution is that it details how to overcome a challenge to a class' commonality. The opinion explains that being part of an identifiable class is not enough for certification, but that the class must have a "common nucleus of operative facts."[104] In

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[90] *Id.* at *9.

[91] *Id.* at *9 (defendant submitted a MPEA disciplinary report regarding an altercation between the plaintiff and a supervisor resulting in plaintiff's suspension).

[92] *Id.* at *9 (citing Kaplan v. Pomerantz, 132 F.R.D. 504, 510 (N.D. Ill. 1990) (citing Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 549 (1949)); Armour v. City of Anniston, 89 F.R.D. 331, 332 (N.D. Ala. 1980).

[93] At best, the contradictions might impeach the credibility of the plaintiff, but they do not directly refute the claims of discrimination.

[94] FED. R. CIV. P. 23(b)(2).

[95] *See* Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 257 (5th Cir. 1974).

[96] Edmonson v. Simon, 86 F.R.D. 375, 382-83 (N.D. Ill. 1980).

[97] *Id.*

[98] *Jefferson*, 1998 WL 474115, at *10.

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] *Id.*

[103] *See, e.g.*, United States Fidelity & Guar. Co. v. Lord, 585 F.2d 860, 875 (8th Cir. 1978), *cert. denied*, 440 U.S. 913 (1979).

[104] *Lividitis*, 963 F.2d at 1017-18.

this case, the plaintiffs were all subject to the same disciplinary system. The class' lawyers cunningly claimed that the discrimination originated from this system. By claiming this system as the class' common thread, one member of the proposed class was excluded by the court because he was not subject to the system. However, the class allowed by the court was broad enough to include almost every other African-American that might have been discriminated against by the defendant. Most practitioners surely would find this to be a success.

The best way to certify a class is to find an overriding official company policy that can be alleged as being implemented in a discriminatory manner. Examples of such practices include discrimination in implementation of disciplinary, corporate advancement, or hiring systems. All companies have these policies. The key is to manipulate the facts so that the discrimination appears to result from the policy.

Summary and Analysis prepared by:

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