

In the United States Court of Federal Claims

No. 04-856C
(Filed August 19, 2005)

WALTER JAYNES, *et al.*,
Plaintiff,
v.
THE UNITED STATES,
Defendant.

Ronald A. Schmidt, Garvey Schubert Barer, Washington, D.C., for plaintiff. Donald B. Scaramastra and David J. Shaffer, of counsel.

Thomas B. Fatouros, Trial Attorney, Mark A. Melnick, Assistant Director, David M. Cohen, Director, Commercial Litigation Branch, Civil Division, Peter D. Keisler, Assistant Attorney General, United States Department of Justice, Washington, D.C., for defendant. John D. Noel, Senior Trial Attorney, Daniel E. O’Connell, Jr., Senior Litigation Counsel, and Kathleen A. O’Neill, Senior Trial Attorney, Department of the Navy, Washington, D.C., and Steven L. Seaton, Puget Sound Naval Shipyard, Bremerton, Washington, of counsel.

OPINION AND ORDER

GEORGE W. MILLER, Judge.

Plaintiffs, five employees of the Puget Sound Naval Shipyard (“PSNS”) located in Bremerton, Washington, filed this action on June 15, 2004, alleging that defendant, the United States Navy, failed to pay Environmental Differential Pay for so-called “high work” as mandated by 5 C.F.R. § 532.511, 5 C.F.R. § 532, Subpart E, Appendix A and Article 10 and Appendix II of the Bremerton Metal Trades Council (“BMTC”) Agreement. Compl. ¶ 1. Contemporaneously with the original complaint, plaintiffs filed a motion for class certification. Plaintiffs sought to certify a class defined as “all current and former Puget Sound Naval Shipyard employees assigned to Shop 64 as shipwrights from April 13, 1999 to the present.” Compl. ¶ 6; Pls.’ Mot. For Class Cert. at 1.

Plaintiffs filed an amended complaint on July 14, 2004. On August 13, 2004, the Government filed an answer to plaintiffs' amended complaint and, on August 20, 2004, the Government filed an opposition to plaintiffs' motion for class certification. On September 13, 2004, plaintiffs filed a reply in support of their motion for class certification. The Court heard oral argument on plaintiffs' Motion for Class Certification on November 4, 2004. On that date, plaintiffs informed the Court that they had filed a motion for summary judgment on liability with respect to Count I of the amended complaint.

At a November 22, 2004 status conference, plaintiffs tendered to the Court a "Proposed Notice of Class Certification" requesting that the definition of the class be broadened to include "[a]ll persons who were assigned as shipwrights at Puget Sound Naval Shipyard from April 14, 1994 to the present." Transcript of Proceedings, Jaynes, et al. v. United States, No. 04-856 C (Fed. Cl. Nov. 22, 2004) at 11-12. In light of plaintiffs' proposed redefinition of the class, the Court, in orders dated December 7, 2004 and March 15, 2005, directed the parties to file supplemental briefs addressing the propriety of certifying the class as redefined by plaintiffs. Plaintiffs filed supplemental briefs on January 7, 2005 and April 5, 2005. Defendant filed supplemental briefs on March 7, 2005 and April 5, 2005.

For the reasons set forth below, plaintiffs failed to satisfy the requirements set forth in Rules 23(a) and (b) of the Rules of the Court of Federal Claims ("RCFC"). Thus, the Court DENIES plaintiffs' motion for class certification.¹

BACKGROUND

Plaintiffs were employed and classified as shipwrights or were otherwise doing the work of shipwrights at PSNS. All shipwrights are assigned to Shop 64 at PSNS. Shop 64 also includes insulators and woodworkers. The Shop 64 insulators and woodworkers, as well as employees from other shops ("loan-overs"), are sometimes assigned to do the work of shipwrights in Shop 64. The primary duties of shipwrights involve the erecting and dismantling of staging or scaffolding in and around naval ships in dry dock. Plaintiffs contend that shipwrights regularly work under conditions and circumstances that would qualify as high work under Appendix II of the BMTC Agreement and 5 C.F.R. § 532, Subpart E, Appendix A.

Federal regulations mandate that federal civilian workers, whose positions are covered by the Federal Wage System and who are paid on an hourly basis in accordance with a local prevailing-rate pay schedule, receive additional compensation, known as Environmental Differential Pay, when exposed to working conditions or hazards that fall within one of the

¹ In making this determination, the Court does not attempt to assess the merits of plaintiffs' underlying claims. See *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974) ("We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.").

categories determined by the Office of Personnel Management. *See generally* 5 U.S.C. §§ 5341-5349 (2000); 5 C.F.R. §§ 532.101-532.801 (2005). One such category is high work, which is defined by Appendix II of the BMTC Agreement and 5 C.F.R. § 532, Subpart E, Appendix A to include:

- (a) working on any structure of at least 30 meters (100 feet) above the ground, deck, floor or roof, or from the bottom of a tank or ship;
- (b) working at a lesser height:
 - (1) if the footing is unsure or the structure unstable; or
 - (2) if safe scaffolding, enclosed ladders or other similar protective facilities are not adequate (for example, working from a swinging stage, boatswain chair, a similar support); or
 - (3) if adverse conditions such as darkness, steady rain, high wind, icing, lightning or similar environmental factors render working at such height(s) hazardous.

Shipwrights at PSNS are represented by the Bremerton Metal Trades Council, Local Union 2317. However, not all shipwrights are members of the BMTC union. On April 13, 1999, the union filed a grievance on behalf of 99 employees demanding Environmental Differential Pay for high work. Am. Compl. ¶ 4. On January 18, 2000, PSNS management decided the grievance and initiated new rules for payment for high work. *Id.* Mary Jane Tallman, superintendent for the shipwrights, stated in her decision that “[c]ertain work situations encountered by Shipwrights in erecting and dismantling staging do meet the criteria for 25% high pay² in accordance with Article 10 and Appendix II of the BMTC Agreement and the Schedule of Environmental Differentials at 5 CFR 532, Subpart E, Appendix E [sic].” Def.’s Opp’n to Pls.’ Mot. for Class Certification, App. II (“Def.’s App. II”) at 12. Specifically, management determined that 25 percent high pay was appropriate under the following circumstances: (1) for shipwrights building and dismantling staging beginning from the first level above the ground/deck unless flooring and safety rails are installed or fall protection devices can be properly used; (2) building and dismantling hanging staging working from similar heights under similarly unguarded situations when fall protection devices cannot be properly used. *Id.* Ms. Tallman limited the back-pay award to the shipwrights to a date 15 work days prior to the filing of the grievance. *Id.* at 13. The union elected not to proceed to binding arbitration.

On April 14, 2000, 56 individual plaintiffs filed a complaint in the United States District Court for the Western District of Washington seeking review of the grievance decision’s limit on

² As used by the parties in their briefs and the Court in this opinion, high pay refers to pay for high work. *See* Am. Compl. ¶ 4.

the retroactivity of the back pay awarded and class-wide relief declaring an entitlement to back pay with interest. *Jaynes, et al. v. Danzig*, Case No. C00-5221RJB, W.D. Wash.; Am. Compl. ¶ 14. The plaintiffs requested certification of a class “generally to be composed of all Shipwrights and others authorized to receive High Pay while assigned as Shipwrights, including retired Shipwrights and those who have terminated employee status as Shipwrights while eligible for High Pay.” See Compl. ¶¶ 8-13, *Jaynes, et al. v. Danzig*, Docket Entry No. 1, Def.’s App. II at 27-30. Plaintiffs estimated that the class included “75 additional persons to the 56 named plaintiffs above who are eligible for the Environmental Differential Pay . . . and an estimated 200 others who are either retired, have terminated employment, or who are no longer working as Shipwrights.” Mot. to Certify Class Action at 2, *Jaynes, et al. v. Danzig*, Docket Entry No. 15; see also Compl. ¶ 9, *Jaynes, et al. v. Danzig*, Def.’s App II. at 27. The district court denied class certification on December 6, 2000. See Order Denying Pls.’ Mot. to Certify Matter as Class Action, *Jaynes, et al. v. Danzig*, Docket Entry No. 22, Def.’s App. II at 50-56. In March 2001, the Navy moved to dismiss for lack of subject-matter jurisdiction. The district court granted the motion. In a July 9, 2001 appeal to the Ninth Circuit, plaintiffs sought review of the district court’s orders denying class certification and dismissing the case. On May 22, 2003, the Ninth Circuit affirmed the district court’s dismissal for lack of jurisdiction and remanded the case to the district court with instructions to transfer the case to the Court of Federal Claims. See *Jaynes v. Johnson*, 65 Fed. Appx. 176, 179-80 (9th Cir. 2003). Having affirmed the district court’s decision to dismiss the case, the Ninth Circuit declined to review the order denying plaintiffs’ motion for class certification. *Id.* at 180. The case was transferred to this court on May 18, 2004. Upon transfer to this court, 51 plaintiffs withdrew from the case. As indicated above, the five remaining plaintiffs filed their initial complaint in this court on June 15, 2004 and an amended complaint on July 14, 2004.

Plaintiffs seek back pay based on: 1) the Government’s failure to pay for high work in violation of the Back Pay Act, 5 U.S.C. § 5596 *et. seq.*, see Am. Compl., Count I; and 2) the Government’s failure to pay for high work performed during adverse conditions in violation of Appendix II of the BMTC Agreement and 5 C.F.R. 532, Subpart E, Appendix A(b)(3), see Am. Compl., Count II. Plaintiffs also seek a declaratory judgment and injunctive relief requiring PSNS management to pay high pay as required by law, regulation, and the BMTC union contract. See Am. Compl., Count III.³

As mentioned above, plaintiffs request certification of a class defined as all current and former PSNS employees assigned to Shop 64 as shipwrights from April 14, 1994 to the present. “Assigned” refers to those persons classified as shipwrights in Shop 64 and loan-overs sometimes assigned to Shop 64 to work as shipwrights. Am. Compl. ¶ 40.

³ The Court of Federal Claims lacks jurisdiction to grant a declaratory judgment or injunctive relief in this case. Section 1491(b) of title 28 specifically provides this Court authority to grant declaratory and injunctive relief in bid protest cases. 28 U.S.C. § 1491(b)(2). The absence of similar language in 28 U.S.C. § 1491(a)(1) and (2) demonstrates that the Court does not have authority to grant declaratory or injunctive relief in this case.

DISCUSSION

I. Class Actions in the Court of Federal Claims

Class actions are governed by RCFC 23. RCFC 23 was “completely rewritten” in 2002. See RCFC 23 Rules Comm. Note. “Although the court’s rule is modeled largely on the comparable federal rule, [FED. R. CIV. P. 23], there are [some] differences between the two rules. In the main, the court’s rule adopts the criteria for certifying and maintaining a class action as set forth in *Quinault Allottee Ass’n v. United States*, 197 Ct. Cl. 134, 453 F.2d 1272 (1972).” *Id.* In order to prevail on a motion for class certification, plaintiffs must satisfy both the prerequisites set forth in RCFC 23(a) and the requirements to maintain a class action set forth in RCFC 23(b).

The court’s rules permit only opt-in classes, not opt-out classes. RCFC 23 Rules Comm. Note. Opt-out classes were deemed inappropriate because of the need for specificity in money judgments against the United States and the fact that the court’s injunctive powers – the typical focus of an opt-out case – are more limited than those of a district court. *Id.* An opt-in class “allows each of the unnamed members of the class the opportunity to appear and include themselves in the suit if each is willing to assume the risks of the suit. This approach resembles permissive joinder in that it requires affirmative action on the part of every potential plaintiff.” *Buchan v. United States*, 27 Fed. Cl. 222, 223-24 (1992). In an opt-in class, “unidentified claimants are not bound if the case should be ruled in the defendant’s favor.” *Id.*

“[T]he burden of proof rests on plaintiffs to show that, under the particular circumstances, a class action would be appropriate.” *Abel v. United States*, 18 Cl. Ct. 477, 478 (1989) (citing *Peterson v. Oklahoma City Hous. Auth.*, 545 F.2d 1270, 1273 (10th Cir. 1976); *Cash v. Swifton Land Corp.*, 434 F.2d 569, 571 (6th Cir. 1970)). A class should be certified only after a rigorous analysis of the requirements set forth in RCFC 23(a). *General Telephone v. Falcon*, 457 U.S. 147, 161 (1982) (“[W]e reiterate today that a Title VII class action, like any other class action, may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.”). Moreover, when addressing the requirements for class certification, the trial court must take a “close look” at the predominance and superiority criteria of Rule 23(b)(2). *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615-16 (1997) (“Rule 23(b)(2) includes a nonexhaustive list of factors pertinent to a court’s ‘close look’ at the predominance and superiority criteria”).

II. RCFC 23(a): Prerequisites to a Class Action

In order to maintain a class action in this court, plaintiffs must first satisfy the four prerequisites identified in RCFC 23(a):

One or more members of a class may sue as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims of the

representative parties are typical of the claims of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Id.

A. Impracticability of Joinder

RCFC 23(a)(1) provides that before a class can be certified it must be shown that the class is so numerous that joinder of all members is impracticable. “Impracticable does not mean impossible.” *Robidoux v. Celani*, 987 F.2d 931, 935 (2d Cir. 1993). To establish impracticability, therefore, “[t]he representatives only need to show that it is extremely difficult or inconvenient to join all the members of the class.” 7AA C.A. WRIGHT, A.R. MILLER, AND M.K. KANE, FEDERAL PRACTICE AND PROCEDURE § 1762 at 176 (3d ed. 2005).

“The *raison d’être* of the class suit doctrine is necessity, which in turn depends upon the question of number.” *Garcia v. Gloor*, 618 F.2d 264, 267 (5th Cir. 1980) (citing 3B Moore’s Federal Practice P 23.05, at 23-149 (2d ed. 1979)). Numerosity “depends on the facts of each case and no arbitrary rules have been established, 7 C. WRIGHT AND A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL, § 1762 (1972), nor indeed should be.” *Id.* The real question is “the practicability of joinder, not the number of interested persons per se.” *Id.* Practicability of joinder depends on the size of the class, the ease of identifying its members and determining their addresses, the facility of making service on them if joined and their geographic dispersion. *Id.*; see also *Robidoux*, 987 F.2d at 936 (“Determination of practicability depends on all the circumstances surrounding a case, not on mere numbers.”); *Andrews v. Bechtel Power Corp.*, 780 F.2d 124, 131-132 (1st Cir. 1985) (“Joinder is considered more practical when all members of the class are from the same geographic area[.] In addition, where class members are easily identifiable, joinder is more likely to be practicable.” (citations omitted)).

The putative class is approximately 258 members⁴, consisting of “[a]ll persons who were assigned as shipwrights of Puget Sound Naval Shipyard from April 14, 1994 to the present.” Pls.’ Supplemental Br. In Supp. of Class Certification, filed Jan. 7, 2005 (“Pls.’ 1/7/05 Supp. Br.”) at 2; Def.’s Supplemental Br., filed Apr. 5, 2005 (“Def.’s 4/5/05 Supp. Br.”) at 3. For the most part, their identity and addresses are readily ascertainable, and the majority of the putative class lives in a compact geographical area.⁵ These individuals have worked or do work together

⁴ Throughout the briefing of plaintiffs’ motion, both parties have proffered several estimates as to the size of the proposed class. For purposes of this motion, the Court assumes the largest of the estimates.

⁵ Nearly 75 percent of the class, 192 individuals, are still employed at the shipyard. Of the 66 individuals who have left the shipyard, the Navy has thus far determined that 18 reside in the state of Washington, eight reside outside the state, and one is deceased. The Government expects that a large proportion of the 39 remaining individuals are still located in Washington

and many are members of the same union. With respect to the issue of entitlement to high pay, plaintiffs have previously organized 99 employees to file a grievance with PSNS management and 56 members to file suit in the District of Washington. Plaintiffs have provided no valid reason⁶ why they could not similarly organize all interested employees to join this action. Under such circumstances and where the framework is an opt-in class, which “resembles permissive joinder in that it requires affirmative action on the part of every potential plaintiff,” *Buchan*, 27 Fed. Cl. at 223, it is unclear what benefit is added by certifying the proposed class as opposed to allowing other plaintiffs to join this action or to initiate their own actions in this court.⁷

Furthermore, the interests of judicial economy are not served by certifying the proposed class. Each plaintiff will have to take some affirmative action to be included in the class. They will then have to show that they performed the type of work that would make them eligible for high pay. This will require a highly fact-intensive analysis. In addition, in order to assess damages each member of the putative class will have to show for what period of time the individual performed high work.

Joinder of individual plaintiffs would not be more burdensome for the court. In fact, the court has entertained cases with hundreds of plaintiffs. *Abel*, 18 Cl. Ct. at 478 (denying class certification for 1,218 plaintiffs, stating that “[t]his court ‘has never expressed any concern nor had any difficulty dealing with cases involving hundreds of plaintiffs or with single plaintiff ‘test’ cases.’” (quoting *O’Hanlon v. United States*, 7 Cl. Ct. 204, 206-07 (1985)); see e.g., *Acker v. United States*, 223 Ct. Cl. 281, 620 F.2d 802 (1980) (case maintained by 352 plaintiffs); *Abreu v. United States*, 22 Cl. Ct. 230 (1991) (case maintained by approximately 9,000 plaintiffs).

Plaintiffs argue that the individual claims of some class members might be time-barred in the absence of a class action. This weighs in favor of class certification, plaintiffs argue, because those members will have no alternative means for presenting their claims. Pls.’ Reply at 19-20 (citing *Moore v. United States*, 41 Fed. Cl. 394, 400 (1998) (“If plaintiffs’ motion to certify the

state. Def.’s 4/5/05 Supp. Br. at 3.

⁶ Plaintiffs attempt to demonstrate impracticability in part based on the fact that the Court of Federal Claims is located in Washington, D.C. Pls.’ Reply in Supp. of Mot. for Class Certification (“Pls.’ Reply”) at 8, 13. This court is a national court, with nation-wide service of process, and routinely accommodates parties and witnesses by holding trials in venues across the country. The fact that the members of the putative class live “3,000 miles,” *id.* at 13, from Washington, D.C. is irrelevant to a determination of the practicability of joinder.

⁷ If individual plaintiffs initiated their own civil actions, this court’s rules offer a variety of mechanisms to ensure that the litigation of such actions would be coordinated with the handling of this action so as to avoid unnecessary duplication of effort by the parties and the Court and to avoid inconsistent rulings in similar factual situations. See RCFC 40.2(a) (directly-related cases), RCFC 40.2(b) (indirectly-related cases), RCFC 42 (consolidation of actions).

class were denied, the potential class would be forever barred from seeking redress. Although this is not sufficient in itself to permit a class action, it weighs in plaintiffs' favor, especially because there are no counter-balancing equitable factors.")). The fact that certain members the proposed class may in the future be held to have sat on their rights to the point that their claims have, to some extent, become time-barred does not justify certifying the proposed class in this case. *See Armitage v. United States*, 18 Cl. Ct. 310, 315 (the tolling of the statute of limitations is a "legitimate concern," but must be weighed against other factors). In fact, as discussed at Section III.B., *infra*, the fact that the statute of limitations may bar the claims of some plaintiffs but not others cuts against certifying the proposed class.

Plaintiffs have not met their burden of demonstrating that it would be impracticable to join all members of the class who wish to pursue their claims.

B. Commonality

RCFC 23(a)(2) requires that there be questions of law or fact common to the class. The requirement for a common question of law is satisfied when there is one core common legal question that is likely to have one common defense. *See Taylor v. United States*, 41 Fed. Cl. 440, 446 (1998). "[W]here factual issues are not common among numerous potential plaintiffs, the class action is of no greater value than repetitive lawsuits, since under either form of proceeding separate determinations of each factual issue would remain necessary." *Saunooke v. United States*, 8 Cl. Ct. 327, 332 (1985).

The Government argues that there are not a sufficient number of legal or factual questions common to the class to warrant certification. Corrected Copy of Def.'s Opp'n to Pls.' Mot. for Class Certification ("Def.'s Opp'n") at 24. The Government asserts that individualized determinations must be made when assessing the damage calculation for each putative class member, including: whether high work was performed at all⁸; whether the requisite notification procedures were followed by each employee; whether there were multiple exposures to high work; whether guards or protective devices were available pursuant to the new policy; and what increment of high pay is warranted. Def.'s Opp'n at 33. Therefore, the Government contends, the putative class includes individuals with substantially different job requirements which will have to be separately evaluated to determine the validity and amount of any claim for high pay. *Id.* at 25.

Under the case law, however, the threshold of commonality is not high; there need be only one factual or legal issue common to the proposed class members. *See In re Am. Med. Sys.*, 75 F.3d 1069, 1080 (6th Cir. 1996). Plaintiffs argue that because all members of the purported class raise the same issue, "whether they are entitled to high pay under the same contract provisions and same regulations for the same work," the commonality requirement is met. Pls.'

⁸ Whether high work was performed at all is also an issue going to liability. *See* Section III.B., *infra*.

Reply at 9. Plaintiffs also point out that if absolute identity of proof on damages were the touchstone of class actions, no class action could ever be certified. *See* Pls.’ Reply at 10.

In this case, members of the putative class consist of both shipwrights and those workers who were “loan-overs” assigned shipwright duties. Despite differences in the title of the workers’ positions, their duties share certain similar characteristics, and their claims share common questions of law and fact.⁹ Thus, plaintiffs have satisfied the prerequisite of commonality.

C. Typicality

RCFC 23(a)(2) requires representative parties to demonstrate that their claims are typical of the claims of the class. The typicality requirement has traditionally not been found to be unusually restrictive. *See Berkley v. United States*, 45 Fed. Cl. 224, 232 (1999). In *Berkley*, the Court of Federal Claims was satisfied that the claims of the named plaintiffs, *i.e.*, denial of equal protection under the Constitution, were typical of the claims of the 1,595 commissioned officers they purported to represent. The named plaintiffs and the members of the class were allegedly denied equal protection as the result of the same mandate, *i.e.*, a Memorandum of Instruction issued by the Secretary of the Air Force. *Id.* at 233.

In the instant case, plaintiffs argue that all of the claims in this action arise from the same pattern, practice, or course of conduct of PSNS, namely the institutional refusal to pay shipwrights for high work. *See* Pls.’ Reply at 11. In addition, plaintiffs contend that differences in the magnitude or bases of the individual plaintiffs’ alleged damages do not preclude a finding of typicality. During oral argument, the Government argued that the named plaintiffs are not typical of the class because the named plaintiffs do not represent both shipwrights and “loan-overs.” *See* Transcript of Proceedings, *Jaynes, et al. v. United States*, Case No. 04-856C (Fed. Cl. Nov. 4, 2004) at 59-60. Plaintiffs’ declarations, however, sufficiently rebut the Government’s argument. App. to Pls.’ Reply Ex. 2-6. Although plaintiffs’ claims raise fact-intensive, individual issues relating to both liability and damages, plaintiffs have satisfied their quite modest burden of demonstrating that their claims are “typical” of those of the class they seek to represent.

D. Adequacy of Representation

RCFC 23(a)(4) provides that before a class may be certified by this court, plaintiffs must establish that “the representative parties will fairly and adequately protect the interests of the class.” *See Kominers v. United States*, 3 Cl. Ct. 684, 686 (1983). Two issues must be addressed when considering adequacy of representation: first, whether the named plaintiffs and their

⁹ Whether those common question “predominate over any questions affecting only individual members” is a different issue and a “far more demanding” criterion. *See* RCFC 23(b)(2) and discussion at Section III.B., *infra*.

counsel have any conflicts of interest with class members; and second, whether the named plaintiffs and their counsel will prosecute the action vigorously on behalf of the class. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998).

Plaintiffs assert that they are aware of no conflicts of interest among themselves and their counsel and the purported class members. Pls.' Reply at 12. The Government argues that an examination of the prior administrative and district court proceedings shows that conflicts exist. Def.'s Opp'n at 29. The Government suggests that there may be different levels of willingness within the class to engage in litigation, as illustrated by the drop-off in the number of named claimants as the action progressed. *Id.* at 30. Plaintiffs contend that factors other than a conflict of interest could be the cause of the drop-off in active participation in litigation (such as the geographical distance from the state of Washington), and that even if some "potential rivalry" could be found, that could be addressed by dividing the class into sub-classes or by decertifying the class for determination of individual damages. Pls.' Reply at 13. Plaintiffs also argue that the purpose of class action litigation is to provide relief when some class members are more willing than others to vindicate their rights in court. *Id.* In addition, plaintiffs contend that fear of reprisal could be the cause of less-than-complete participation by class members in litigation. *Id.* at 14. Finally, plaintiffs point out that because they seek only an opt-in class, the Government's argument regarding the conflict between members of the putative class based on willingness to litigate is irrelevant. *Id.* Only those class members wishing to pursue their claims will opt-in. Having considered the parties' arguments as discussed above, there does not appear to be any conflict of interest sufficient to bar adequate representation by the named plaintiffs.

The second prong of the adequacy-of-representation test concerns the competence of counsel. The plaintiffs' attorney must be "qualified, experienced, and generally able to conduct the proposed litigation." *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 247 (3d Cir. 1975); *see also Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978). The Government contends that the failure of plaintiffs' counsel to file any memorandum in support of plaintiffs' initial motion for class certification, combined with the general assertions in the complaint that merely recited the language of RCFC 23, preclude a finding of adequate representation. Def.'s Opp'n at 31-32. Plaintiffs rebut that they "are represented by lawyers with substantial experience in class action and complex civil litigation," Pls.' Reply at 12, and they provide a declaration by counsel of record, Ronald Schmidt, and his law firm's resume in support of these assertions, App. to Pls.' Reply at 59-72. Based on the submissions by plaintiffs, the Court concludes that plaintiffs have met their burden of demonstrating that their proposed class counsel is qualified, experienced, and generally able to conduct the litigation on behalf of the proposed class.

Because plaintiffs have satisfied only three of the four prerequisites set forth in RCFC 23(a), their motion for class certification must fail. In an attempt to fully analyze the issues raised by plaintiffs' motion, however, the Court will also address the requirements to maintain a class action set forth in RCFC 23(b).

III. RCFC 23(b): Class Actions Maintainable

Under RCFC 23(b), an action may be maintained as a class action if the prerequisites of subsection (a) are satisfied and in addition:

- (1) the United States has acted or refused to act on grounds generally applicable to the class, and
- (2) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by members of the class; and (C) the difficulties likely to be encountered in the management of a class action.

RCFC 23(b). The factors set forth in RCFC 23(b)(2)(A)-(C) comprise a “nonexhaustive” list, *Amchem*, 521 U.S. at 616; the Court may therefore consider factors other than those listed in the rule.

A. The United States Acted or Refused to Act on Grounds Generally Applicable to The Class

RCFC 23(b)(1) mirrors the language of the first clause of FED. R. CIV. P. 23(b)(2) (“the party opposing the class acted or refused to act on grounds generally applicable to the class”). “The term ‘generally applicable’ in Federal Rule 23(b)(1) has been said to signify ‘that the party opposing the class does not have to act directly against each member of the class.’” WRIGHT, MILLER AND KANE, *supra*, at § 1775 (quoting Comment, *Rule 23: Categories in Subsection (b), in The Class Action – A Symposium*, 1969, 10 B.C. IND. & COM. L. REV. 539, 542)). “The courts have interpreted this requirement to mean that the party opposing the class either has acted in a consistent manner toward members of the class so that the opposing party’s actions may be viewed as part of a pattern of activity, or has established or acted pursuant to a regulatory scheme common to all class members.” *Id.*; see also *Baby Neal v. Casey*, 43 F.3d 48, 63-64 (3d Cir. 1994).

In this case, the Navy has acted on grounds generally applicable to the class. Specifically, the Navy; prior to the resolution in January 2000 of the grievance filed by the BMTC union on behalf of 99 employees, categorically failed to pay high pay to those class members engaged in high work. The Government argues that it did not act on grounds generally applicable to the proposed class because some of the members of the proposed class did not engage in high work and thus were not entitled to Environmental Differential Pay. Def.’s Opp’n at 35-36; Def.’s 3/7/05 Supp. Br. at 25-26 (“Since some members of the class do not perform high-work and the

high-pay policies do not impact those potential class members who did not perform high-work, the Navy does not act in a manner generally applicable to the class.”). The Government’s argument addresses the merits of plaintiffs’ claims rather than the requirements for maintaining a class action. Whether or not an individual plaintiff performed high work would be determined during the liability phase of the case. Notwithstanding the fact that some plaintiffs may fail to prove liability, plaintiffs have adequately alleged that the Navy acted on grounds generally applicable to the class, *i.e.*, refusing to pay employees assigned as shipwrights in Shop 64 properly for high work both before and after the January 2000 resolution of the union grievance.

B. The Questions of Law or Fact Common to the Members of the Class Do Not Predominate Over The Questions Affecting Only Individual Members

Under RCFC 23(b)(2), a class action may be maintained if “the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.” In determining whether common questions predominate, “it is not sufficient that common questions merely exist, as is true for purposes of Rule 23(a)(2).” WRIGHT, MILLER AND KANE, *supra*, § 1778. “[T]he predominance criterion is far more demanding.” *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 624 (1997).

In this case, the Court must apply regulations concerning payment of Environmental Differential Pay in light of the work performed by individual members of the putative class. This will require the Court to undertake a factual investigation to determine whether an individual employee has performed work that meets the criteria for eligibility for Environmental Differential Pay for high work. The regulations authorize high pay for work at heights under 100 feet if (1) the footing is unsure or the structure is unstable; or (2) safe scaffolding, enclosed ladders or other similar protective facilities are not adequate; or (3) adverse environmental conditions such as darkness, steady rain, high wind, icing, lightning, or similar factors render working at such heights hazardous. *See* 5 C.F.R. § 532, Subpart E, Appendix A. To find that the Government is liable for high pay pursuant to these criteria, each plaintiff will be required to demonstrate that he or she performed work falling within one or more of the categories described in the regulation. Merely working on the construction of scaffolding is insufficient to establish liability in this case. And, as the Government points out, the shipwright trade has various tasks within its scope that do not constitute high work. *See* Winkler Dec. ¶ 10, Def.’s Opp’n Ex. 1. While the Court may be able to broadly describe the general types of duties a shipwright performs that fall under the regulation’s descriptions, whether a particular individual actually performed such duties under the conditions described is an individual issue going to liability and an issue requiring individual proof.

Plaintiffs contend that precise documentation as to each shipwright’s daily activities prior to the filing of the grievance is unavailable. Pls.’ Reply at 17; Def.’s Opp’n at 37. Plaintiffs argue that this failure is a violation of 5 C.F.R. § 551.402(b), which states that “[a]n agency shall keep complete and accurate records of all hours worked by its employees.” Plaintiffs further assert that the Government cannot invoke its own refusal to maintain legally required records of

hours worked as a defense to a claim that it owes back wages for that work. Pls.' Reply at 17-18. That argument, however, goes to the merits of the case (and possibly to the manner of proof of damages), but does not obviate the requirement that plaintiffs individually establish their entitlement to back pay.

The Government contends that members of the proposed class will be subject to differing dates regarding tolling of the statute of limitations. *See* Def.'s 3/7/05 Supp. Br. at 21; Def.'s 4/5/05 Supp. Br. at 4. The law is settled that affirmative defenses are properly considered in making class certification decisions. *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 295 (1st Cir. 2000). "Because a time bar constitutes an affirmative defense, *see* [RCFC] 8(c), statute-of-limitations defenses are appropriate for consideration in the class certification calculus." *Id.*¹⁰

In order to resolve the statute of limitations issues regarding any individual plaintiff or group of plaintiffs, the Court would have to determine: (1) for what period of time and with respect to what claims the filing of the action in the Western District of Washington tolled the statute of limitations and (2) how long and with respect to what claims filing of the original and amended complaints in this court tolled the statute of limitations. Such an inquiry would be highly fact-intensive and legally complex. "A necessity for individualized statute-of-limitations determinations invariably weighs against class certification under Rule 23(b)[(2)]." *Waste Mgmt.*, 208 F.3d at 296; *see also Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 342 (4th Cir. 1998) ("[w]hen the defendant's affirmative defenses (such as . . . the statute of limitations) may depend on facts peculiar to each plaintiff's case, class certification is erroneous." (internal quotation marks omitted)); *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 629 (3rd Cir. 1996) (where "the statute of limitations may bar some plaintiffs, but not others," individual questions of law and fact predominate over the common questions).

Where, as here, the myriad factual and legal issues affecting individual plaintiffs predominate over common questions, there is a substantial risk that the case would "degenerate . . . into multiple lawsuits separately tried." *Georgine*, 83 F.3d at 629 (internal quotations omitted). The predominance requirement of RCFC 23(b)(2) is therefore not satisfied.

C. A Class Action is Not Superior to Other Available Methods for the Fair and Efficient Adjudication of the Case

In determining whether a class action is superior to other available methods for the fair and efficient adjudication of the controversy, the Court must "consider what other procedures, if any, exist for disposing of the dispute before it." WRIGHT, MILLER AND KANE, *supra*, at § 1779. If a comparative evaluation of other procedures reveals no other realistic possibilities, this portion of RCFC 23(b)(2) has been satisfied. *See id.*

¹⁰ In this court compliance with the six-year statute of limitations set forth in 28 U.S.C. § 2501 is also a prerequisite to the court's jurisdiction. *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1576-77 (Fed. Cir. 1988).

The parties' briefs were relatively silent regarding the factors set forth in RCFC 23(b)(2)(A)-(C). The Court concludes that plaintiffs have met their burden of demonstrating that there are no "difficulties likely to be encountered in the management of a class action" that would preclude certification in this case. *See* RCFC 23(b)(2)(C). Neither party raised a concern about "the extent and nature of any litigation concerning the controversy already commenced by members of the class." RCFC 23(b)(2)(B).

Plaintiffs have not shown that "the interest of members of the class in individually controlling the prosecution of separate actions" will not be problematic if the Court were to certify the class. RCFC 23(b)(2)(A). The Supreme Court has explained that this factor is intended to account for the degree of cohesion within the class and the amount at stake for individual class members. *Amchem*, 521 U.S. at 616. Generally, a class action is appropriate when "small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor." *Id.* at 617 (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)). Plaintiffs are seeking "in excess of ten million dollars" in this case. Am. Compl. ¶ 67(c). At the time that damages estimate was created, plaintiffs anticipated a class of approximately 150 members. On average, that amounts to about \$67,000 per plaintiff. Additionally, that estimate does not appear to account for the amount of high pay shipwrights would earn in the future if the outcome of this case were favorable to plaintiffs. Thus, the amount of money at stake for individual claimants in this case is not insignificant, and certainly those plaintiffs with a greater potential recovery would have an interest in "individually controlling the prosecution of separate actions." RCFC 23(b)(2)(A); *see also Amchem*, 521 U.S. at 616-17.

Additionally, as discussed in Section I, *supra*, the Rules of this court allow only opt-in class actions. For the reasons set forth above and in Section II.A., *supra*, relating to the practicability of joinder, a class action is not superior in this case to simply allowing additional plaintiffs to join in this action or institute their own individual suits. Accordingly, plaintiffs have failed to satisfy the requirements to maintain a class action set forth in RCFC 23(b)(2).

CONCLUSION

Plaintiffs have failed to satisfy the prerequisite to class certification set forth in RCFC 23(a)(1), and they have failed to satisfy the criteria for maintaining a class action set forth in RCFC 23(b)(2). Plaintiffs' motion for class certification is therefore DENIED.

IT IS SO ORDERED.

GEORGE W. MILLER
Judge