THE HONORABLE ROBERT S. LASNIK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KHALIL NOURI et al.,

Plaintiffs,

v.

THE BOEING COMPANY, a Delaware corporation,

Defendant.

NO. C99-1227L

DEFENDANT'S SUPPLEMENTAL MOTION TO DECERTIFY CLASS

NOTE FOR MOTION CALENDAR:
April 9, 2004

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I. INTRODUCTION

Defendant The Boeing Company ("Boeing") asks the Court decertify the plaintiff class. This supplemental motion is based on statistical analyses performed recently by *plaintiffs*' expert, Dr. Bernard Siskin, for each of the seven ethnicities/nationalities comprising the class. Dr. Siskin testified in his deposition on December 2, 2003, that he had not performed such a "disaggregated" analyses. Boeing and its expert, Dr. Michael Ward, assumed that was the case. However, in carefully reviewing all the back-up data and log files that Dr. Siskin supplied in connection with his trial report, dated October 24, 2003, Dr. Ward discovered on March 23, 2004 that Dr. Siskin *had*, in fact, conducted precisely such a disaggregated study. Dr. Siskin did not include the study in his report, and, when one examines the results, it is abundantly clear why: *the study definitively demonstrates that no pattern of adverse treatment exists across the seven individual protected groups comprising the plaintiff class*. Indeed, it shows some groups consistently advantaged and others never statistically significantly disadvantaged. No case law supports continuing certification of the class in the face of statistics such as these. In light of Dr. Siskin's study, the class cannot stand as a matter of law.

II. FACTS

As the Court is well aware, plaintiffs are Boeing engineers and technical workers of seven ethnicities: Cambodian, Vietnamese, Indian, Pakistani and Filipino, Iranian, and Afghan. Plaintiffs claim to have experienced race and national origin discrimination in the Company's annual salary adjustment processes. They sue under Title VII of the Civil Rights Act of 1964 as amended, and 42 U.S.C. § 1981.

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Both parties have engaged statistical experts to analyze Company data as it pertains to this lawsuit. In March, 2003 the Court ordered the parties to conduct a comprehensive national origin survey to try to determine the specific ethnicities of potential classmembers. Order Regarding Contents of Survey, March 7, 2003 (Dkt #257). After the national origin survey was conducted, the parties' experts defined the class population using the information gleaned from the survey, supplemented with information from Boeing's personnel databases. Declaration of Rima Hartman ("RH") ¶ 2. They then conducted statistical analyses, with competing models, for potential use at trial.

Plaintiffs' expert, Dr. Siskin, produced his report for trial on October 24, 2003 ("Siskin's 2003 Report"). Id. ¶ 3. This report included only aggregated statistical data relating to the class. Id. The report did not include any analysis ethnicity by ethnicity. Id. Boeing then issued a request for Dr. Siskin's back-up data relating to his 2003 statistical analyses. Id. ¶ 4. Dr. Siskin provided that backup documentation to Dr. Ward at various points thereafter. Declaration of Michael Ward ("MW") ¶ 3. Boeing deposed Dr. Siskin regarding his 2003 Report on December 2, 2003. RH ¶ 5. In that deposition, Dr. Siskin testified as follows:

> A: . . [T]here was a table 3 in the earlier report which dealt with the results by specific country of origin, which we no longer did—ran.
>
> Q.: Why did you drop those studies?
>
> A.: I believe—this was not for class certification. This was post class certification. So we were told the class were certified [sic], this is what the class is, study the class.

Deposition of Bernard Siskin at 34:17-25 (RH 6).

Defendant's expert, Dr. Ward, produced his expert report in this case on December 5, 2003. RH ¶ 6. Dr. Siskin produced a rebuttal report on February 5, 2004 ("Rebuttal

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Report"). Id. ¶ 7. Again, Dr. Siskin's Rebuttal Report omitted any disaggregated analysis of plaintiffs' class by country of origin. Id.

When Dr. Ward received the back-up data to Dr. Siskin's 2003 Report, he did not look for any disaggregated studies in the backup data provided by Dr. Siskin—believing Dr. Siskin's testimony that none had been run. MW ¶ 5. However, on March 23, 2004, Dr. Ward discovered that Dr. Siskin *did* perform a disaggregated, by-country analysis, but left out the results of those studies in his 2003 Report and his 2004 Rebuttal Report. Id.¶ 3

At the request of counsel for Boeing, Dr. Ward printed out Dr. Siskin's log files displaying the country-by-country analyses. Id. ¶ 3 and pp. 40-58. Dr. Ward also performed the mathematical calculation necessary to display Dr. Siskin's results in terms of standard deviation. Id. ¶ 4. He further conducted a statistical run of his own (using Dr. Siskin's regression model) to confirm the results obtained from Dr. Siskin's log files. Id. ¶ 4 and pp. 40-58. As set forth in more detail below, the results of Dr. Siskin's analysis are straightforward and inescapable: *no pattern of statistically significant disadvantage exists across the composite class of ethnicities plaintiffs represent.*

III. ARGUMENT/AUTHORITIES

A. THE COURT MAY DECERTIFY THE CLASS AT ANY TIME.

Plaintiffs have repeatedly argued that because this Court certified a class and because the Ninth Circuit refused Boeing's interlocutory appeal, the class certification decision is somehow set in stone. See, e.g., Plaintiffs' Opposition to Defendant's Motion for Summary Judgment on Class Claims (Dkt # 310) at 2; Plaintiffs' Motion in Limine to Preclude Boeing from Revisiting Class Definition During Trial (Dkt. #326), at 2-3. Plaintiffs' assertion lacks any basis in the law.

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Rule 23 itself provides that a court may alter or amend certification of a class *at any time* prior to a decision on the merits. Fed. R. Civ. P. 23(c)(1). Indeed, the Supreme Court has ruled that a court's order respecting class status is not final or irrevocable, but rather, is "*inherently tentative*." General Telephone Co. of the Southwest v. Falcon, 457 U.S. 147, 160 (1982) (emphasis added) (quoting Coopers & Lybrand v. Livesay, 437 U.S. 463, 469 n.11 (1978)). See also Paton v. New Mexico Highlands University, 275 F.3d 1274, 1278 (10th Cir.2002) (trial court granted defendant's motion for decertification after the close of trial but before the matter was submitted to the jury); Armstrong v. Davis, 275 F.3d 849, 872 (9th Cir. 2001) ("district court may redefine the class, may excise portions of a plaintiffs' class allegations, and may even decertify the class" at any time before final judgment); Officers for Justice v. Civil Serv. Comm'n, 688 F.2d 615, 625 (9th Cir.1982), cert. denied, 459 U.S. 1217 (1983) (district court has broad discretion to amend, alter or even decertify the class at any time prior to a decision on the merits); O'Brien v. Sky Chefs, Inc., 670 F.2d 864, 869 (9th Cir. 1982), overruled on other grounds by Atonio v. Ward's Cove Packing Co., Inc., 810 F.2d 1477, 1481 (9th Cir.1987) (affirming district court's decertification of class following the plaintiffs' failure to produce sufficient evidence of classwide discrimination).

B. THE LACK OF A STATISTICAL PATTERN AMONG PLAINTIFFS' SEVEN ETHNICITIES DEFEATS CLASS CERTIFICATION.

Dr. Siskin's statistical evidence definitively demonstrates that the requirements of commonality and typicality are not met as to the present class. Indeed, the facts are precisely the opposite: that there is no common adverse experience among plaintiffs' seven-country "Asians." The Court anticipated this precise issue when denying plaintiffs' first motion for class certification:

> Statistical analyses tied to individual nationalities may reveal disparities which do not fit the overall contours of the plaintiffs' class.

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> For example, there is no reason to assume, and plaintiffs have offered no evidence to suggest, that a particular nationality . . . has been adversely affected by the policies and practices of which they complain. With regard to any one or more nationalities, Boeing may be able to rebut whatever presumption of discrimination arises out of plaintiffs' [overall] statistical showing. In light of this very real possibility, the typicality of the named plaintiffs' claims remains in doubt.

Order Denying Plaintiffs' Motion to Certify Class, May 24, 2001 (Dkt. # 152) at 4-5.

As it turns out, Boeing need not undertake studies to demonstrate that there is not a statistically significant pattern of adverse effect against the individual nationalities comprising the class—*Dr. Siskin has already done it*. As the tables appended to Dr. Ward's declaration demonstrate, no pattern of disparity exists across the class. MW ¶ 4 and pp. 40-58. To the contrary, Indian engineers, for example, received *more* pay than would be predicted, *to a statistically significant degree in almost every year*. Id.[1] The results for Pakistani engineers were likewise positive in most years, though not statistically significantly. Id. Iranian engineers and technical workers had no statistically significant results in any year. Id. Filipino engineers had statistically significant negative results in only *one* year; the same was true for Filipino engineers. Id. Of all the technical workers, only two ethnicities showed *any* statistically significant adverse results in any year: Indians

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[1] As Dr. Ward's declaration indicates, the standard deviations derived for Dr. Siskin's analysis are set forth in Column B of Exhibit C to the declaration. MW 40-58. Dr. Ward ran a "check" on these figures by replicating Dr. Siskin's actual statistical model and running it with Dr. Siskin's data, comparing each ethnicity against the data for white employees. Id. ¶ 4. This produces very slight variation, as reflected in Column D. Id. 40-58. Either set of standard deviations confirms the same result—lack of a common statistical pattern across the class.

The Court should note, of course, that all these analyses are from Dr. Siskin or replicate his model. Boeing does not agree that this model is appropriate, but accepts it for purposes of this motion only. Dr. Ward's model, which Boeing believes is a better reflection of the compensation results, is provided for comparison. MW ¶ 6 and pp. 59-73.

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in 1997 and 1998, and Vietnamese in 1998, and the degree of statistical significance seen there is *miniscule*, ranging from 2.01 to 2.13. Id. Overall, the vast majority of Dr. Siskin's outcomes were not statistically significant in either direction in any year.[2] Id.

While the Supreme Court has declined to hold that "precise calculations of statistical significance are necessary in employing statistical proof," Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 311-12 n.17 (1977); Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 995 n.3 (1988), the Court has stated "'if the difference between the expected value and the observed number is ***greater than two or three*** standard deviations,'" then the hypothesis [that no discrimination occurred] would be suspect." Hazelwood, 433 U.S. at 309 n.14 (citation omitted) (emphasis added).

The Ninth Circuit has interpreted that guidance to mean that while a *social scientist* may be suspicious of standard deviations just above two or three, a different—even higher—standard applies in *court,* adding that "courts should be 'extremely cautious' of drawing any inferences from standard deviations in the range of 1 to 3." Gay v. Waiters' & Dairy Lunchmen's Union Local No. 30, 694 F.2d 531, 551 (9th Cir. 1982) (citation omitted). In Gay, the Ninth Circuit cautioned:

> In order to establish a prima facie case of disparate treatment based solely on statistical evidence, the plaintiff must produce statistics showing "*a clear pattern, unexplainable on grounds other than race*." "But such cases are rare." Absent a "*stark*" *pattern*, "impact alone is not determinative, and the [c]ourt must look to other evidence." It is vitally important, therefore, to remember that "statistically

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[2] To understand the time frame in Dr. Siskin's compensation studies, it is important to note that, at Boeing, the new salaries for engineers and technical workers take effect on March 2. Dr. Siskin's snapshots of salaries taken on March 1 therefore generally reflect the salary in place for the *previous* year. Thus, his studies of March 1, 1996 salaries actually reflect salaries set in ***1995***, his studies of March 1, 1997 salaries actually reflect salaries set in ***1996***, and so forth. Siskin Dep. at 82:12-83-11, 84:1-20. RH 7-8.

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> significant" results are not necessarily "legally significant" results. As the district court recognized, "the probability of random occurrence of a value is not the obverse of the probability that is the result of deliberate action." Simply put, statistics demonstrating that chance is *not* the more likely explanation are not by themselves sufficient to demonstrate that race *is* the more likely explanation for an employer's conduct.

Gay, 694 F.2d at 552-53 (emphasis added; citations and footnotes omitted).

As the Court acknowledged when it granted Boeing's motion for summary judgment as to the claims of technical workers after March 1 of 2001, disparities such as those found in Dr. Siskin's disaggregated analysis simply *cannot* support plaintiffs' case. Order Granting in Part Defendant's Motion for Summary Judgment on Class Claims, March 25, 2004 (Dkt #348), at 3. The Court wrote: "the differences between class members' expected salaries and their actual salaries are so small that they are more likely the result of random chance than the employee's race or national origin." Id. Given the known differences among the plaintiffs' class and the indisputable fact that there are no statistically significant results for *most* of the ethnicities in *most* of the years at issue, there is plainly no longer any basis for class treatment. To hold otherwise would leave open the completely unjustified possibility that Boeing could be found liable for discrimination against ethnic groups for whom there is only statistical evidence of *favorable* treatment. Nothing in the letter or spirit of Rule 23, Title VII or Section 1981 permits such a result.

IV. CONCLUSION

On the basis of the foregoing, Boeing respectfully requests that the Court decertify the class

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DATED: March 25, 2004.

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CERTIFICATE OF SERVICE

On March 25, 2004, I caused to be served upon counsel of record, at the address stated below, via the method of service indicated, a true and correct copy of the following documents:

Defendant's Supplemental Motion to Decertify Class

Steven J. Toll Joseph M. Sellers Christine E. Webber Jenny R. Yang Cohen, Milstein, Hausfeld & Toll, PLLC 1100 New York Avenue, NW West Tower, Suite 500 Washington, DC 20005	___ ___ ___ ___ __X__	Via hand delivery Via U.S. Mail, 1st Class, Postage Prepaid Via Overnight Delivery Via Facsimile Via E-filing
Harish Bharti Law Offices of Harish Bharti & Associates, LLC 5516 17th Avenue NW Seattle, WA 98107 Attorneys for Plaintiffs	___ ___ ___ ___ __X__	Via hand delivery Via U.S. Mail, 1st Class, Postage Prepaid Via Overnight Delivery Via Facsimile Via E-filing

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED at Seattle, Washington, this 25th day of March, 2004.

s/ Rima Hartman
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