

3. In *Ross v. Lockheed Martin Corp.*, 2020 WL 4192566 (D.D.C. July 21, 2020), Judge Ketanji Brown Jackson in the District of Columbia denied plaintiffs' request for pre-class certification discovery finding that plaintiffs had not demonstrated that such discovery would help them make a prima facie showing that their class action plausibly satisfies Fed. R. Civ. P. 23's requirements.

In this Title VII litigation, plaintiffs alleged that Lockheed Martin had a policy of discrimination against African American employees. Plaintiffs sought pre-class certification discovery to assist in making the required prima facie "showing that their class action plausibly satisfied Rule 23's certification requirements." *Id.* at *1.

To receive precertification discovery, the plaintiff's pleadings "must present plausible classwide claims." *Id.* at *2. In other words, where a complaint "'demonstrates that the requirements for maintaining a class action cannot be met,' then it is reasonable to conclude that 'no amount of discovery' can overcome that deficiency." *Id.* (quoting *Goode v. LexisNexis Risk & Info. Analytics Grp., Inc.*, 284 F.R.D. 238, 245-46 (E.D. Pa. 2012)). Importantly, the consideration for whether a plaintiff can receive precertification discovery is not predicated on the plaintiffs' likelihood of success in class certification but rather on whether plaintiffs can make a prima facie showing using the proposed discovery. *Id.* at *3.

Judge Jackson held that plaintiff's complaint made it manifestly implausible that the members of the proposed class action "suffered a common injury that can either be redressed through a single remedy on a classwide basis or be proven through common questions of fact that predominate over individualized proof of injury." *Id.* at *1. Plaintiffs claimed that Lockheed Martin's employee review process provided too much discretion, which led to discrimination. Judge Jackson noted, however, that the "the impropriety of classwide claims with respect to such an evaluation system is well established." *Id.* at *7. Additionally, Judge Jackson observed that as pleaded, the class definition "presumably includes African-American employees who are perfectly situated and satisfied at Lockheed Martin." Plaintiffs' claims, therefore, could not be proven on a classwide basis to satisfy Rule 23's predominance requirement. Finally, Judge Jackson held that the proposed class members' injuries could not be redressed through an indivisible remedy.

The commonality issue could not be fixed through precertification discovery. *Id.* at *9. Judge Jackson explained that the issues in plaintiff's pleading with regard to class certification could not be cured with a sufficient factual showing. Rather, "[p]laintiffs' allegations about the [employee review] system are such that classwide injury is implausible, even if [p]laintiffs' description of the system's operation is factually accurate." Simply put, the individual nature of the assessment system meant that no amount of factual discovery could show that the employee review system operated "in the same manner across the entire workforce or any subgroup thereof, much less produce a common injury that can be established by common proof."

Judge Jackson also held that plaintiff's breach of contract claims were so speculative that precertification discovery could not provide a sufficient factual basis for the plaintiffs to make a prima facie case for certification. *Id.* at *10. Plaintiffs alleged that the agreements between Lockheed Martin and the government were intended to impose a duty on Lockheed Martin to not discriminate against the putative class members. Judge Jackson held, however, that plaintiffs "failed to make a non-speculative allegation that the supposed anti-discrimination provisions in

the unidentified contracts between Lockheed Martin and the federal government were plainly intended to create a duty towards the class members, as is necessary to support any plausible claim that Plaintiffs are third-party beneficiaries of said contracts.” *Id* (emphasis in original). At best, Judge Jackson held, plaintiffs offered only “rank speculation about the existence of contracts between Lockheed Martin and the federal government” and alleged no facts plausibly supporting the “requisite clear intent to allow Plaintiffs to sue for the breach of any contracts between Lockheed Martin and the federal government.”