

Nelson v. Wal-Mart Stores, Inc.

United States District Court for the Eastern District of Arkansas, Eastern Division
January 13, 2009, Decided; January 13, 2009, Filed
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Reporter: 2009 U.S. Dist. LEXIS 38859; 105 Fair Empl. Prac. Cas. (BNA) 643

DARYAL T. NELSON and TOMMY ARMSTRONG, individually and on behalf of all persons similarly situated, PLAINTIFFS vs. WAL-MART STORES, INC. and WAL-MART TRANSPORTATION, LLC., DEFENDANTS

Subsequent History: Costs and fees proceeding at [Nelson v. Wal-Mart Stores, Inc., 2009 U.S. Dist. LEXIS 71253 \(E.D. Ark., Aug. 12, 2009\)](#)

Prior History: [Nelson v. Wal-Mart Stores, Inc., 2009 U.S. Dist. LEXIS 28708 \(E.D. Ark., Jan. 13, 2009\)](#)

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Judges: Wm. R. Wilson, Jr., UNITED STATES DISTRICT JUDGE.

Opinion by: Wm. R. Wilson, Jr.

Opinion

ORDER

Pending is Defendants' Motion For Decertification (Doc. No. 150). Plaintiffs have responded ¹ and Defendants have replied. ² For the reasons set out below, Defendants' Motion is DENIED.

I. DISCUSSION

In a May 16, 2007, Order, I certified the following class under *Rule 23(b)(2) of the Federal Rules of Civil Procedure*:

- a. African American persons who reside in the continental United States of America who have applied for employment as over-the-road truck drivers at Wal-Mart since [*3] September 22, 2001, and who have not been hired; and
- b. African American persons who reside in the continental United States of America who were deterred or thwarted from applying for positions as over-the-road truck drivers at

¹ Doc. No. 170.

² Doc. No. 181.

Wal-Mart due to Wal-Mart's challenged policies and practices.³

Defendants correctly note that "courts have an obligation to assure that compliance with Rule 23 continues after certification and in light of evidentiary developments arising during the course of litigation." 4Rule 23 of the Federal Rules of Civil Procedure governs class actions.⁵ A class certified under Rule 23(b)(2) must meet the requirements of Rule 23(a), which are:

- (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.⁶ A class certified under Rule 23(b)(2) must also show that "the party opposing the class has acted or refused to act on grounds that apply generally to the class"⁷

Defendants contend that post-certification evidence shows that Plaintiffs cannot meet either the commonality requirement of Rule 23(a) or the cohesiveness requirement of Rule 23(b)(2).⁸ Defendants maintain that Plaintiffs' experts have no reliable statistical evidence that Wal-Mart's hiring policies or practices adversely affected or deterred African-American OTR driver applicants, and that Plaintiffs' assertions of commonality are unfounded.⁹ I disagree.

A. Expert Evidence

1. Hiring Outcomes Vary By Location

I stand by my finding that Plaintiffs' evidence created an inference that Wal-Mart's OTR driver hiring practices and policies disfavor African Americans nationwide, as demonstrated by the "statistically significant underrepresentation of African American [OTR] truck drivers in Wal-Mart's work force."¹⁰ Wal-Mart asserts that Plaintiffs' expert analyses do not support the conclusion that African-American drivers are underrepresented [*5] at each of Wal-Mart's 47 transportation offices ("TOs"). Wal-Mart contends that Plaintiffs have moved away from a nationwide statistic, and turned to local labor markets to calculate the expected representation of African-American OTR drivers at Wal-Mart's 47 TOs, thus destroying commonality. I do not read Plaintiffs' pleadings or statistics as having "moved away" from a nationwide statistic.¹¹ Further, I am not persuaded by the law -- discussed below -- cited by Wal-Mart in support of its position.

In *Stastny v. Southern Bell Telephone & Telegraph Co.*, a class of female employees alleged Southern Bell Telephone and Telegraph Company's promotion and pay practices violated Title VII.¹² The class included females from various Southern Bell facilities across the state of North Carolina, but plaintiffs' evidence was related only to employment decisions affecting persons in one Southern Bell facility.¹³ *Stastny* can be distinguished from this case; in *Stastny*, "[t]hough statewide statistical data was introduced to show statewide disparities in filling management positions, there was no showing of the extent to which, if at all, the overall disparities [*6] were

³ Doc. No. 118.

⁴ Doc. No. I*41 156. The standard of review for decertification of a class is abuse of discretion. See *Roby v. St. Louis Southwestern Railway Co.*, 775 F.2d 959, 961 (8th Cir. 1985).

⁵ *Fed. R. Civ. P. 23*.

⁶ *Fed. R. Civ. P. 23(a)*.

⁷ *Fed. R. Civ. P. 23(b)(2)*.

⁸ Doc. No. 156.

⁹ *Id.*

¹⁰ Doc. No. 118.

¹¹ See, e.g., Doc. No. 170.

¹² *Stastny v. Southern Bell Tel. & Tel. Co.*, 628 F.2d 267, 269 (4th Cir. 1980).

¹³ See *id.* at 279.

paralleled in the separate facilities or even a statistically reliable sample of them." ¹⁴

Clayborne v. Omaha Pub. Power Dist.,

¹⁵ also cited by Defendants, is distinguishable as well, because that case involved multiple job classifications.

2. The Methodology of Plaintiffs' Statistical Analyses

Wal-Mart's challenges to Plaintiffs' statistical analyses were addressed in the Order denying Wal-Mart's Motion To Exclude Testimony. ¹⁶

B. The Use and Effect of Word-of-Mouth Recruiting

1. Dissemination of the 1-800 Number: Wal-Mart's Home Office and TOs

Although Wal-Mart uses various means to distribute the 1-800 cards and the 1-800 number, ¹⁷ word-of-mouth appears to be the preliminary method. ¹⁸

2. African Americans Calling the 1-800 Number

The Order denying Wal-Mart's Motion for Summary Judgment on Plaintiffs' Class Claims addresses Wal-Mart's assertions that because 15% of callers asking for applications were African [*7] American, Wal-Mart effectively reaches out to the African-American truck driver population. ¹⁹

Wal-Mart's expert, Topel, found that 70% of applicants -- both African American and white -- learned of Wal-Mart's OTR driver positions through another driver. ²⁰ First, this finding was based on applicant flow data, so it does not take into account any chilling effect a word-of-mouth

recruitment policy may have. Second, this finding supports Plaintiffs' position that a word-of-mouth recruitment policy is crucial to Wal-Mart's OTR driver positions. This finding does not, however, show that Wal-Mart's hiring practices and policies do not adversely affect or thwart African-American applicants.

C. Wal-Mart's Subjective Practices

Wal-Mart argues that it incorporates extensive objective criteria in its OTR driver selection process. ²¹ Beyond the minimum requirements set out on the 1-800 card, I am unaware of a written corporate policy setting out objective criteria.

I believe the commonality requirement has been met -- in part, it's Wal-Mart's centralized policy allowing subjective practices that is at question. Wal-Mart asserts that Plaintiffs [*8] could have analyzed applicant flow data to determine if African-American drivers were less likely to be hired than white drivers. I explained in the Order denying Wal-Mart's Motion To Exclude Testimony why I think the use applicant flow data is not appropriate in this case.

CONCLUSION

Based on the findings of fact and conclusions of law above, I find the commonality requirement of *Rule 23(a)* is met, as is the cohesiveness requirement of *Rule 23(b)(2)*. Accordingly, Defendants' Motion is DENIED.

IT IS SO ORDERED this 13th day of January, 2009.

/s/ Wm. R. Wilson, Jr.

UNITED STATES DISTRICT JUDGE

¹⁴ *Id.* at 279.

¹⁵ *211 F.R.D. 573, 578 (D. Neb. 2002)*.

¹⁶ Doc. No. 187.

¹⁷ Doc. No. 158-2, Ex. 5.

¹⁸ *See* Doc. No. 158-3, Ex. 1(b); Plaintiffs' Ex. 134, filed under seal; and Doc. No. 176-16.

¹⁹ Doc. No. 188.

²⁰ Doc. No. 158-6, Ex. 27.

²¹ Doc. No. 156.