

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

PETER RAND, JEFFREY HOLT,
MICHAEL LAJOIE, CLINTON MASON,
GARY APPLEBY, and ADAM TOWERS

Plaintiffs

v.

Civil No. 99-227-P-C

BATH IRON WORKS CORPORATION,

Defendant

GENE CARTER, District Judge

MEMORANDUM OF DECISION AND ORDER

Plaintiffs, six former employees of Bath Iron Works Corporation (“BIW”), brought this action in Maine Superior Court alleging Fraudulent Misrepresentation (Count I), Negligent Misrepresentation (Count II), and Breach of Contract (Count III), and seeking, among other relief, Punitive Damages (Count IV). State Court Complaint (Docket No. 1A). Defendant removed the action to federal court on the basis of federal question jurisdiction. 28 U.S.C. § 1331. Notice of Removal (Docket No. 1). Currently before the Court is Plaintiffs’ Motion for Class Certification (“Plaintiffs’ Motion”) (Docket No. 9), filed pursuant to Fed. R. Civ. P. 23.

I. BACKGROUND

According to Plaintiffs, during the summer of 1995, Defendant found itself in need of approximately 100 additional electricians and pipe fitters to complete shipbuilding projects within contractual time limits. Complaint ¶ 9. Defendant proceeded to advertise the job openings, interview candidates, and hire approximately 100 electricians and pipe fitters. *Id.* ¶¶ 15, 30-31. During the period at issue, BIW and its unionized employees were subject to a collective bargaining agreement, and all new employees were required to join a union. *Id.* ¶ 18.

Plaintiffs assert that during the interview process, prospective employees were informed that they would not be protected by the collective bargaining agreement's no-layoff provision. *Id.* ¶ 26. It is alleged, however, that prospective employees were also told not to worry about the possibility of layoff because BIW had plenty of work to keep them busy through the current collective bargaining agreement, which expired at the end of 1997. *Id.* Indeed, Plaintiffs contend they were told that BIW had enough work to keep them employed until at least 2000. *Id.* In February 1996, approximately four months after BIW had hired them, the approximately 100 electricians and pipe fitters were laid off. *Id.* ¶ 39.

Plaintiffs claim that BIW intentionally misled the new hires regarding their prospects for long-term employment and that BIW knew they would be laid off in the near future. *Id.* ¶ 11. Plaintiffs allege that BIW needed these additional employees only to complete discrete projects. *Id.* Furthermore, Plaintiffs contend that BIW did not want to hire long-term employees for fear that it would upset BIW's ongoing acquisition by General Dynamics Corporation. *Id.* ¶ 13. Finally, Plaintiffs admit that union representatives participated in the interviewing process. *Id.* ¶ 18.

The Complaint, however, fails to relate another relevant chapter in this story. Following the layoffs in early 1996, some of the former BIW employees formed an organization called BIW Deceived. *See BIW Deceived v. Local S6, Industrial Union of Marine and Shipbuilding Workers of America*, 132 F.3d 824, 827 (1st Cir. 1997). The organization and individuals then sued Local S6, Industrial Union of Marine and Shipbuilding Workers of America ("the Union"), in state court, alleging negligence, fraud, intentional infliction of emotional distress, and unjust enrichment, among other claims. *Id.* The defendant removed that case to this Court, and the plaintiffs sought remand to the state court on the grounds that all claims arose under state law. *Id.* The Union countered by arguing that all the claims were preempted by either the National Labor Relations Act, 29 U.S.C. § 151 *et. seq.*, or the Labor Management Relations Act, 29 U.S.C. § 185 *et. seq.* *Id.* This Court denied the plaintiffs motion, finding merit in the

defendant's argument. *Id.* at 827-28. Subsequently, the plaintiffs sought, and obtained, an entry of final judgment in favor of the defendant, without prejudice of the plaintiffs' right to appeal. *Id.* at 828. The plaintiffs then appealed this Court's denial of the plaintiffs' motion to remand to the state court. *Id.* The Court of Appeals for the First Circuit affirmed this Court's denial of the plaintiffs' motion to remand and then affirmed the judgment in favor of the defendant. *Id.* at 834.

II. CLASS CERTIFICATION

Plaintiffs seek to prosecute this litigation as a class action. Plaintiffs describe the putative class as: "All pipe fitters and electricians hired by Bath Iron Works after August 1, 1995 and laid off by Bath Iron Works on or about February 2, 1996." Plaintiffs' Motion at 1. By their Motion, Plaintiffs seek certification with respect to liability issues only – not with respect to damages. *Id.* at 1-2.

At its discretion, the Court may certify the proposed class if it is "satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *General Telephone Co. v. Falcon*, 457 U.S. 147, 161, 102 S. Ct. 2364, 2372 (1982). Thus, Plaintiffs must demonstrate that:

(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a).

In addition, Plaintiffs must satisfy one of the three tests set forth in Rule 23(b). Here, Plaintiffs claim to satisfy Rule 23(b)(3), which requires a showing "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Plaintiffs, as the party seeking class certification, bear the burden of satisfying all of the requirements set forth Rule 23. *See In re One Bancorp*

Securities Litigation, 136 F.R.D. 526, 529 (D. Me. 1991). Because the Court finds that Plaintiffs have failed to meet their burden with respect to the commonality and typicality requisites of Rule 23(a), the Court begins with a discussion of those two requirements.

A. Commonality and Typicality

The Supreme Court has recognized that the commonality requirement of Rule 23(a)(2), and the typicality requirement set forth in Rule 23(a)(3) “tend to merge,” as they serve similar functions in determining whether class certification is appropriate. *Falcon*, 457 U.S. at 157 n.13, 102 S. Ct. at 2370 n.13. Plaintiffs properly point to several issues of law and fact that are shared by Plaintiffs and the putative class. In particular, they were all apparently hired and fired by BIW at roughly the same times. Further, the law of Maine presumably applies to all Plaintiffs and putative class members because any alleged fraud or breach of contract took place in Maine. The Court finds, however, that factual issues fundamental to Plaintiffs’ claims are sufficiently uncommon and atypical among Plaintiffs and putative class members such that class certification is inappropriate.

Plaintiffs’ action asserts claims for fraudulent misrepresentation, negligent misrepresentation, and breach of oral contract. Each of these claims arises out of alleged oral statements made to Plaintiffs and the putative class members by BIW officials during job interviews; specifically, the alleged promise that there would be enough work to keep potential new hires working until the next collective bargaining agreement. In general, oral representations are not well suited to class certification. The alleged oral promises in this case were provided in individual interviews such that the factual resolution of what was said to these six Plaintiffs is not necessarily typical of what was said to the putative class members. Indeed, an examination of the depositions of the named Plaintiffs reveal that there may not be commonality or typicality among the six named Plaintiffs, let alone among the approximately

100 putative class members.¹ First, the depositions reveal that the interviews were conducted by different representatives of BIW. For example, Plaintiff Mason was interviewed by John Poulin, while, according to BIW records, Plaintiff Rand was interviewed by a different BIW representative. Mason Deposition at 13, 17. Second, while Plaintiff Mason was interviewed only by a BIW representative, Plaintiff Towers was interviewed by both a BIW representative and a Union representative. Towers Deposition at 10. Finally, to the extent that Plaintiffs were promised “long-term” employment, the versions of this alleged promise differ. For example, Plaintiff Towers testified that he was told that he would be employed for “at least a year” or “until the contract in ‘97,” whereas Plaintiff Appleby testified that he was promised “two to three years” of employment, while Plaintiff Mason testified that he was told there would be “work until the year 2000.” Towers Deposition at 14, Appleby Deposition at 11, Mason Deposition at 17. The variation in the individual interviewers, the varying absence and presence of Union representatives at the interviews, and the differing accounts as to what Plaintiffs allege they were promised all demonstrate why this case is ill-suited for class certification. The Court foresees the necessity to conduct individual inquiries into exactly what each Plaintiff was told and by whom in order to resolve the legal claims set forth in the Complaint.

The need for detailed knowledge of each oral representation is particularly necessary for a fraudulent misrepresentation claim. To prevail on a claim of fraud under Maine law, a plaintiff must demonstrate that the defendant made a false representation of a material fact with knowledge of its falsity or with reckless disregard of its truth, for the purpose of inducing another to act or to refrain from acting in reliance thereon and that the plaintiff justifiably relied on the

¹ The Court believes that reliance on the depositions cited by Defendant is proper. It is well established that class certification – if granted – should be withdrawn at any later point in the proceeding if it is determined that the requirements of Rule 23 are no longer satisfied. *See Stott v. Haworth*, 916 F.2d 134, 139 (4th Cir. 1990). From that rule, the Court infers that it is appropriate to explore depositions now available. To hold otherwise is illogical, as it would require the Court to rely solely on the Complaint to decide the issue of class certification, knowing that further discovery will require a different outcome.

statement to the plaintiff's detriment. *McCarthy v. U.S.I. Corp.*, 678 A.2d 48, 53 (Me. 1996). Variations in either the representation made by a BIW representative – if any – or the degree to which a Plaintiff or a putative class member relied on any misrepresentation could lead to divergent outcomes for each Plaintiff.² Although the Court is unaware of such a holding in the Court of Appeals for the First Circuit, disfavor of class certification for claims alleging fraud based on oral representations has been noted in the Court of Appeals for the Fourth, Fifth, and Seventh Circuits. *See Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 341 (4th Cir. 1998) (oral representations form a “particularly shaky basis for a class claim”); *Simon v. Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 482 F.2d 880, 882 (5th Cir. 1973) (“an action based substantially, as here, on oral rather than written misrepresentations cannot be maintained as a class action”); *Retired Chicago Police Ass’n v. City of Chicago*, 7 F.3d 584, 597 n.17 (7th Cir. 1993) (“claims based substantially on oral rather than written communications are inappropriate for treatment as class actions unless the communications are shown to be standardized”).³

Although the above cases deal with claims of fraud, the principle is equally applicable to the negligent misrepresentation and breach of contract counts in the Complaint. As with fraudulent misrepresentation, a negligent misrepresentation claim will turn on the statement by the defendant as well as the reliance by the plaintiff. *See Perry v. H.O Perry & Son Co.*, 1998 ME 131, ¶ 8, 711 A.2d 1303, 1305-06. Furthermore, Plaintiffs’ allegation of breach of contract depends on a finding of an oral contract, which will require the same type of factual inquiry as to

² While Plaintiffs have requested class certification with respect to liability only and not damages, the issue of reliance must still be resolved to determine liability. Reliance is an element of a fraud claim, rather than merely a means to measure damages.

³ While Plaintiffs have suggested that the interview language may have been “scripted,” they offer no support for that position. No Plaintiff alleged in the Complaint that they saw anything resembling a script or that the BIW representative appeared to be reading a statement. Furthermore, the deposition testimony of Plaintiffs belies any suggestion that BIW representatives operated with a script. Accordingly, Plaintiffs’ reliance on cases holding that class certification is appropriate where fraud is alleged with respect to scripted oral statements is unfounded.

what each Plaintiff and each member of the putative class was allegedly promised. Accordingly, the Court concludes that the prerequisites of Rule 23(a) have not been satisfied.

B. Numerosity, Adequacy of the Representative Parties, and Predominance of Common Questions and Superiority of Class Action

Having found that Plaintiffs failed to satisfy the requirements of commonality and typicality set forth in Rule 23(a), the Court need not address the remaining two provisions of Rule 23(a) – numerosity and fair and adequate representation of the class members – as all four requirements of Rule 23(a) must be met before a class may be certified. For the same reason, the Court need not explore Plaintiffs’ effort to satisfy Rule 23(b)(3).

III. CONCLUSION

Accordingly, it is hereby **ORDERED** that Plaintiffs’ Motion for Class Certification be, and it is hereby, **DENIED**.

GENE CARTER
District Judge

Dated at Portland, Maine this 19th day of April, 2000.

RAND, et al v. BATH IRON WORKS
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Filed: 07/15/99
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