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CIVIL RIGHTS

Richardson v. City of New York, No. 17-cv-9447, 2021 WL 1910689 (S.D.N.Y. May 12, 2021) (Oetken, J.) Plaintiffs, African American Fire Department of New York (“FDNY”) firefighters, brought a discrimination suit against their employer, alleging that civilian employment practices created a disparate impact and involved disparate treatment, in violation of federal and state statutes. Defendant moved for partial summary judgment and to strike Plaintiffs’ claims, and Plaintiffs sought certification.

The Court granted summary judgment in part and denied the other motions. In terms of class certification, the Court looked primarily at commonality, evaluating whether Plaintiffs had shown that African Americans at FDNY are subjected to a common mode or general policy of discrimination. The Court found Plaintiffs had pointed to three discriminatory processes as examples of disparate impact but failed to show that these were uniformly applied or produced common questions. For disparate treatment claims, the Court noted that Plaintiffs need only show a widespread engagement in intentional discrimination practices but found that Plaintiff’s statistical evidence was not sufficient to show this. Therefore, the Court denied certification and did not review additional Rule 23 elements.

EMPLOYEE RETIREMENT INCOME SECURITY ACT

Boley v. Universal Health Services, Inc., No. 20-cv-2644, 2021 WL 2186432 (E.D. Pa. May 27, 2021) (Kearney, J.)

Plaintiffs brought suit under the Employee Retirement Income Security Act (“ERISA”), alleging various breaches of fiduciary duties relating to their retirement savings plan. Certification was granted and appealed under Rule 23(f), and Defendants moved for a stay of proceedings pending the appeal, arguing that upcoming discovery depositions would be a waste of resources.

The Court denied the motion to stay all proceedings, allowing discovery to proceed, but vacated the obligations under its order for other pretrial actions.

In support of its decision, the Court considered the test under *Nken v. Holder*. The Court first found that Defendants had demonstrated a reasonable chance of success on the merits. In considering potential harm in proceeding during the appeal, the Court agreed with both parties in part and found no harm in allowing discovery depositions to continue, but stayed all other obligations as to expert reports, summary judgment, and trial. The Court also recognized that balancing equities and public interest warranted a stay of the final trial but noted that preserving testimony would be helped by proceeding with the depositions now.

ENVIRONMENTAL

Sanders v. City of Winnfield, No. 53,872-CA, 2021 WL 2125445 (La. Ct. App. May 26, 2021) (Cox, J.) Plaintiff brought suit against the city after sustaining damage from flood waters, alleging a failure to maintain adequate drainage facilities as well as alleging federal claims of discrimination in land use and drainage system policies against the predominately African American residents of his neighborhood. Defendant removed the matter to federal court, which dismissed the federal claims. In state court, Plaintiff then moved for certification, which was granted. Defendant then appealed.

The Court reversed the lower court’s decision. Reasoning in support of its decision, the Court first looked at

commonality, which was found by the lower court upon the basis that each class member's flooding was due to inadequate drainage. The Court instead looked to the Louisiana Supreme Court case of *Brooks v. Union Pac. R.R. Co.*, in which decertification was affirmed in a mass tort case involving multiple defendants where more than one cause and theory of liability was possible. The Court likewise found that commonality had not been established in the instant case because of the potential of multiple contributing factors within the drainage system, as well as secondary causes for the flooding at issue.

The Court then looked at numerosity and joinder and found Plaintiff had failed to present sufficient evidence of the exact and actual number of persons likely to have a claim in the matter. The Court found mere allegations or speculation on potential numerosity were not sufficient, and that some specific evidence cited as proving numerosity had simply not been produced. Thus, Plaintiff had not shown the class was so numerous as to be impracticable for joinder. Because numerosity had not been met, the Court determined it need not address the remaining criteria for certification.

RACKETEERING

Miller v. Grand Canyon University, Inc., No. 20-cv-00652, 2021 WL 1996564 (N.D. Tex. May 19, 2021)
(*per curiam*)

Plaintiff brought suit against the university, alleging claims of omission, misrepresentation and statutory violations including the Racketeer and Corrupt Influenced Organizations Act after discovering the program in which she enrolled was not accredited in her state. Plaintiff moved for class certification.

The Court denied the motion. First, with respect to numerosity, the Court found tens of thousands of class members sufficient. In terms of commonality, the Court identified six common questions proposed by Plaintiff's motion but found that Plaintiff had failed to show how a class action would generate common answers to these. Rather, the Court found these questions would each require individualized evidence unsuitable for class-wide resolution, and therefore Plaintiff had not shown commonality.

In terms of typicality, the Court found similar problems, in that Plaintiff's claims depend on statements made orally to her in unique circumstances and individualized conversation, as opposed to an identified uniform practice. As such, the Court found typicality had not been shown. Defendant also argued Plaintiff was subject to a unique defense in that she had left the university because of expulsion due to a failed criminal background check, not because of alleged fraud. The Court found this circumstance was problematic for satisfying predominance. To close out the Rule 23(a) factors in terms of adequacy, the Court found no conflict of interest, and that counsel was sufficiently experienced.

Turning to Rule 23(b)(3) predominance, the Court found Plaintiff had failed to show typicality and commonality and declined to address superiority. Specifically, the Court found individual questions would predominate with respect to Plaintiff's expulsion and individual interactions with her recruiter involving non-uniform oral statements. Additionally, the Court found proving reliance would depend on individual class members' own circumstances involving the same types of conversations. Thus, a class could not be certified under Rule 23(b)(3).

Turning next to Rule 23(b)(2), the Court found former students would have no need for injunctive relief, and therefore a putative class of former students could not be certified under this section.

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