

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
SUMMONS ISSUED

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y.
★ JAN 23 2012 ★

BROOKLYN OFFICE

Averil C. Morrison, Individually and on behalf of all
others similarly situated,

Plaintiffs,

- against -

International Union of Operating Engineers Local 14-
14B, AFL-CIO

Defendant.

CV 12 - 301
11 Civ. () ()
Complaint and Jury Demand
BLOCK, J.

REYES, M.J

Plaintiffs, by her attorney, Michael G. O'Neill, complain against defendant as follows:

JURISDICTION AND VENUE

1. This is an action to remedy race discrimination in the construction industry in New York City.
2. Jurisdiction is by virtue of 28 U.S.C. §1331, 28 USC §1343, 28 U.S.C. §1367, 42 USC §1981 and 42 USC §2000e et seq.
3. Venue is proper because defendant is a resident of the Eastern District of New York.

THE PARTIES

4. Plaintiff is an African American woman.
5. Defendant is a Labor Organization within the meaning of 42 USC §2000e(d).

6. Defendant is the collective bargaining representative of individuals who operate various types of heavy equipment in the construction industry within New York City, including Cranes, Hoists, Excavators and related categories of equipment.

7. The individuals represented by defendant are known in the industry as "Operating Engineers."

8. Although there is no licensing of Operating Engineers per se, much of the equipment operated by Operating Engineers does require a license or permit to operate by the New York City Department of Buildings or some other city agency.

CLASS ALLEGATIONS

9. Plaintiff brings this action on behalf of herself and a class of individuals (the "Class") consisting of all non-White members of Local 14-14B who have worked or attempted to work in the construction industry in New York City within the statute of limitations periods applicable to the claims made herein.

10. The number of persons in the Class identified above are so numerous that joinder of all members is impracticable. Although the precise number of such persons is unknown, plaintiff estimates that the number of the persons in the Rule 23 Class is at least 100.

11. The claims of plaintiff are typical of the claims of the Class.

12. Plaintiff will fairly and adequately protect the interests of the Class.

13. The actions of defendant complained of herein have been 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.

14. There are questions of law and fact common to the Class that predominate over any questions solely affecting individual members of the Class, including but not limited to:

- (a) whether defendant has intentionally and systematically discriminated against non-White members in the assignment of work to operating engineers;
- (b) whether defendant has intentionally and systematically discriminated in favor of White members in the assignment of work to operating engineers;
- (c) whether defendant's system of assigning work to operating engineers has disparately impacted non-White members;
- (d) the nature and extent of Class-wide injury and the appropriate measure of damages for the Class.

15. The claims of the plaintiff are typical of the claims of the Class she seeks to represent. Plaintiff and the Class are all non-White operating engineers and members of the defendant labor union. Plaintiff and the Class are all affected by the employment practices of the defendant complained of herein, which affect the quality and quantity of work that plaintiff and the Class are able to obtain in the construction industry in New York City, which in turn affects the compensation that plaintiff and the Class are able to earn. Plaintiff and the Class are identically affected by these practices.

16. Defendant has committed the acts complained of herein on grounds generally applicable to the Class, thereby making declaratory relief with respect to the Class appropriate.

17. Plaintiff will fairly and adequately represent and protect the interests of

the Class.

18. Plaintiff has retained counsel competent and experienced in labor and employment litigation, including class actions.

19. A class action is superior to other available methods for the fair and efficient adjudication of this litigation. The members of the Class have been damaged and are entitled to recovery as a result of defendant's common and uniform policies, practices, and procedures. The acts complained of herein apply identically to all members of the Class, and therefore class treatment is superior because it will obviate the need for unduly duplicative litigation that might result in inconsistent judgments about defendant's practices. Plaintiff has been informed and believed that many members of the Class fear retaliation if they bring actions in their own names or otherwise challenge the practices complained of herein, and a class action will permit them to participate in recovery without fear of the same.

FACTS

20. There is a long history of discrimination against non-Whites in the construction industry.

21. Despite previous attempts at eradicating the effects of past discriminatory practices (see, e.g., *Equal Employment Opportunity Comm'n v. Local 14, Int'l Union of Operating Engineers*, 553 F.2d 251 (2d Cir. 1977)), defendant remains virtually an all White union.

22. Defendant has about 1,200 members.

23. Upon information and belief, about 100 of defendant's members are non-

White.

24. Upon information and belief, about 20 of defendant's members are both female and non-White.

25. Defendant is governed by an Executive Board, and day to day operations are performed by Officers.

26. Although the constitution and by-laws of defendant require the Executive Board and Officers to be elected by defendant's members, there has not been an election since 2002.

27. Defendant has entered into collective bargaining agreements with industry trade groups. These agreements set forth terms and conditions by which members of the trade groups employ Operating Engineers.

28. The wages provided for by these collective bargaining agreements (collectively, the "CBA") are very high. Base hourly rates range from \$35 on the low end up to over \$60 on the high end, depending on the type of equipment operated. Night, weekends, holidays and overtime hours are paid at double time. The value of benefits paid for these jobs is about 50 percent of the base wage rate.

29. The CBA require covered employers to hire Operating Engineers who belong to defendant to operate any of the equipment specified by the CBA.

30. Covered employers may hire Operating Engineers directly, as long as the Operating Engineers are members of defendant..

31. Covered employers may also hire Operating Engineers through defendant's hiring hall.

32. Not all jobs for Operating Engineers in the construction industry are created equal. Sometimes, an Operating Engineer will be required for only one day or for a short period of time.

33. On the other hand, major construction projects may provide steady employment for Operating Engineers for years.

34. Large construction projects also require that so-called "Master Mechanics" be hired. A Master Mechanic is an Operating Engineer who is charged with ensuring that the provisions of the CBA are complied with at a job site and acting as an on-site liaison between the contractor and the defendant.

35. In theory, the Master Mechanic is also qualified to operate and troubleshoot all equipment covered by the CBA and to fill in on a temporary basis should there be an unexpected need for an Operating Engineer.

36. The Master Mechanic is generally the highest earning Operating Engineer at the worksite. He (almost never, she) can work virtually as much double time as he desires. At a large worksite, the Master Mechanic can easily earn several hundred thousand dollars a year.

37. The Master Mechanic also wields a large amount of power at the worksite. The Master Mechanic determines how strictly the CBA work rules are enforced. A Master Mechanic who "cooperates" with the contractor by being "reasonable" with respect to the enforcement of the CBA work rules can save the contractor many hundreds of thousands of dollars a year in labor costs.

38. The CBA gives defendants the right to designate the Master Mechanic to

be employed by the contractor at the work site.

39. During all times complained of herein, defendant has systematically operated its affairs in such a manner as to ensure that the highest paying and longest lasting jobs for Operating Engineers in the construction industry are reserved for Whites and to ensure that non-Whites as a class are under-represented in the industry and are relegated to the lower paying jobs and jobs of shorter duration.

40. Defendant accomplishes the foregoing through a variety of acts and practices.

41. Defendant intentionally limits the membership of non-Whites by informing individuals who inquire over the phone about membership that "the books are closed," meaning that defendant is purportedly not accepting new members. Defendant, however, routinely accepts new members who are referred or sponsored by existing White members.

42. The few non-White members that are admitted into defendant's membership almost always must go through a long and tedious apprenticeship program. During this program, which often lasts years for non-Whites, apprentices earn a fraction of the wages of Operating Engineers. Even after serving as apprentices, non-Whites are sometimes denied admission to membership in defendant.

43. For the most part, Whites who are referred or sponsored by existing White members do not have to go through the apprenticeship program. Such individuals are often permitted to work jobs covered by the CBA without any delay and without having any qualifications other than being sponsored by an existing White member.

44. It is by controlling and manipulating the procedures for hiring and assigning Operating Engineers, however, that defendant has perfected the means for ensuring that White Operating Engineers enjoy the best jobs and earn the most money.

45. In general, the very best paying job for Operating Engineers is Master Mechanic.

46. There is no objective qualification, test or experience requirement to be a Master Mechanic.

47. The defendant has the sole and unfettered discretion to decide which Operating Engineers are assigned to be the Master Mechanic at a work site. The only limit on defendant's discretion is that the contractor may approve the defendant's appointment. In practice, the defendant's appointment is never challenged by the contractor.

48. Defendant almost never appoints non-Whites as Master Mechanics.

49. Control over the appointment of Master Mechanics gives defendant control over the hiring process for all large construction projects, which is where the longest lasting and best paying jobs are.

50. This control is effectuated by the ability of the Master Mechanic to insist on strict compliance with the work rules and terms and conditions of the CBA.

51. Thus, for example, if the contractor were to insist on hiring Operating Engineers of its own choosing, which it theoretically can do under the CBA, the Master Mechanic, which is beholden to the defendant, can insist on a strict interpretation of the rules and the CBA in terms of manning and operating machines, etc. This can greatly

increase the cost of construction.

52. As a practical matter, therefore, contractors obtain Operating Engineers through the defendant.

53. Nominally, this is to be done through defendant's hiring hall.

54. In theory, the hiring hall operates on a first come, first served basis. The first Operating Engineer to show up at the hall receives the first assignment for work for which he is qualified.

55. Under this system, in theory, getting work is a function of getting to the hiring hall early, and getting good work is the luck of the draw.

56. In reality, however, it is not so much the luck of the draw as it is the luck of the Irish, except that it is not luck and it is not only the Irish, but the Italians, the Germans, and just about anybody except for non-Whites.

57. The hiring hall system is entirely rigged.

58. The premium jobs, that is to say, the jobs on long term construction projects, do not appear suddenly or randomly.

59. A large construction project involves a lot of planning. The contractor knows weeks, sometimes months, in advance when actual construction will start and when Operating Engineers will be needed at the worksite.

60. Furthermore, the contractor knows with some certainty how long the construction project will last.

61. In order to request Operating Engineers from defendant, the contractor calls the business agent assigned to the region where the construction project is taking

place.

62. The contractor informs the business agent what machines will need Operating Engineers, when the work will start, and how long the work will last.

63. Defendant is in this fashion alerted to the availability of premier jobs at major construction projects well in advance of when the actual jobs start.

64. The business agent will then plan which Operating Engineers are to be assigned to these projects.

65. There are at least three ways that the business agent can ensure that a particular Operating Engineer is assigned to a particular job.

66. The first and most blunt approach is simply to instruct the contractor to request the Operating Engineer by name. This creates a record that makes it appear that the contractor was exercising its right under the CBA to hire an Operating Engineer directly.

67. Second, the business agent can hold the job request until the chosen Operating Engineer is the next engineer to be assigned at the hiring hall.

68. Third, the business agent can actually sign in the Operating Engineer at the hiring hall to make it appear that he arrived at a particular time, which fortuitously enables the Operating Engineer to be assigned to the job as it comes up.

69. Every construction job comes to an end eventually. In theory, this would mean that every Operating Engineer becomes unemployed at one time or another.

70. There are tricks and techniques used by defendant to ensure that White Operating Engineers have the most continuity of employment.

71. For example, a three year job may have five or six months left of work. At that time, a new project comes online that is planned to last at least two years. The Operating Engineer at the job that is winding down will be told to quit that job, and shortly thereafter (if not immediately) he will be assigned to the new project, thus ensuring uninterrupted employment for two more years.

72. Non-White Operating Engineers are discriminated against is by defendant's practice of allowing individuals to work jobs covered by the CBA "on permit." "On permit" means that the individual working the job is not a member of defendant but is being permitted to work a job covered by the CBA in order to gain the necessary experience to join defendant. Since only defendant's members are supposed to work jobs covered by the CBA, any unemployed Operating Engineer has the right to take the job of an individual who is working on permit.

73. In 2010, plaintiff had been out of work for a while. Plaintiff requested defendant to enforce its rules, but it refused to remove White individuals working on permit or without the proper license in order to permit plaintiff to have a job.

74. Up to the present time, there are numerous White individuals working on permit at long term construction sites, such as the World Trade Center site, earning well over \$100,000 a year, while plaintiff and members of plaintiff's class struggle to find any employment at all.

75. These jobs are supposed to be filled only by defendant's members, but defendant permits White individuals, who are not full members, to remain employed to the detriment of non-White Operating Engineers.

76. As a woman, plaintiff suffers additional discrimination in the industry. Historically, there have been very few female Operating Engineers. Women are generally not assigned jobs operating the heavier equipment that pays higher wages, such as excavators.

77. Plaintiff, like most female Operating Engineers, has been assigned mostly the small machines such as compressors and welding machines. The wages for operating these machines is lower than the wages for operating the heavier equipment.

78. There are no female Master Mechanics.

79. There are no women on the Executive Board.

80. There are no women on the Examining Board.

81. White women who are the daughters of White Operating Engineers, however, are often given favored treatment. There are some jobs for Operating Engineers that are relatively clean and easy, and these are usually assigned to the daughters of White Operating Engineers.

82. Under the CBA a contractor must employ an Operating Engineer to operate a building's elevator, when a certain amount of space is being renovated. An example of such a project is the renovation of the Federal Courthouse at 40 Center Street in Manhattan. Operating Engineers are employed at that project to run the elevators in the building, even though these are the same self-service freight or passenger elevators that any adult can operate. These jobs are called house elevators, and they are often given to the daughters of White Operating Engineers because they are clean, easy, require no training and often pay very well. Upon information and belief, two of the three

Operating Engineers assigned to the house elevators at the Federal Courthouse are White women.

83. Another area where defendant discriminates in favor of Whites is in the assignment of "settlements." The CBA requires contractors engaged in the renovation of interior space over a certain threshold of square footage to hire Operating Engineers. Ostensibly this is to operate the elevators within the building, but frequently the service of the Operating Engineer is just not required. In such a case, the contractor pays a "settlement," meaning that an Operating Engineer is paid for a certain number of weeks, and there is no requirement that the Operating Engineer ever show up. It is, in essence, a "no show" job.

84. Upon information and belief, settlements are rarely if ever assigned to non-White Operating Engineers.

85. An Operating Engineer who receives a settlement can work at another site and collect two paychecks. This practice is not permitted under defendant's by-laws, but upon information and belief defendant makes no attempt to enforce this rule against White Operating Engineers.

86. Defendant also discriminates in favor of Whites by permitting retired Operating Engineers to come out of retirement from time to time to accept lucrative work assignments, typically as Master Mechanics.

87. This preferential treatment is not afforded to non-Whites.

88. The foregoing constitutes a pattern and practice of racial discrimination in favor of Whites and against non-White Operating Engineers and entitles plaintiff and the

class she seeks to represent the relief requested herein.

89. Upon information and belief, as a result of the foregoing pattern and practice of discrimination, White Operating Engineers as a class earn substantially more money than non-White Operating Engineers.

90. Plaintiff timely filed charges of race discrimination with the United States Equal Employment Opportunity Commission (“EEOC”).

91. On about October 31, 2011, plaintiff received a “right to sue” letter from the EEOC.

First Claim

92. Defendant has engaged in a pattern and practice of discrimination against non-Whites, or discrimination in favor of Whites, in violation of 42 U.S.C. §2000e et seq.

93. By virtue of the foregoing, plaintiff and the class that plaintiff seeks to represent have suffered damages.

Second Claim

94. Defendant has engaged in a pattern and practice of discrimination against non-Whites, or discrimination in favor of Whites, in violation of 42 U.S.C. §1981 et seq.

95. By virtue of the foregoing, plaintiff and the class that plaintiff seeks to represent have suffered damages.

Third Claim

96. Defendant has engaged in a pattern and practice of discrimination against non-Whites, or discrimination in favor of Whites, in violation of the New York City Human Rights Law.

97. By virtue of the foregoing, plaintiff and the class that plaintiff seeks to represent have suffered damages.

Fourth Claim

98. Defendant has engaged in a pattern and practice of discrimination against women in violation of 42 U.S.C. §2000e et seq.

99. By virtue of the foregoing, plaintiff has suffered damages.

Fifth Claim

100. Defendant has engaged in a pattern and practice of discrimination against women in violation of the New York City Human Rights Law.

101. By virtue of the foregoing, plaintiff has suffered damages.

WHEREFORE, plaintiff demands judgment for all relief permitted by law, including but not limited to:

a Awarding plaintiff and the members of the class that plaintiff seeks to represent a money judgment for their damages, including but not limited to lost wages, lost benefits, front pay, other economic damages, shame, humiliation, embarrassment and mental distress;

b Awarding plaintiff and the members of the class that plaintiff seeks to represent punitive damages;

- c Awarding to plaintiff and the class that plaintiff seeks to represent attorneys' fees;
- d Awarding pre-verdict, post-verdict and prejudgment interest and costs;
- e Granting preliminary and permanent injunctive relief enjoining defendant from engaging in the discriminatory practices complained of herein;
- f Granting such further and additional relief as the Court deems just and appropriate under the circumstances.

Dated: New York, New York
January 23, 2012

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Jury Demand

Plaintiff demands trial by jury on all issues.

Dated: New York, New York
January 23, 2012

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