United States District Court, D. Minnesota, Third Division.

Nimali (DeSilva) SONDEL, Holly Novack, Kim Shaller, Brenda Glapa, and Stephanie Chung, on behalf of themselves and all other persons similarly situated, Plaintiffs,
v.
NORTHWEST AIRLINES, INC. and Republic Airlines, Defendants.

Civ. No. 3–92–381.
|
Sept. 30, 1993.

Attorneys and Law Firms

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MEMORANDUM OPINION AND ORDER

KYLE, District Judge.

Introduction

***1** This matter is before the Court on plaintiffs' motion for class certification. Plaintiffs have asserted that the minimum height requirement for flight attendants of Republic Airlines ("Republic") and Northwest Airlines ("Northwest"), although facially neutral, excludes a disproportionate number of women from employment opportunities as flight attendants. Plaintiffs seek to certify a class of

> all women who applied, or who would have applied but for the height requirement, for employment as flight attendants, were under 5′2″ in height or were or would have been treated by defendants as under that height, and were not hired by defendants on or after October 20, 1991.

Plaintiffs' motion is granted in part, denied in part.

Background

I. Factual History

Plaintiff Nimali Sondel is an Asian woman of Sri Lankan national origin. She is 4′11″ tall. The facts underlying Sondel's claim of discrimination are set out in this Court's Memorandum Opinion and Order, dated January 14, 1993, dismissing Sondel's claims with prejudice as time-barred. Sondel alleges that she applied to and was rejected by Republic and other airlines because of her height. Sondel formally filed a charge with Equal Employment Opportunity Commission ("EEOC") in December of 1984.

Plaintiff Brenda Glapa is about 5′1″ tall. She applied for a flight attendant job with Northwest in December of 1991 and interviewed with them in the same month. Northwest offered Glapa a flight attendant position, contingent upon her passing a physical examination. On or around December 20, 1991, just before flight attendant training was to begin, Northwest withdrew its offer of employment, allegedly because Glapa was under 5′2″. On May 1, 1993, Glapa began work as a flight attendant with Continental Airlines. She has worked on various types of aircraft including those utilized by Northwest. Glapa formally filed an EEOC charge alleging discrimination on the basis of race, color and national origin, as well as gender, on August 12, 1992.

Plaintiff Holly Novack is between 5′0″ and 5′2″ tall. She applied for a flight attendant job with Northwest in 1991. After inviting her to attend the six-week flight attendant training program, Northwest gave her a physical, at which she measured less than 5′2″. Novack began the six-week flight attendant training program on January 6, 1992. She was dismissed on January 28, 1992, before completing the program, allegedly because of her height. Novack was

subsequently hired as a flight attendant by American Trans Air. Novack works on aircraft similar to those used by Northwest. She appears to have filed an EEOC discrimination charge alleging discrimination on the basis of race, color and national origin, as well as gender.[1]

Plaintiff Kim Shaller is between 5′0″ and 5′2″ tall. She applied for a flight attendant job with Northwest. After inviting her to attend flight attendant training, Northwest gave her a physical, at which she measured less than 5′2″. Shaller began the Northwest training program in January of 1992; she was dismissed on or about January 29, 1992, before completing the program, allegedly because of her height. Shaller filed an EEOC charge alleging discrimination on the basis of race, color and national origin, as well as gender, on October 1, 1992.

***2** *Plaintiff Stephanie Chung* is between 5′0″ and 5′2″ tall. She is an Asian woman, born in Korea, of Korean national origin. She is presently a United States citizen. Chung applied in November of 1991 for a flight attendant position with Northwest. Northwest measured her in January of 1992 and told her that she was under 5′2″. Her application was rejected. Chung is currently a full-time pre-architecture student at the University of Minnesota's College of Liberal Arts. She began the pre-architecture program in September of 1992 and is currently classified a sophomore. Chung has not filed an EEOC charge.

Defendant Republic merged with defendant Northwest in the late summer of 1986. In the late 1970s or early 1980s, Republic had acquired Hughes Airlines and Southern Airlines. Both Hughes and Southern employed flight attendants under 5′2″. Republic absorbed at least some of these flight attendants into its work force. In turn, Northwest absorbed them when it merged with Republic. Northwest had no discretion in hiring these flight attendants because of labor protective conditions imposed under the Railway Labor Act. *See* Brodin Depo. at 11–12.[2] Northwest asserts that the number of 5′0″ to 5′2″ flight attendants it absorbed is extremely small.

At all times relevant to this action up until March 26, 1992, Northwest observed the hiring policy of requiring all flight attendants to be 5′2″ or taller. In late 1991 and early 1992, however, Northwest determined that, to be more competitive in the Asian market, it needed to hire flight attendants fluent in Asian languages. Management at Northwest determined that to achieve that goal it would be necessary to lower the minimum height requirement; a greater number of Asian applicants, fluent in one or more Asian languages, would then be eligible for the flight attendant position. As a result, Northwest changed its minimum height requirement from 5′2″ to 5′0″ on March 26, 1992. Northwest asserts that it planned to hire about fifty flight attendants under 5′2″ as a "trial run." All of the flight attendants under 5′2″ who were hired after March 26, 1992, have been laid off.

II. Procedural History

In 1984, Sondel filed a formal charge with the EEOC, alleging discrimination on the basis of race, color, national origin and gender. The EEOC initially found no probable cause, but reversed itself in March of 1991, finding that Republic and Northwest's 5′2″ minimum height requirements discriminatorily excluded women, especially Hispanic and Asian women, from employment opportunities as flight attendants.

The EEOC investigated the disparate impact of Northwest's 5′2″ height requirement. Conciliation efforts began in April of 1991. The Commission sent a proposed conciliation agreement to Northwest on June 3, 1991, requiring the airline to lower its height requirement to 5′0″ and allowing Northwest to impose a requirement that persons between 5′0″ and 5′2″ have an average reach of 76 inches—the average reach of a person who is 5′2″. Conciliation efforts were unsuccessful. The EEOC therefore issued Sondel a right-to-sue letter.

***3** On June 8, 1992, Sondel filed suit in this court, indicating that hers was a civil rights class action. Her Second Amended Complaint, filed November 18, 1992, added Plaintiffs Novack, Glapa, Shaller and Karen Johnson[3] to the complaint (Doc. No. 37). On January 14, 1993, this Court, on Northwest's motion for summary judgment, dismissed Sondel's claims with prejudice as time-barred (Doc. No. 60). After filing their motion for class certification with the Court, plaintiffs again amended their complaint to add Stephanie Chung as a named plaintiff and to request damages. Third Amended Complaint, August 25, 1993, (Doc. No. 123).

Discussion

I. Standard for Class Certification.

Under Rule 23 of the Federal Rules of Civil Procedure, plaintiffs seeking class certification must satisfy several requirements. First, the Court must find plaintiffs have satisfied two implicit requirements: (1) the existence of a precisely defined class and (2) that the class

representatives are members of the proposed class. *White v. National Football League,* 822 F.Supp. 1389, 1402 (D.Minn.1993); *Powell v. National Football League,* 711 F.Supp. 959, 966 (D.Minn.1991).

Second, plaintiffs must satisfy the four requirements of Rule 23(a), commonly known as numerosity, commonality, typicality and adequate representation.[4] The Supreme Court has observed that the last three requirements tend to overlap and blend together.[5] Finally, a court may only certify the proposed class if it falls under one of the three categories of classes described in Rule 23(b). In the present case, plaintiffs assert that their action falls under Rule 23(b)(2).[6]

Certification of a nationwide class action is within the broad discretion of the district court. *Califano v. Yamasaki,* 442 U.S. 682, 703, 99 S.Ct. 2545, 2558 (1979); *Gilbert v. City of Little Rock,* 722 F.2d 1390, 1399 (8th Cir.1983), *cert. denied* 466 U.S. 972, 104 S.Ct. 2347 (1984). In considering plaintiffs' motion for class certification, the Court shall not conduct a preliminary inquiry into the merits of plaintiffs' suit; rather, it must evaluate whether plaintiffs meet the requirements of Rule 23. *Eisen v. Carlisle & Jacqueiln,* 417 U.S. 156, 177–78, 94 S.Ct. 2140, 2152–53 (1974). The parties seeking to represent the class bear the burden of establishing that they meet the requirements of Rule 23. *Smith v. Merchants & Farmers Bank,* 574 F.2d 982, 983 (8th Cir.1978) (per curiam); *Jenson v. Eveleth Taconite Co.,* 139 F.R.D. 657, 659 (D.Minn.1991). The Court may only certify the class if it satisfied after a rigorous analysis that all of the prerequisites are met. *General Tel. Co. of the Southwest v. Falcon,* 457 U.S. 147, 161, 102 S.Ct. 2364, 2372 (1982); *Bishop v. Committee on Professional Ethics,* 686 F.2d 1278, 1287 (8th Cir.1982). In addition, the Court may certify a class as to one or more claims without certifying the entire complaint. Fed.R.Civ.Pro. 23(c)(4). Finally, the Court may alter or amend the class certification to reflect further developments in a case before a decision on the merits is made. Fed.R.Civ.Pro. 23(c)(1).

***4** Plaintiffs have requested that the Court certify a class consisting of

> all women who applied, or who would have applied but for the height requirement, for employment as flight attendants, were under 5′2″ in height or were or would have been treated by defendants as under that height, and were not hired by defendants on or after October 20, 1991.

Plaintiffs have defined the temporal scope of the class consistently with the Court's earlier dismissal of Nimali Sondel's claims.[7] Pursuant to 42 U.S.C. § 2000e–5, plaintiffs calculated back 300 days from the date that Brenda Glapa filed her EEOC charge, arriving at the beginning date for the class of October 20, 1991.

Northwest attacks the class certification on the following grounds: (1) the class cannot include deterred applicants; (2) the named plaintiffs lack standing to challenge the 5′0″ height requirement; (3) plaintiffs have failed to satisfy the numerosity requirement; (4) Stephanie Chung is an inadequate representative of the class; (5) the Caucasian named-plaintiffs cannot represent Asian and Hispanic women because there is a conflict of interests; (6) plaintiffs have failed to demonstrate that the class satisfies Rule 23(b)(2); and (7) even if the prerequisites to class certification are met, the court should still deny the motion because proceeding as a class action serves no useful purpose.

A. The Implicit Requirements for Class Certification.

Courts have developed two implicit requirements under Rule 23(a) for class certification. The Court must find the existence of a precisely defined class and that the class representatives are members of the proposed class. *East Texas Motor Freight Sys. Inc. v. Rodriguez,* 431 U.S. 395, 403, 97 S.Ct. 1891, 1896 (1977); *Powell,* 711 F.Supp. at 966; *Jenson,* 139 F.R.D. at 659; *In re Workers' Compensation,* 130 F.R.D. 99, 103 (D.Minn.1990).

Northwest argues that plaintiffs have failed to demonstrate the existence of a precisely defined class, specifically regarding the sub-class of women who were deterred from applying for a flight attendant position. Courts are divided over whether to include deterred applicants in class action suits involving discriminatory hiring practices. Defendants have cited a number of cases in which courts have refused to include deterred applicants in classes alleging employment discrimination.[8] Plaintiffs have cited district court cases from California that have included deterred applicants,[9] and opinions from the Eleventh and Fifth Circuits which have approved the certification of classes that include deterred applicants.[10]

This Court finds that the sub-class comprised of non-applicants who claim to have been subjectively

deterred from applying is too imprecise and speculative to be certified. Plaintiffs have provided the Court with no data relating to the proposed sub-class, nor have they identified even one deterred applicant. Plaintiffs merely speculate that an amorphous sub-class exists of women deterred from applying by Northwest's publicized minimum height requirement. Furthermore, plaintiffs' sub-class of deterred applicants encompasses a substantial percentage of the nation's female work force. An attempt to identify those women who were subjectively deterred would involve an individualized inquiry into the state of mind of each putative member. Such an inquiry would place a tremendous burden upon the Court, defeating the fundamental purpose of judicial economy underlying the class action. *Rodriguez v. United States Dep't of the Treasury*, 131 F.R.D. 1, 6–7 (D.D.C.1990); *Ulloa v. City of Philadelphia*, 95 F.R.D. 109, 112 (E.D.Pa.1982). Accordingly, this Court will not certify a sub-class of deterred applicants because it cannot be precisely defined.[11]

***5** The class that remains to be certified consists of all women who applied for employment as flight attendants, were under 5′2″ in height (or were or would have been treated by defendants as under that height) and were not hired by defendants on or after October 20, 1991. The Court is satisfied that the proposed named plaintiffs—Glapa, Novack, Shaller and Chung—are members of this class. All applied for employment with Northwest as flight attendants; all are under 5′2″ in height; and all were rejected by Northwest on or after October 20, 1991.

B. Threshold Issue: Standing

Plaintiffs argue that, on behalf of the class, they are challenging both the 5′2″ and the 5′0″ minimum height standards implemented by Northwest. Plaintiffs Glapa, Novack, and Shaller assert that their EEOC charges clearly indicate their intent to challenge the 5′0″ height requirement.[12] Defendants contend that the named plaintiffs cannot challenge the 5′0″ requirement because they lack standing to do so. The Court notes that the language of the EEOC charges is ambiguous; plaintiffs state that they are challenging the disparate impact of "this policy." Regardless of whether "this policy" includes the 5′0″ height requirement, the Court concludes that the named plaintiffs lack constitutional standing to challenge the 5′0″ minimum height requirement.[13]

To maintain an action in federal court, every plaintiff, including the representatives in a class action, must satisfy the constitutional case-or-controversy requirement of standing: a plaintiff must establish that she has "suffered 'some threatened or actual injury resulting from the putatively illegal action.' " *Warth v. Seldin*, 422 U.S. 490, 499, 95 S.Ct. 2197, 2205 (1975) (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617, 93 S.Ct. 1146, 1148 (1973)). In the context of discriminatory hiring, courts have held that someone who has a required credential cannot challenge the discriminatory impact of the requirement. *Phillips v. Joint Legislative Comm.*, 637 F.2d 1014, 1026 n. 20 (5th Cir.1981), *cert. denied* 456 U.S. 960, 102 S.Ct. 2035 (1982) (plaintiffs with college degrees lacked standing to challenge defendant's requirement that all employees have a college education).

All of the named plaintiffs were rejected by Northwest at a time when the 5′2″ height requirement was in effect. All of the named plaintiffs are over 5′0″ in height.[14] None of them has been injured in fact by the 5′0″ height requirement. None of them, were she to apply now, would be threatened with being rejected because she failed to meet Northwest's height requirement. In fact, one of the named plaintiffs, Brenda Glapa, works for Continental, an airline that has a 5′0″ minimum height requirement. Decl. of Brenda Glapa Supp.Pls.' Mot. for Class Certification ¶ 4. The Court holds that none of the plaintiffs has standing to challenge the 5′0″ minimum height requirement. Therefore, the 5′0″ minimum height requirement cannot be challenged in this class action.

***6** Northwest adopted the new 5′0″ policy on March 26, 1992. Northwest stopped reviewing applications under the old 5′2″ standard on March 12, 1992. Aff. of Rebecca Chou Opp.Pls.' Mot. for Class Certification ¶ 2. Since the 5′ 0″ minimum height standard is not properly at issue in this class action, the class cannot consist of women who applied subject to that height requirement. Therefore, any class that this Court certifies shall not include women who applied to be flight attendants after March 12, 1992.

C. Requirements of Rule 23(a)

(1) Numerosity.

Rule 23(a)(1) provides that a class action is maintainable only if "the class is so numerous that joinder is impracticable." To make this determination, a court must make a practical judgment based on the specific facts of each case and imposes no absolute limitations. *General Tel. Co. of the Northwest v. EEOC*, 446 U.S. 318, 330, 100 S.Ct. 1698, 1706 (1980); *Paxton v. Union Nat'l Bank,*

688 F.2d 552, 560–61 (8th Cir.1982), *cert. denied*, 460 U.S. 1083, 103 S.Ct. 1772 (1983); *Alvarado Partners, L.P. v. Mehta*, 130 F.R.D. 673, 675 (D.Colo.1990). When considering numerosity and impracticability of joinder in deciding whether to certify a class, it is not necessary for the class representatives to either identify each particular member of the class or the exact number of class members; instead the trial court may reasonably infer that numerosity is satisfied from the facts of the case. *Ikonen v. Hartz Mountain Corp.*, 122 F.R.D. 258, 261–62 (S.D.Cal.1988); *see also Ventura v. New York City Health & Hospital Corp.*, 125 F.R.D. 595, 599 (S.D.N.Y.1989). The statement that "joinder is impracticable" does not mean that joinder is impossible, it merely means that joining all class members would be difficult or inconvenient. *Jenson v. Continental Financial Corp.*, 404 F.Supp. 806, 809 (D.Minn.1975).

Defendants argue that plaintiffs have failed to demonstrate that the proposed class is so numerous that joinder is impracticable. Northwest hired 802 flight attendants for the period October 20, 1991 through March 26, 1992. Aff. of Rebecca Chou ¶ 5. Plaintiffs have surveyed the applications that Northwest rejected during the period from October 20, 1991 to March 1, 1992, and determined that approximately 350 of the rejected applicants were women under 5′2″. Decl. of Lynn Sagramoso ¶¶ 4–5. Northwest contends plaintiffs have not demonstrated that the sole reason these 350 women were not hired was because of their height.[15] Thus, plaintiffs have failed to establish that the class of applicants is sufficiently numerous to make joinder impracticable.

Northwest's argument is misplaced; it relates to the merits of the case rather than to the issue of how many women share a common question of law that constitutes a prima facie case of disparate impact gender discrimination. From plaintiff's statistical data, the Court can reasonably infer that a sufficiently numerous class of rejected applicants exists. Plaintiffs have also offered evidence that the members of the class are geographically dispersed, making joinder difficult. The Court is satisfied that a sufficiently numerous class exists.

(2) Commonality.

***7** Rule 23(a)(2) requires that "there are questions of law or fact common to the class." The rule may be satisfied "where questions of law linking the class members are substantially related to the resolution of the litigation even though the individuals are not identically situated." *Paxton*, 688 F.2d at 561 (quoting *American Finance Sys., Inc. v. Harlow*, 65 F.R.D. 94, 107 (D.Md.1974)). Factual differences are not fatal to maintenance of the class action if common questions of law exist. *See Coley v. Clinton*, 635 F.2d 1364, 1378 (8th Cir.1980); *Jenson v. Eveleth Taconite Co.*, 139 F.R.D. 657, 664 (D.Minn.1991).

Northwest has argued that deterred applicants should not be included in any class that is certified. Although the Court has already determined that the sub-class of deterred applicants is too imprecise and speculative to be certified, it also finds that including deterred applicants would defeat the requirement of commonality.

Plaintiffs have argued that common questions of law apply to both deterred applicants and rejected applicants. While it is true that both groups would assert the disparate impact of the minimum height requirement and the issue of a business necessity, the highly individualistic inquiries necessary to determine whether deterred applicants should be included within the class would overwhelm and obscure the common issues of law. *Rodriguez v. United States Dep't of the Treasury,* 131 F.R.D. 1, 7 (D.D.C.1990); *see Antonson v. Robertson*, 141 F.R.D. 501, 508 (D.Kan.1991) (denying class certification because individual questions of fact predominated with respect to securities fraud plaintiffs' common-law fraud claims in which each individual plaintiff would have to prove his or her individual reliance). To determine that relief should be afforded to the group of deterred applicants, this Court would have to inquire into and evaluate each allegedly deterred applicant's state of mind. Such an individualized inquiry would place an unjustifiable burden upon the other class members and upon the Court.

Plaintiffs stress that the Supreme Court has stated that deterred applicants are as much victims of discrimination as those who applied and were rejected. *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 365–66, 97 S.Ct. 1843, 1869–70 (1977). Thus, deterred applicants are proper people to seek relief under Title VII. Yet, the Supreme Court also stated in the same opinion that "[t]o conclude that a person's failure to submit an application for a job does not inevitably and forever foreclose his entitlement to a [make-whole remedy] under Title VII is a far cry ... from holding that nonapplicants are always entitled to such relief." *Id.* at 367, 97 S.Ct. at 1871. The *Teamsters* Court noted that nonapplicants must make an additional showing that their position is analogous to that of an applicant: "Resolution of the nonapplicant's claim requires two distinct determinations: that he would have applied but for discrimination and that he would have been discriminatorily rejected had he applied." *Id.* at 368 n. 52, 97 S.Ct. at 1871 n. 52. Thus, the *Teamsters* opinion does not mandate the automatic inclusion of deterred

applicants in class actions alleging discriminatory practices in hiring.

***8** With respect to those women under 5′2″ who applied and were rejected, the Court finds that plaintiffs have established that common questions of law predominate. The rejected applicants share legal issues concerning the disparate impact of the minimum height requirement and the issue of a business necessity. Thus the commonality requirement is met.

(3) Typicality.

"The first two prerequisites under Rule 23(a), numerosity and commonality, form the core of the class action concept. The second two prerequisites, typicality and adequate representation, focus instead on the desired characteristics of the class representative." 1 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* § 3.13, at 3–71 (3d ed. 1993). Rule 23(a)(3) provides that a class action may be maintained only if "the claims or defenses of the representative parties are typical of the claims and defenses of the class." The typicality requirement is met if the named plaintiffs' claims arise out of the same event or practice or course of conduct that gives rise to the class members' claims and is based on the same legal theory. *Paxton,* 688 F.2d at 561–62; *Dirks v. Clayton Brokerage Co. of St. Louis,* 105 F.R.D. 125, 132–33 (D.Minn.1985). The pertinent inquiry is whether the named plaintiffs' individual circumstances are markedly different or whether the legal theory upon which their claims are based differs from that upon which the other class members will be based. Again, the requirement can be met even though the fact patterns underlying the named plaintiffs' claims differ from those of the class members. *Moskowitz v. Lopp,* 128 F.R.D. 624, 629–30 (E.D.Pa.1989).

The Court finds that the claims of the named plaintiffs are typical of the claims for the class of rejected applicants who are under 5′2″ tall. The same basic course of conduct, evaluation of applicants on the basis of height, underlies both the named plaintiffs' claims and those of the other putative class members. Furthermore, the named plaintiffs' claims are based on the same legal theory as the claims of the class. Thus, plaintiffs have satisfied the typicality requirement.

(4) Adequacy of Representation

Rule 23(a)(4) provides that a class action may be maintained only if "the representative parties will fairly and adequately protect the interests of the class." Due process requires that the criteria for a class action, particularly the adequacy of representation prerequisite, be strictly applied to ensure that the interests of the absent class members will be well protected. *Issen v. GSC Enterp. Inc.,* 508 F.Supp. 1278, 1296 (D.C.Ill.1981); *see also Bishop v. Committee on Professional Ethics,* 686 F.2d 1278, 1288 (8th Cir.1982) (the requirement of adequate representation is of "critical importance in all class actions"). There are two elements to the adequacy of representation requirement: "First, the representatives and their attorneys must be able and willing to prosecute the case competently and vigorously. Second, each representative's interest must be sufficiently similar to those of the class that it is unlikely that their goals and viewpoints will diverge." *In re Wirebound Boxes Antitrust Litigation,* 128 F.R.D. 268, 270 (D.Minn.1989).

***9** Northwest has raised two arguments with respect to the adequacy of representation. First, the airline has challenged whether Stephanie Chung, the plaintiff added most recently to the lawsuit, will provide adequate representation. Second, the airline has challenged whether the three Caucasian women who are named plaintiffs can adequately represent the interests of minority women.

(a) Stephanie Chung.

While, generally speaking, consideration of the adequacy requirement tends to focus primarily on the competence and experience of class counsel, Rule 23(a)(4) does warrant some inquiry into the personal characteristics of the proposed representatives as well. *Gibb v. Delta Drilling Co.,* 104 F.R.D. 59, 75 (N.D.Tex.1984). An important, although not determinative, factor that courts may consider is whether the proposed representative has a substantial stake in the controversy. *McNeill v. New York City Housing Auth.,* 719 F.Supp. 233, 253 (S.D.N.Y.1989); *Linder v. Litton Sys., Inc.,* 81 F.R.D. 14, 19 (D.Md.1978). A named representative must also demonstrate a willingness and ability actively to pursue and to take control of the litigation. *Epifano v. Boardroom Business Prods. Inc.,* 130 F.R.D. 295, 299 (S.D.N.Y.1990) ("[a] plaintiff who is not seriously interested in his own action cannot be relied upon to rigorously pursue the claims of others."). Northwest argues that Chung has not demonstrated that she would be an adequate representative of the class.

Northwest contends that Chung does not have a sufficient

personal stake in the litigation. As a class member, she would be eligible to recover back pay. However, with regard to instatement, Chung has stated only that she "would consider" working as a flight attendant for Northwest. Depo. of Stephanie hung at 77–78. Unlike two of the other named plaintiffs, who currently work as flight attendants in the airline industry, Chung has invested a substantial amount of time in pursuing a bachelor's degree in architecture at the University of Minnesota. Chung has stated that, if the class prevailed and this Court granted injunctive relief requiring instatement, one of the factors she would have to weigh in deciding whether to take a flight attendant position with Northwest is her University coursework. *Id.* at 78. Chung also stated that she intends to complete her degree at the University. *Id.* at 107.

In an employment discrimination case, it is of no small significance that the class representative have an interest in the equitable relief she seeks on behalf of her class. *Linder,* 81 F.R.D. at 19; *see also Ashworth v. Sherwin–Williams Co.,* 10 Fair Empl.Prac.Cas. (BNA) 709, 710 (N.D.Ga.1974) (finding a serious question of adequate representation exists when a named plaintiff has no personal stake other than a claim for back pay). The Court determines that, Stephanie Chung has failed to establish that she has a sufficient personal stake in the outcome of the litigation. As plaintiffs have pointed out, such a finding is not determinative on the question of adequacy of representation.

***10** Northwest also contends that Chung lacks the willingness and ability to take an active role in and control the litigation to protect the interests of absentees. Chung has been aware of the litigation since February of 1992; at that time friends encouraged her strongly to become involved in the lawsuit, but she chose not do so. Chung Depo. at 48–50. Chung expressed no interest in becoming actively involved in the lawsuit until she was contacted by a third party—plaintiffs' counsel—this spring. Chung Depo. at 51–52. Plaintiffs argue that there is nothing improper in class counsel approaching potential plaintiffs. Pls.' Supplemental Reply Supp.Mot. for Class Certification at 7 (citing *Gulf Oil v. Bernard,* 452 U.S. 89, 101–03, 101 S.Ct. 2193, 2200–01 (1981)).

Plaintiffs, however, misapprehend the thrust of Northwest's argument. The significance of plaintiffs' counsel contacting Chung lies not in the *propriety* of the conduct; rather it lies in what that fact says about Chung's state of mind and degree of interest in pursuing this litigation. Chung had no interest in challenging Northwest's rejection of her application until she was contacted by plaintiffs' counsel—at least fifteen months after she was rejected.[16] In the meantime, she had chosen to pursue post-secondary education in a specialized field wholly unrelated to the airline industry. When a named plaintiff has little knowledge of or involvement in the class action, the district court must be concerned that "the party is not simply lending his name to a suit controlled entirely by the class attorney." 7A Charles Wright, Arthur Miller & Mary K. Kane, Federal Practice and Procedure § 1766 (1986).

Finally, in response to the Court's queries about what Stephanie Chung's presence adds to the lawsuit, plaintiffs' counsel replied that her presence was necessary to help ensure "sufficient" and proportionate representation. Plaintiffs' counsel has cited no case law requiring a certain ratio of named representatives to total class members. Indeed, courts, including this one, have determined that no set number of plaintiffs are required to maintain a class action; adequacy of representation is largely a matter of quality, not quantity. *See e.g., Grasty v. Amalgamated Clothing and Textile Workers Union,* 828 F.2d 123 (3d Cir.1987), *cert. denied,* 484 U.S. 1042, 108 S.Ct. 773 (1988); *Buchholtz v. Swift & Co.,* 62 F.R.D. 581, 598 (D.Minn.1973) (only two persons representing class of from 850 to 1500 members was not inadequate).

This Court finds that plaintiff Chung has failed to establish that she will adequately represent the class, and further finds that her presence as a class representative is not necessary.

(b) Conflicts of interest prevent Caucasian women from representing Asian and Hispanic women.

Northwest argues that the claims of the Caucasian named plaintiffs are adverse to those of Asian and Hispanic women. Northwest asserts that Asian and Hispanic women must prove national origin discrimination because their claims are directly dependent upon proof that white women are treated more favorably than Asian and Hispanic women. Accepting *arguendo* plaintiffs' statistics as true, Northwest contends they establish that, if a minimum height requirement more adversely impacts women than men, it must also adversely impact Asian and Hispanic women more than Caucasian women.

***11** Plaintiffs distinguish the cases cited by Northwest as cases involving claims of both race *and* gender discrimination. Plaintiffs, however, "are proceeding against Northwest for engaging in sex discrimination *only,* a class of just women is requested, and named plaintiffs have the same interest as *all* female class members in challenging Northwest's sex discriminatory

policy." Plaintiffs' Reply Mem. in Supp. of Class Certification at 7. This Court agrees with plaintiffs. In a class action alleging strictly gender discrimination, the race, color or national origin of the named plaintiffs is irrelevant. Northwest's argument does, however, raise a question of the proper scope of the class action.

Rule 23(c)(4) allows the district court to certify a class as to one or more claims without certifying the entire complaint. Paragraph 29 of the Third Amended Complaint alleges that "Northwest has continually discriminated against the named plaintiffs and others on the basis of their gender by failing and refusing to hire them as flight attendants because of their height...." Paragraph 30 of the Third Amended Complaint alleges that "Northwest has continually discriminated against Ms. Chung and others similarly situated on the basis of their race, color and national origin by failing and refusing them as flight attendants because of their height...." In light of plaintiffs' statements in their supporting memoranda and the Court's finding that Stephanie Chung is not an adequate class representative, this Court certifies this class action *only* with respect to Paragraph 29 of the Third Amended Complaint, alleging gender discrimination.

D. The requirements under Rule 23(b)

Having determined that plaintiffs have defined a class that satisfies the requirements of Rule 23(a), the Court must next consider whether that class falls within one of the categories of class actions defined in Rule 23(b). Plaintiffs assert that this class action, like most employment discrimination class actions, is properly maintained under Rule 23(b)(2) because Northwest has allegedly "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."

Northwest argues that plaintiffs have failed to establish that final injunctive relief is appropriate with the respect to the class as a whole. Northwest contends that it has eliminated the standard complained of and is unlikely to reinstitute a 5′2″ standard because of the continued need to compete in the Asian market. Therefore, injunctive relief is unnecessary.

Plaintiffs respond that the requirements of Rule 23(b)(2) are met for three reasons. First, they are asking for relief that will prevent Northwest from implementing the 5′2″ minimum height standard in the future, conduct which, although Northwest asserts is unlikely, is nonetheless possible. Second, plaintiffs assert that declaratory relief is appropriate for the class as a whole and that such declaratory relief is a proper foundation to this Court's award of back pay to the class as a whole. Third, plaintiffs contend that future injunctive relief for the class as a whole that requires Northwest to instate the class members could also be appropriate.

***12** This Court finds that plaintiffs have demonstrated that final injunctive or corresponding declaratory relief could be appropriate for the class as a whole. Certification of a class under Rule 23(b)(2) is appropriate when plaintiffs seek injunctive relief from sex discrimination in employment. *Marshall v. Kirkland,* 602 F.2d 1282, 1295–96 (8th Cir.1979). Assuming that the 5′2″ minimum height standard violates Title VII as impermissible gender discrimination, the class could be entitled to injunctive relief requiring instatement, declaratory relief and back pay. The Court observes that plaintiffs' prayer for relief in the Third Amended Complaint includes back pay, front pay, and other monetary damages for lost compensation and job benefits that they would have received but for the discriminatory practices of defendants. The Eighth Circuit has clearly held that "[t]he fact that back pay was sought incidentally to the prayer for injunctive relief does not affect" the appropriateness of bringing the action under Rule 23(b)(2). *Paxton v. Union Nat'l Bank,* 688 F.2d 552, 563 (8th Cir.1982) (citing *United States Fidelity & Guaranty Co. v. United States Gypsum Co.*, 585 F.2d 860, 875 (8th Cir.1978)). Therefore this suit may proceed as a Rule 23(b)(2) class action.

II. Northwest's "No Useful Purpose" Argument is Without Merit.

Northwest argues that, even if all the requirements for class certification are met, this Court should still not certify this case as a class action. Northwest contends that the Court "can rule on the lawfulness of the challenged exclusionary policy in the context of individual claims but has no basis for awarding any significant monetary relief." Def.'s Mem.Opp.Mot. for Class Certification at 15. Northwest relies for this proposition on the Eighth Circuit's decision in *Ihrke v. Northern States Power Co.*, 459 F.2d 566 (8th Cir.), *vacated on other grounds,* 409 U.S. 815 (1972).

Specifically, Northwest argues that plaintiffs have failed to demonstrate that women were actually injured by the airline's hiring policy. Northwest asserts that at least as many women as plaintiffs' expert claims should have been hired in the absence of a minimum height standard

were in fact hired. Def.'s Mem. in Opp. to Mot. for Class Certification at 15–16. Northwest also challenges the quality of the statistics relied upon by plaintiffs' expert and attempts to show that the actual number of additional women that would have been hired but for the height requirement is only twenty (rather than the forty-seven that plaintiffs' expert predicted), a statistically insignificant number. *Id.* at 16–18.

The situation presented in *Ihrke* is distinguishable from this case. In *Ihrke*, the only relief that plaintiff sought was a declaratory judgment; plaintiff did not seek monetary or equitable relief. 459 F.2d at 572. The Eighth Circuit concluded that the grant of declaratory relief to one person was the same as granting it to a class; thus, the court determined that certification of the class would serve no useful purpose. *Id.* In the present case, plaintiffs request not only declaratory relief but also injunctive relief, instatement and back pay. The Eighth Circuit's reasoning is not germane here.

***13** Northwest's arguments in essence state that the plaintiffs cannot ultimately prevail on the merits. Plaintiffs argue that Northwest's statistical arguments go to the merits of the underlying claim and are premised upon an inappropriate "bottom-line" analysis of the impact of its hiring policy. *See Connecticut v. Teal*, 457 U.S. 440, 442, 102 S.Ct. 2525, 2529 (1982) (employer cannot defend disparate impact of written examination by asserting that any adverse effect of the exam is offset by other measures such that the "bottom line" is a balanced work force). The Court agrees that Northwest has impermissibly attempted to argue the degree of impact of its height requirement. In considering plaintiffs' motion for class certification, the Court is not to consider the merits of plaintiffs' allegations; rather, it must evaluate whether plaintiffs have met the requirements of Rule 23. *Eisen v. Carlisle & Jacqueiln*, 417 U.S. 156, 177–78, 94 S.Ct. 2140, 2152–53 (1974). The Court finds that the maintenance of the class action here will serve the useful purpose of judicial economy—the consolidation of claims sharing common questions of law and requests for relief.

Conclusion

Based on the files, records and proceedings herein, the Court certifies a class with respect to plaintiffs' claim of gender discrimination only. The class shall be represented by named plaintiffs Brenda Glapa, Holly Novack and Kim Shaller. It shall consist of

> all women who applied for employment with Northwest Airlines as flight attendants, who were under 5′2″ (or were treated as if they were under 5′2″) and who were rejected between October 10, 1991, and March 12, 1992.

Accordingly, IT IS ORDERED that plaintiffs' motion for class certification (Doc. No. 96) is granted in part, denied in part.

All Citations

Not Reported in F.Supp., 1993 WL 559031, 63 Fair Empl.Prac.Cas. (BNA) 415, 63 Empl. Prac. Dec. P 42,870

Footnotes

[1] The copy of Novack's EEOC charge, submitted by plaintiffs an Exhibit 2 to the Declaration of David Offen–Brown in Support of Plaintiffs' Reply Memorandum for Class Certification, is marked a "file copy" and is unsigned, undated and not notarized.

[2] Excerpts from the deposition of Robert Brodin were attached as Exhibit 16 to the Affidavit of Jean Holloway in Opposition to Plaintiffs' Motion or Class Certification.

[3] Karen Johnson voluntarily withdrew from the action on May 11, 1993. *See* Stipulation and Order (Doc. No. 93).

[4] Rule 23(a) provides:

> 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.

[5] The commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interest of the class members will be fairly and adequately protected in their absence. Those requirements therefore also tend to merge with the adequacy-of-representation requirement, although the latter requirement also raises concerns about the competency of class counsel and conflicts of interest.

> *General Tel. Co. of the Southwest v. Falcon,* 457 U.S. 147, 157 n. 13 (1982).

[6] Rule 23(b)(2) provides:

> An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

> (2) 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 ...

[7] The plaintiffs note that, in so acting, they do not concede that the entry of summary judgment was proper. Pls.' Mem.Supp.Mot. for Class Certification at 5 n. 5.

[8] *E.g., Rodriguez v. United States Dep't of the Treasury,* 131 F.R.D. 1, 6–7 (D.D.C.1990); *Harris v. General Development Corp.,* 127 F.R.D. 655, 659 (N.D.Ill.1989); *Alvarez v. City of Philadelphia,* 98 F.R.D. 286, 289 (E.D.Pa.1983); *Quigley v. Braniff Airways, Inc.,* 85 F.R.D. 74, 84 (N.D.Tex.1979).

[9] *Sandoval v. Saticoy Lemon Ass'n,* 56 Fair Empl.Prac.Cas. (BNA) 1745, 1746 (C.D.Cal.1989); *Pollar v. Judson Steel Corp.,* 49 Fair Empl.Prac.Cas. (BNA) 221, 222 (N.D.Cal.1984); *Kraszewski v. State Farm Gen. Ins. Co.,* 38 Fair Empl.Prac.Cas. (BNA) 197, 258 (N.D.Cal.1985).

[10] *Kilgo v. Bowman Transp. Inc.,* 789 F.2d 859, 878 (11th Cir.1986); *Phillips v. Joint Legislative Comm.,* 637 F.2d 1014,

1022 (5th Cir.1981), *cert. denied,* 456 U.S. 960, 102 S.Ct. 2035 (1982).

[11] The Court also finds that it would be inappropriate to certify a class of deterred applicants because their presence would destroy commonality. *See infra* section C.(2) on commonality.

[12] Plaintiffs Glapa, Novack, and Shaller's EEOC charges were filed with the Court as Exhibits 2, 3, and 4 to the Declaration of David Offen–Brown in Support of Plaintiffs' Reply Memorandum for Class Certification. All three charges contain the same paragraph:

> I understand that Northwest had a policy of requiring flight attendants to be 5'2" until this year [i.e., 1992], when they lowered the requirement to 5'0". I bring this charge for myself and on behalf of similarly situated members of protected groups (such as women, Asians, and Hispanics) disproportionately affected by this policy.

[13] The argument that "this policy" refers to both the 5'2" and the 5'0" height requirements is not persuasive. Both sides have presented the Court with material, including extracts from the depositions of various Northwest officials, relating to the rationales and decision-making processes that led Northwest to lower its height requirement in 1992. It is clear from these documents that Northwest set a new minimum height standard to increase the number of Asian-language-speaking flight attendants who service their Asian routes. This increase was intended to improve the airline's competitiveness in the Asian business travel market. Northwest also added Asian language skills to the requirements for the flight attendant position. Thus, the new 5'0" height requirement was part of a change in the hiring policies of Northwest Airlines.

[14] Although Nimali Sondel remains in the caption of the suit she is not a class representative because she applied to and was rejected by Republic prior to October 20, 1991. *See supra* note 7 and accompanying text.

[15] Northwest has identified a number of other requirements that an applicant must have to qualify for employment as a Northwest flight attendant: a high school diploma or G.E.D.; 20/200 uncorrected vision; authorization to work in the United States; authorization to enter and exit the countries that Northwest services; and a valid passport.

[16] The following exchange occurred during Ms. Chung's deposition:

> Q: Did you ever file a charge relating to your application to Northwest with the Equal Employment Opportunity Commission?
>
> A: No.
>
> Q: Did you ever consider doing that?
>
> A: No. You mean before I met David Offen–Brown [plaintiffs' counsel], or it doesn't matter?
>
> Q: Either.

A: After, yes.

Chung Depo. at 87.