NATIONAL WORKRIGHTS INSTITUTE

Bringing Human Rights to the Workplace

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CLASS ACTIONS

A Look at the Record

It would be difficult to find a legal issue more controversial than class action suits. Joseph Garrison, former president of the National Employment Lawyers' Association, calls class actions "the only way rank and file employees with modest claims have any chance of receiving justice". Senator Orrin Hatch disagrees, calling class actions, "jackpot justice". A Washington Post editorial calls class actions, "a high-stakes extortion racket".

The National Workrights Institute examined five of the largest and best-publicized recent employment class actions to see which of these descriptions of class actions is most accurate. For each case, we asked the following questions:

Did the case have a strong factual basis?

How much of the recovery did the plaintiffs' attorneys receive?

Would the employees have been able to bring their claims without class actions?

HISTORICAL BACKGROUND

Class actions are governed by Rule 23 of the Federal Rules of Civil Procedure, enacted in 1938. The rule allows many individuals with a claim against a single entity to file a joint claim, rather than having each individual file a claim. The purpose is to increase judicial economy and enable individuals with small claims to afford access to court. State court rules providing for class actions soon followed.

In order to bring a class action, an individual must show that:

- ***there are questions of law or fact common to each member of the class***
- ***the class is so large that it is impractical for every member to participate as a party***
- ***the individual attempting to bring the class action will fairly and adequately represent the other members of the class.***

Defendants typically oppose having a case proceed as a class action. When this occurs, a judge holds a hearing to determine whether the requirements for proceeding as a class action have been met.

Corporations have criticized class actions since their creation. These criticisms have led to numerous revisions of Rule 23, most recently by the Class Action Fairness Act of 2005, which requires that class actions involving parties from different states be heard in federal court.

CASES

Boeing

A group of 15,000 employees sued Boeing for discriminating against women and racial minorities in compensation. Boeing's own Diversity Salary Assessment team concluded that "Asian and Black hires received, on average, lower starting salaries than Caucasians in the Northwest". A 1997 internal Boeing audit concluded, "Similarly situated women and minorities have lower starting salaries". It also found that "women and minorities are placed in lower grade levels and lower paying positions". In merit pay reviews, the audit reported, "African-Americans tend to receive lesser (percentage) increases in engineering." And in January 1998, top Boeing executives who attended a diversity session at the company's annual meeting were briefed on an internal survey of its affirmative action issues. The survey was reported to have found "racial bias" in hiring practices and "gender and racial bias" in promotion practices.

In light of this evidence, Boeing settled the case for $15 million. Of this, $3.85 million was paid to the attorneys representing the employees. After all other expenses had been paid, the employees received $7.3 million (just under half of the total settlement). Of the employees who received compensation, the amount ranged from $1,000 to $50,000.

Mitsubishi

Over 300 female employees of Mitsubishi filed a class action for sexual harassment. They claimed that they had been groped, pressured for sex, and threatened by co-workers. Some women claimed that they had to agree to sex to win jobs. Drawings of genitals,

breasts, and various sexual acts were placed on car fenders, labeled with women worker's names, and run down the assembly line. They complained to management, but little was done.

Mitsubishi ultimately apologized to the women and agreed to pay $34 million, the largest sexual harassment award in history. There were no legal fees because the women were represented by the Equal Employment Opportunity Commission. The women received an average of $69,959.

IBP

In *IBT v. Alvarez*, over 5,000 employees claimed that they were entitled to compensation under federal wage and hour laws for time spent walking to their work areas after donning protective gear. Unlike the other cases in this study, management did not settle out of court. The case reached the United States Supreme Court, which unanimously ruled that the employees were entitled to compensation for this time.

The award was $11.4 million. The attorneys for the employees received $1.9 million. The employees received the remaining $9.5 million. The awards to individual employees ranged from $20 to $15,000. The average award was $1,886.

The GAP

Over 30,000 workers employed by firms producing clothing for the GAP, J. Crew, Tommy Hilfiger, and other prominent stores brought suit in 1999 over the conditions in the factories where they worked, located on the island of Saipan (a territory of the United States). The workers claimed that they were:

virtually imprisoned when not working in "dormitories" that were unfit for human habitation
forced to work up to 12 hours a day, 7 days a week, without being paid overtime. In many cases, they claimed not to have been paid at all for many of the hours they worked
forced to remain in Saipan against their wills to repay illegitimate "debts" to their employers
denied their rights to freedom of speech and freedom of religion.

Many of these allegations were confirmed by reports from the United States Department of the Interior and Department of Labor. The employers' time records, obtained through discovery, demonstrated widespread violation of wage and hour laws. Copies of the workers' contracts, also obtained through discovery, confirmed allegation about illegal controls on workers' off-duty behavior.

The defendants ultimately resolved the case through a settlement agreement that provided $20 million to compensate the workers and create a monitoring program to prevent future

abuses.

Coca-Cola

In 1998, over 2000 African-American employees of Coca-Cola filed a class action claiming that they were paid less than comparable Caucasian employees (Abdallah *v.* Coca-Cola). The evidence showed that Caucasians were twice as likely as African-Americans to reach the professional/managerial level, four times as likely to reach the director level, and 10 times as likely to reach the vice-president level. In addition, African-Americans were paid 60% less on average than Caucasians.

Coca-Cola settled the suit for $192 million. Plaintiffs' counsel received $20 million and the remaining $172 million went to the employees, who received an average of $81,810.

A summary of these cases and their financial disposition is displayed in Table 1.

TABLE 1

Class Action Outcomes

Case	Award (millions)	Attorney's Fees (millions)	Net Award (millions)	# of Employees	Average Award ($)	Range ($)
Boeing	15	3.85	7.3 [7]	15,000	487	1,000-50,000 [8]
Coca Cola	192.5	20.7	171.8	2,100	81,810	N/A [9]
The GAP	20	3.15	5.8 [10]	30,000	193	N/A [11]
IBP	11.42	1.91	9.51	5,045	1,886	20-15,000
Mitsubishi	34	0 [12]	34	486	69,959	N/A

[7] There were administrative expenses in addition to attorneys fees.
[8] Not all employees received an award.
[9] Data not available.
[10] In addition to the funds received by employees, there were 5.6 million in costs. An additional $ 5.4 million was used to set up a monitoring program to prevent future violations.
[11] Data not available.
[12] The employees were represented by the EEOC.

LEGITIMACY

These five cases lend no support to the claim that class actions are suits without merit that employers settle to avoid the expense of trial.

In one case, IBP *v*. Alvarez, the employer did not settle, but went to trial and appealed the adverse decision all the way to the U.S. Supreme Court, where it received a definitive (and unanimous) decision that its conduct was illegal.

There was no court decision in the remaining four cases, because they cases were settled out of court. However, the official records scarcely suggest that they were without merit.

In ***Boeing***, the corporation's own internal audits indicated that unequal treatment of women and minorities was widespread.

In ***Coca-Cola***, there were enormous statistical differences between the promotion patterns and compensation of African-Americans and Caucasians.

In ***Mitsubishi***, the complaints of harassment by female employees were so numerous and credible that the corporation took the highly unusual step of issuing a formal apology.

In ***The Gap***, allegations of misconduct were confirmed by employers' own time records and reports of two federal agencies.

Nor does the data on these cases suggest that the companies settled the cases to avoid the expense of litigation. The settlements in the three cases that settled ranged from a low of ***$15 million (Boeing)*** to a high of ***$192 million (Coca-Cola)***. There is no way of knowing how much it would have cost these companies to litigate had they chosen to do so. Certainly, the costs would have been substantial. It seems unlikely, however, that they would have reached this level. The plaintiffs' legal fees ranged from a low of 11% to a high of 26% of the total settlement (as discussed in the next section). Even if the defense costs were twice this high, they would still have been far less than the amounts for which the companies settled.

LEGAL FEES

It is frequently argued that the settlements in class actions go predominantly to the plaintiffs' attorneys and that the employees themselves get very little.

That was not the case in the class actions we studied. The standard contingency fee in individual cases is at least 33%. In some cases, it is as high as 40%. In all of the cases we examined, the plaintiffs' attorneys received less than this. The largest percentage of the recovery received by plaintiffs' counsel was 25.7%, in the Boeing case. In the other cases, the percentage of the award received by plaintiffs' attorneys was even lower, less than half of the normal contingency fee.

TABLE 2

Attorneys Fees

Case	Award (millions)	Attorney's Fees (millions)	Percentage %
Boeing	15	3.85	25.7
Coca Cola	192.5	20.7	10.8
The GAP	20	3.15	15.7
IBP	11.4	1.9	16.7
Mitsubishi	34	N/A [7]	N/A

ACCESS TO JUSTICE

Could the employees in these cases, who had legitimate claims against their employers,

[7] The employees in Mitsubishi were represented by the EEOC, not by private attorneys. There were no attorneys' fees.

receive justice without the ability to bring a class action?

We compared the amounts received and the legal fees they would have generated had they been brought as individual cases with the estimated legal fees these employees would have faced had they brought their cases individually.

To determine the legal fees required for an employee in one of these cases to bring his or her complaint as an individual case, we asked experienced employment lawyers to review each case and estimate the legal fees they would have charged to represent a single member of the class. In addition, we asked each attorney if he or she would have been willing to represent the employee on a contingency fee basis. The results of this analysis are shown in the following table. This table compares the size of the awards generated for individual employees in each case and the legal fees these awards would generate with the fees an experienced employment lawyer estimated would be required to handle the case.

TABLE 3

Individual Awards

Case	Average Award ($)	Potential Legal Fees ($)	Highest Award ($)	Potential Legal Fees ($)	Required Fees ($)
Boeing	487	162	50,000	20,000	125,000
Coca Cola	81,810	32,720	N/A	N/A	120,000
The GAP	193	77	N/A	N/A	25,000 [8]
IBP	1,886	753	15,000	6,000	30,000
Mitsubishi	69,959	27,384	N/A	N/A	162,000

The results are striking. In all five cases, the legal fees required to bring an individual

[8] This figure represents only the estimated legal fees of bringing an action against the factory owner only with claims limited to the Fair Labor Standards Act. The legal fees of bringing the entire case on behalf of a single employee would have been substantially higher.

action far surpassed the fees the case would have generated. Even the employees who received the largest awards would have been unable to afford counsel. The largest awards were received by the employees of Coca-Cola, who received $81,810 each. Even this award, however, would not have been sufficient for the employees to retain counsel individually. This award would have generated legal fees of at most $32,729 even under extremely generous assumptions.[9] This is barely one-quarter of the $120,000 in legal fees an experienced employment lawyer estimated would be required to handle the case. For the other employee-plaintiffs in the cases we examined, the discrepancy between the legal fees required to handle the case and the legal fees an individual case would generate are even greater. Not one of the over 50,000 employees in the cases we examined would have been able to find representation without the availability of class actions.

CONCLUSION

One must be cautious about drawing conclusions from a study of only five cases. It is possible that the cases we selected to examine are not typical of employment class actions as a whole. To the extent they are typical, however, they lend little support to the common criticisms of class actions. None of the cases was frivolous. Each case displayed strong evidence of employer misconduct. In one case the United States Supreme Court unanimously ruled that the employer's conduct was illegal.

Nor were any of the charges trivial. The least serious charge in these cases was that the employer systematically paid low-level employees less than was legally required.

Contrary to popular perception, the lawyers did not receive more than the employees. The highest percentage received by any of the lawyers was 25.7% (Boeing), substantially less than a normal contingency fee. The other attorneys received even less.

Finally, the employees in these cases would not have received anything without the option of filing a class action. The potential legal fees from even the largest settlements do not begin to approach the fees that would have been required to bring these complaints as individual cases. Without class actions, Boeing and Coca-Cola would still be discriminating against minority employees, IBP and the GAP would still be paying low-level workers less than they are legally entitled to, and sexual harassment would still be rampant at Mitsubishi.

The facts of these class actions strongly indicate that class actions in employment cases have turned out as intended, an effective means for workers with legitimate claims against their employer that are not large enough to support the expense of litigation to receive justice.

[9] This figure assumes a contingency fee of 40%, which is the maximum commonly charged. In many cases, the fee is lower, frequently 33%. It also assumes that there are no expenses in the case, which are paid from the employee's share of the recovery. Under other assumptions, the fee generated would be even lower.