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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

DEIDRE BROWN; LYNN CAIN; CHERYL
GERALD; DEBRA JONES; DONNA
KELSAY; ANNE M.Z. NOVOTNY; and
GLORIA SALAZAR, on behalf of
themselves and all others
similarly situated,

NO. CIV. S-98-1719 LKK/JFM

Plaintiffs,

v.

O R D E R

SACRAMENTO REGIONAL TRANSIT
DISTRICT,

Defendant.

Plaintiffs¹ bring this action against their employer, the
Sacramento Regional Transit District (RT), alleging gender
discrimination in violation of Title VII of the Civil Rights Act,
42 U.S.C. § 2000-e, and California's Fair Employment and Housing
Act, Cal. Gov't Code § 12900. The case is now before the court on

¹ Deidre Brown, Lynn Cain, Cheryl Gerald, Debra Jones, Donna
Kelsay, Anne Novotny, and Gloria Salazar.

1 plaintiffs' motion to certify their complaint as a class action.
2 I resolve the motion after briefing and oral argument.

3 I.

4 **STANDARDS FOR CLASS CERTIFICATION**

5 A suit may be maintained as a class action where the
6 requirements of Fed. R. Civ. P. 23(a) are met and one of the
7 conditions enumerated in Rule 23(b) is satisfied. To meet 23(a)
8 requirements plaintiffs must demonstrate that (1) the class is
9 so numerous that joinder of all members is impracticable, (2)
10 there are questions of fact common to the class, (3) the claims
11 and defenses of the representative party are typical of the
12 claims and defenses of the class, and (4) the representative
13 parties will fairly and adequately protect the interests of the
14 class. Certification under Rule 23(b)(2) is proper where "the
15 party opposing the class has acted or refused to act on grounds
16 generally applicable to the class, thereby making appropriate
17 final injunctive relief or corresponding declaratory relief with
18 respect to the class as a whole." Below, I examine plaintiffs'
19 showing.²

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23 ² A sotto voce theme of defendant's brief is that the claim
24 lacks merit. "In determining the propriety of a class action, the
25 question is not whether the plaintiff or plaintiffs have stated a
26 cause of action or will prevail on the merits, but rather whether
the requirements of Rule 23 are met." Eisen v. Carlisle and
Jacquelin, 417 U.S. 156, 178 (1974) (quoting Miller v. Mackey Int'l,
452 F.2d 424 (5th Cir. 1971)).

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II.

FED. R. CIV. P. 23(a)

Plaintiffs allege RT discriminates against women in hiring, promoting, training and determining salary, grade level, job description and job title. They now move to certify a class composed of all women who from August 1995 onward:

1. applied unsuccessfully for promotions within RT;
2. applied unsuccessfully for positions with RT;
3. were discouraged from applying for positions with RT due to RT's allegedly notorious discrimination against women; and
4. who will be discouraged from applying for positions with RT in the future due to RT's allegedly notorious discrimination against women.

See Amended Complaint at ¶6.

Clearly, plaintiffs' definition of the proposed class is both over and under-inclusive. The proposed class includes all women who have applied for promotions or positions with RT and is thus overly inclusive, since under the pleadings the proper class should be restricted to women who were denied promotions or positions on the basis of gender. But the proposed class is also under-inclusive since plaintiffs' formal definition of the class only includes women who have suffered discrimination when applying for positions and promotions with RT. Under their moving papers, however, plaintiffs also seek to proceed on behalf of women employees at RT who have suffered discrimination

1 with regards to salary and training opportunities. As I now
2 explain, other problems suggest that some boundaries must be
3 placed around the amorphous class proposed by plaintiffs.

4 It seems clear that a class comprising all the present,
5 past and future women who have worked or hoped to work for RT is
6 simply unmanageable. Rather, the court will consider subclasses
7 for each manifestation of RT's allegedly discriminatory policies
8 and practices, i.e., a subclass for women rejected as job
9 applicants, another for those denied promotion, another for
10 those deprived of training and another for those discriminated
11 against with regards to salary, job title, job description
12 and/or grade level.³ Below, the court determines whether and to
13 what extent the court should certify each sub-class given the
14 prerequisites of Fed. R. Civ. P. 23(a)--numerosity, commonality,
15 typicality and adequacy of representation.

16 **A. DISCRIMINATION IN HIRING**

17 The named plaintiffs prosecute this action on behalf of all
18 women who have applied, unsuccessfully, for employment with RT.
19 Thus, they seek to represent all women affected by RT's
20 allegedly discriminatory hiring practices. As employees of RT,
21 however, plaintiffs do not "possess the same interest and suffer
22 the same injury" as women who applied unsuccessfully to work at
23

24 ³ Although under plaintiffs' pleadings it appears that some
25 members of the class suffered multiple forms of discrimination,
26 dealing with a smaller number of cross subclass members appears
more manageable than attempting to sort out the confusions that
would likely occur in dealing with one undifferentiated class.

1 RT. Schlesinger v. Reservists Committee to Stop the War, 418
2 U.S. 208, 216 (1974). Put differently, plaintiffs' interests
3 and injuries may not be typical of a sub-class including
4 unsuccessful applicants. See General Telephone Co. of the
5 Southwest v. Falcon, 457 U.S. 147, 157-58 (1982). In Falcon, as
6 here, the plaintiff claimed discrimination in promotion and
7 sought to represent employees who suffered discrimination in
8 hiring. The Supreme Court held that certification was improper
9 because the plaintiff's claims were not typical of the claims
10 made by the class. The Court did note two possible exceptions
11 to its holding: (1) where the employer used a common biased
12 evaluation process and (2) where the plaintiff produced
13 "significant proof" of a general policy of discrimination
14 manifesting itself in the same general fashion. Id. at 159
15 n.15.⁴

16 ////

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18 ⁴ The court explained:

19
20 "If petitioner used a biased testing procedure to
21 evaluate both applicants for employment and incumbent
22 employees, a class action on behalf of every applicant
23 or employee who might have been prejudiced by the test
24 clearly would satisfy the commonality and typicality
25 requirements of Rule 23(a). Significant proof that an
26 employer operated under a general policy of
discrimination conceivably could justify a class of both
applicants and employees if the discrimination
manifested itself in hiring and promotion practices in
the same general fashion, such as through an entirely
subjective decisionmaking process."

26 Falcon, 457 U.S. at 159 n. 15.

1 Plaintiffs contend that RT's discrimination against women
2 manifested itself in hiring and promotion practices through RT's
3 subjective decisionmaking process. According to plaintiffs'
4 moving papers, however, RT's general policy of discrimination
5 manifests itself differently in its hiring and promotion
6 practices. With regards to hiring, RT allegedly re-writes job
7 descriptions to exclude women who qualify under existing job
8 descriptions and declines to interview women who meet the
9 minimum requirements for positions while it agrees to interview
10 men who do not meet the minimum requirements. With regards to
11 promotions, RT allegedly solicits men when promotion
12 opportunities become available, creates promotion opportunities
13 for men and denies women direct appointments when positions
14 become available while it grants men such appointments.

15 In sum, under plaintiffs' allegations RT's alleged policy
16 of gender discrimination does not manifest itself in the same
17 general fashion when it comes to hiring and promoting employees.
18 Accordingly, the named plaintiffs' interests and injuries are
19 not typical of those women who have applied unsuccessfully for
20 employment with RT. Nor are they typical of those women who
21 have been or will be discouraged from applying for positions
22 with RT. Because those women are not employees of RT, they do
23 not face the same manifestations of RT's discriminatory policy
24 that the named plaintiffs face. Therefore, the class will be
25 restricted to women who are current or former employees of RT
26 who have suffered discrimination in promotions, in training and

1 in salary, job title, job description and grade level.

2 **B. DISCRIMINATION IN PROMOTING**

3 The named plaintiffs seek to represent all women employees
4 at RT who have suffered discrimination in the promotion process
5 on the basis of their gender. As I now explain, such a broad
6 class is improper.

7 On the one hand, all hourly workers at RT are employed
8 pursuant to a collective bargaining agreement which governs,
9 inter alia, promotions. On the other hand, promotions from the
10 union to salaried positions or promotions from one salaried
11 position to a higher management position are governed by RT's
12 own employment rules and procedures. It thus follows that
13 different employment practices underlie any discrimination
14 against women employees who seek promotion within the bargaining
15 unit and women employees, whether union or management, who seek
16 promotion to salaried positions.

17 The named plaintiffs are all salaried, i.e., non-union
18 employees of RT. Accordingly, their interests and injuries are
19 not typical of women employees who seek promotion within the
20 bargaining unit. See, e.g., Jordan v. County of Los Angeles,
21 669 F.2d 1311, 1322 (9th Cir. 1982) (named plaintiff's claim is
22 typical if it stems from the same practice), reversed on other
23 grounds, 459 U.S. 810 (1982). This distinction, however, does
24 not apply to women wage employees applying for promotions to
25 non-union salaried positions, because they share a common issue
26 with the named plaintiffs--RT's alleged practice of denying

1 women promotions in favor of men who are similarly situated.

2 Defendant contends that class treatment is improper because
3 the putative members will have different qualifications and
4 ambitions, and thus RT's allegedly discriminatory promotion
5 policies and practices will affect them in different ways. I do
6 not agree. The factual variations RT relies on are insufficient
7 to destroy commonality given the alleged common thread of
8 discrimination, i.e., the common practice of re-writing job
9 applications, creating promotions for men and soliciting men for
10 promotions when they become available. Id. at 1320.

11 The typicality requirement is satisfied because the same
12 policies and procedures affect the named plaintiffs and the
13 class members when they apply for promotions to positions in the
14 non-union management structure. Id. at 1322. Put directly, the
15 evidence plaintiffs use to prove discrimination in promotion
16 claims will prove the class claims as well. Falcon, 457 U.S. at
17 157-58.

18 Because the named plaintiffs and the class members share
19 the same interest, promotion to non-union positions, the court
20 can conclude that the suit is not collusive and that the named
21 plaintiffs' interests are not antagonistic to the class. Thus,
22 the named plaintiffs are adequate representatives. United
23 Energy Corp. v. Baumer, 122 F.R.D. 251, 257 (C.D. Cal. 1988).⁵

24
25 ⁵ Of course, adequacy of representation includes class
26 counsel's performance, and the court will remain alert throughout
the litigation to insure that counsel's performance justifies
continued class certification.

1 Finally, in support of the numerosity requirement,
2 plaintiffs submit charts listing more than thirty women who have
3 been denied promotion or discouraged from applying for
4 promotion.⁶ See Myers Decl., Exh. A. The court can safely
5 conclude that joinder of thirty women would be impracticable.
6 Accordingly, the court will certify a sub-class consisting of
7 all women who have applied for promotions to salaried management
8 positions but been denied on the basis of their gender, and all
9 women who were discouraged from making such an application by
10 virtue of RT's alleged discriminatory policy.

11 **C. DISCRIMINATION IN TRAINING**

12 The analysis governing discrimination in promotions also
13 governs discrimination in training. Plaintiffs cannot represent
14 union members who seek training for union jobs, because the
15 collective bargaining agreement governs such employment.
16 Accordingly, the court will certify a sub-class consisting only
17 of women employees who have sought training for positions in
18 salaried positions.

19 Plaintiffs allege that RT affords men more valuable,
20 prestigious training and refuses to prepare grant applications
21 for training targeting women who seek leadership positions in
22 the transportation industry. Under these allegations, women
23 employees who request training for salaried positions suffer

24
25 ⁶ Given plaintiffs' identification of women who have been
26 discouraged from applying for promotions, the court will expand the
sub-class to include women who have been deterred from applying for
promotions on the basis of their gender.

1 from a common thread of discrimination.

2 Once again, the evidence the named plaintiffs use to prove
3 their discrimination in training claims will prove the class
4 claims as well. Therefore, the named plaintiffs' interests are
5 typical of the class, and they are adequate representatives.

6 There may, however, be a question of numerosity.
7 Plaintiffs' chart identifies only two class members who have
8 been denied training. See Myers Decl., Exh. A. It seems
9 likely, however, that if plaintiffs' allegations are true,
10 discovery will produce a larger number of women who have been
11 denied training. Accordingly, the court will tentatively
12 certify a class, subject to a motion to decertify at the close
13 of discovery, of all present and former women employees of RT
14 who suffered gender-based discrimination in training and all
15 women who were discouraged from seeking training by virtue of
16 RT's alleged discrimination.

17 **D. DISCRIMINATION IN DETERMINING SALARY, JOB TITLE, JOB**
18 **DESCRIPTION AND GRADE LEVEL**

19 The analysis governing discrimination in promotion also
20 governs discrimination in salary, job title, etc. Plaintiffs
21 cannot represent union members in this sub-class because the
22 collective bargaining agreement governs determination of salary,
23 job title, etc. for union jobs. Therefore, the court will
24 certify a sub-class consisting of only salaried women employees
25 who have been discriminated against with respect to salary, job
26 title, etc.

1 Once again, under the named plaintiffs' allegations, these
2 class members suffer from a common thread of discrimination.
3 Plaintiffs allege that RT pays men more for identical work,
4 allows men to negotiate above the standard pay increase when
5 they are promoted and conducts job analyses and salary surveys
6 more often for men. The named plaintiffs' interests and
7 injuries are typical of the class, and the evidence they use to
8 prove their discrimination as to these claims will prove the
9 class claims as well. Therefore, the named plaintiffs'
10 interests are not antagonistic to the class, and they are
11 adequate representatives.

12 As for numerosity, the named plaintiffs have identified ten
13 women who have been discriminated with regards to pay. While
14 ten class members is arguably sufficient to demonstrate that
15 joinder is impracticable, if plaintiffs allegations of system-
16 wide discrimination are true discovery should produce a larger
17 number of women in this subclass. Accordingly, the court will
18 tentatively certify a class, subject to a motion to decertify at
19 the close of discovery, of all present and former salaried women
20 employees at RT who were discriminated against by virtue of
21 their gender in the determination of their salary, job title,
22 job description or grade level.

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IV.

CLASS CERTIFICATION REQUIREMENTS UNDER FED. R. CIV. P. 23(b)(2)

Because plaintiffs allege system-wide discrimination, it is clear they allege that RT "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." Fed. R. Civ. P. 23(b)(2).

V.

ORDERS

For all the foregoing reasons, the court hereby makes the following ORDERS:

1. The court tentatively CERTIFIES the following classes:
 - a. Subclass 1: All current or former women employees of RT who applied for promotions to salaried positions but were denied such promotions on the basis of their gender and/or who were discouraged from making such an application by virtue of defendant's alleged discriminatory policies and practices;
 - b. Subclass 2: All current or former women employees of RT who sought training for salaried positions and/or who were discouraged from seeking such training by virtue of defendant's alleged discriminatory policies and practices;

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c. Subclass 3: All current or former women employees of RT who were salaried and who were discriminated against with regard to salary, job title, job description and/or grade level; and

2. Defendants may move for decertification upon the close of discovery.

IT IS SO ORDERED.

DATED: February 15, 2000.



LAWRENCE K. KARLTON
CHIEF JUDGE EMERITUS
UNITED STATES DISTRICT COURT

United States District Court
for the
Eastern District of California
February 16, 2000

as

* * CERTIFICATE OF SERVICE * *

2:98-cv-01719

Brown

v.

Sacramento Regional

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on February 16, 2000, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office, or, pursuant to prior authorization by counsel, via facsimile.

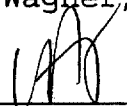
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