

Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

NOURI, *et al.*

Plaintiffs,

v.

THE BOEING COMPANY, INC.,

Defendant.

CAUSE NO. C99-1227L

**PLAINTIFFS’ MOTION
FOR APPROVAL OF
CLASS NOTICE PROPOSAL**

Noted: January 23, 2004

1
2 I. RELIEF REQUESTED

3 Plaintiffs respectfully request that this Court approve Plaintiffs' Proposed Notice to the
4 Class ("Notice"), attached to the Declaration of Christine Webber ("Webber Decl.") as Exhibit
5 A, as well as Plaintiffs' proposal for distribution of this Notice to prospective class members as
6 set forth herein. Despite attempts over the past few months to reach an agreement, the parties
7 have been unable to agree on the appropriate scope of distribution of the Notice to current and
8 former Boeing employees. Plaintiffs believe that compliance with due process and Federal Rule
9 of Civil Procedure 23 requires that the Notice be mailed to all Boeing employees in Washington
10 state who were employed in Engineering (Paycode 4) or Technical (Paycode 2T) positions at any
11 time during the class period of October 12, 1996 to the present, to ensure that as many individual
12 class members as reasonably possible receive notice. Boeing contends that distribution of the
13 Notice should be limited to only a subset of potential class members. As a result of this
14 disagreement over the scope of distribution of the Notice, the parties have not been able to reach
15 agreement on the text of the Notice.

16 Thus, for the reasons set forth in this memorandum of points and authorities, Plaintiffs
17 respectfully request that this Court grant Plaintiffs' Motion for Approval of Class Notice
18 Proposal.

19 II. BACKGROUND

20 On May 22, 2002, the Court certified a class action under Fed.R.Civ.P. 23(b)(3) on
21 behalf of "all current and former employees whose national origin or ethnic background is from
22 Cambodia, Vietnam, the Phillippines, India, Pakistan, Afghanistan or Iran who have been
23 employed at Boeing's facilities in the state of Washington as salaried employees in Paycodes 2T
24 or 4, below the level of first level manager at any time from October 12, 1996 to the present."

1 Order, May 22, 2002.

2 On November 6, 2003, Plaintiffs provided Boeing with a proposal for notice to the class.
3 (Webber Decl. at ¶ 2). In an effort to facilitate a prompt agreement on the language of the
4 notice, Plaintiffs' Notice is modeled on the Federal Judicial Center's illustrative forms of class
5 action notices.¹ From November to December 2003, the parties engaged in extensive e-mail
6 exchanges concerning Plaintiffs' notice proposal and at least two telephone conversations, before
7 deciding during a telephone call on December 30, 2003, that the parties could not reach an
8 agreement on the scope of distribution of the Notice to the class. (Webber Decl. at ¶ 3). The
9 parties have been unable to reach an agreement on the text of the Notice, although Plaintiffs have
10 modified the proposed Notice in response to concerns Boeing has raised. (Webber Decl. at ¶ 4).
11 Due to disagreement on the scope of distribution of the Notice, Boeing has declined to provide
12 Plaintiffs with either detailed feedback or a counter-proposal concerning the language of the
13 Notice. (Webber Decl. at ¶ 5).

14 III. ARGUMENT

15 A. Notification of all Engineering (Paycode 4) or Technical (Paycode 2T) Positions
16 Provides the Best Notice Practicable Under the Circumstances.

17 The parties' central area of disagreement concerns the appropriate scope of distribution
18 of the Notice. Plaintiffs believe that due process and Fed.R.Civ.P. 23 require that the Notice be
19 mailed to the last known address of every current and former employee employed by Boeing in
20 Washington state in Engineering (Paycode 4) or Technical (Paycode 2T) positions at any time
21 during the class period, in order to reach as many class members as reasonably possible.² Boeing
22

23 ¹ The model is available at <http://www.fjc.gov> on the Class Action Notices Page under
24 the link, "Employment discrimination class action certification: full notice."

25 ² Plaintiffs plan to mail Notices to the last known addresses the parties have for all such
26 employees. Should any letters be returned to sender, Plaintiffs will engage in additional efforts

1 seeks to limit distribution of the notice to some subset of potential class members. Boeing has
2 suggested that the Notice be limited to those class members who responded to an optional survey
3 in the Spring of 2003 that asked recipients to identify their ethnicity or national origin. This
4 survey was distributed to current and former Boeing employees in Washington state employed in
5 Engineering (Paycode 4) or Technical (Paycode 2T) positions at any time from October 12, 1996
6 to the Spring of 2003. However, participation in the survey was completely voluntary, and a
7 substantial percentage of employees did not respond to the survey. (Webber Decl. at ¶ 6). As
8 such, limiting class notification to those individual class members who chose to respond to the
9 survey would fail to provide sufficient notice to numerous class members.

10 The due process protection of the Fourteenth Amendment to the United States
11 Constitution requires that in a class action brought under Rule 23(b)(3), absent class members
12 must receive notice plus an opportunity to be heard and participate in the litigation. *See Mullane*
13 *v. Central Hanover Bank & Trust Co*, 339 U.S. 306, 314-315 (1950). “The notice must be the
14 best practicable, ‘reasonably calculated, under all the circumstances, to apprise interested parties
15 of the pendency of the action” *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812
16 (1985)(citing *Mullane*, 339 U.S. at 314-315). The Fed.R.Civ.P. 23(c)(2) notice provisions were
17 “designed to fulfill requirements for due process to which the class action procedure is of course
18 subject.” *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-74 (1974) (citing to Advisory
19 Committee’s Note to Rule 23, 28 U.S.C. App., p. 7765).

20 Fed.R.Civ.P. 23(c)(2)(B) provides:

21 For any class certified under Rule 23(b)(3), the court must direct to class
22 members the best notice practicable under the circumstances, including individual
23 notice to all members who can be identified through reasonable effort.

24
25 to obtain a valid address based upon the individual’s social security number.

1 Plaintiffs' proposal to mail Notices to the last known address of each current and former
2 Boeing employee in Washington state employed in an Engineering (Paycode 4) or Technical
3 (Paycode 2T) position during the class period, would provide the "best notice practicable under
4 the circumstances" as required by Rule 23(c)(2)(B) and due process. Boeing's effort to limit
5 notice to a subset of the potential class fails to comply with these stringent requirements. Since
6 many employees did not respond to the voluntary Spring 2003 survey, notice would be provided
7 only to that subset of class members who chose to respond to the survey. The Notice itself
8 neither provided any reference to the definition of the class that had been certified nor notice that
9 failing to respond to the survey would impact class members' legal rights. Further, employees
10 hired after the distribution of the survey would be precluded from receiving notice of their rights.
11 Even expanding the scope of notice to include all current and former employees in Boeing's
12 database identified as "Asian," would result in a failure to reach class members who are not
13 classified as "Asian" in Boeing records such as Iranians and Afghans.

14 Precedent exists for sending notice more broadly than to only those known to be
15 members of the class. For example, in *Neal v. Director, District of Columbia Dept. of*
16 *Corrections*, Civ.A.No. 93-2420, 1995 WL 517246, at * 6 (D.D.C. Aug. 9, 1995), the court
17 ordered that notice be delivered or mailed to all current and former employees, employed during
18 the applicable class period, where the class was limited to those employees subjected to a pattern
19 or practice of sexual harassment and retaliation. Because database information did not permit
20 identification for those who might have suffered retaliation, notice was provided to all
21 employees.

22 As the Supreme Court has made clear, "the express language and intent of Rule 23(c)(2)
23 leave no doubt that individual notice must be provided to those class members who are
24 identifiable through reasonable effort." *Eisen*, 417 U.S. at 175; *see also Frank v. United*
25

1 *Airlines*, 216 F.3d 845, 851 (9th Cir. 2000) (notice for a Rule 23(b)(3) class action requires
2 “individual notice to all members who can be identified through reasonable effort.”) Plaintiffs
3 have proposed doing just that. There is no sufficient justification to support Boeing’s effort to
4 deny notice to potential class members when they can be easily identified. Since Plaintiffs will
5 bear the full cost of mailing the notices to potential class members, the cost of a comprehensive
6 mailing will not burden Boeing. Accordingly, the Court should grant Plaintiffs’ Motion for
7 Approval of Class Notice Proposal.

8 B. Plaintiffs’ Proposed Notice Satisfies all the Requirements of Rule 23

9 Plaintiffs’ proposed Notice, attached to Webber Decl. as Exhibit A, fully complies with
10 the requirements of Rule 23. Rule 23(c)(2)(B) provides that for any class certified under Rule
11 23(b)(3):

12 The notice must concisely and clearly state in plain, easily understood
13 language:

- 14 • the nature of the action,
- 15 • the definition of the class certified,
- 16 • the class claims, issues, or defenses,
- 17 • that a class member may enter an appearance through counsel if the
18 member so desires,
- 19 • that the court will exclude from the class any member who requests
exclusion, stating when and how members may elect to be excluded, and
- 20 • the binding effect of a class judgment on class members under Rule
21 23(b)(3).

22 Plaintiffs have satisfied all elements of Rule 23's notice provision. In clear language, the
23 Notice explains the nature of the action, defines the class and sets forth the claims in the case.
24 Notice, pp 1-5. In addition, the Notice provides in plain language an explanation of a class
25 member’s rights and options, including that a class member may enter an appearance through
26 counsel; that the court will exclude any class member who requests exclusion, as well as the

1 procedures for requesting exclusion; and the binding effect of a judgment on class members
2 under Rule 23(b)(3). Notice, pp. 6-7. Plaintiffs' Notice also includes a website for class
3 members to consult for more information about the case and a toll-free number class members
4 may call to ask class counsel questions about the case.³ Further, in an effort to facilitate prompt
5 agreement on the Notice, Plaintiffs modeled the Notice on the Federal Judicial Center's
6 illustrative forms of class action notices. The Federal Judicial Center's website at
7 <http://www.fjc.gov>, Class Action Notices Page, states that these notices were designed to
8 illustrate how attorneys and judges might comply with a change to Fed.R.Civ.P. 23(c)(2)(B),
9 effective December 1, 2003. Plaintiffs have revised the Notice to address concerns raised by
10 Boeing, including making it more explicit that the Notice applies only to class members and that
11 if an individual is not a member of one of the national origin or ethnic groups identified in the
12 Notice, that individual is not a member of the class.

13 As set forth in the proposed Notice, Plaintiffs request that the deadline for class members
14 to seek exclusion from the class be set for March 15, 2004.⁴ This will provide parties with notice
15 of who is a part of the class, at least two weeks before the trial date of April 5, 2004. In addition,
16 Plaintiffs request that notices be mailed out to class members by February 15, 2004, so that class
17 members have time to consider whether to opt out of the class.

22 ³ The website address and toll-free number will be established once the Notice is
23 approved for distribution.

24 ⁴ The proposed Notice requires that class members postmark their Exclusion Requests by
25 March 15, 2004, so the parties should receive notice of who is part of the class within a week
26 thereafter.

1 In light of Plaintiffs' compliance with the notice provisions of Fed.R.Civ.P. 23 and
2 Plaintiffs' efforts to address concerns raised by Boeing, the Court should approve Plaintiffs'
3 Proposed Class Notice and Plaintiffs' proposal for distribution of this Notice to all Boeing
4 employees in Washington state who were employed in Engineering (Paycode 4) or Technical
5 (Paycode 2T) positions at any time during the class period of October 12, 1996 to the present.

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7 Dated: January 8, 2004

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9 Respectfully submitted,

10
11 By: s/Christine E. Webber

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