STATE OF MICHIGAN
IN THE COURT OF APPEALS

TOM NOWACKI, ET AL.,

Plaintiff-Appellee,

Court of Appeals No. 315969
Lower Court #11-852-CD
Washtenaw County Circuit Court

v

STATE OF MICHIGAN
DEPARTMENT OF CORRECTIONS,

Defendant-Appellant.

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BRIEF OF PLAINTIFF-APPELLEE

ORAL ARGUMENT REQUESTED

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Counter-Statement of Jurisdiction

Plaintiff filed a Motion for Class Certification in this gender discrimination case in March 2012. Defendant filed a response on April 3, 2012. At the hearing on the Motion for Certification Judge Connors disqualified himself and therefore did not hear the motion. An Order of Reassignment to Judge Brown was entered on April 19, 2012.

Plaintiff filed a slightly different Motion for Certification on May 22, 2012 which Defendant did ***not*** answer. The motion was scheduled for June 21, 2012. In lieu of oral argument, Judge Brown, on June 20, 2012, entered an Order granting class certification.

Defendant filed a Motion for Reconsideration on July 11, 2012, but named Judged Connors as the Judge on the caption and failed to provide a copy of the motion to Judge Brown's chambers. Consequently, Judge Brown was unaware of Defendant's motion until April 2013. Judge Brown promptly denied the motion on April 9, 2013.

MCR 7.203(B)(1) and MCR 7.205(A)(2) permit Defendant to file an interlocutory Application for Leave to Appeal of that order despite the fact it is not a final judgment appealable of right. On June 25, 2013, this Court granted Defendant's interlocutory Application for Leave to Appeal and stayed further trial court proceedings pending resolution of the appeal.

Counter-Statement of Question Presented

I. Was the trial court's certification of a class of Defendant's E-9 Corrections Officers appropriate where 1) Plaintiff clearly established the class action factors set forth in MCR 3.501(A)(1), and 2) the trial court considered the pleadings and written submissions of the parties and specifically adopted Plaintiff's analysis of each of those factors?

Circuit Court says: "Yes."

Plaintiff says: "Yes."

Defendant says: "No."

Introduction

Plaintiff and the class members are male E-9 Corrections Officers ("COs") at Defendant's only female prison known as the Women's Huron Valley Correctional Facility ("WHV"). WHV opened as a female prison in May 2009.

Defendant seeks interlocutory review of the trial court's certification of a class of approximately 87 E-9 male COs who have been denied assignments and overtime because Defendant designated approximately 257 positions as female only positions. The purported rationale for the designations is that the female gender is a bona fide occupational qualification ("BFOQ") for each position. Thus, at issue is an agency policy at Defendant's lone female prison which impacts approximately 87 male COs, causing nearly identical injuries (denial of assignments and overtime).

Direct evidence establishes that (1) Defendant made the BFOQ designations in response to two large jury verdicts in 2008 for female inmates that were sexually abused by male COs years before at prisons that were closed or closing at the time of the verdicts; (2) the conditions which led to the sexual abuse problems at the closed prisons had been rectified years before the verdicts; (3) there is no "basis in fact" to believe that the "BFOQ-female only" designations were necessary to operate WHV as is required by the case law; (4) contrary to the case law, Defendant's "BFOQ-female only" designations were ***not*** the product of a reasoned decision-making process, but rather, a knee-jerk reaction to embarrassing 2008 jury verdicts which were completely unrelated to the conditions at the WHV in 2009; and (5) Defendant failed to consider alternatives to the blatant gender discrimination posed by the bad faith "BFOQ-female only" designations as is required by

the case law. See **Ex. A**: Plaintiff's Motion for Partial Summary Disposition which was not heard due to this Court's stay of the trial court proceedings.[1]

The EEOC, at the behest of WHV female COs, has determined that Defendant "is using too broad of an application of the BFOQ." See **Ex. B**: EEOC Determination.

It is important at the outset to correct a material inaccuracy in Defendant's Brief: "[Plaintiffs] claim they were denied the right to work in one-on-one, unsupervised positions with female inmates and in the female housing units." (Brief, p. 6). Plaintiff specifically disclaimed any challenge to the housing unit "BFOQ-female only" positions. **Ex. A**: Plaintiff's Motion for Partial Summary Disposition, p. 2, para 6. The Sixth Circuit in *Everson v. MDOC*, 391 F.3d 737 (6th Cir. 2004) upheld Defendant's assertion of the BFOQ affirmative defense for housing unit positions. Further, none of the *non-housing* unit positions that Defendant designated as "BFOQ-female only," and that Plaintiff *is* challenging, are legitimately designated "BFOQ-female only." For example, Deputy Director Manns testified that there was no need to designate the following non-housing unit positions as "BFOQ-female only": Food service officer, yard rover officer, healthcare infirmary officer, school officer, gate control officer, gym officer (**Ex. O**: Manns at 45, 49-51, 54-55;[2] *see also* **Ex. P**: Regional Prison Administrator Curtis at 31-32). WHV Warden Millicent Warren testified to this effect as well. See Facts, Section III, infra.

Now, to the core of Defendant's Brief. The trial court did not simply "rubber stamp" Plaintiff's Motion for Class Certification. The trial court had "broad discretion" as to whether the class would be certified, and was only required to consider the pleadings, or, if the pleadings were insufficient, "any asserted facts, claims, defenses, and relevant law." *Henry v. Dow Chemical Co.*, 484 Mich. 483, 503-504; 772 N.W.2d 301 (2009). The Court considered the parties' pleadings and

[1] The supporting brief can be found at www.whvclassaction.com or in the trial court.
[2] Manns requested approval for the designations in a March 27, 2009 letter although he cannot even remember signing the letter, **Ex. O**: at 34-35.

"written submissions," including Plaintiff's certification motion and brief and Defendant's Response, in rendering a decision. Each party discussed the requisite class action factors required by MCR 3.501 and analyzed them in the context of the case. **Ex. C**: Portion of Plaintiff's Brief adopted by trial court. The trial court adopted Plaintiff's analysis, which complies with *Henry*.

Defendant also asserts various other unfounded arguments. Defendant claims it will suffer substantial harm because it will be required to engage in extensive discovery. Substantial discovery has already been conducted. The discovery deadline of June 14, 2013 has passed. Defendant's concern over discovery is moot.

Defendant is also incorrect in claiming that it will suffer substantial harm if required to undertake an expensive, time-consuming trial where certification is unwarranted. If ever there was a case well-suited for class action treatment it is this one: there is a single agency-wide policy applicable to approximately 87 identically situated male corrections officers who have suffered nearly identical injuries (deprivation of assignments and overtime). This is the textbook case for class certification. It will be far more efficient to adjudicate this case as a class rather than in individual cases.

Inexplicable is the best way to describe Defendant's contention that the certified class includes plaintiffs who may never have applied to work at MDOC's Huron Valley facility. This assertion is incorrect and certainly would not bar certification if it were true.

Defendant's Appeal is a "Hail-Mary pass" to avoid proper class certification. As set forth below, Plaintiff meets the requirements of MCR 3.501 and the trial court properly certified the class. Thus, this Court should affirm the class certification order of the trial court and remand this case for further proceedings, including the hearing of Plaintiff's Motion for Partial Summary Disposition.

Counter-Statement of Facts

I. Impetus for 2009 BFOQs

Defendant consolidated its female prisoner population at the Women's Huron Valley Corrections Facility ("WHV") in May 2009. At that time it designated most of the WHV corrections officer positions as "BFOQ-female only." The designations were a knee-jerk reaction to two large jury verdicts in 2008 by female inmates[3] against Defendant alleging sexual misconduct by male guards at three ***other*** closed female prisons. Note: The female prison at issue in this case, the WHV, was not even operational at the time of the verdicts.

The jury verdicts were rendered in Washtenaw County Circuit Court in February and November 2008. In reaction to those verdicts the MDOC significantly expanded the number of "BFOQ-female only" positions to include ***non-housing*** unit positions never before envisioned as "BFOQ-female only." It did this despite the fact that:

1. in 2005 it had already addressed the issue of sexual misconduct in a judicially sanctioned plan by which all males were removed from the ***housing*** units; *see Everson v MDOC*, 391 F3d 737 (6th Cir 2004);

2. the damages awarded were for injuries which were largely inflicted before 1996 and certainly before 2002; *see Everson v MDOC*, 222 F Supp 2d 864 (ED Mich 2002); and

3. it had absolutely no basis for barring men from the ***non-housing*** unit positions in 2009 other than the 2008 jury verdicts for conduct which occurred years prior and which had already been remedied.

II. MDOC Administrators' Stated Desire to Drive Male COs from WHV

WHV Warden Warren testified that Deputy Director Straub and RPA Curtis informed her of MDOC Director Caruso's desire that "the gender of staff working with the women was to have all staff be female":

[3] The verdicts were in favor of two groups of 10 class action members from the class action lawsuit known as *Neal v Michigan Department of Corrections* ("MDOC").

Q. Was there any discussion beyond that with Straub and Curtis?

A. Yes.

Q. Okay. Tell me about that.

A. **The decision made by the department on the gender of staff working with the women was to have all staff be female.**

***

A. Yes. There were two specific lawsuits. And because of the indefensible position I believe the department found themselves in in some of the litigation, to avoid future allegations of that nature, **a comment was made all staff should be female working with female prisoners.**

Q. Who made that comment?

A. **I was told it was from Pat Caruso.**

Q. Who told you that?

A. Deputy Director Straub and RPA Curtis.[4]

Consistent with Warren's testimony, the *Michigan Citizen* reported in October 2008 that Russ Marlan, Public Information Officer for MDOC, stated that one of changes that MDOC has been making to address sexual abuse of female prisoners is "the termination of male guards in female facilities."[5] Although Marlan claims that he was misquoted, Warren's testimony and statements that she and Deputy Lucille Evans made to groups of MDOC employees confirm that the Michigan Citizen was spot on.

For instance CO Ralph Golidy states:

* * *

3. I am the former President of the W.H.V. Facility Chapter Union.

4. During my employment I have heard Warden Millicent Warren say (on more than one occasion) that "we are going to do some things to allow male corrections officers to leave". This was said at a meeting on January 27, 2011.

[4] **Ex. D**: Warren at 55-56.
[5] **Ex. E**: Michigan Citizen article.

5. Once in a one-on-one meeting in January 2011, she told me that "we are going to do something to allow male corrections officers to leave".

6. I also heard Deputy Warden Lucille Evans say "we are doing some things to motivate the male corrections officers to leave" the facility. This was said on December 15, 2010.[6]

CO William Gomoluch states: "In a hearing in October 2010, I heard Warden Millicent Warren state that "when these males leave (referring to the current male corrections officers at the facility) there will be no more males here.""[7]

CO Shirley McClain states that Warden Warren told her academy class in the spring of 2012 that: "It is our intention to make WHV an all female corrections facility."[8]

CO Stennis George states that Curtis told those at a Union/Management meeting that (a) The Department would not hire any more male corrections officers for its female prisons and (b) the department intended to get rid of male corrections officers in female prisons.[9]

III. MDOC Falsely Stated in Job Descriptions That Strip Searches are an Essential Duty to Disqualify Males From Performing Those Jobs

Warden Warren explained when a position would be designated as "BFOQ-female only": "My understanding is the provisions of the BFOQ apply when the essential function of your duty includes putting your hands on a member of the opposite sex."[10] Warren also testified that a position could be designated "BFOQ-female only" if it involved seeing female prisoners in a state of undress.[11] Thus, according to Warren, the " BFOQ-female only" should be applied to corrections officer positions only when they required the searching of female prisoners, seeing them in a state of undress, or both.

[6] **Ex. F**: Golidy Affidavit
[7] **Ex. F**: Gomoluch Affidavit
[8] **Ex. F**: McClain Affidavit
[9] **Ex. F**: George Affidavit.
[10] **Ex. D**:Warren 102
[11] **Ex. D**:Warren 102

That is ***not*** the case with the ***non-housing*** unit "BFOQ-female only" designations at issue here. Defendant slipped the searches into the non-housing job descriptions in 2009 to bar males from performing those jobs. The uniform testimony is that the non-housing positions do not require the COs to perform pat downs or strip searches or see inmates in a state of undress.

A. "Pat Down" Searches

When a male officer identifies the need to conduct a pat down (clothed body) search of a female prisoner, he simply follows Defendant's "team search" policy:

> "WHV corrections officers, in conjunction with a female corrections officer, may search a prisoner's coat/outerwear, while the female corrections officer performs the actual clothed body or pat down search."[12]

Male and female corrections officers have worked in such teams successfully for years.[13] In fact, Warren cannot recall any complaints from female officers about assisting male officers.[14] Most importantly, this approach was sanctioned by Deputy Director Straub and RPA Curtis, who indicated the only true requirement was the **"the ability to have <u>a</u> [i.e. one] custodial officer to provide the essential service of a shake if it was required**."[15]

WHV has "shake down officers" that do the bulk of the searches, both pat down and strip searches. A female shake down officer "shakes down female prisoners when there is a male on assignment that can't shake down the female prisoner and conduct, a strip search to ensure that a prisoner is not in possession of contraband."[16]

B. Strip Searches

Strip searches are supposed to be conducted in certain areas and should be conducted by the "shake down officer."[17] While male officers cannot conduct strip searches, any female officer can

[12] *Id.* at 85-86
[13] **Ex. G:** Officer Affidavits re strip searches (McKinney, Kemner, Osborne); **Ex. H**: Plaintiff's Affidavit
[14] **Ex. D**:Warren 85, 174
[15] *Id.* at 59 (all emphasis added)
[16] **Ex. I**: Evans at 87.
[17] **Ex. D**:Warren 120-121, 124

be designated by a supervisor to conduct strip searches.[18] Male officers, as instructed, take female prisoners who require a strip search to the designated strip search room where a female officer conducts the search.[19] The procedure works well.[20]

Further, Captain (ret.) Finch will testify that 99% of strip searches at WHV are conducted in visitation, segregation or the yard, "so it is easy to have the strip searches done by the same sex officer."[21] Warren admits that the majority of strip searches are conducted in the visiting area after prisoner visitations.[22]

Non-routine strip searches can only be conducted with authorization from the warden's office (i.e. a senior officer of the facility),[23] and that requirement provides plenty of time to summon the strip search or other female officer. In fact, Warren has disciplined female officers for failing to obtain authorization before conducting strip searches in the food service building and conducting the searches in a non-private area.[24] If time allows, an authorized, non-routine strip search is conducted in one of the designated strip search areas.[25]

"BFOQ-female only" designations of ***non-housing*** unit positions searches are unnecessary since, according to Warren, the non-housing unit positions do not require strip searching or pat downs. Further, the only areas that prisoners are permitted to be in a state of undress are the health care areas, restrooms, shakedown areas, observation cells and housing units subject to "certain precaution."[26] That significantly limits the positions in which an officer must see a female prisoner in a state of undress.

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[18] **Ex. D**:Warren 74
[19] **Ex. G:** Officer Affidavits re strip searches (McKinney, Kemner, Spisak); **Ex. H:** Plaintiff's Affidavit
[20] **Ex. G:** Officer Affidavits (Spisak)
[21] **Ex: J:**Finch Affidavit
[22] **Ex. D**:Warren 120
[23] **Ex. D**:Warren 77-78; **Ex. I**:Evans 28
[24] **Ex. D**:Warren 77-81; **Ex. I**:Evans 59
[25] **Ex. D**:Warren 78
[26] **Ex. D**:Warren 103-105

Warden Warren's testimony is echoed in the many affidavits submitted by male and female COs which collectively are attached as **Ex. G**, as well as by MDOC Deputy Director Gary Manns, who testified that there was no need to designate as "BFOQ-female only" the non-housing unit positions which he asked to be so designated (**Ex. O**: Manns at 45, 48-51, 54-55; see also **Ex. P**: Curtis at 31-32).

IV. BFOQ Law

Before an employer can designate a position "BFOQ-female only," the law requires a "basis in fact" for the belief that a BFOQ is "reasonably necessary – not merely reasonable or convenient – to the normal operation of its business." *Everson v. MDOC*, 391 F.3d 737, 748 (6th Cir. 2004). This means that "the employer must introduce sufficient evidence to prove that the administrator's judgment – that a particular sex classification is reasonably necessary to the normal operation of the institution – is the product of a reasoned decision-making process, based on available information and experience." *Henry v Milwaukee County,* 539 F3d 573, 580-581 (7th Cir 2008). Also, Defendant must meet "the burden of establishing that no reasonable alternatives exist to discrimination on the basis of sex," *Everson* at 749. Defendant has the burden of proof on all three points as the BFOQ defense is an affirmative defense.

V. Defendant's Inability to Make Out BFOQ Affirmative Defense

Despite direct inquiries, MDOC has failed to establish (1) a "basis in fact" for the belief that BFOQs are necessary or (2) that the "BFOQ-female only" designations were the product of a reasoned decision-making process based on available information and experience and not embarrassing jury verdicts. Plaintiff's Motion for Partial Summary Disposition on these two independent issues is pending.

Plaintiff's Motion also requests partial summary disposition because MDOC cannot demonstrate that it considered gender neutral alternatives to designating positions "BFOQ-female

only." Not only did MDOC not consider gender neutral alternatives, it went out of its way to bar males from holding correction officer positions by falsely stating in job descriptions that strip searches were an essential function of the position. The strip search requirements automatically made the position "BFOQ-female only." The evidence on this point is undisputed and includes testimony from the warden of WHV, a captain from WHV and many lower level command officers and corrections officers.

Counter-Statement of Proceedings Below

Plaintiff does not concur with Defendant's Statement of Proceedings Below to the extent it adds argument to its recitation of the trial court proceedings. Most of Defendant's arguments are addressed in other areas of this Brief. Those that are not are addressed below:

The trial court, in its Order Regarding Defendant's Motion for Reconsideration of its Order Granting Class Certification, specifically adopted Plaintiff's pleadings as its basis for granting class certification. (See Defendant's Exhibit 2). In both Plaintiff's original and Amended Complaints, as well as his motions for class certification, Plaintiff defined the class as:

> … all individuals who:
>
> a. are correctional officers formerly or currently employed at WHV;
>
> b. are male; and
>
> c. were or continue to be denied employment opportunities, bid assignments, or overtime assignments by the Defendant.

Thus, the Court adopted Plaintiff's definition of the class in its order and complied with MCR 3.501(B)(3)(c). In the same way, the trial court followed the *Henry* ruling by adopting Plaintiff's analysis of the MCR 3.501(A)(1) factors in the context of this case.

Defendant is correct that no Notice to putative class members has been submitted to the Court for approval under MCR 3.501, but is incorrect that Plaintiff has violated that rule. Plaintiff has waited to submit a proposed Notice to the Court for several legitimate reasons. First, the Court did

not decide Defendant's Motion for Reconsideration of its order granting Plaintiff's Motion for Class Certification until April 9, 2012. Thus, the class could have been decertified and no notice would have been necessary. Plaintiff also correctly anticipated that Defendant would file an interlocutory appeal and that this action might be stayed pending resolution of the appeal. Finally, the class membership is currently fluid, as more employees are becoming potential class members due to transfers and new hires.

Also, under MCR 3.501(C)(3), the court may postpone the notice determination until after the parties have had an opportunity for discovery. Discovery did not terminate in this matter until June 14, 2013, which was a mere eleven days before this Court stayed the trial court action. To date, Defendant has failed to provide requested discovery regarding the class, specifically, an electronic database containing the identity of, and information regarding, each class member.

Finally, Defendant was apparently not too concerned about the issuance of the Notice, as it waited over nine months after the Court's order granting class certification to bring it to the Court's attention. Its concern over the time it took the Court to rule on its Motion for Reconsideration is also suspect, as Defendant named the wrong judge on the caption and failed to provide the trial court with a Judge's copy pursuant to 2.119(A)(2). (See Defendant's Exhibit 2).

Summary of Argument

Defendant contends that Plaintiff has no "glue holding together the alleged reasons for the employment decisions" and thus class certification is inappropriate. Nothing could be further from the truth.

Wal-Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541 (2011), the case Defendant cites in support of its "glue" defense, specifies that "glue" may consist of "[s]ignificant proof that an employer operated under a general policy of discrimination." *Id.* at 2553. Defendant admits such a policy here, as, at its **only** female prison, it excludes male COs from assignments and overtime based on

their gender.[27] The applicable collective bargaining agreement states: "**An employee required to be a certain gender . . . will be excluded from the overtime procedure**." (Defendant's Exhibit 5 to its Application for Leave to Appeal, Article 17 "Overtime," Section 1(g), Note 9 – All emphasis added). Moreover, there is significant direct evidence of discrimination in the form of statements by Defendant's officials regarding a desire to completely remove **all** male COs from WHV.[28]

Defendant's "BFOQ-female only" policy is the central issue in this case. It is responsible for all of the Plaintiff's claims and unites them into a proper class. It alone satisfies most of the MCR 3.501(A)(1) requisite class action factors. In addition to the "BFOQ-female only" policy, the number of identically situated male COs with nearly identical injuries also confirms that class certification is appropriate. Accordingly, this Court should affirm the class certification order of the trial court and remand this case for further proceedings.

Argument

I. Standard of Review

Plaintiff concurs with Defendant's statement of the standard of review as stated in the **first paragraph only** of Section IB on page 10 of Defendant's Brief.

II. Plaintiff Has Clearly Met His Burden of Establishing the MCR 3.501 Class Certification Requirements

MCR 3.501(A)(1), "Class Actions," sets forth the requirements for class certification:

> One or more members of a class may sue … 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;

[27] See Defendant's Brief, page 6, paragraph 2

[28] See, e.g., **Ex. A**: Motion for Partial Summary Disposition, p. 3, para. 10; **Ex. D:** Excerpts of Millicent Warren Deposition at 55-56; **Ex. F**: CO Affidavits.

(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.

A. MCR 3.501(A)(1)(a) – "Numerosity"

To demonstrate "numerosity," Plaintiff must: (1) adequately define the class so potential members can be identified; and (2) present some evidence of the number of class members or otherwise establish by reasonable estimate the number of class members. *Zine v. Chrysler Corp.*, 236 Mich.App. 261, 288; 600 N.W.2d 384 (1999).

In both Plaintiff's original and Amended Complaints, Plaintiff defined the class as:

5. The class is defined as all individuals who:

   a. are correctional officers formerly or currently employed at WHV;

   b. are male; and

   c. were or continue to be denied employment opportunities, bid assignments, or overtime assignments by the Defendant.

There are approximately 87 potential class members.[29] Note that:

> 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, 236 Mich. App. at 287-288 (emphasis added). Here, 87 potential class members are certainly sufficient to support class certification.

Zine also held that "[t]o maintain a lawsuit, the plaintiffs must have suffered an actual injury and, therefore, a plaintiff must show that the class members suffered the injury for which the lawsuit seeks redress." *Id.* at 289. In discrimination cases, that showing can be made by demonstrating:

[29] **Exhibit K**: Affidavit Maureen K. Proffitt

> "'[D]iscrimination was the company's standard operating procedure-the regular rather than the unusual practice.' In other words . . . a pattern and practice of discrimination throughout the department."

Duskin v. Dep't of Human Services, 284 Mich. App. 400, 413 (2009), *vacated and remanded* 485 Mich. 1064 (2010). *See also Neal v. James*, 252 Mich.App. 12, 20-21; 651 N.W.2d 181 (2002), *overruled on other grounds by Henry*, 484 Mich. at 505 FN39. As demonstrated above, Defendant's "standard operating procedure" was and is to exclude males from WHV positions wherever and whenever possible.

Finally, the cases cited by Defendant do not support its numerosity arguments because:

1. *Some of the cases have nothing to do with numerosity*. In *Oakwood Homeowners Assoc. v. Ford Motor Co.*, a 1977 case, the Court of Appeals was construing a predecessor of the current court rule on class actions (GCR 2.08) and the defendants in that case were not even contesting the numerosity requirement. 77 Mich.App. 197, 206; 258 N.W.2d 475 (1977). In *Tinman v. Blue Cross and Blue Shield of Michigan* the Court of Appeals was addressing the commonality requirement, not the numerosity requirement. 264 Mich.App. 546, 552, 562-563; 692 N.W.2d 58 (2004).

2. Defendant cites to cases that deal with the numerosity issue but the portions of those cases it cites have nothing to do with numerosity. The portion of *Hill v. City of Warre*n, 276 Mich.App. 299, 740 N.W.2d 706 (Mich.App. 2007) cited by Defendant regarding individualized fact finding and damages provides an analysis of the **"commonality"** requirement. In fact, the *Hill* Court relied heavily on "general knowledge and common sense" in determining numerosity. Here, it is undisputed that Defendant has written policies that specifically prohibit approximately **87** male COs from approximately **257** assignments based on their gender and **all** overtime generated by those assignments. "General knowledge and common sense" indicate that a significant number of

male COs are being denied assignments and overtime.

Likewise, the portion of *A & M Supply Co. v. Microsoft Corp*., 252 Mich.App. 580, 624-625; 654 N.W.2d 572 (Mich.App. 2002), cited by Defendant provided an analysis of the "**superiority"** requirement. In fact, the *A&M* court held that numerosity was met. *Id.* at 621.

3. *The one case cited by Defendant that actually addresses numerosity is clearly distinguishable.* The Court in *Jackson v. Wal-Mart Stores, Inc.*, 2005 WL 3191394, 4 (Mich.App. 2005), found a lack of "numerosity" where some class members may not have been impacted by Wal-Mart's alleged pattern and practice of causing its employees not to report time worked or to forgo breaks. *Id*. That is not the case here. For example, the applicable collective bargaining agreement covering COs states: "An employee required to be a certain gender . . . **will be excluded** from the overtime procedure." (Defendant's Exhibit 5 to its Application for Leave to Appeal, Article 17 "Overtime," Section 1(g), Note 9 – emphasis added). Thus, **each and every** class member was denied consideration for overtime in BFOQ positions.

In short, Plaintiff has clearly established the required "numerosity" for class certification.

B. MCR 3.501(A)(1)(b) – "Commonality"

"Commonality" requires that there be a "'common issue the resolution of which will advance the litigation.'" *Zine*, 236 Mich. App. at 289. "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." *Id*. However, there is no requirement that all questions necessary for ultimate resolution be common to the members of the class. *A&M*, 252 Mich. App. at 599.

The commonality requirement in disparate treatment cases can be satisfied by demonstrating a "standardized employment practice or policy, such as a biased testing procedure." *Neal* at 18. "Commonality is satisfied … by showing that the defendant's general policy affects the ability of all

class members to take advantage of a guaranteed right." Conte and Newberg, *Newberg in Class Actions*, Vol 8, §24:20, pp. 120-122 (4th ed Thomason West 2002)[30]; Barbara T. Lindeman and Paul Grossman, *Employment Discrimination Law*, Vol. II, p. 2136-2137 (4th ed., American Bar Association 2007)[31]. ("The extent to which personnel practices are uniform and subject to centralized authority are often important factors in determining whether commonality has been satisfied in such cases.") Plaintiff has demonstrated an agency-wide policy – the male exclusion policy – which establishes commonality.

"Individual class members need not be 'identically situated' to meet the common questions requirement." Conte and Newberg, *supra* §24:22, p. 142. As noted in *Kurihara v. Best Buy Co.*, 2007 WL 2501698, 10 (N.D. Cal.), "courts' discomfort with individualized liability issues is assuaged in large part where the plaintiff points to a specific company-wide policy or practice that allegedly gives rise to liability." (citations omitted). Plaintiff now turns to some of Defendant's arguments regarding "commonality."

1. While Courts May Consider the Facts and Relevant Law in Deciding Class Certification, They Cannot Make Determinations on the Merits

"The court should analyze asserted facts, claims, defenses, and relevant law, but "should avoid making determinations on the merits of the underlying claims at the class certification stage of the proceedings." *Michigan Ass'n of Chiropractors v. Blue Care Network of Michigan, Inc.*, 300 Mich.App. 577, 834 N.W.2d 138 (2013). Thus, while Plaintiff touches on the merits of this case in addressing the class action factors, this Court cannot make any determinations on the merits of the case in deciding whether certification is proper.

[30] **Exhibit L**
[31] **Exhibit M**

If the Court were to make a determination on the merits, Plaintiff is confident that it would find for him. See Plaintiff's Motion for Partial Summary Disposition.[32]

2. Plaintiff's Burden of Proving an "Intentional Discrimination" or "Mixed Motive" Case Does Not Require "Individualized Inquiries"

Proving a case of "intentional discrimination" entails a demonstration by Plaintiff that: a) he was male, b) he suffered adverse employment actions (in the form of denied assignments or overtime), c) Defendant was predisposed to discriminate against males, and d) Defendant actually acted on that disposition in subjecting him to adverse employment actions. *Reisman v. Regents of Wayne State University*, 188 Mich.App. 526, 538; 470 N.W.2d 678 (1991); *Wilcoxon v. Minnesota Min. & Mfg. Co.*, 235 Mich.App. 347, 360; 597 N.W.2d 250 (1999) ("Sometimes courts describe "mixed motive" cases in terms of making a prima facie case of "intentional discrimination.").

The first element is undisputed in this case and the remaining elements do not require individualized proof. The "BFOQ-female only" designations, as well as statements by Defendant's officials regarding a desire to completely remove all male COs from WHV, establish a predisposition to discriminate against males. Further, Defendant's use of those BFOQS as an **absolute bar** to males receiving assignments and overtime establish that Defendant acted on that predisposition. That absolute bar also establishes adverse employment actions, as male officers were automatically excluded from BFOQ assignments and any overtime generated by those assignments. Defendant considered nothing but the class members' gender in enforcing the absolute bar – not work histories, not disciplinary histories, not qualifications, not seniority and not training.

The burden now falls on Defendant to establish that its "female only" BFOQs are reasonable and necessary to the normal operation of WHV. *Micu v. City of Warren*, 147 Mich.App. 573, 583; 382 N.W.2d 823 (1985). The BFOQs and their legitimacy are the predominant issues concerning Defendant's liability in this case.

[32] **Exhibit A**

3. Plaintiff Possesses Direct Evidence of Gender Discrimination and Thus Does Not Need to Proceed Under the *McDonnell Douglas* Burden Shifting Method of Proof

Plaintiffs with direct evidence of discrimination do not need to proceed under the *McDonnell Douglas* burden-shifting method of proving discrimination. *DeBrow v. Century 21 Great Lakes, Inc.*, 463 Mich. 534, 539; 620 N.W.2d 836 (2001). Plaintiffs with direct evidence of discrimination may "go forward and prove unlawful discrimination in the same manner as a plaintiff would prove any other civil case." *Hazle v. Ford Motor Co.*, 464 Mich. 456, 462; 628 N.W.2d 515 (2001).

Direct evidence is defined as "evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." *Id*. Here, there are numerous statements by Defendant's officials regarding their desire to remove all males from WHV and those statements constitute direct evidence of gender discrimination.[33] Thus, contrary to Defendant's assertions, Plaintiff does not need to meet any of the *McDonnell Douglas* burdens, and any of Defendant's "individualized inquiry" arguments based on those burdens are irrelevant.

4. Defendant's "One Facility" Distinction is Meaningless

Defendant claims that "[t]he existence of BFOQs in positions at the one female correctional facility does not demonstrate a state-wide, department-wide policy or practice of discrimination" against male COs. (See Defendant's Brief, page 15). However, that argument is unavailing, as WHV is the **only** women's prison in Michigan. In other words, the "female-only" BFOQs exist at only one facility because there is only one facility to which they are applicable. This point is further underscored by the fact that "male-only" BFOQs do not exist in male prisons.[34]

[33] See, e.g., **Ex. D**: Warren at 55-56.
[34] **Ex. G:** Officer Affidavits re strip searches

5. *Wal-Mart v. Dukes* Supports Plaintiff's Case

Defendant cites *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (U.S. 2011) for its contention that Plaintiff has no "glue holding together the alleged reasons for the employment decisions." In *Walmart*, female employees of Wal-Mart brought Title VII claims against the company for sex discrimination. *Id.* at 2547.

The United States Supreme Court held in *Wal-Mart* that commonality and typicality may be established by "[s]ignificant proof that an employer operated under a general policy of discrimination." *Id.* at 2553. Defendant admits such a policy here, as, at its only female prison, it excludes male COs from assignments based on their gender. (See Defendant's Brief, page 14-15). There is no question that such a policy also denies male Corrections Officers overtime. The applicable collective bargaining agreement states: "**An employee required to be a certain gender . . . will be excluded from the overtime procedure**." (Defendant's Application for Leave to Appeal Exhibit 5, Article 17 "Overtime," Section 1(g), Note 9 – all emphasis added). Thus, male employees are automatically excluded from consideration for overtime in "BFOQ-female only" positions. There are no "individualized inquiries" to be conducted here, as Defendant automatically rejects male COs for assignments and overtime based on the "BFOQ-female only" designations.

C. MCR 3.501(A)(1)(c) – "Typicality"

"Typicality" requires the class representatives' claims "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. Such is the case here, where both the class representative's and other class members' claims arise from Defendant's policy of excluding males from positions based on bad-faith BFOQ designations. Further, the claims are based on the same legal theory – Defendant's policy of excluding the male class representative and class members

assignments based on bad-faith BFOQ designations is a violation of the Elliott-Larsen Civil Rights Act, MCL 37.2101 *et seq*.

Defendant argues that Plaintiff cannot show typicality because every Corrections Officer possesses a different skill set and that each assignment requires specific skills. Unfortunately for Defendant:

> [T]he employment status of the plaintiff need not be identical to that of the class members or other plaintiffs, **particularly when the representative plaintiff employees are subject to practices arising from the same course of conduct as the class members**.

Alba Conte and Herbert Newberg, *Newberg on Class Actions*, Vol. 8, § 24.29, p. 165-170 (4th ed., Thomson West 2002) (emphasis added).[35] Such a "practice[] arising from the same course of conduct" is present here in Defendant's policy of excluding males from assignments based on bad faith BFOQ designations. Plaintiff's provision of "[s]ignificant proof that an employer operated under a general policy of discrimination" establishes typicality. *Wal-Mart*, 131 S.Ct. at 2553.

D. MCR 3.501(A)(1)(d) – "Adequacy"

The "adequacy" factor requires a "two-step" inquiry. *Neal*, 252 Mich.App. at 22. First, the named plaintiff's counsel must be qualified to sufficiently pursue the putative class action. Defendant does not contest the adequacy of counsel.

Second, the members of the proposed class may not have antagonistic or conflicting interests. *Id.* Defendant argues that potential conflicts exist among class members as to which male COs should have received which assignments.

That is not an issue in this case because the proposed class is comprised of but one job classification – E9. Thus, there is a minimal chance, at best, of conflict among class members over assignments. In fact, the collective bargaining agreement covering E-9s contains extensive

[35] **Ex L**

procedures for determining assignments and overtime. (Defendant's Application for Leave to Appeal, Exhibit 5).

Federal cases routinely hold that limited employment opportunities do not cause the type of conflict that destroys adequacy. The Fourth Circuit held in *Brown v. Nucor Corp.*, 576 F.3d 149, 7-8 (4th Cir 2009):

> To the extent that the district court was correct that the putative class 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-unless the EEOC deems fit to do so-when the plaintiffs seek instatement into previously denied positions?

In *Dean v, International Truck and Engine Corp,*, 220 FRD 319, 322 (N.D. Ill. 2004), the district court held:

> In any Title VII class action where jobs are sought as a remedy, the number of jobs available is likely to be smaller than the number of class members. Mr. Dean is an adequate class representative unless a conflict exists that "goes to the very subject matter of the litigation." *Wilfong v. Rent-A-Center, Inc.,* No. 00-C0680, 2001 WL 1728985, at *25 (SD Ill Dec 27, 2001). The inevitable conflict that arises when there are more class members than potential jobs is not such a conflict. Mr. Dean is a typical and adequate class representative.

See also Hartman v. Duffy, 158 FRD 525, 547 (D. D.C. 1994):

> The fact that there are not enough positions at the Agency to accommodate every class member participating in the remedial phase of the litigation does not show that representation of the class is inadequate.

In the words of the district court in *Meiresonne v. Marriott Corp.*, 124 FRD. 619, 625 (N.D. Ill. 1989): "That absurd proposition would of course doom almost every *class* action charging discrimination in promotion-a drastic rewrite of the law in this area."

Defendant's citation to *Sprague v. General Motors Corp.*, 133 F.3d 388, 399 (6th Cir. 1998) does not aid its cause as it is distinguishable from this case. In *Sprague*, the Sixth Circuit held plaintiffs failed to demonstrate **typicality** (i.e. not adequacy) because:

> "Each [retiree's] claim, after all, depended on each individual's particular interactions with GM—and these, as we have said, varied from person to person."

In fact, "[t]he district court took testimony from more than three hundred class members in an effort to obtain a purportedly representative sample of the representations and communications made by GM." Here, each and every CO's claim depends on the legitimacy of Defendant's BFOQ affirmative defense.

E. MCR 3.501(A)(1)(e) – "Superiority"

The maintenance of this lawsuit as a class action will clearly be superior to any other available method of adjudication and will promote the convenient administration of justice. A review of MCR 3.501(A)(2), which sets forth the mandatory considerations in the "superiority" analysis, makes that conclusion evident:

> (a) whether the prosecution of separate actions by … 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 … of separate actions.

1. Risks Associated with Prosecution of Separate Actions

a. Inconsistent or Varying Adjudications

This is entirely possible and why class certification is appropriate. The central issue of this case - whether Defendant's "BFOQ-female only" designations are legitimate under MCL 37.2208 – could be decided differently by different courts. In other words, some courts could hold that the BFOQs are legitimate (and thus certain plaintiffs' gender discrimination claims might fail) while other courts could hold the BFOQs are not legitimate (and thus certain individual plaintiffs' gender claims would succeed).

b. Adjudications Dispositive of Interests of Non-Party Members

A finding of one court in an individual case that Defendant did not maintain a policy of male exclusion could substantially impair or impede the ability of another corrections officer to subsequently challenge employment Defendant's assignments. This factor militates in favor of class certification.

2. Whether Final Equitable or Declaratory Relief Might be Appropriate

An injunction striking down Defendant's male exclusion policy is certainly warranted. The possibility of such an injunction is yet another factor compelling class certification.

3. Whether the Action Will be Manageable as a Class Action

The primary concerns in determining the "superiority" are practicality and manageability, i.e. whether the issues are so disparate as to make a class action suit unmanageable." *Dix v. American Bankers Life Assurance Co. of Fla.*, 429 Mich. 410, 429 (1987) and *Hill v. City of Warren*, 276 Mich. App. 299, 314; 740 N.W.2d 706 (Mich. App. 2007). Significantly, "[t]he convenient administration of justice criteria does not preclude maintenance of a class action where the individual claims differ slightly with regard to such specifics of time, place, and exact nature of

the injury." *Creech v. WA Foote Memorial Hospital, Inc.*, 2004 WL 1258011, 7 (Mich. App. 2004). The main issue here is whether Defendant had a policy of excluding males from CO positions via bad faith BFOQ designations.

Further, the filing of 87 or more claims, as exist here, in a court would "impede the convenient administration of justice". *Henry*, 484 Mich. at 517.

4. Whether Separate Claims Insufficient to Support Separate Actions

The answers is yes. In each case that goes to trial, costs and attorney's fees will easily exceed $150,000.00.[36] Given the modest pay rates of COs, they may have not been denied enough assignments to justify such an attorney fee expenditure. "The likely 'negative value' of the individual suits is a 'compelling rationale' for finding superiority in a class action" (though not in and of itself). *Jackson v. Wal-Mart Stores, Inc.***,** 2005 WL 3191394, 7 (Mich. App. 2005). *See also Snyder v. Grand Valley Title Co***,** 1999 WL 33453800, 3 (Mich. App. 1999).

5. Whether the Amount Which May be Recovered by Individual Class Members is Large Enough to Justify Class Action

The answer is a resounding yes. The proposed class members number about 87. If only 87 members recover an average of $50,000 each in lost wages, as a class they would recover $4,350,000.00 in economic damages alone. That does not include non-economic damages (which could far exceed economic damages), *Department of Civil Rights Ex Rel Johnson v. Silver Dollar Café*, 198 Mich. App. 547, 549; 499 N.W.2d 409 (1993), attorney fees and costs, MCL 37.2802, or mandatory interest. MCL 600.6013.

6. Whether Class Members have a Significant Interest in Continuing the Prosecution of Separate Actions

Members of the class do not have a significant interest in continuing the prosecution of separate actions. Importantly, many class members would be unaware of Defendant's male

[36] **Ex N**: Swanson, *Employment Litigation and the Battle Over Attorney Fee Awards: What Every Attorney Needs to Know*, 14 Labor and Employment Law Notes, No 2, Summer 2004

exclusion policy and resulting sex discrimination but for this action. The benefit of notice to class members would be "administratively valuable." *See Snyder*, 1999 WL 33453800 at 3.

More important, individual class members could not afford to pursue individual actions and would be likely unable to find counsel to prosecute such cases on a contingent fee basis because of the limited damages potential.

Defendant complains of "unwieldy discovery" due to the number of class members. This issue is moot because discovery terminated on **June 14, 2013**. Further, Defendant clearly was not concerned with discovery, as, despite having **over a year** to conduct discovery, it:

1. Waited until May 24, 2013 to file a motion to extend discovery dates (which the trial court denied).

2. Waited until three days before the discovery deadline (June 11, 2013) to improperly serve a subpoena on the class counsel (as opposed to each individual class member) requiring the depositions of **all** class members on the last day of discovery. (Defendant would have needed to conduct a deposition roughly every 12 minutes from 8:30 am until 11:59 pm to complete the depositions in one day.)

Defendant also contends "[a] class action that diminishes the ability of individual litigants is not a superior form of litigation" based on *Oakwood Homeowners Ass'n, Inc.*, 77 Mich.App. at 234-235 and *Sprague*, 133 F.3d at 399. However, the portion of *Oakwood* cited by Defendant is from the opinion of the dissenting judge and, as set forth above, the Court of Appeals was construing a predecessor of the current court rule on class actions. *Oakwood Homeowners Ass'n, Inc*., 77 Mich.App. at 234-235. Further, the portion of *Sprague* cited by Defendant addresses typicality, not superiority. Of course, Defendant's mere statement that individual litigants will be "severely prejudiced" by a class action without explanation or proof is insufficient to establish prejudice (especially where no such prejudice exists).

Finally, it is significant that the "commonality" factor – which militates in favor of class certification in this case – "ties in" with the superiority factor. *Zine,* 236 Mich. App. at 290, FN14.

Summary and Relief Requested

Wynn v. Dixieland Foods, Inc., 125 FRD 696, 698 (M.D. Ala. 1989) is instructive in light of the direct evidence of Defendant's "BFOQ-female only" policy.

> The most telling testimony at the hearing on the plaintiffs' motion for class certification came from Bruce Neal and Robert Purvis. Mr. Neal was first employed by Dixieland in 1981, and in 1986 he was promoted to store manager. He was terminated by Dixieland in June of 1987. Mr. Purvis first went to work with Dixieland in 1975 and ultimately became a district supervisor in charge of numerous stores. **The court finds the testimony of each of these witnesses to be persuasive as to why this court should grant the plaintiffs' motion for class certification. Both Mr. Neal and Mr. Purvis testified as to the defendants' class-wide policy of limiting hiring opportunities for black persons.** They testified that Dan Lee, a top management employee of Dixieland, made racially derogatory statements at various management meetings such as: (1) he would not hire another black until the government made him; (2) the store manager[s] should not hire blacks to handle money; and (3) the store manager[s] should not hire black cashiers because they steal. (emphasis added)

Plaintiff, by providing irrefutable evidence of a centralized, facility-wide policy of discrimination, has established all of the requirements for class certification under MCR 3.501(A)(1). Accordingly, the trial court, by certifying the class based on Plaintiff's establishment of the requirements for class certification, undoubtedly did not commit clear error in its factual findings or abuse its discretion.

Therefore, Plaintiff requests that this Court affirm the class certification order of the trial court and remand this case for further proceedings, including the hearing of Plaintiff's Motion for Partial Summary Disposition.

Respectfully submitted,

FETT & FIELDS, P.C.

/s/ James K. Fett
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Dated: September 24, 2013

Affidavit of Mailing

The undersigned certifies that a copy of the foregoing instrument was served upon the attorneys of record of all parties via the email service of the electronic filing system.

I DECLARE THAT THE STATEMENTS ABOVE ARE TRUE TO THE BEST OF MY INFORMATION, KNOWLEDGE AND BELIEF.

/s/ Joshua R. Fields
Joshua R. Fields
Dated: September 24, 2013

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F. Officer Affidavits re direct evidence (George, Golidy, Gomoluch, McClain)

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J. Finch Affidavit

K. Affidavit Maureen K. Proffitt

L. Alba Conte and Herbert Newberg, *Newberg on Class Actions*, Vol. 8, § 24.29, p. 165-170 (4th ed., Thomson West 2002)

M. Barbara T. Lindeman and Paul Grossman, *Employment Discrimination Law*, Vol. II, (4th ed., American Bar Association 2007)

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O. Excerpts from Manns Deposition: 34-35, 45, 48-51, 54-55

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