



## 8th Circuit: Class Certification Denied in Discrimination Lawsuit

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Employees could not establish class certification requirements because the company's employment practices varied by department, but employees could use evidence of discrimination against third parties to prove individual discrimination claims, the 8th U.S. Circuit Court of Appeals held.

Six black employees brought suit against their employer, the Nucor Corp. and Nucor-Yamato Steel Co. (Nucor), alleging discriminatory disparate treatment, disparate impact and hostile work environment. All six plaintiffs worked at Nucor's Blytheville, Ark., plant.

The employees claimed they were denied promotions and training opportunities in favor of white employees, that Nucor employees regularly used racial epithets and displayed Confederate flags, including Confederate-style "do-rags" sold in Nucor's on-site store for employees. Evidence also suggested that black employees were ridiculed over the company's e-mail and workplace radio systems.

In addition to their individual claims, the employees sought to certify a class consisting of more than one hundred black individuals who were employed, applied for employment or were discouraged from applying for employment at the Blytheville plant.

The district court denied plaintiffs' requests for class certification and granted summary judgment in favor of Nucor on the disparate impact and disparate treatment claims. The plaintiff's individual claims of hostile work environment went to trial.

At trial, the district court allowed plaintiffs to introduce evidence of discrimination against nonparties, including a 1995 complaint filed against Nucor by the Equal Employment Opportunity Commission (EEOC), a 2002 letter from Nucor employees to the EEOC, various employee affidavits gathered by Nucor in anticipation of litigation in 2003 and a nonparty employee's testimony about discrimination at Nucor. The jury awarded each plaintiff a total of \$200,000 in compensatory and punitive damages.

Both parties appealed. The employees appealed the district court's denial of class certification. Nucor appealed the admission at trial of several types of evidence describing discrimination against nonparties. The 8th Circuit affirmed.

On appeal, the circuit court cited the U.S. Supreme Court's denial of class certification in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), and upheld the district court's denial of class certification because the plaintiffs' claims and the claims of rejected and discouraged applicants for employment would not turn on the same issues of law and fact and were not sufficiently similar to those of black employees working in other areas of the Blytheville plant. The circuit court noted that the district court denied class certification because Nucor presented evidence of "decentralized" management and decision-making and that Nucor's different departments varied widely in their employment practices, working environments and functions.

The circuit court also upheld the district court's decision during trial on the individual claims to admit evidence regarding discrimination against nonparties. The circuit court recognized that while the district court could not create a "per se" rule that such evidence was admissible, the district court did not err in admitting the evidence because it conducted a fact-based analysis and "the key" was "whether it's the same place, the same time, the same decision-makers, or whether it's such that the people who are making the decisions reasonably should have known about the hostile environment." Because "evidence of harassment or discrimination against nonparty co-workers can be relevant to a plaintiff's hostile work environment claim," the prejudicial effect of the evidence did not outweigh its probative value.

The court noted that the district court admitted several of the affidavits and the 1995 EEOC complaint and 2002 letter to the EEOC only after the employer's designated witness denied knowledge of evidence regarding prior discrimination. Nucor's hearsay objections also failed because the evidence was not admitted "for the truth of the matter asserted," but was admitted because it was relevant to the company's knowledge and motive as well as to the credibility of the plaintiffs' allegations.

*Bennett v. Nucor Corp.*, 8th Cir., Nos. 09-3831/3834 (Sept. 22, 2011).

**Professional Pointer:** This case presents a compromise courts may be willing to make in light of the difficulty employee-plaintiffs will have to establish the requirements of class certification after *Dukes*. Even when claims are not similar enough to warrant class certification, courts may allow employees to prove their individual discrimination claims using evidence of the discriminatory treatment of co-workers, whether or not those co-workers are involved in the related suits that were denied class treatment.

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**Editor's Note:** This article should not be construed as legal advice.

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