

STATE OF MICHIGAN  
COURT OF APPEALS

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TOM NOWACKI/All Others Similarly Situated,  
Plaintiff-Appellee,

UNPUBLISHED  
August 19, 2014

v

DEPARTMENT OF CORRECTIONS,  
Defendant-Appellant.

No. 315969  
Washtenaw Circuit Court  
LC No. 11-000852-CD

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Before: SAAD, P.J., and OWENS and K.F. KELLY, JJ.

PER CURIAM.

In this employment discrimination class action, plaintiff alleges that certain policies enacted by defendant at the Women’s Huron Valley Correctional Facility (WHV), defendant’s only facility that houses women prisoners, discriminate against male correction officers in violation of the Civil Rights Act (CRA), MCL 37.2101 *et seq.* The trial court granted plaintiff’s motion for class certification and denied defendant’s motion for reconsideration. This Court granted defendant’s application for leave to appeal.<sup>1</sup> We affirm.

I. BACKGROUND

Before 2009, several lawsuits were brought against defendant alleging that some of its staff were sexually abusing female prisoners. Settlement agreements were reached in these cases. In response, defendant sought, and the Michigan Civil Service Commission approved, the use of bona fide occupational qualifications (BFOQs), which ensured that only women could be employed for certain positions at WHV. Plaintiff’s lawsuit in the underlying action alleges that defendant applied these BFOQs over broadly, improperly denying him and other men opportunities for various job assignments and overtime work.

Plaintiff moved for class certification and the trial court granted the motion without oral argument, stating that it would “decide the matter based upon the written submissions of the parties,” and finding that plaintiff “satisfied the requirements . . . for class certification.”

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<sup>1</sup> *Nowacki v Dep’t of Corrections*, unpublished order of the Court of Appeals, entered June 25, 2013 (Docket No. 315969).

Defendant moved for reconsideration, arguing that the court erred by granting plaintiff's motion for class certification without oral argument and without providing specific findings on the requirements for class certification. The trial court denied the motion, stating that it had adopted "Plaintiff's pleadings to set forth the basis for the granting of the class certification."

Defendant argues on appeal that plaintiff failed to establish any of the requirements for class certification.

## II. CLASS CERTIFICATION

### A. STANDARD OF REVIEW

The interpretation of the court rules governing class certification is a question of law that we review de novo. *Henry v Dow Chem Co*, 484 Mich 483, 495; 772 NW2d 301 (2009). Findings of fact are reviewed for clear error and the decision to certify the class is reviewed for an abuse of discretion. *Id.* at 495-496. "A finding is clearly erroneous if, after reviewing the entire record, [this Court] [is] definitely and firmly convinced that the trial court made a mistake." *Duskin v Dep't of Human Servs*, 304 Mich App 645, 651; \_\_\_ NW2d \_\_\_ (2014). "An abuse of discretion occurs when the trial court's decision falls outside the range of principled outcomes." *Duncan v Michigan*, 300 Mich App 176, 185; 832 NW2d 761 (2013). "The burden of establishing that the requirements for a certifiable class are satisfied is on the party seeking to maintain the certification." *Mich Ass'n of Chiropractors v Blue Care Network of Mich, Inc*, 300 Mich App 577, 586; 834 NW2d 138 (2013). In determining whether class certification is appropriate, we do not consider the merits of the case. *Henry*, 484 Mich at 504.

### B. LEGAL STANDARDS

A class may be certified only if it meets the requirements of MCR 3.501(A)(1). *Henry*, 484 Mich at 496. That rule provides as follows:

(1) One or more members of a class may sue or be sued as representative parties on behalf of all members in a class action only if:

(a) the class is so numerous that joinder of all members is impracticable;

(b) there are questions of law or fact common to the members of the class that predominate over questions affecting only individual members;

(c) the claims or defenses of the representative parties are typical of the claims or defenses of the class;

(d) the representative parties will fairly and adequately assert and protect the interests of the class; and

(e) the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice. [MCR 3.501(A)(1).]

“These prerequisites are often referred to as numerosity, commonality, typicality, adequacy, and superiority.” *Mich Ass’n of Chiropractors*, 300 Mich App at 586, citing *Henry*, 484 Mich at 488.

“[A] party seeking class certification is required to provide the certifying court with information sufficient to establish that each prerequisite for class certification in MCR 3.501(A)(1) is in fact satisfied.” *Henry*, 484 Mich at 502. The Court in *Henry* recognized that the allegations in the pleadings of a party seeking class certification could potentially satisfy this burden, “such as in cases where the facts necessary to support this finding are uncontested or admitted by the opposing party.” *Id.* at 503. However, the Court also recognized that “[i]f the pleadings are not sufficient, the court must look to additional information beyond the pleadings to determine whether class certification is proper.” *Id.*

## C. APPLICATION

### 1. NUMEROSITY

“There is no particular minimum number of members necessary to meet the numerosity requirement, and the exact number of members need not be known as long as general knowledge and common sense indicate that the class is large.” *Zine v Chrysler Corp*, 236 Mich App 261, 288; 600 NW2d 384 (1999). However, “the plaintiff must adequately define the class so potential members can be identified and must present some evidence of the number of class members or otherwise establish by reasonable estimate the number of class members.” *Id.* Otherwise, the trial court will be unable to determine if joinder of class members would be impracticable. *Id.* In addition, it is not sufficient merely to allege a large class. Plaintiff “must establish that a sizeable number of class members have suffered an actual injury.” *Duskin*, 304 Mich App at 653.

Plaintiff avers that the class is composed of approximately 80 male corrections officers. In an affidavit, a paralegal of plaintiff’s attorney claims that “[a]pproximately 87 potential class members contacted our office.” We find that a class of more than 80 members is sufficiently numerous, and defendant does not argue to the contrary.

However, defendant disputes whether plaintiff has shown that a sizeable number of the members have suffered actual injury. From the exhibits provided by plaintiff in his motion for class certification, we believe that he has. One corrections officer avers that he heard the warden and deputy warden of WHV say that they were trying to motivate male officers to leave. Another officer avers to one of plaintiff’s central complaints, i.e., that the broad application of the BFOQs deprives male officers of opportunities to earn overtime pay. A female officer avers that “the administration inserted ‘strip searches’ as core duties in most positions in order to deny those assignments to the male officers.” Another officer echoes this assertion, and adds that this practice has “severely limited the available male assignments” in WHV.

We find that this evidence, as credited by the trial court, is sufficient to support numerosity. According to plaintiff’s exhibits, defendant has used the BFOQs too broadly in an effort to purge WHV of male corrections officers. The affidavits suggest that this problem has affected all of the officers at WHV, both male and female. The fact that more than 80 “potential class members” have contacted the office of plaintiff’s attorney strongly suggests that a sizeable

number have suffered the injuries that form the basis of plaintiff's complaint. Consequently, we are not definitely and firmly convinced that the trial court made a mistake in concluding that numerosity was satisfied.

## 2. COMMONALITY

Commonality addresses “whether there ‘is a common issue the resolution of which will advance the litigation.’ ” *Zine*, 236 Mich App at 289, quoting *Sprague v Gen Motors Corp*, 133 F3d 388, 397 (CA 6, 1998) “It requires that ‘the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, must predominate over those issues that are subject only to individualized proof.’ ” *Zine*, 236 Mich App at 290, quoting *Kerr v West Palm Beach*, 875 F2d 1546, 1557-1558 (CA 11, 1989). Plaintiffs seeking class certification must establish that “all members of the class had a common injury that could be demonstrated with generalized proof, rather than evidence unique to each class member.” *A&M Supply Co v Microsoft Corp*, 252 Mich App 580, 600; 654 NW2d 572 (2002).

We find that commonality has been established in this case. Defendant does not dispute that it uses the BFOQs. The issue is whether its application is improper and violates the CRA. This is the sole issue, and it is shared by each class member. Furthermore, this issue can be established by generalized, rather than individual, proof. Essentially, plaintiff seeks to establish that defendant applies the BFOQs to various job assignments, the BFOQs are applied unnecessary and in bad faith, and the intention of the administration is to purge WHV of all male officers. This could be accomplished through testimony from a few class members and other employees and administrators at WHV, and every class member would not need to testify about his individual circumstances. It would then be an issue of law whether such an application violates the CRA. In sum, the determination of whether defendant employs the BFOQs in the manner alleged by plaintiff “will resolve an issue that is central to the validity of each one of the claims in one stroke.” *Duskin*, 304 Mich App at 654 (quotation marks and citations omitted). Therefore, we are not definitely and firmly convinced that the trial court made a mistake in concluding that commonality was satisfied.

## 3. TYPICALITY

The typicality requirement “directs the court to focus on whether the named representatives’ claims have the same essential characteristics as the claims of the class at large.” *Neal v James*, 252 Mich App 12, 21; 651 NW2d 181, 183 (2002) (quotation marks and citations omitted), overruled in part on other grounds by *Henry*, 484 Mich 505 n 39. To that end, although “factual differences between the claims do not alone preclude certification, the representative’s claim must arise from the same event or practice or course of conduct that gives rise to the claims of the other class members and . . . [be] based on the same legal theory.” *Neal*, 252 Mich App at 21 (quotation marks and citations omitted). However, even if the claims are “based on the same legal theory, [they] must all contain a common core of allegation.” *Id.* (quotation marks and citations omitted).

As “[t]he commonality and typicality requirements of Rule 23(a) tend to merge,” *Gen Tel Co of Southwest v Falcon*, 457 US 147, 157 n 13; 102 S Ct 2364; 72 L Ed 2d 740 (1982), so do these factors under Michigan court rule. See *Neal*, 252 Mich App at 15 (stating that “this Court

may refer to federal cases construing the federal rules on class certification”). For the same reasons that plaintiff has satisfied commonality, he has also satisfied typicality. His claims are based on the same legal theory, violation of the CRA, and arise from the same practice, the alleged bad faith application of the BFOQs. Therefore, the trial court did not clearly err in finding that typicality was satisfied.

#### 4. ADEQUACY

The adequacy requirement “focuses on whether the class representatives can fairly and adequately represent the interests of the class as a whole.” *Neal*, 252 Mich App at 22. To determine whether adequacy is fulfilled, a two-step inquiry is necessary. *Id.* “First, the court must be satisfied that the named plaintiffs’ counsel is qualified to sufficiently pursue the putative class action. Second, the members of the advanced class may not have antagonistic or conflicting interests.” *Id.* (quotation marks and citations omitted).

Defendant does not allege that plaintiff’s counsel is unqualified to pursue this action. Defendant, relying on *Neal*, argues that the class members may have had antagonistic or conflicting interests because they may have been in competition for the same job assignments that they allege defendant discriminatorily denied them. In *Neal*, this Court found that the representative plaintiffs did not meet the adequacy requirement where there were claims that some members were denied promotions because “there may be conflicts among the class members related to competitions for the same position.” *Id.* at 23.

We find *Neal* distinguishable. In that case, this Court characterized the employment discrimination claims of the class representatives as “highly individualized.” *Id.* at 17. It explained, “The individual factual circumstances pertinent to each plaintiff will need to be reviewed, and individual, fact-specific inquiries will need to be made in evaluating why certain individuals were not hired or promoted, or why other individuals were discharged or not retained.” *Id.* at 20. This Court found that adequacy had not been established for two reasons. First, as stated above, there was a possibility of conflict among members. Second, “the highly individualized nature of the claims presented,” made it “unlikely that the named plaintiffs [could] adequately represent all of the interests of the entire class.” *Id.* at 23. In the present case, as stated in the discussion of commonality, the class members’ claims are not highly individualized and they rely on a common contention.

In addition, we agree with the persuasive authority presented by plaintiff that holds that class certification should not be denied merely because of the possibility that class members vied for the same job assignments. In *Brown v Nucor Corp*, 576 F3d 149, 159 (CA 4, 2009), the United States Court of Appeals for the Fourth Circuit observed where “representatives have a conflict with the class in terms of competition for promotions, this conflict should not defeat class certification. Indeed, if this were true, how might a class action challenging promotion practices ever be brought . . . ?” The United States District Court for the Northern District of Illinois has echoed this sentiment and has suggested that the test for determining whether potential conflicts defeat adequacy is whether the conflict “goes to the very subject matter of the litigation.” *Dean v Int’l Truck & Engine Corp*, 220 FRD 319, 322 (ND Ill, 2004) (quotation marks and citation omitted); *Meiresonne v Marriott Corp*, 124 FRD 619, 625 (ND Ill, 1989) (emphasis omitted). In the present case, any potential conflicts do not affect the crux of the class

members' contention—that defendant is improperly applying the BFOQs. Moreover, it does not appear, and defendant does not allege, that any potential antagonistic interests will affect how plaintiff, as class representative, pursues this action. Therefore, we are not definitely and firmly convinced that the trial court made a mistake in concluding that adequacy was satisfied.

## 5. SUPERIORITY

The superiority requirement “asks whether a class action, rather than individual suits, will be the most convenient way to decide the legal questions presented, making a class action a superior form of action.” *A&M Supply Co*, 252 Mich App at 601. When making this determination, “the court may consider the practical problems that can arise if the class action is allowed to proceed. The relevant concern . . . is whether the issues are so disparate that a class action would be unmanageable.” *Id.* (quotation marks and citations omitted). In deciding whether superiority has been fulfilled, MCR 3.501(A)(2) requires a trial court to consider the following factors:

(a) whether the prosecution of separate actions by or against individual members of the class would create a risk of

(i) inconsistent or varying adjudications with respect to individual members of the class that would confront the party opposing the class with incompatible standards of conduct; or

(ii) adjudications with respect to individual members of the class that would as a practical matter be dispositive of the interests of other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;

(b) whether final equitable or declaratory relief might be appropriate with respect to the class;

(c) whether the action will be manageable as a class action;

(d) whether in view of the complexity of the issues or the expense of litigation the separate claims of individual class members are insufficient in amount to support separate actions;

(e) whether it is probable that the amount which may be recovered by individual class members will be large enough in relation to the expense and effort of administering the action to justify a class action; and

(f) whether members of the class have a significant interest in controlling the prosecution or defense of separate actions.

In the present case, the class members do not present disparate issues but rather one issue—whether defendant’s use of the BFOQs to deny male officers certain job assignments and overtime work violates the CRA. More than 80 actions all seeking to show that defendant pursued a specific discriminatory policy or practice based on the same evidence would be

unnecessarily duplicative and would place needless demands on the resources of the court system. In addition, individual actions could lead to inconsistent adjudications regarding whether defendant's policy violates the CRA. Furthermore, it appears that equitable relief in the form an injunction to stop defendant from improperly using the BFOQs would be appropriate if plaintiff prevails. Given these considerations, the trial court did not clearly err in finding that plaintiffs established superiority.

### III. CONCLUSION

We conclude that the trial court did not clearly err in finding that plaintiff established the requirements for class certification. Therefore, we hold that the trial court did not abuse its discretion in certifying the class.

Affirmed.

/s/ Henry William Saad  
/s/ Donald S. Owens  
/s/ Kirsten Frank Kelly