PLAINTIFF'S COMPENDIUM OF DOCUMENTS FILED IN THE OLGUIN V. FED EX STATE COURT ACTION ASSIGNED TO THE HONORABLE STEPHEN J. SUNDVOLD VOLUME II OF II

PART 3 OF 3

EXHIBIT 2

IN THE SUPERIOR COURT OF CALIFORNIA

FOR THE COUNTY OF ORANGE

CERTIFIED COPY

JAVIER OLGUIN and other members of the general public similarly situated,

Plaintiffs,

VS.

FEDEX GROUND PACKAGE SYSTEM, and Does 1 through 50, inclusive,

Defendants.

NO. OCSC 02CC00200

DEPOSITION OF JUSTIN T. WALKER

TAKEN ON BEHALF OF DEFENDANT

November 18, 2005

Job No. 914995

I said, there is a time set for the trucks to go out, and if you take time away from that, then it just means that you're going to have to work harder and faster.

Q. Personally, would you have preferred to keep working?

A. I would have preferred regular breaks, and then -- but not like -- the way they did it, everybody stopped. So all of production stopped. The way I would have preferred it would have been, you know, individual breaks where you had somebody else come in and fill in while you took a break. That would be the way I would have preferred it.

Q. Did you ever ask for a meal break during the time that you worked at FedEx Ground?

A. No.

Q. If you had had the opportunity to have an unpaid meal break but it would have extended your shift an equal amount of time, is that something that would have been of interest to you?

A. That would have been very much of interest to me. I would much rather have a meal break and stay longer than not and go home earlier.

Q. What time would you have wanted to do that?

(N.B.: As a matter of firm policy, the stenographic notes and computerized backup of this transcript will be destroyed five years from the date appearing on the following certificate, unless notice is received otherwise from any party or counsel hereto on or before said date of the 28 day of November, 2010.)

STATE OF OREGON)
County of Multnomah) ss.

I, Paula D. Tieger, a Registered Professional Reporter and Certified Shorthand Reporter for the State of Oregon, do hereby certify that, pursuant to stipulation of counsel hereinbefore set out, **JUSTIN T. WALKER**, personally appeared before me at the time and place mentioned in the caption herein; that the witness was by me first duly sworn on oath, and examined upon oral interrogatories propounded by counsel; that said examination, together with the testimony of said witness, was taken down by me in stenotype and thereafter reduced to typewriting; and, that the foregoing transcript, Pages 1 to 53, both inclusive, constitutes a full, true and accurate record of said examination of and testimony by said witness, and of all other proceedings had during the taking of said deposition, and of the whole thereof.

Witness my hand at Portland, Oregon, this 28 day of November, 2005.

Paula D. Tieger

Paula D. Tieger, RPR
RPR No. 049286
Certified Shorthand Reporter

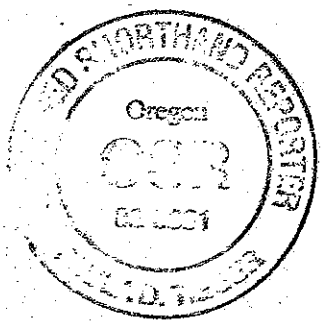

EXHIBIT 3

CERTIFIED COPY

SUPERIOR COURT OF CALIFORNIA

COUNTY OF ORANGE

JAVIER OLGUIN and other members of the general public similarly situated,

Plaintiffs,

vs.

Fed Ex Ground PACKAGE SYSTEM, and Does 1 through 50, inclusive,

Defendants.

No. OCSC 02CC00200

DEPOSITION OF GLORIA BURKS

Costa Mesa, California

Wednesday, September 14, 2005

Reported by:
MONICA T. VOGELBACHER
CSR No. 6406

stay and have a sandwich; is that right?

A You know, you would have to -- working those trailers like we did, you want to go home and just sit or lay. I mean -- I mean, I've been working for years, and, I mean, to me, that's a lot of -- I was tired. I mean, it burnt me out. I mean, to tell you the truth, within two to three months I lost about 30 pounds.

Q That's a lot.

A And that's just working, working your butt off, no breaks.

Q Is it fair to say that, as soon as you were able to go home, you wanted to get home?

A I wanted to get home.

Q To soak in the tub, I think you said?

A Yes. A hot shower.

Q If someone had told you, instead of finishing at six you're going to finish at 6:30, but we're going to give you half hour to have a meal somewhere in there, would that -- is that something you would have wanted?

A Yeah, because, you know, it's like working three to four, maybe five hours straight with no break or nothing, and you're huffing and puffing because you know you've got to get it done, I mean, to me that's -- and the work that we did. You know what I'm saying? It's hard work.

STATE OF CALIFORNIA)
: ss
COUNTY OF LOS ANGELES)

I, the undersigned, a Certified Shorthand Reporter of the State of California, do hereby certify:

That the foregoing proceedings were taken before me at the time and place herein set forth; that any witnesses in the foregoing proceedings, prior to testifying, were placed under oath; that a verbatim record of the proceedings was made by me using machine shorthand which was thereafter transcribed under my direction; further, that the foregoing is an accurate transcription thereof.

I further certify that I am neither financially interested in the action nor a relative or employee of any attorney of any of the parties.

IN WITNESS WHEREOF, I have this date subscribed my name.

Dated: September 19, 2005

Monica T. Vogelbacher

MONICA T. VOGELBACHER
CSR No. 6406

EXHIBIT 4

CERTIFIED COPY

SUPERIOR COURT OF CALIFORNIA

COUNTY OF ORANGE

JAVIER OLGUIN, and other members of the general public similarly situated, Plaintiffs, vs. FED EX GROUND PACKAGE SYSTEM, and Does 1 through 50, inclusive, Defendants.	No. OCSC 02CC00200

DEPOSITION OF JUSTIN BAILEY

Costa Mesa, California

Wednesday, September 14, 2005

Reported by:
MONICA T. VOGELBACHER
CSR No. 6406

could go. You know, Hurry up. If not, he would be just like, Hold on, wait, and then wait for a little bit, and then I'd go back in the trailer.

Q Okay. You weren't ever denied an opportunity to use the restroom when you needed to, were you?

A Mostly no, sometimes yes. If it was really backed up, then they would want me to wait, I'd have to wait, so...

Q You worked for Fed Ex Ground for approximately three and a half years; is that right?

A Yes.

Q And your estimate was that you asked for a meal break maybe ten to 15 times?

A Yes, that's about accurate.

Q So that would be maybe somewhere between three, four times a year?

A Yes. Approximately, yeah, I would say that.

Q The first time that you asked, what response did you get?

A We're almost through, to keep going.

Q How long had you worked at that point?

A See, they don't have clocks down there. A lot of times, like, the place you clock out is on the opposite side and you can't go check the time, they're not going to let you do that, and they don't have clocks

in the facility. So I don't know when those times were. But I would gauge it by the sun, it would be real bright outside, and it started off dark, so I know it had been hours. I didn't know when exactly.

Q You didn't wear a watch to work?

A No. They didn't let you wear watches. You couldn't wear a watch.

Q Do you know how long you had worked on any of the occasions you'd asked for a meal break?

A Yes. There was -- it was between six and seven hours.

Q How were you able to tell that?

A Because I wrote down what time I started and what time I clocked out at.

Q And did you also write down the date that you asked for a meal break?

A Yeah. Yeah, those days.

Q You did?

A Yes.

Q Is that contained in your log?

A Some -- yeah. I didn't write them all down or they're not all in here, but I have some of them.

Q Well, let's see what you did write down.

A Okay. Like December the 3rd, 2002 I worked from -- on Tuesday, from 5:15 until 12:18, and that was

STATE OF CALIFORNIA)
: ss
COUNTY OF LOS ANGELES)

I, the undersigned, a Certified Shorthand Reporter of the State of California, do hereby certify:

That the foregoing proceedings were taken before me at the time and place herein set forth; that any witnesses in the foregoing proceedings, prior to testifying, were placed under oath; that a verbatim record of the proceedings was made by me using machine shorthand which was thereafter transcribed under my direction; further, that the foregoing is an accurate transcription thereof.

I further certify that I am neither financially interested in the action nor a relative or employee of any attorney of any of the parties.

IN WITNESS WHEREOF, I have this date subscribed my name.

Dated: September 19, 2005

Monica T. Vogelbacher

MONICA T. VOGELBACHER
CSR No. 6406

EXHIBIT 5

[MOVING PARTY TO GIVE NOTICE. ARGUMENT EXPECTED, ALTHOUGH NOT REQUESTED OR REQUIRED]

Proper grounds for Counsel to be relieved are presented. Avanti's dispute with the insurance carrier does not take away from the fact that Counsel must be paid.

8 OLGUIN vs. FED EX GROUND PACKAGE SYS.

MOTION : DEMURRER - OVERRULED, 20 DAYS TO ANSWER

[MOVING PARTY TO GIVE NOTICE. ARGUMENT EXPECTED, ALTHOUGH NOT REQUESTED OR REQUIRED]

The language of the Statute is not ambiguous, and therefore the Court does not need to resort to the Legislative history to find its meaning. The Statute requires that if the employee does not receive the required meal or rest breaks, the employee receives *pay* for the time worked. There is nothing ambiguous abut the word "pay"; it is equivalent to wages. There is no mention of penalty in the Statute. The amount owed is money due to the employee at the time of termination. As this money due the employee was not allegedly not paid at the time of termination, waiting-time penalties are appropriate.

What the California Statute does is provide for pay when a benefit was not given as required. Plaintiffs are entitled to both the rest and meal periods and pay for the rest periods. When they don't receive the rest periods, they are out a benefit, a form of compensation; and the Statute properly compensates when employers ignore the law.

9 SAN RAFAEL vs. STANDARD PACIFIC

MOTION : FOR GOOD-FAITH SETTLEMENT - GRANTED

[MOVING PARTY TO GIVE NOTICE. NO APPEARANCE REQUIRED AS NO REAL OPPOSITION HAS BEEN RECEIVED. IF ANY COUNSEL WISHES TO OPPOSE, THEY ARE TO ADVISE THE COURT NO LATER THAN 9:00 A.M. ON THE DAY OF THE HEARING]

There is no real opposition presented to the Motion. The burden of proof is on the opposing party to prove the lack of a good-faith settlement. That burden has not been met.

11 WESSELOH vs. K L WESSELL

MOTION : LAKEVIEW'S TO SEVERE - GRANTED

EXHIBIT 6

Assembly Concurrent Resolution No. 43

Introduced by Assembly Members Jerome Horton and Koretz

March 29, 2005

Assembly Concurrent Resolution No. 43—Relative to labor.

LEGISLATIVE COUNSEL'S DIGEST

ACR 43, as introduced, Jerome Horton. Labor.

This measure would declare that the Division of Labor Standards Enforcement does not have the authority to promulgate a specified regulation relating to meal and rest periods, that this authority rests with the Legislature or the Industrial Welfare Commission, and that the specified regulation is inconsistent with existing law.

Fiscal committee: no.

WHEREAS, Section 1 of Article XIV of the California Constitution declares, "The Legislature may provide for minimum wages and for the general welfare of employees and for those purposes may confer on a commission legislative, executive, and judicial powers"; and

WHEREAS, Pursuant to this constitutional authorization, the Legislature enacted Section 1173 of the Labor Code, conferring upon the Industrial Welfare Commission (IWC) the authority "to ascertain the hours and conditions of labor and employment in the various occupations, trades, and industries in which employees are employed in this state, and to investigate the health, safety, and welfare of those employees"; and

WHEREAS, The California Supreme Court has affirmed that the IWC "is the state agency empowered to formulate regulations (known as Wage Orders) governing employment in the State of

California" (Tidewater Marine Western, Inc. v. Bradshaw (1996) 14 Cal.4th 557, 561); and

WHEREAS, Exercising its statutory powers, the IWC has promulgated 17 industry and occupational Wage Orders regulating the wages, hours, and working conditions of California employees and these Wage Orders are required by law to be posted at every workplace in California; and

WHEREAS, The IWC must follow the procedures set forth in Sections 1171 to 1188, inclusive, of the Labor Code to promulgate regulations through convening wage boards consisting of equal representation of employers and employees in a particular industry or occupation, except in instances where there has been a specific legislative mandate to follow other procedures; and

WHEREAS, By establishing the detailed IWC process the Legislature has ensured that the commission charged with establishing workplace protections for California workers does so only after a comprehensive process ensuring participation of equal numbers of employers and employees is completed in compliance with Sections 1171 to 1188, inclusive, of the Labor Code; and

WHEREAS, The Legislature has conferred upon the citizen members of these wage boards the unique authority to recommend changes in wage and hour law which are binding upon the IWC when enacted by a two-thirds vote of the wage board; and

WHEREAS, No other agency, department, or division, including the Division of Labor Standards Enforcement (DLSE), has been additionally delegated these powers to regulate wages, hours, and working conditions; and

WHEREAS, In Section 516 of the Labor Code, the Legislature reiterates this explicit grant of power to the IWC to "adopt and amend working condition orders with respect to break periods, meal periods, and days of rest for any workers in California consistent with the health and welfare of those workers"; and

WHEREAS, The DLSE has recently proposed a meal and rest break regulation at Section 13700 of Title 8 of the California Code of Regulations that would significantly diminish long-standing protections in California wage and hour law

concerning the provision of meal and rest periods to employees; and

WHEREAS, The DLSE does not have the authority to promulgate a regulation that weakens the substantive protections and remedies afforded to California employees under Sections 226.7 and 512 of the Labor Code and the 17 Wage Orders; and

WHEREAS, The proposed regulation is inconsistent with existing law and regulations which require, among other protections, that the employer provide a meal break to all employees within the first five hours of work unless a statutory waiver is entered into between the employer and the employee; and

WHEREAS, The Legislature has granted DLSE discrete rulemaking authority that is limited in scope to the internal operations of DLSE and to areas of labor law enforcement that are not expressly delegated to another officer, board, or commission and the Legislature has expressly delegated authority to regulate wages, hours, and working conditions to the IWC; and

WHEREAS, Two separate entities promulgating contradictory regulations on the same subject will create confusion concerning an employee's right to meal and rest breaks; now, therefore, be it

Resolved by the Assembly of the State of California, the Senate thereof concurring, That the Legislature of the State of California hereby declares that the DLSE does not have the authority to promulgate the proposed regulation concerning meal and rest periods; and be it further

Resolved, That this authority rests exclusively with the Legislature or, in the alternative, the IWC, pursuant to legislative delegation of power; and be it further

Resolved, That the proposed regulation on meal and rest breaks is inconsistent with existing law and will create confusion concerning these rights; and be it further

Resolved, That the Chief Clerk of the Assembly transmit copies of this resolution to the Governor of the State of California, to the Secretary of the Labor and Workforce Development Agency, and to the State Labor Commissioner.

O

EXHIBIT 7

C

United States District Court, N.D. Illinois, Eastern Division.
John N. O'MEARA, on his own behalf and on behalf of all persons similarly situated, Plaintiff,
v.
UNITED STATES of America, Defendant.
No. 72 C 2386.

March 20, 1973.
On Motion for Class Designation and Objection to Interrogatory May 24, 1973.

Member of reserve component of United States Marine Corps brought action against the United States to recover lump-sum readjustment payment and the United States moved to dismiss action or, in the alternative, for summary judgment. The District Court, Will, J., held that rounding provision of statute, which provided for readjustment payment to reserve component members who have completed at least five years of continuous active duty, that six months or more of active duty will be counted as a whole year was applicable to eligibility requirement and not only to computation of readjustment payment. It was further held that reservist's action could be maintained as class action and that government would be required to provide plaintiff's counsel with names and addresses of members of designated class despite objection to interrogatory that manual examination of files to determine makeup of proposed class would take approximately eight months and cost approximately $1,000,000.

Order accordingly.

West Headnotes

[1] Statutes 361 ⇐217.4

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k213 Extrinsic Aids to Construction
361k217.4 k. Legislative History in General. Most Cited Cases
Legislative history is irrelevant to interpretation of statute if statutory enactment is clear and unambiguous.

[2] Armed Services 34 ⇐23.1(6)

34 Armed Services
34I In General
34k21 Enlisted Personnel
34k23.1 Basic Pay and Special Pay
34k23.1(6) k. Discharge and Reinstatement; Mustering Out Pay. Most Cited Cases
(Formerly 34k23.5)
Rounding provision of statute, granting readjustment pay to members of reserve component in certain circumstances, that six months or more of active duty will be counted as whole year was applicable to five-year eligibility requirement and was not applicable only to computation of readjustment payment; thus, complaint in which reservist alleged that he had completed four years, 11 months and 17 days on active duty prior to involuntary release from active duty was sufficient to state claim against the United States for readjustment payment. 10 U.S.C.A. § 687(a)(2); Armed Forces Reserve Act of 1956, § 265, 70 Stat. 517; 28 U.S.C.A. § 1346(a)(2); Fed.Rules Civ.Proc. rule 12(b)(6), 28 U.S.C.A.

[3] Armed Services 34 ⇐23.1(6)

34 Armed Services
34I In General
34k21 Enlisted Personnel
34k23.1 Basic Pay and Special Pay
34k23.1(6) k. Discharge and Reinstatement; Mustering Out Pay. Most Cited Cases
Where member of reserve component of United States Marine Corps, in response to request for augmentation into regular Marine Corps, received letter stating that he had been considered for extension of active duty and was not selected for augmentation or extension of active duty, whether member had actually applied for extension of active duty was irrelevant to his right to receive readjustment payment, under statute providing for such payment to member of reserve component who has been released from active duty involuntarily or who has not been accepted for additional tour of active duty for which he has volunteered. 10 U.S.C.A. § 687(a); Armed Forces Reserve Act of 1956, § 265, 70 Stat. 517.

[4] Armed Services 34 ⇐23.1(6)

34 Armed Services

34I In General
34k21 Enlisted Personnel
34k23.1 Basic Pay and Special Pay
34k23.1(6) k. Discharge and Reinstatement; Mustering Out Pay. Most Cited Cases
Fact that request for additional tour of active duty made by member of reserve component of United States Marine Corps was contingent on his not being accepted for augmentation into regular Marine Corps did not preclude grant of readjustment payment on theory that request for additional tour was "conditional" and that, therefore, member could not be regarded as having been involuntarily released from active duty as is required for eligibility for readjustment payment. 10 U.S.C.A. § 687(a)(2); Armed Forces Reserve Act of 1956, § 265, 70 Stat. 517.

[5] Federal Civil Procedure 170A 181

170A Federal Civil Procedure
170AII Parties
170AII(D) Class Actions
170AII(D)3 Particular Classes Represented
170Ak181 k. In General. Most Cited Cases
Action brought by member of reserve component of United States Marine Corps for lump-sum readjustment payment following his involuntary release from active duty after serving on active duty for four years, 11 months and 17 days could be maintained as class action even though 40 other lawsuits seeking same relief were pending and even if screening required to determine makeup of proposed class would take approximately 14 months to complete and cost the United States 1.5 million dollars. 10 U.S.C.A. § 687(a); 28 U.S.C.A. § 1346(a)(2); Fed.Rules Civ.Proc. rule 23, 28 U.S.C.A.

[6] Federal Civil Procedure 170A 181

170A Federal Civil Procedure
170AII Parties
170AII(D) Class Actions
170AII(D)3 Particular Classes Represented
170Ak181 k. In General. Most Cited Cases
Fact that jurisdiction of action to recover lump-sum readjustment payment following more than four and one-half but less than five years' active duty by member of reserve component of United States Marine Corps was based on Tucker Act did not preclude maintenance of action as class action on theory that Tucker Act does not grant jurisdiction over any suit which could not have been brought in Court of Claims and that class action cannot be maintained in the Court of Claims. 10 U.S.C.A. § 687(a); 28 U.S.C.A. § 1346(a)(2); Fed.Rules Civ.Proc. rules 23, 23(b)(3), 28 U.S.C.A.

[7] Federal Civil Procedure 170A 181

170A Federal Civil Procedure
170AII Parties
170AII(D) Class Actions
170AII(D)3 Particular Classes Represented
170Ak181 k. In General. Most Cited Cases
Where jurisdiction of proposed class action was based on Tucker Act, under which district courts do not have jurisdiction over claims against United States greater than $10,000, proposed class definition would have to limit class to those persons who would otherwise qualify as class members and whose projected benefits under the Act would not exceed $10,000. 10 U.S.C.A. § 687(a); 28 U.S.C.A. § § 1346(a)(2), 1491; Fed.Rules Civ.Proc. rule 23, 28 U.S.C.A.

[8] Federal Civil Procedure 170A 1512

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(D) Written Interrogatories to Parties
170AX(D)2 Scope
170Ak1512 k. Identity and Location of Witnesses and Others. Most Cited Cases
In class action instituted by member of reserve component of the United States Marine Corps to recover readjustment payment following his involuntary release from active duty after serving more than four and one-half years but less than five years on active duty, United States could be required to provide plaintiff's counsel with names and addresses of members of designated class despite objection to interrogatory that manual examination of files to determine makeup of proposed class would take approximately eight months and cost approximately $1,000,000. 10 U.S.C.A. § 687(a); 28 U.S.C.A. § 1346(a)(2); Fed.Rules Civ.Proc. rule 23, 28 U.S.C.A.

***561** Roger J. Kiley, Jr., Edward T. Joyce, Kevin M. Forde, Chicago, Ill., for plaintiff.
James R. Thompson, U. S. Atty., Jack M. Wesoky, Asst. U. S. Atty., Chicago, Ill., for defendant.

MEMORANDUM OPINION

WILL, District Judge.

Plaintiff has brought this action to recover a lump sum readjustment payment from the United States Department of the Navy, to which he claims he is entitled under the provisions of 10 U.S.C. § 687(a), and which the Navy has denied him. The jurisdiction of this court is invoked under 28 U.S.C. § 1346(a)(2).

Defendant has moved to dismiss the action for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6), Fed.R.Civ.P. In the alternative, it moves for summary judgment in its favor.

I

In his complaint, plaintiff alleges he is now, and has been since March 1, 1967, a member of the reserve component*562 of the United States Marine Corps. As a member of the Marine Corps, he recently completed a period of active duty of four years, 11 months and 17 days. He alleges that some months prior to his release from active duty he volunteered, but was not accepted, for an additional tour of active duty. Though not alleged in the complaint, plaintiff also requested augmentation into the regular Marine Corps. This request was denied as well.

After his release from active duty, plaintiff applied for readjustment pay under 10 U.S.C. § 687(a). That statute provides, in relevant part:

(a) [A] member of a reserve component or a member of the Army or the Air Force without component who is released from active duty involuntarily, or because he was not accepted for an additional tour of active duty for which he volunteered after he had completed a tour of active duty, and who has completed, immediately before his release, at least five years of continuous active duty, is entitled to a readjustment payment computed by multiplying his years of active service (other than in time of war or national emergency . . .), but not more than eighteen, by two months' basic pay of the grade in which he is serving at the time of his release. . . . For the purposes of this subsection--

(1) a period of active duty is continuous if it is not interrupted by a break in service of more than 30 days;

(2) a part of a year that is six months or more is counted as a whole year, and a part of a year that is less than six months is disregarded; and . . ..

By virtue of this section, plaintiff claimed a readjustment payment of $9,273.00. Upon defendant's refusal to make any payments, plaintiff initiated this law suit.

II

The government's motion to dismiss the action is based on its contention that the rounding provision contained in the statute, § 687(a)(2), applies only to the computation of the readjustment payment and cannot be used to meet the five-year eligibility requirement. Since plaintiff has, in fact, served thirteen days less than five complete years, defendant contends he is not entitled to the payment, and therefore has no cause of action.

This argument, in turn, is based on the government's view that the statute is ambiguous, and that we must, therefore, look to the Congressional intent in enacting the statute to determine its meaning. We are urged to consider: 1) that the predecessor to the readjustment pay statute currently before us specifically provided that its rounding provision was to apply only '[f]or the purposes of computing the amount of readjustment pay.' Act of July 9, 1956, ch. 534, § 265; and 2) that despite Congress' omission of this limitation in the current statute, Senate Report No. 1876, 87th Cong. 2nd Sess., U.S.Code Cong. & Admin.News 1962, p. 2456, contains a statement that the new bill was 'not intended to make any substantive change in existing law.' To apply the rounding provision to the eligibility requirement, the government argues, would be to make '[a] substantive change in existing law' contrary to the Congressional intent.

[1][2] Defendant's contentions are not persuasive. It is well settled that legislative history is irrelevant if the statutory enactment is clear and unambiguous. With respect to the section in question, we agree with the Court of Claims in Schmid v. United States, 'that the section is clear and unambiguous on its face and is susceptible, on its face, of only one interpretation.' 436 F.2d 987, 989, 193 Ct.Cl. 780 (1971), cert. den. 404 U.S. 951, 92 S.Ct. 283, 30 L.Ed.2d 268 (1971). *See also*, *563Cass v. United States, 344 F.Supp. 550 (D.Mont.1972). The phrase, 'For the purposes of this subsection,' clearly refers to the entire subsection 687(a) which includes both the five year eligibility requirement and the method of computing the readjustment sum. Consequently, as the rounding provision which follows contains no express or

implied limitations in it, it must apply to the entire subsection.

There is, therefore, no need to turn to the legislative history of the statute to determine the intent of the enacting legislative body. Only by defendant's introduction of legislative history purporting to show a possible conflict between the Congressional intent and the clear language of the Congressional enactment can any ambiguity be found. It is not the function of courts to utilize legislative history to rewrite an otherwise clear and precise statute.

Even if we were to make such an inquiry, however, we cannot agree with defendant's contention that the legislative history supports its interpretation of the statute. On the contrary, we find the analysis of the statute's history in Schmid v. United States, *supra*, more convincing than the position urged by the government here, and agree with that court in its conclusion that at the very least:
. . . the legislative history of that section does not so clearly evidence an intent inconsistent with the plain meaning of the statutory language as to enable us to depart from that plain meaning. 436 F.2d at 991.

Finding, as we do, that the rounding provision applies to the determination of eligibility, defendant's motion to dismiss for failure to state a claim must be denied.

III

In addition to requiring five years of continuous active service, section 687(a) also requires that a reserve member of the service either be released from active duty involuntarily or not be accepted for an additional tour of active duty for which he volunteered. Defendant has moved for summary judgment in its favor contending that plaintiff fails to satisfy this aspect of the statute because he never requested an additional tour of active duty. Its study of plaintiff's service record reveals only a request made by him for augmentation into the regular Marine Corps, the denial of which concededly does not entitle plaintiff to the benefits of the statute. Plaintiff both in his complaint and by affidavit, however, states he did apply for an additional tour of active duty and was denied his request.

[3] While it would appear that this would raise a disputed issue of material fact, our review of the exhibits submitted in support of defendant's motion leads us to conclude that whether or not plaintiff actually applied for an extension is irrelevant. In response to his request for augmentation, plaintiff received a letter, by direction of the Commandant of the Marine Corps, stating in part:
1. Your request, reference (a), for augmentation into the Regular Marine Corps was considered by the Officer Retention Board on 16 March 1972. This Board, convened in accordance with paragraph 5f of reference (b) *also considered you for extension of active duty. It is regretted that you were not selected for augmentation or extension of active duty.* (emphasis supplied)

Even if plaintiff did not, in fact, submit a request for an extension in addition to his request for augmentation, the Marine Corps certainly treated him as having done so and denied him any extension he might have requested. If he had not already filed an extension request, surely it would have served no purpose for him to do so after receiving this letter from the Commandant.

The defendant argues that the Board's gratuitous denial of an additional tour ***564** cannot be used to estop the government since plaintiff would not have been bound by a determination that he *was* accepted for an additional tour if he had not, in fact, requested it. The Commandant has clear authority to act upon requests made by reserve officers for both augmentation and extensions of active duty. Even though technically he may have been without actual authority to deny an additional tour of active duty when no such request was made, surely plaintiff was entitled to rely on the Commandant's implied authority and assume that he need not perform the useless act of applying for something which had already been denied.

[4] We also find no merit in defendant's position that, even if plaintiff actually requested an additional tour of active duty, he does not satisfy the requirements of the statute. Citing cases holding that the denial of conditional requests does not constitute involuntary release as required by the statute, defendant contends that, since plaintiff's request for an additional tour was contingent on his not being accepted for augmentation, the request was 'conditional' and therefore plaintiff cannot be regarded as having been involuntarily released from active duty.

Defendant misconstrues the very authorities on which it relies. The regulation cited by defendant outlining the types of requests which bar a determination of involuntary release if denied includes only conditions

imposed by the serviceman making the request on the additional tour of active duty requested, such as assignment to a particular geographic location or a particular type of duty or being tendered a specific type of contract. *See* Navy Department Comptroller Manual, paragraph 044189-1. Plaintiff's request for an additional tour of active duty imposed no restrictions whatsoever on the additional tour itself. Once his request for augmentation was denied, he was simply volunteering for an additional tour with no conditions attached. Moreover, the Commandant's letter indicates no condition on the extension of active duty as the ground for its denial. Quite properly, neither the regulation nor the other authorities consider this type of alternative request a 'conditional' one.

In light of the above considerations, it is clear that there is no legal basis on which defendant is entitled to summary judgment. Consequently, both its motion to dismiss and its motion for summary judgment will be denied. An appropriate order will enter.

On Motion for Class Designation and Objection to Interrogatory

In a memorandum opinion dated March 20, 1973, we denied the government's motion to dismiss and its motion for summary judgment. A detailed statement of the facts appears in that opinion and need not be repeated here. Briefly, however, plaintiff who had served 4 years, 11 months and 17 days, invoked jurisdiction under the Tucker Act, 28 U.S.C. § 1346, seeking to recover a lump sum readjustment payment from the U. S. Department of the Navy under 10 U.S.C. § 687(a). A motion by the plaintiff to designate this proceedings a class action pursuant to Rule 23, Fed.R.Civ.P., is currently before us, as is an objection by the government to one of the plaintiff's interrogatories. For the reasons hereinafter set forth, the motion for a class designation will be granted and the objection to the interrogatory will be stricken.

CLASS ACTION

[5] The action is brought by plaintiff on his own behalf and on behalf of all persons similarly situated. Plaintiff has proposed that the class be defined as follows:
All persons who were members of the various reserve components of the Armed Forces or members of the Army and Air Force without component who, at any time after September*565 24, 1966 to date, were released from active duty because he or she was not accepted for an extension of active duty for which he or she volunteered after he or she had completed a tour of active duty and who had completed, immediately before his or her release, more than four (4) years and six (6) months of continuous active duty but less than five (5) years as a commissioned officer, warrant officer or enlisted member.

The government raises three basic objections to the maintenance of this suit as a class action. Each will be discussed in turn.

I

Rule 23(b)(3), Fed.R.Civ.P., the subsection pursuant to which plaintiff attempts to bring this class action, requires that questions of law or fact common to the members of the class predominate over any questions affecting only individual members. The government contends that 'while there are certain common questions of law and fact, there are distinct and separate litigable factual issues unique to certain members of the alleged class.'

This may be, but the issue is whether or not the common questions predominate. The government discusses three possible issues which purportedly show that the common questions do not predominate over the individual questions. The first relates to whether the class member volunteered for an extension of active duty or whether he or she only requested an augmentation into the regular branch of the Service. This question is covered in the proposed definition; in order to be a member of the class, an individual must have volunteered for an extension of active duty.

The second purported separate issue is whether the class member made a timely application for an extension of active duty. Here again is simply a question of definition. Only persons who made timely application are members of the class. Procedural regularity will be presumed and, if there is a variation, it can be dealt with any time.

The third purported issue is whether the proposed class member conditioned his request for an extension of active duty. Again, the issue is definitional and only persons making unconditional requests will be members of the class.

None of the so-called separate questions envisioned by the government in any way shown that there is any variation between class members in the application of the common question of law, the

interpretation of the statute, which is the critical issue in these claims. This common and basic question clearly predominates over any individual factual issues. In fact, the only individual issues raised by the government relate solely to eligibility for membership in the class, not to differences between members. *II*

The government next contends that a class action would not be superior to other methods of adjudication. Relying on Professor Moore's four criteria for determining the superiority of a class action, *see* 3B J. Moore, Federal Practice § 23.45, it states that because of the amount of recovery for each class member if the defendant is found liable ($8,000 to $10,000 on the average, the government contends), the interest of the individual class members in controlling their own claims is 'significant.' Illustrative of this, the government contends, is the fact that there are approximately 40 lawsuits now pending across the country seeking the same relief as the instant action.

Counsel for the plaintiff, on the other hand, assert that many of the claims will run in the hundreds, not thousands, of dollars. Moreover, on the government's own showing, the 40 cases represent a minute fraction of the members of the plaintiff class. Unless the government*566 hopes to avoid paying many members who are entitled to the benefits provided by Congress, one class action would appear to be desirable from the point of view of all concerned. If all members of the class were to bring separate suits, the courts would be overwhelmed if the government's estimate of the number of class members is correct.

It is especially difficult to accept this argument when, in the instant action, the essential and critical legal question-namely, the interpretation of the statute-has been resolved in favor of the plaintiff. It would be almost foolish for individual class members to pursue separate actions and thereby relitigate the legal question which they have already won. If class members nevertheless wish to pursue such a course, they may opt out of the class when notice is sent to them.

The government has not contended that the class representative and his attorneys would not fairly represent the class. Indeed, such an allegation would be hard to support given the competence of plaintiff's attorneys. Adequacy of counsel and representation is a most critical factor in deciding whether to declare a class action, and since this point is not in dispute, it would argue in favor of a class designation.

With respect to the 40 lawsuits pending in the other courts, these can be stayed pending the resolution of the class action and thereby conserve judicial and legal resources. Alternatively, all these actions can be consolidated in one action for purposes of discovery pursuant to the rules for multidistrict litigation. However, such a consolidation seems unnecessary since a class ruling would apply to all present litigants unless they opt out. Judge Collinson of the United States District Court in Kansas City, Missouri, has one of these 40 cases pending before him and, so far as we are aware, the only other suit brought as a class action. The government has advised us that none of the other pending suits is a class action. Judge Collinson has informed us that he will stay his action and the motion in that case for a declaration of a class action pending resolution of the instant action which is in a considerably more advanced state of litigation. If necessary, similar arrangements can be made in the other actions.

Finally, the government argues the difficulties which will present themselves in determining and managing the proposed class discourages the declaration of a class action. An affidavit submitted by the Principal Deputy Assistant Secretary of Defense stated that the screening required to determine the makeup of the proposed class would take approximately 14 months to complete and cost approximately $1.5 million. Assuming the correctness of this estimate, it is clear that such a determination will be a significant burden. However, this burden does not support a conclusion that a class action is not the best method for adjudicating the involved claims. It merely means that over a period of time the government has apparently been engaged in a policy designed to avoid granting a very large number of ex-servicemen and women statutory benefits to which three courts have already found they were entitled.[FN1] If the government is ultimately found liable to the class members, there is no way that it can avoid what it contends will be a terribly costly procedure to determine all who are entitled to these benefits.

FN1. O'Meara v. United States, 72 C 2386 (N.D.Ill. Mar. 20, 1973); Cass v. United States, 344 F.Supp. 550 (D.Mont.1972); Schmid v. United States, 436 F.2d 987, 193 Ct.Cl. 780 (1971), cert. denied 404 U.S. 951, 92 S.Ct. 283, 30 L.Ed.2d 268.

Clearly, the class action is the superior method by which to adjudicate all these similar claims. The

government has failed to demonstrate that the class action is not the superior procedural device with which to dispense justice in ***567** this case. Indeed, it has failed to offer any alternative procedure which would be more efficient.

It is obvious that the government's present intention is to litigate each individual case which is filed seeking to obtain a favorable determination and, at the same time, hoping that few of the potential claimants will even file suit. It has refused, and, we are advised, will continue to refuse to accept any decisions favorable to the ex-servicemen claimants until all appeals are exhausted and then only with respect to the particular case. If the government should obtain a favorable decision in a given case, that will not, of course, be binding on the hundreds of thousands, or millions, of other possible claimants. The only way to bring the issue to a definitive conclusion, one way or the other, is by a class action which will bind all concerned. It will also prevent the statute of limitations from running against individual members of the class who, through ignorance of their possible rights, fail to file their own separate suits.

III

[6] The government's last point in opposition to the motion for a class determination is that a class action under Rule 23(b)(3) may not be maintained in a suit where jurisdiction is based on the Tucker Act, 28 U.S.C. § 1346. This argument is based on an interpretation of United States v. Sherwood, 312 U.S. 584, 61 S.Ct. 767, 85 L.Ed. 1058 (1941) that the Tucker Act does not grant jurisdiction over any suit which could not be brought in the Court of Claims. The government argues that a rule 23(b)(3) class action could not be brought in the Court of Claims and that therefore, a Rule 23(b)(3) class action cannot be maintained in the instant case when jurisdiction is based on the Tucker Act.[FN2]

> FN2. It may be noted in passing that one of the decisions which the government has refused to accept and follow was handed down by the Court of Claims. *See* Schmid v. United States, *supra*.

This precise argument was raised in Rothgeb v. Statts, 56 F.R.D. 559 (S.D.Ohio, 1972) where it was rejected in a well reasoned opinion by Judge Weinman. We adopt Judge Weinman's analysis with respect to this point, and reject the government's position that a class action is prohibited in an action brought under 28 U.S.C. § 1346.

Briefly, Judge Weinman held that United States v. Sherwood, *supra*, 'only stands for the proposition that a federal district court in a Tucker Act case may not utilize the Federal Rules of Civil Procedure in a manner which would expand the district court's jurisdiction beyond that possessed by the Court of Claims.' 56 F.R.D. at 563. Since in *Rothgeb*, as in the instant case, no question of expansion of jurisdiction existed, he held that *Sherwood* had no application. In addition, he alternatively demonstrated that the class action device was available in the Court of Claims. See Quinault Allottee Assoc. v. United States, 453 F.2d 1272 (Ct.Cl.1972).

Aside from the legal analysis which disposes of the government's argument, it may also be disposed of as a practical absurdity. Clearly, each claim of each class member may be adjudicated in the Court of Claims. Clearly, each claim of each class member may also be adjudicated in the Federal District courts. To find impermissible obviously more efficient and effective means of adjudicating these claims over which both the Court of Claims and the District Courts clearly have jurisdiction would be unfortunate to say the least.

IV

[7] One legitimate objection to the proposed class definition which has not been raised by the government is that federal district courts do not have Tucker Act jurisdiction over claims against the United States which are greater ***568** than $10,000. See 28 U.S.C. § 1346(a)(2). All claims against the United States which exceed $10,000 must be brought in the Court of Claims. *See* 28 U.S.C. § 1491. Accordingly, the proposed class definition will have to limit the class to those persons who would otherwise qualify as class members and whose projected benefits under 10 U.S.C. § 687(a) would not exceed $10,000.

Counsel for the plaintiffs have informed us that the number of claims which would exceed $10,000 are minimal in an absolute sense and miniscule relative to the number of claims which are under $10,000. He points out that very few higher ranking officers served less than five years. Consequently, little benefit would come from transferring the entire action to the Court of Claims. Those relatively few with claims over $10,000 can bring their actions

individually or pursue an action in the nature of a class action which is current available in the Court of Claims. *See*, Quinault Allottee Assoc. v. United States, *supra*.

OBJECTIONS TO INTERROGATORY

[8] The interrogatory to which the government objects requests 'the name and last known address of every member' of the plaintiff class. In support of the objection, it is alleged that the number of reserve officers separated from the Armed Services during the period covered in the class definition (September 24, 1966 to date) is approximately 311,760, and that the number of enlisted personnel separated during that same period is over one million. The government now alleges that the manual examination of these files to determine the makeup of the proposed class would take approximately eight months and cost approximately one million dollars.[FN3]

FN3. As discussed earlier in this opinion, the government, in its affidavit in opposition to designation as a class action, originally estimated that the required screening would take fourteen months and cost $1.5 million. It is clear from this discrepancy and otherwise understandable that the government estimates are speculative.

The government raised this same burden as an objection to the designation of this suit as a class action. The same analysis which led us to reject these points above is applicable here. Furthermore, if this lawsuit is to proceed as a class action as it has been designated above in this opinion, the determination of the names and addresses of the actual members of the class must be made within a reasonable time so that the notice requirements of Rule 23, Fed.R.Civ.P., can be fulfilled. Consequently, within a short time the government must provide plaintiffs' counsel with the names and addresses of the designated class members, whom it should be kept in mind, are those members of the proposed class who have projected claims under $10,000. However, the purpose of the interrogatory (to identify the class members) may be achieved in some other way. As suggested in open court by counsel for the plaintiff, perhaps a less expensive and time consuming alternative may be found.[FN4] If a less expensive and cumbersome alternative can be found and agreed upon by the parties, the government need not answer the interrogatory. However, the objection to the interrogatory is denied.

FN4. Counsel has suggested, for example, that notice might be sent to each of the former officers and enlisted men separated from service during the period in question with a questionnaire, the information from which would establish the identity of the class members.

CONCLUSION

The government has failed to raise any legitimate objection to the designation of this suit as a class action. It is evident that a class action is the most efficient manner in which to proceed with what could be a staggering number of individual suits. A class action also ***569** would be the most efficient manner for the government to defend against these claims and to resolve, once and for all, the basic question involved in all of them.

The only possible basis for opposing the class designation is the potential size of the class and the mechanical problems involved in identifying and sending notices to the currently largely unwitting class members. This problem is, of course, inherent in any class action involving a large number of class members. It does not follow, however, that a binding adjudication of the rights of a large number of persons is to be denied merely because their numbers will present mechanical problems. Rule 23 was amended to deal with just such situations since the alternatives are either a multitude of individual suits or the forfeiture of their rights by a large number of individuals or both.

An appropriate order will enter striking the government's objection to plaintiff's interrogatory which requests the name and addresses of the proposed class members and declaring this action a class action in accordance with Rule 23, Fed.R.Civ.P., with the class defined to include the following:
Any person who was a member of the various reserve components of the Armed Forces or a member of the Army and Air Force without component who 1) at any time after September 24, 1966 to date, was released from active duty because he or she was not accepted for an extension of active duty for which he or she volunteered after he or she had completed a tour of active duty, 2) who had completed, immediately before his or her release, more than four (4) years and six (6) months of continuous active

duty but less than five (5) years either as a commissioned officer, warrant officer or enlisted member, and 3) whose projected benefits under 10 U.S.C. § 687(a) do not exceed $10,000.

N.D.Ill., 1973
O'Meara v. U. S.
59 F.R.D. 560, 17 Fed.R.Serv.2d 672

END OF DOCUMENT

EXHIBIT 8

H

United States Court of Federal Claims.
Jimmie Ann TAYLOR, Ladell Vasicek, Noma Chriss, Martha Cole, and Sara M. McCarthy, Plaintiffs,
v.
UNITED STATES, Defendant.
No. 97-946 C.

July 30, 1998.

In action by former employees of the Army and Air Force Exchange Service (AAFES) denied separation pay after volunteering for early retirement, allegedly in violation of separation Pay Act, motion was filed for class certification. The Court of Federal Claims, Moody R. Tidwell, III, Senior Judge, held that: (1) there is no basis for stating that class actions are generally disfavored in Court of Federal Claims and should be used only in rare and extraordinary cases; (2) class certification was appropriate; and (3) it was appropriate to utilize an opt-out approach.

Motion allowed.

West Headnotes

[1] Federal Courts 170B 1110

170B Federal Courts
170BXII Claims Court (Formerly Court of Claims)
170BXII(B) Procedure
170Bk1110 k. Parties; Class Actions and New Parties. Most Cited Cases
Unlike class certification under the Federal Rules of Civil Procedure, certification under Rules of Court of Federal Claims is discretionary, granting the court freedom to determine under what circumstances to certify a class and the terms and conditions of the class once it is certified. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.; RCFC, Rule 23, 28 U.S.C.A.

[2] Federal Courts 170B 1110

170B Federal Courts
170BXII Claims Court (Formerly Court of Claims)
170BXII(B) Procedure
170Bk1110 k. Parties; Class Actions and New Parties. Most Cited Cases
There is no basis for stating that class actions are generally disfavored in Court of Federal Claims and should be used only in rare and extraordinary cases. RCFC, Rule 23, 28 U.S.C.A.

[3] Federal Courts 170B 1110

170B Federal Courts
170BXII Claims Court (Formerly Court of Claims)
170BXII(B) Procedure
170Bk1110 k. Parties; Class Actions and New Parties. Most Cited Cases
Court of Federal Claims can certify class to determine whether the government is liable to class members for separation pay under Separation Pay Act and later, if necessary, the court can use a formula to determine damages for individual class members, and if the determination of damages becomes too speculative or encumbered by individual factual issues, the court can decertify the class for the determination of money damages. 5 U.S.C.A. § 5597; RCFC, Rule 23, 28 U.S.C.A.

[4] Federal Courts 170B 1110

170B Federal Courts
170BXII Claims Court (Formerly Court of Claims)
170BXII(B) Procedure
170Bk1110 k. Parties; Class Actions and New Parties. Most Cited Cases
Certification of a class action was the most fair and efficient way to resolve the dispute concerning entitlement of certain former employees of the Army and Air Force Exchange Service (AAFES) to separation pay under the Separation Pay Act; test case approach would introduce a greater risk of duplicative litigation. RCFC, Rule 23, 28 U.S.C.A.

[5] Federal Courts 170B 1110

170B Federal Courts
170BXII Claims Court (Formerly Court of Claims)
170BXII(B) Procedure
170Bk1110 k. Parties; Class Actions and New Parties. Most Cited Cases
Criteria for certifying class in Court of Federal Claims, which are not exclusive but are persuasive

and helpful, are: (1) members must constitute a large but manageable class; (2) there is a question of law common to the whole class; (3) a common legal issue overrides separate factual issues affecting individual members; (4) claims of the party plaintiffs are typical of claims of the class; (5) the Government must have acted on grounds generally applicable to the whole class; (6) the claims of many claimants must be so small that it is doubtful they would be otherwise pursued; (7) the party plaintiffs must adequately and fairly protect the interests of the class without conflicts of interest; and (8) court should consider whether certification of the class action would serve the interests of justice. 28 U.S.C.A. § 1295; RCFC, Rule 23, 28 U.S.C.A.

[6] Federal Courts 170B 1110

170B Federal Courts
170BXII Claims Court (Formerly Court of Claims)
170BXII(B) Procedure
170Bk1110 k. Parties; Class Actions and New Parties. Most Cited Cases
Proposed class of at least 213 persons, consisting of certain employees of the Army and Air Force Exchange Service (AAFES), was a sufficiently large but manageable group for certification of class in Court of Federal Claims; through limited discovery of AAFES records, plaintiffs could readily identify and notify the potential class members, and although the potential members were spread throughout the world, they were linked through the Army and Air Force, and as a result, should not be difficult to reach. RCFC, Rule 23, 28 U.S.C.A.

[7] Federal Courts 170B 1110

170B Federal Courts
170BXII Claims Court (Formerly Court of Claims)
170BXII(B) Procedure
170Bk1110 k. Parties; Class Actions and New Parties. Most Cited Cases
In determining whether a class is manageable, Court of Federal Claims considers whether the members of the class are readily identifiable, easily reachable, and whether there are factual distinctions that would interfere with resolution of the issues and thus undermine the manageability of the class. RCFC, Rule 23, 28 U.S.C.A.

[8] Federal Courts 170B 1110

170B Federal Courts
170BXII Claims Court (Formerly Court of Claims)
170BXII(B) Procedure
170Bk1110 k. Parties; Class Actions and New Parties. Most Cited Cases
For purposes of certification of class in Court of Federal Claims, class consisting of certain employees of the Army and Air Force Exchange Service (AAFES) denied separation pay after volunteering for early retirement, allegedly in violation of Separation Pay Act, presented a common question of law. 5 U.S.C.A. § 5597; RCFC, Rule 23, 28 U.S.C.A.

[9] Federal Courts 170B 1110

170B Federal Courts
170BXII Claims Court (Formerly Court of Claims)
170BXII(B) Procedure
170Bk1110 k. Parties; Class Actions and New Parties. Most Cited Cases
Where damages are the sole issue requiring a special determination, class certification should not be ruled out. RCFC, Rule 23, 28 U.S.C.A.

[10] Federal Courts 170B 1110

170B Federal Courts
170BXII Claims Court (Formerly Court of Claims)
170BXII(B) Procedure
170Bk1110 k. Parties; Class Actions and New Parties. Most Cited Cases
Factors relevant to class action criterion of whether common legal question overrides separate factual issues are whether there are numerous factual issues that would require individual determination, whether there would be a delay of prompt resolution of the case because of these separate factual issues, and whether there is difficulty identifying the members of the class. RCFC, Rule 23, 28 U.S.C.A.

[11] Federal Courts 170B 1110

170B Federal Courts
170BXII Claims Court (Formerly Court of Claims)
170BXII(B) Procedure
170Bk1110 k. Parties; Class Actions and New Parties. Most Cited Cases
For purposes of certification in Court of Federal Claims of class consisting of certain employees of the

Army and Air Force Exchange Service (AAFES) denied separation pay after volunteering for early retirement, allegedly in violation of Separation Pay Act, common legal question overrode separate factual issues; many of the factual differences related to whether a claimant is properly a member of the class, and court was free to decertify the class if predominance of common legal issue changed because of differences between mobile and non-mobile employees, or at damages phase. RCFC, Rule 23, 28 U.S.C.A.

[12] Federal Courts 170B 1110

170B Federal Courts
170BXII Claims Court (Formerly Court of Claims)
170BXII(B) Procedure
170Bk1110 k. Parties; Class Actions and New Parties. Most Cited Cases
For purposes of certification in Court of Federal Claims of class consisting of certain employees of the Army and Air Force Exchange Service (AAFES) denied separation pay after volunteering for early retirement, allegedly in violation of Separation Pay Act, claims of named plaintiffs were typical of the class; claimants were similarly situated, they asserted jurisdiction under the same statute, and they alleged the same statutory violation. 5 U.S.C.A. § 5597; RCFC, Rule 23, 28 U.S.C.A.

[13] Federal Courts 170B 1110

170B Federal Courts
170BXII Claims Court (Formerly Court of Claims)
170BXII(B) Procedure
170Bk1110 k. Parties; Class Actions and New Parties. Most Cited Cases
For purposes of certification in Court of Federal Claims of class consisting of certain employees of the Army and Air Force Exchange Service (AAFES) denied separation pay after volunteering for early retirement, allegedly in violation of Separation Pay Act, government acted on grounds applicable to the entire class; government's denial of separation pay affected all similarly situated plaintiffs in the same manner, and the case did not implicate matters unique to a given job or employee. 5 U.S.C.A. § 5597; RCFC, Rule 23, 28 U.S.C.A.

[14] Federal Courts 170B 1110

170B Federal Courts
170BXII Claims Court (Formerly Court of Claims)
170BXII(B) Procedure
170Bk1110 k. Parties; Class Actions and New Parties. Most Cited Cases
For purposes of certification in Court of Federal Claims of class consisting of certain employees of the Army and Air Force Exchange Service (AAFES) denied separation pay after volunteering for early retirement, allegedly in violation of Separation Pay Act, damages allegedly suffered by many individual class members were so small that it was doubtful that they would otherwise be pursued; damages could range from $0 to $25,000, and many members of the proposed class were retired or near retirement, and under the circumstances, probably would not risk the cost of litigation, and alternative methods of test cases, consolidation of cases, and permissive joinder could not efficiently adjudicate plaintiffs' claims. 5 U.S.C.A. § 5597; RCFC, Rule 23, 28 U.S.C.A.

[15] Federal Courts 170B 1110

170B Federal Courts
170BXII Claims Court (Formerly Court of Claims)
170BXII(B) Procedure
170Bk1110 k. Parties; Class Actions and New Parties. Most Cited Cases
Relevant inquiry under criterion for certification of class in Court of Federal Claims, as to whether damages allegedly suffered by many individual class members are so small that it is doubtful that they would otherwise be pursued, is whether the class members would pursue the claim if the class was not certified, and another consideration under this criterion is whether there is a better alternative to resolve this dispute. RCFC, Rule 23, 28 U.S.C.A.

[16] Federal Courts 170B 1110

170B Federal Courts
170BXII Claims Court (Formerly Court of Claims)
170BXII(B) Procedure
170Bk1110 k. Parties; Class Actions and New Parties. Most Cited Cases
For purposes of certification in Court of Federal Claims of class consisting of certain employees of the Army and Air Force Exchange Service (AAFES) denied separation pay after volunteering for early retirement, allegedly in violation of Separation Pay Act, there was adequate and fair representation for the class; plaintiffs' attorneys were neither members

of the class nor related to members of the class, and they did not have an economic stake in a positive outcome of the suit beyond the potential recovery of attorney fees, and there was no evidence that counsel was incapable or lacked sufficient resources for the completion of the litigation. 5 U.S.C.A. § 5597; RCFC, Rule 23, 28 U.S.C.A.

[17] Federal Courts 170B 1110

170B Federal Courts
170BXII Claims Court (Formerly Court of Claims)
170BXII(B) Procedure
170Bk1110 k. Parties; Class Actions and New Parties. Most Cited Cases
For purposes of certification of class in Court of Federal Claims, there is fair and adequate representation when the class representative is precluded from raising individual arguments and similarly situated persons are suing under the same statute. RCFC, Rule 23, 28 U.S.C.A.

[18] Federal Courts 170B 1110

170B Federal Courts
170BXII Claims Court (Formerly Court of Claims)
170BXII(B) Procedure
170Bk1110 k. Parties; Class Actions and New Parties. Most Cited Cases
For purposes of certification in Court of Federal Claims of class consisting of certain employees of the Army and Air Force Exchange Service (AAFES) denied separation pay after volunteering for early retirement, allegedly in violation of Separation Pay Act, certifying the class would serve the interests of justice; class action was the most efficient method of resolving this case, and plaintiffs were similarly situated with relatively few factual distinctions among their claims. 5 U.S.C.A. § 5597; RCFC, Rule 23, 28 U.S.C.A.

[19] Federal Courts 170B 1110

170B Federal Courts
170BXII Claims Court (Formerly Court of Claims)
170BXII(B) Procedure
170Bk1110 k. Parties; Class Actions and New Parties. Most Cited Cases
Though Court of Federal Claims has traditionally applied an opt-in approach to class actions, this is not the absolute rule for class actions in the Court of Federal Claims. RCFC, Rule 23, 28 U.S.C.A.

[20] Federal Courts 170B 1110

170B Federal Courts
170BXII Claims Court (Formerly Court of Claims)
170BXII(B) Procedure
170Bk1110 k. Parties; Class Actions and New Parties. Most Cited Cases
It was appropriate to utilize an opt-out approach in class action by former, present and future employees of the Army and Air Force Exchange Service (AAFES) denied separation pay after volunteering for early retirement, allegedly in violation of Separation Pay Act; opt-in approach would place the court in the uncomfortable position of inviting persons to join litigation, and would amount to little more than a permissive joinder rule, with the opt-in method, the defendant loses the benefit of binding unidentified parties, and opt-out class would maximize the claims handled in one suit, and thus provide a just and efficient method to resolve the litigation. 5 U.S.C.A. § 5597; RCFC, Rule 23, 28 U.S.C.A.

*442 Genice A.G. Rabe and Gail M. Dickenson, Dallas, Texas, for plaintiffs.
Patricia M. McCarthy, United States Department of Justice, Washington, D.C., with whom were Assistant Attorney General Frank W. Hunger, Director David M. Cohen, and Assistant Director James W. Kinsella, for defendant.

***443 ORDER**

MOODY R. TIDWELL, III, Senior Judge.
This action is brought by former employees of the Army and Air Force Exchange Service (AAFES) under the Separation Pay Act, 5 U.S.C. § 5597 (1994). Plaintiffs assert that defendant promised separation pay incentives to AAFES employees who applied for involuntary early retirement and retired after the Department of Defense authorized separation pay incentives for AAFES employees. Plaintiffs additionally assert that defendant failed to make separation payments to non-mobile persons and mobile persons who had not made a Permanent Change of Station (PCS) move under their current obligation of mobility. Plaintiffs' current motion, which defendant opposes, is to certify a class of all similarly situated persons pursuant to Rule 23 of the United States Court of Federal Claims (RCFC 23). As discussed below, the court finds that plaintiffs satisfy the criteria for class certification, and

therefore plaintiffs' motion to certify a class action is allowed.[FN1]

FN1. In making this determination, the court does not resolve any substantive legal issues or make any factual findings.

BACKGROUND

In October, 1992, Congress enacted the Separation Pay Act "to avoid or minimize the need for involuntary separation due to a reduction in force, base closure, reorganization, transfer of function, or other similar action affecting [one] or more defense agencies...." 5 U.S.C. § 5597(b). The Act authorized the Secretary of Defense to "establish a program under which separation pay may be offered to encourage eligible employees to separate from service voluntarily (whether by retirement or resignation)." *Id.*

On January 13, 1993, the Secretary of Defense approved separation pay incentives for AAFES employees. These pay incentives were extended on October 12, 1994. The incentives provided for separation pay to be paid in a lump sum equal to the lesser of either (a) the amount the employee would be entitled to receive under 5 U.S.C. § 5595(c) (1994), if the employee were entitled to pay under this section; [FN2] or (b) $25,000. *See* 5 U.S.C. § 5597(d)(2).

FN2. 5 U.S.C. § 5595 governs the determination of severance pay. The pay amount is a formulaic calculation based on years of service and age of the employee.

All five named plaintiffs were hired by the AAFES between 1966 and 1968 and remained continually employed until their retirement between January, 1993 and March, 1996. Each volunteered for separation after AAFES's request for volunteers under the Separation Pay Act. Plaintiffs allege that defendant's failure to award them separation pay violates the Act. Plaintiffs also allege that defendant failed to make these payments because plaintiffs were either non-mobile or mobile, but had not made a PCS move. Plaintiffs Taylor, Cole, and McCarthy also filed discrimination charges against the AAFES.

On January 27, 1998, plaintiffs moved to certify a class consisting of:
all future, present, and former Army and Air Force Exchange Service (AAFES) non-mobile employees and all future, present, and former AAFES mobile employees who did not make a Permanent Change of Station (PCS) move under their last obligation of mobility and who may seek or have sought voluntary separation by resignation or retirement in order to avoid or minimize the need for involuntary separation due to reduction in force, base closure, reorganization, transfer of function or other similar action since January 13, 1993, who have not received separation pay and who are, were, or will be employees as defined by 5 U.S.C. § 5597(a)(3).

Pls.' Br. in Supp. of their Mot. for Class Certification at 7-8. For the reasons discussed below, the court grants plaintiffs' motion for class certification.

DISCUSSION

I. Certification of a Class Action

[1] Federal district courts and the Court of Federal Claims utilize different rules when considering whether to certify class actions. This court's rules provide:
***444** A motion to certify a class action shall be filed with the complaint and comply with Rule 3(c), with service to be made as provided in Rule 4. The court shall determine in each case whether a class action may be maintained and under what terms and conditions.

RCFC 23. Unlike Rule 23 of the Federal Rules of Civil Procedure, RCFC 23 is discretionary, granting the court freedom to determine under what circumstances to certify a class and the terms and conditions of the class once it is certified.

[2] Despite this broad grant of discretion, prior cases in this court have repeatedly observed that class actions are "reserved for extraordinary cases and [are] generally disfavored." *O'Hanlon v. United States,* 7 Cl.Ct. 204, 206 (1985); *see Buchan v. United States,* 27 Fed.Cl. 222, 223 (1992); *Black v. United States,* 24 Cl.Ct. 471, 477 (1991); *Armitage v. United States,* 18 Cl.Ct. 310, 312 (1989), *aff'd,* 991 F.2d 746 (Fed.Cir.1993); *Cutright v. United States,* 15 Cl.Ct. 576, 578 (1988); *Busby School of the Northern Cheyenne Tribe v. United States,* 8 Cl.Ct. 596, 602 (1985); *Saunooke v. United States,* 8 Cl.Ct. 327, 329 (1985). The language disfavoring class actions originated in *O'Hanlon,* and appears to have been premised merely on the fact that class actions

were not frequently certified in this court. *See* O'Hanlon, 7 Cl.Ct. at 206. The lack of class actions prior to *O'Hanlon* may be attributed more to the fact that previous cases were not suited for class action resolution than to a generalized belief that they should not be certified in this court. After *O'Hanlon,* however, courts appeared to treat the disfavored status language as a general rule, rather than making an individual determination regarding the propriety of each class action. Considering the discretionary nature of RCFC 23 and the fact that it calls for a case-by-case determination, there appears to be no basis for stating that class actions are "generally disfavored" and should be used only in "rare and extraordinary cases."

[3] A frequently cited rationale for the disfavored status of class actions is related to the unique jurisdiction of this court. In cases where a money judgement is sought against the United States, the court requires individual proof of the amount of money damages. *See* Buchan, 27 Fed.Cl. at 225. This requirement is based on the belief that only individual plaintiffs can meet the burden of proof for damages when there is a waiver of sovereign immunity, which is always present in this court. *See* Abel v. United States, 18 Cl.Ct. 477, 478 n. 1 (1989); Saunooke, 8 Cl.Ct. at 329. While a valid concern, this rationale principally implicates the determination of money damages. In this case, the court can certify the class to determine whether the government is liable to class members for separation pay. Later, if necessary, the court can use a formula to determine damages for individual class members. If the determination of damages becomes too speculative or encumbered by individual factual issues, the court can decertify the class for the determination of money damages.

[4] Prior cases have also expressed concern with class action procedures. In *Buchan,* the court argued that inherent difficulties existing with both opt-in and opt-out classes preclude their use in all but rare circumstances. *See* Buchan, 27 Fed.Cl. at 223-24; Abel, 18 Cl.Ct. at 478 n. 1. Procedural difficulties include legally binding parties who have not affirmatively joined the litigation through an opt-out class, or placing the court in the uncomfortable position of inviting parties to join the litigation through an opt-in class. The *Buchan* court concluded that, in light of these difficulties, the court can apply alternative methods, such as consolidating the cases or using a test case method. *See* Buchan, 27 Fed.Cl. at 226. Although the court recognizes that there are other viable methods, the court believes that in this case, certification of a class action is the most fair and efficient way to resolve the dispute.

The test case approach introduces a greater risk of duplicative litigation. *See* Lumco Indus., Inc. v. Jeld-Wen, Inc., 171 F.R.D. 168, 175 (E.D.Pa.1997). Moreover, it is possible that several similarly situated persons would not be notified of the litigation, or through misunderstanding, fail to intervene. *See* 7B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, ***445**Federal Practice & Procedure § 1781, at 23 n. 32 (2d ed.1986). As a result, plaintiffs, defendant, and this court would be inconvenienced. For plaintiffs, there would be an increased chance of inconsistent adjudications; for defendant, there would be a chance of repetitious litigation, whether or not the United States won the test case; and for the court, there would be a backlog of factually similar cases. In contrast, a class action would efficiently resolve the issues while protecting the interests of both parties.

Despite this court's historical reluctance to certify class actions, the principal case interpreting RCFC 23, Quinault Allottee Association v. United States, 197 Ct.Cl. 134, 453 F.2d 1272 (1972), acknowledged the ability of plaintiffs to join together in a class, recognized the historical acceptance of class actions, and ultimately certified plaintiffs' class. *See id.,* 453 F.2d at 1275, 1277. Notably in *Quinault,* the court refused to adopt a general rule for the certification of class actions or the procedures for a class action once certified. *See id.* at 1275. Instead, the court advocated a case-by-case approach with the potential of developing a general rule in the future. *See id.* at 1276. A general rule has yet to materialize and therefore, the court is free to apply its discretion when deciding when and how to certify a class.

[5] Although the federal district courts and the Federal Court of Claims apply different rules when certifying a class, the *Quinault* criteria are influenced by the Federal Rules of Civil Procedure. The now familiar *Quinault* criteria are:
(1) members must constitute a large but manageable class; (2) there is a question of law common to the whole class; (3) a common legal issue overrides separate factual issues affecting individual members; (4) claims of the party plaintiffs are typical of claims of the class; (5) the Government must have acted on grounds generally applicable to the whole class; (6) the claims of many claimants must be so small that it is doubtful they would be otherwise pursued; (7) the party plaintiffs must adequately and fairly protect the interests of the class without conflicts of interest; and

(8) the prosecution of individual lawsuits must create a risk of inconsistent or varying adjudications.

Buchan, 27 Fed.Cl. at 224; *See Quinault*, 453 F.2d at 1276. In addition to the *Quinault* criteria, the court considers whether certification of the class action would serve the interests of justice. *See Moore v. United States*, 41 Fed.Cl. 394, 397 (Fed.Cl.1998); *Kominers v. United States*, 3 Cl.Ct. 684, 686 (1983). While the *Quinault* criteria are not exclusively applied, they are persuasive and helpful when determining whether to certify a class.

II. Application of the Quinault Criteria

1. Is the class large but manageable?

[6] The court finds plaintiffs' proposed class of at least 213 persons a sufficiently large but manageable group. Cases applying the numerosity requirement vary widely. *Compare Abel*, 18 Cl.Ct. at 478-79 (numerosity requirement not satisfied by class of over 1200 plaintiffs), *with Hannon v. United States*, 31 Fed.Cl. 98, 103 (1994) (numerosity requirement satisfied by class of 340 plaintiffs). The court is given the discretion to determine on a case-by-case basis whether a proposed class is sufficiently large, and in this case the court believes that the numerosity requirement is satisfied.

[7] In determining whether a class is manageable, the court considers whether the members of the class are readily identifiable, easily reachable, and whether there are factual distinctions that would interfere with resolution of the issues and thus undermine the manageability of the class. *See Moore*, 41 Fed.Cl. at 397; *Hannon*, 31 Fed.Cl. at 103; *Armitage*, 18 Cl.Ct. at 313-14. Through limited discovery of AAFES records, plaintiffs can readily identify and notify the potential class members. Although the potential members are spread throughout the world, they are linked through the Army and Air Force, and as a result, should not be difficult to reach. Finally, there appears to be little factual variance among the claims. Plaintiffs' proposed class is manageable.

*446 *2. Is there a question of law common to the whole class?*

[8][9] In this case, the potential class members present a common question of law. This criterion is satisfied when there is one core legal question that is likely to have one common defense. *See Moore*, 41 Fed.Cl. at 397-398. Claimants are all former, present, or future non-mobile or mobile (without a PCS move) employees of the AAFES. They were all offered the separation pay option by the authority of the Secretary of Defense, and they all volunteered for early retirement within the same time period. Finally, they were all denied separation pay, allegedly in violation of the Act. As a result, the common question of law is "whether [d]efendants have violated the Separation Act ... by failure to pay separation pay to [p]laintiffs and class members." Pls.' Reply to Def.'s Resp. to Pls.' Mot. for Class Certification at 12. While there are limited factual differences among the plaintiffs concerning damages, where damages are the sole issue requiring a special determination, class certification should not be ruled out. *See Hannon*, 31 Fed.Cl. at 103. In this case, the core legal question, whether defendant violated the Act, is shared by the entire class. Factual differences involved in the damages determination are separate from the common question of law.

3. Does the common legal question override separate factual issues?

[10][11] Factors relevant to this criterion are whether there are numerous factual issues that would require individual determination, whether there would be a delay of prompt resolution of the case because of these separate factual issues, and whether there is difficulty identifying the members of the class. *See Black*, 24 Cl.Ct. at 477-78; *Armitage*, 18 Cl.Ct. at 313-14. In this case, there are separate factual issues, such as the length of employment for each claimant, the date retirement was requested by each employee, and the amount of severance pay received by each employee. These minor factual differences do not predominate over the legal question such that certification of the class action is inappropriate. Many of the factual differences are related to whether a claimant is properly a member of the class and will not adversely affect determination of the common legal question. While there is a possibility that factual differences between mobile and non-mobile employees may ultimately override the common legal questions, the court retains the right to decertify the class and certify two classes or proceed with each case individually. A final consideration is the factual differences involved in determining damages. If a damages phase is necessary, the court may devise a formula to apply to each claimant or decertify the class if the damages assessments become too cumbersome or speculative. Presently, the common

legal question predominates separate factual inquiries, and if this were to change, the court is free to decertify the class.

4. Are the claims of the named plaintiffs typical of the class?

[12] The fourth *Quinault* factor is met in this case because the claims of the five plaintiffs are typical of the claims of the class. Each claimant was a non-mobile or mobile (without a PCS move) employee, held a position in the same division for roughly the same amount of time, voluntarily retired after being offered the separation pay incentive, and was denied separation pay under 5 U.S.C. § 5597. The claimants are similarly situated, they assert jurisdiction under the same statute, and they allege the same statutory violation. *See Moore,* 41 Fed.Cl. at 399-400. Therefore, the typicality requirement has been met.

5. Has the government acted on grounds applicable to the whole class?

[13] This criterion has been met for essentially the same reasons as the typicality requirement. The government acted in the same manner towards all similarly situated plaintiffs. *See Hannon,* 31 Fed.Cl. at 103; *Buchan,* 27 Fed Cl. at 225; *Moore,* 41 Fed.Cl. at 399-400. In addition, the government's denial of separation pay affected all similarly situated plaintiffs in the same manner. *See id.* Finally, the case does not *447 implicate matters unique to a given job or employee. *See Armitage,* 18 Cl.Ct. at 312.

6. Were the damages allegedly suffered by the individual class members so small that it is doubtful they would be otherwise pursued?

[14][15] The relevant inquiry under this criterion is whether the class members would pursue the claim if the class was not certified. *See Hannon,* 31 Fed.Cl. at 103-04. Plaintiffs allege that if the Separation Pay Act had been applied in an appropriate manner, each claimant should receive damages ranging from more than $0 to $25,000. Although a $25,000 claim is larger than that is typically involved in class actions, it is unlikely that each plaintiff would bring an individual claim. By definition, many members of the proposed class are retired or near retirement, and under the circumstances, probably would not risk the cost of litigation to receive pay under the Separation Pay Act. Many of the plaintiffs already received some severance pay when they volunteered for retirement. Their claims will necessarily fall below $25,000.

Another consideration under this criterion is whether there is a better alternative to resolve this dispute. As mentioned previously, the court favors the efficiency inherent in a class action approach. The alternative methods, test cases, consolidation of cases, and permissive joinder, cannot efficiently adjudicate plaintiffs' claims in this case. Under the circumstances, the damages to individual class members are too slight to warrant individual litigation.

7. Will the named plaintiffs adequately and fairly protect the interests of the class?

[16][17] There is no evidence that plaintiffs' attorneys are unable to adequately represent the interests of the class. Plaintiffs' attorneys are neither members of the class nor related to members of the class, and they do not have an economic stake in a positive outcome of the suit beyond the potential recovery of attorney fees. *See Kominers,* 3 Cl.Ct. at 686 (interests of the class were not adequately represented when representative of the class would unfairly profit from a ruling for plaintiffs); *Armitage,* 18 Cl.Ct. at 312. There is no evidence that counsel is incapable or lacks sufficient resources for the completion of the litigation. *See Black,* 24 Cl.Ct. at 478. Finally, there is fair and adequate representation when the representative is precluded from raising individual arguments and similarly situated persons are suing under the same statute. *See Moore,* 41 Fed.Cl. at 399-400; *Hannon,* 31 Fed.Cl. at 104. Considering the capabilities and resources of plaintiffs' attorneys and the discussion under the second, third, and fourth criteria, the court finds that there is adequate and fair representation for the class.

8. Is there a risk of inconsistent adjudications if individual actions are separately maintained?

In *Moore,* the court concluded that the eighth *Quinault* criterion is no longer applicable because the Federal Circuit hears all appeals from the district courts and this court in cases involving requests for money damages from the government. *See Moore,* 41 Fed.Cl. at 399-400 (citing 28 U.S.C. § 1295 (1994)). The court agrees with the *Moore* court that

this criterion is no longer relevant.

Equitable Test: Does certifying this case as a class action serve the interests of justice?

[18] Under the circumstances of this case, certifying the class serves the interests of justice. The court believes that a class action is the most efficient method of resolving this case. Plaintiffs are similarly situated with relatively few factual distinctions among their claims. The use of a class action will be more efficient for both plaintiffs, defendant, and this court. As discussed previously, a class action will decrease the chances of duplicative litigation and inconsistent rulings. A class action will also be more cost effective for all parties involved. Finally, as demonstrated in the previous discussion, it is appropriate to use a class action approach because the case satisfies the *Quinault* criteria. Therefore, considering efficiency, costs of litigation, and the *Quinault* ***448** factors, it is in the interest of justice for the court to certify this class.

III. Certification of an Opt-out Class

[19][20] While the district courts regularly certify class actions on an opt-out basis, the Court of Federal Claims has traditionally applied an opt-in approach to class actions. In this case, the court believes that it is appropriate to utilize an opt-out approach. In the Court of Federal Claims, the preference for the opt-in approach originated with *Quinault.* The *Quinault* court expressed a general concern about binding absent class members with a traditional opt-out approach. *See Quinault,* 453 F.2d at 1275-76. Ultimately, however, the court certified the class under the opt-in approach because members of the class were not "widely scattered." *Id.* at 1276. The *Quinault* court recognized that all potential members of the class lived on the same reservation and knew of the litigation. *See id.* Thus under the facts of *Quinault,* it was more efficient to utilize an opt-in approach since there was no risk of potential members missing the opportunity to join the class because most claimants had knowledge or would likely gain knowledge of the suit due to their close physical proximity. In contrast, the potential class members in this suit are scattered throughout the world, and there is a greater likelihood that the members would not know of the litigation or realize the need to take affirmative steps to opt-in, and as a result, would be excluded from the litigation. In *Quinault,* the court's utilization of opt-in was based on the facts of *Quinault* and is not the absolute rule for class actions in the Court of Federal Claims.

Past courts have argued against the use of an opt-out approach. The principal argument they rely upon is that it is improper to bind parties who fail to exclude themselves. *See e.g. Saunooke,* 8 Cl.Ct. at 329-30. This concern, though valid, is relatively minor when balanced against the problems associated with an opt-in approach. First, an opt-in approach places the court in the uncomfortable position of inviting persons to join litigation. *See Buchan,* 27 Fed.Cl. at 223-24; *Cooke v. United States,* 1 Cl.Ct. 695, 698 (1983). Second, the opt-in procedure amounts to little more that a permissive joinder rule. It is therefore of limited use in informing potential class members of the suit and the claimants' right to join the suit. *See id.* at 697 n. 3. Third, with the opt-in method, the defendant loses the benefit of binding unidentified parties, which can lead to repetitive litigation and a risk of inconsistent verdicts. *See id.* Finally, and most importantly, considering the facts of this case and the characteristics of this class, an opt-out class will maximize the claims handled in one suit, and thus provide a just and efficient method to resolve the litigation.

RCFC 23 is discretionary, giving the court power to determine whether to certify and in what manner to certify a class action. Nothing prevents the court from using a method that it deems to be more efficient and appropriate for the case. Therefore, in the interest of efficiency and justice, the court finds that an opt-out class shall be applied in this case.

CONCLUSION

Plaintiffs' motion to certify this action as a class action on an opt-out basis is allowed. The preliminary definition of the class shall be:

1. All future, present, and former AAFES non-mobile employees, and all future, present, and former AAFES mobile employees who did not make a PCS move under their last obligation of mobility;
2. Who may seek or have sought voluntary separation by resignation or retirement under the Separation Pay Act in order to avoid or minimize the need for involuntary separation due to reduction in force, base closure, reorganization, transfer of function or other similar action within the authorized time period; and
3. Who have not received separation pay; and
4. Who were or are employees as defined by 5 U.S.C. § 5597(c).

Counsel for plaintiffs and defendant shall generate a final definition of the class and a preliminary list of potential members of the ***449** class. Also, the parties shall determine the best method to notify members of the class and determine the substance of the notification, including information regarding class members' options. Plaintiffs and defendant shall attempt to come to an agreement regarding definition and notification of the class, and submit a joint proposal to the court by August 31, 1998 for approval before actual notice is sent to the members. If no agreement is reached, the parties shall each make a limited filing of their notification plan by September 15, 1998.

In light of this order, plaintiffs' motion for oral argument filed May 15, 1998 is denied. In addition, the stay ordered on March 10, 1998 is lifted, and therefore, Plaintiffs' Motion for Reconsideration of Defendant's Request for Stay filed March 23, 1998 is moot.

IT IS SO ORDERED.

Fed.Cl.,1998.
Taylor v. U.S.
41 Fed.Cl. 440

END OF DOCUMENT

EXHIBIT 9

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SUPERIOR COURT OF CALIFORNIA

COUNTY OF ORANGE

JAVIER OLGUIN and other members of the general public similarly situated,

Plaintiffs,

vs.

FED EX GROUND PACKAGE SYSTEM, and Does 1 through 50, inclusive,

Defendants.

_____/

Case No. OCSC 02CC00200

CLASS ACTION

Assigned for all purposes to the Honorable Stephen J. Sundvold

SUPPLEMENTAL DECLARATION OF ANNABEL DIZON

I, **ANNABEL DIZON,** declare as follows:

1. I am an individual residing in Vallejo, California. I have personal knowledge of the matters set forth herein, and would and could testify thereto if called as a witness.

2. In connection with this case, I had my deposition taken by Fed Ex's attorneys regarding the declaration I provided for this case. I was asked about taking "breaks" to use the restroom or to get a drink of water; however, I was never asked about the length of these so called "breaks." During the times, I went to the bathroom or had a drink of water it was never more than a few minutes at best. At no point was I ever gone for more than 5 minutes. If I got a drink of water, I would be away from the conveyor belt for no more than 2 minutes. When I stepped away to use the restroom Zee, our supervisor at the time, would say "hey what are you doing?" I would rush to the bathroom and return within 2-3 minutes. If we asked to step away for a minute to get a drink of water or use the restroom, Donald another supervisor I worked under would always say "not right now." It seemed that there was never a good time to step away.

3. If the belt broke down, or truck were being moved or were late, we were not given 10-minute breaks either. I would be moved to another area to work or we would wait for the problem to be resolved. Fixing a broken down belt or the process of moving an empty truck out and a full truck into the area for unloading took less than 10 minutes.

4. As stated before, we did not start getting 10 minutes breaks until Fed Ex started turning off the conveyor belt in August 2004 and explained to us that we were not to perform any work during the 10 minute period that the conveyor belt was purposely shut down by FedEx for a break.

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct and that if called as a witness, I could competently testify to the same.

Executed this 14 day of August, 2006, at Vallejo, California.

ANNABEL DIZON

EXHIBIT 10

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SUPERIOR COURT OF CALIFORNIA

COUNTY OF ORANGE

JAVIER OLGUIN and other members of the general public similarly situated,

Plaintiffs,

vs.

FED EX GROUND PACKAGE SYSTEM, and Does 1 through 50, inclusive,

Defendants.

_____/

Case No. OCSC 02CC00200

CLASS ACTION

Assigned for all purposes to the Honorable Stephen J. Sundvold

SUPPLEMENTAL DECLARATION OF JUSTIN WALKER

I, **JUSTIN WALKER,** declare as follows:

1. I am an individual residing in Hillsboro, Oregon. I have personal knowledge of the matters set forth herein, and would and could testify thereto if called as a witness.

2. I was employed by the defendant as a Package Handler from September 2001 to February 2002.

3. At my deposition I was asked about taking "breaks" to use the restroom and/or get a drink of water; however, I was never asked about the length of time I was away on these so called "breaks." Using the restroom or getting water was very difficult. Boxes were coming down the line and if stopped the boxes would pile up. When I stepped away to get a drink of water or to use the restroom John, my supervisor at the time would say "hey where are you going, hurry up and come back." The restroom was so close to the line that I was never gone more than 2 minutes. Neither using the restroom nor getting a drink of water during the shift occurred very often.

4. In the situations where a truck was being moved, a truck might be late and/or the conveyor belt broke down, the time spent waiting for the problem to be resolved was not a break of ten minutes in length. We were required to stay in the area and often we would be sent to help out in another area with another line or truck until the matter was resolved. Fixing a broken down belt or the process of moving an empty truck out and a full truck into the area for unloading took less than 10 minutes.

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct and that if called as a witness, I could competently testify to the same.

Executed this 8th day of August, 2006, at Hillsboro, Oregon.

JUSTIN WALKER

EXHIBIT 11

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SUPERIOR COURT OF CALIFORNIA

COUNTY OF ORANGE

JAVIER OLGUIN and other members of the general public similarly situated, Plaintiffs, vs. FED EX GROUND PACKAGE SYSTEM, and Does 1 through 50, inclusive, Defendants.	Case No. OCSC 02CC00200 CLASS ACTION *Assigned for all purposes to the Honorable Stephen J. Sundvold* **SUPPLEMENTAL DECLARATION OF LANCE OPPENHEIMER**

I, LANCE OPPENHEIMER, declare as follows:

1. I am an individual residing in Bakersfield, California. I have personal knowledge of the matters set forth herein, and would and could testify thereto if called as a witness.

2. I was employed by the defendant at its Bakersfield Terminal in Bakersfield, California from mid 1998 until November 2002. For approximately the first 2 years with the

company I held the position of Package Handler. For the remainder of my employment I worked as a driver.

3. During my depositions I was asked about taking "breaks" to use the restroom and/or get a drink of water; however, I was never asked about the length of these so called "breaks." During the times, I went to the bathroom or had a drink of water during my shift it was never more than a few minutes at best. It was never close to a ten-minute period. Water breaks were hard to get because the belts were always running and if you stopped to get a drink then it messed up the entire process. The General Manager at the time, Dan told us that we could not get off the belt because 'stuff needed to get done'. If any of us went to get a drink he would say "come on, get back on the belt". The only chance we really got was if we were caught up and the truck load didn't have too many packages, then we might have had a chance to run and get something to drink. A lot of times trucks had too many packages and we could not step away. It was also hard for me to get a free minute because I would also help back up semi truck into the loading dock.

4. Sometimes workers were able to stop and get a drink of water when switching trucks, but that was very rare because the workers still had to load the backup. In the situations where a truck was being moved, a truck might be late and/or the conveyor belt broke down, the time spent waiting for the problem to be resolved was not a break of ten minutes in length. We were required to stay in the area and often we would be sent to help out in another area with another line or truck until the matter was resolved. Fixing a broken down belt or the process of moving an empty truck out and a full truck into the area for unloading took less than 10 minutes.

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct and that if called as a witness, I could competently testify to the same.

Executed this 10 day of August, 2006, at Bakersfield, California.

LANCE OPPENHEIMER

EXHIBIT 12

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SUPERIOR COURT OF CALIFORNIA

COUNTY OF ORANGE

JAVIER OLGUIN and other members of the general public similarly situated,

Plaintiffs,

vs.

FED EX GROUND PACKAGE SYSTEM, and Does 1 through 50, inclusive,

Defendants.

Case No. OCSC 02CC00200

CLASS ACTION

Assigned for all purposes to the Honorable Stephen J. Sundvold

SUPPLEMENTAL DECLARATION OF LUIS GRANDE

I, **LUIS GRANDE,** declare as follows:

1. I am an individual residing in Richmond, California and have personal knowledge of the matters set forth below. I could testify thereto if called as a witness.

2. I am currently employed by the defendant at its South San Francisco Terminal location in California. I have held the position the position of Package Handler since I began working for the company in May 2001.

3. During my depositions I was asked about taking "breaks" to use the restroom and/or get a drink of water; however, they failed to ask how long I would be away from the line in those rare situations when I would use the bathroom or get a drink of water during my shift. At any time that I went to the restroom or had a drink of water during my shift it was never more than a few minutes. It was never even close to a ten-minute period. I would run to get some water or to use the restroom but it would be no more than 2-3 minutes long since they were both approximately really close (approximately 50 feet) from my station. That being said, I would rarely step away from my station during my shifts.

4. In, the situations where a truck was being moved, a truck might be late and/or the conveyor belt broke down, the time spent waiting for the problem to be resolved was not a 10 minute rest break. We were required to stay in the area and often we would be sent to help out in another area with another line or truck until the matter was resolved. The time it took FedEx to get the belt back up or moving an empty truck out and a full truck into the area for unloading took less than 10 minutes.

5. As stated before, we did not start getting breaks of at least 10 minutes in length until, Fed Ex started turning off the conveyor belt in approximately July 2004 for the implementation of its rest period policy wherein we were not entitled to perform any work during the 10 minute period that the conveyor belt was purposely shut down by FedEx.

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct and that if called as a witness, I could competently testify to the same.

Executed this 9 day of August, 2006, at Richmond, California.

LUIS GRANDE

EXHIBIT 13

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Attorneys for Plaintiffs

SUPERIOR COURT OF CALIFORNIA

COUNTY OF ORANGE

JAVIER OLGUIN and other members of the general public similarly situated,

Plaintiffs,

vs.

FED EX GROUND PACKAGE SYSTEM, and Does 1 through 50, inclusive,

Defendants.

Case No. OCSC 02CC00200

CLASS ACTION

Assigned for all purposes to the Honorable Stephen J. Sundvold

SUPPLEMENTAL DECLARATION OF JUSTIN BAILEY

I, **JUSTIN BAILEY,** declare as follows:

1. I am an individual residing in Downey, California. I have personal knowledge of the matters set forth herein, and would and could testify thereto if called as a witness.

2. I previously provided a declaration in this case and had my deposition taken by Fed Ex's lawyer regarding my declaration in connection with this case.

3. Some of the questions asked of me at deposition were whether I used the bathroom and/or ever got a drink of water during my shift; however, I was never asked about how much time I would spend away from the belt on those occasions when I went to the bathroom or got a drink of water. If I went to the bathroom or had a drink of water during my shift it took a few minutes at most as it was impossible to be away from the belt for periods of more than a few minutes. In fact, Danny my supervisor at the time would tell me to "Hurry up" because I was on the belt and packages would get backed up. Basically, I would rush from the line to the bathroom and return within minutes. If I grabbed a drink of water, I would be away from the conveyor belt for no more than 2 minute. I was never gone for more than 3-4 minutes either way.

4. In, the situations where a truck was being moved, a truck might be late and/or the conveyor belt broke down, the time spent waiting for the problem to be resolved was not a break of ten minutes in length. We were required to stay in the area and often we would be sent to help out in another area with another line or truck until the matter was resolved. Fixing a broken down belt or the process of moving an empty truck out and a full truck into the area for unloading took less than 10 minutes.

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct and that if called as a witness, I could competently testify to the same.

Executed this 7TH day of August 2006, at Downey, California.

Justin Bailey

JUSTIN BAILEY

EXHIBIT 14

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SUPERIOR COURT OF CALIFORNIA

COUNTY OF ORANGE

JAVIER OLGUIN and other members of the general public similarly situated,

Plaintiffs,

vs.

FED EX GROUND PACKAGE SYSTEM, and Does 1 through 50, inclusive,

Defendants.

_____/

Case No. OCSC 02CC00200

CLASS ACTION

Assigned for all purposes to the Honorable Stephen J. Sundvold

SUPPLEMENTAL DECLARATION OF EYAD LATIF

I, **EYAD LATIF,** declare as follows:

1. I am an individual residing in Berkley, California. I have personal knowledge of the matters set forth herein, and would and could testify thereto if called as a witness.

2. I was employed by Fed Ex at its 85th Avenue Terminal location in Oakland, California. I held the position of Package Handler from February 2002 until I quit in December 2002.

3. In my deposition I was asked about taking "breaks" to use the restroom and/or get a drink of water; however, I was never asked about the length of these so called "breaks." When I went to the restroom or had a drink of water during my shift I was never gone for more than 3 minutes. It was never close to a ten minute period. I would rush from the line to the restroom and be back in less than 5 minutes. If I grabbed a drink of water, I would be away from the conveyor belt for no more than two minutes since the water cooler was no more than 20 to 30 feet away.

4. In, the situations where a truck was being moved, a truck might be late and/or the conveyor belt broke down, the time spent waiting for the problem to be resolved was not a break of ten minutes in length. We were required to stay in the area and often we would be sent to help out in another area with another line or truck until the matter was resolved. Fixing a broken down belt or the process of moving an empty truck out and a full truck into the area for unloading took less than 10 minutes.

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct and that if called as a witness, I could competently testify to the same.

Executed this 11 day of August, 2006, at Berkeley, California.

EYAD LATIF

EXHIBIT 15

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Attorneys for Plaintiffs

SUPERIOR COURT OF CALIFORNIA

COUNTY OF ORANGE

JAVIER OLGUIN and other members of the general public similarly situated,

Plaintiffs,

vs.

FED EX GROUND PACKAGE SYSTEM, and Does 1 through 50, inclusive,

Defendants.

Case No. OCSC 02CC00200

CLASS ACTION

Assigned for all purposes to the Honorable Stephen J. Sundvold

SUPPLEMENTAL DECLARATION OF GLORIA BURKS

I, **GLORIA BURKS,** declare as follows:

1. I am an individual residing in Riverside, California. I have personal knowledge of the matters set forth herein, and would and could testify thereto if called as a witness.

2. I was employed by the defendant at its Bloomington terminal located in San Bernardino County in California. I held the position of Package Handler from June 2001 until August 2002.

3. During my deposition I was asked about taking "breaks" to use the bathroom; however, I was never asked about the length of these so called "breaks." When I went to the bathroom during my shift it was never more than a few minutes. Since the bathroom was by the floor on the dock I would be gone for less than 5 minutes when I would use the bathroom. I recall Paul my manager at times saying to me "hurry up and get back because nobody is running your trailers." I would bring my own water and drink it while I was working.

4. When a truck was being moved, a truck might be late and/or the conveyor belt broke down, the time spent waiting for the problem to be resolved was not a break of ten minutes in length. We were required to stay in the area. When these things occurred I would use that time to load backed up packages onto the trucks or help out in another area with another line or truck until the matter was resolved.

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct and that if called as a witness, I could competently testify to the same.

Executed this 23 day of 08, 2006, at Riverside, California.

Gloria Burks

GLORIA BURKS