Frank Gaweda, *et al.* v, Metropolitan Water Reclamation
District of Greater Chicago
10CH 52264

RULING

This matter coming before the court on a motion by plaintiffs, Frank Gaweda, Jerome McGovern, Tracy Taylor-Gagliardi, Peter Tzakis, Sadgio Fredianelli, Alan Holman, John Cernick, Mickey Huttenhoff, Abbis Bhikhapurawala, Adela Martinez-Johnson, Joseph Cannici, Richard DeLong, Michael Schramm, Martyn Bernstein, Gary Whyte, Jeannine Rehr, James Hilliard, Robert Lau, Thomas Byerly, Ramam Vaitla, Delphus Levy, Mary O'Connell, Charon Fitzpatrick, Brenda Holmes, Elizabeth Collins, and Gregory Dudash (collectively "plaintiffs"), on behalf of themselves and all others similarly situated, and pursuant to 735 ILCS 5/2-801 *et seq.*, for certification of certain designated classes; the matter has been briefed; a hearing held; and the court, being advised in the premises, states that:

Plaintiffs bring this action against defendant Metropolitan Water Reclamation District of Greater Chicago (the "District" or "defendant") for a declaratory judgment arising out of the District's November 18, 2010 decision (the "November 18 Policy" or "Pre-Suit Action") to eliminate all accrued termination pay and all accrued sick leave incentive pay in excess of 15 days for plaintiffs earned effective January 1, 2011. (See plaintiffs' memorandum in support of class certification ("plaintiffs' memorandum") at 4 and indicating for example that starting January 1, 2011, the "Annual Sick Leave Incentive Pay Redemption" would be eliminated, and "the accrued sick leave balance at the time of separation" would be reduced "from a maximum of 60 days' pay (120 days of accrued sick leave) to a maximum of 15 days' pay (30 days of accrued sick leave)"). Plaintiffs also contend that by its November 18 Policy, the District unilaterally

modified plaintiffs' employment contracts as to future accrual and redemption of termination pay and sick leave incentive pay benefits after January 1, 2011. (See plaintiffs' memorandum at 1). The District's Board also reduced the number of sick leave days from 15 to 12 annually starting January 1, 2011. (See plaintiffs' memorandum at 4).

The amended verified complaint ("AVC") contains four counts that "includes: 1) count 1 (Breach of Employment Agreement, Declaratory Judgment) challenges the District's actions in retroactively eliminating accrued termination and sick pay as of January 1, 2011; and 2) count III (Breach of Employment Agreement, Declaratory Judgment) challenges the District's Pre-suit Action in eliminating future accrual and redemption of termination and sick pay after January 1, 2011." (See plaintiffs' memorandum at 4-5). Counts 2 and 4 seek equitable relief for promissory estoppel based on claims for accrued and prospective termination pay and sick leave incentive pay benefits, but the relief is sought in the alternative to the breach of contract claims in counts 1 and 3, respectively. In their motion, plaintiffs do not seek class certification as to counts 2 and 4. (See plaintiffs' memorandum at 5, f/n 1).

According to the parties' present submissions and their evidentiary submissions made in connection with the prior summary judgment proceeding, the District issued in November 1994 its first Employee Handbook to its non-represented employees (the "1994 Handbook"). (See Joint Stipulation ("JS") at ¶ 18, that was submitted in the cross-motion summary judgment practice and is also attached as ex. B to plaintiffs' memorandum). Prior to 1994, the District did not have a document entitled as an Employee Handbook that was available to its non-represented employees. Id. The 1994 Handbook contains, in pertinent part, the following language, stating that: "The Board of Commissioners, the General Superintendent, and District management

reserve the right to add, amend, change or eliminate the practices and policies referred to in this handbook." (See 1994 Handbook at 19, and also referring to a "Disclaimer," p. i, that references the 1994 Handbook). The 1994 Handbook includes a "Termination Pay" policy, originally instituted by the District in 1968 and modified in 1985, as defined by resolution, and a "Sick Leave Incentive Pay" benefit policy, including an "Annual Sick Leave Incentive Pay Redemption" and "Accumulated Sick Leave Incentive Pay Redemption." JS at ¶ 20. The District re-issued its Employee Handbook in 2010 (the "2010 Handbook"). Id. at ¶ 23. The 2010 Handbook includes language considered to be a disclaimer that is "largely" identical to that which is contained in the 1994 Handbook. Id.

On November 18, 2010, the District's Board of Commissioners (the "Board") decided to eliminate Termination Pay for all non-represented employees effective January 1, 2011. Id. at ¶ 26. The Board also decided to modify the Sick Leave Incentive Pay benefits. Id. at ¶ 27. Accordingly, starting January 1, 2011, the Annual Sick Leave Incentive Pay Redemption would be eliminated and "the accrued sick leave balance at the time of separation" would be "reduced from a maximum of 60 days' pay (120 days accrued) to a maximum of 15 days' pay (30 days accrued)." Id. The Board also decided to "reduce the number of sick leave days from 15 to 12 annually, starting January 1, 2011." Id. at ¶ 28. On December 2, 2010, defendant notified its employees that these changes would be effective January 1, 2011, and that each employee could either accept the changes or voluntarily resign by December 31, 2010 to receive all earned and accrued Termination Pay and Sick Leave Incentive Pay benefits. Id. at ¶ 29.

The issuance of the District's November 18, 2010 Policy prompted plaintiffs to file their original complaint on December 15, 2010. Plaintiffs also presented an emergency motion for a

temporary restraining order (the "TRO"), which this court granted in part and restrained the District from retroactively eliminating accrued Termination Pay and Accrued Sick Leave Incentive Pay for certain named plaintiffs hired prior to 1994. Id. at ¶ 30. On December 28, 2011, this court granted plaintiffs leave to file their AVC to add additional named plaintiffs and further granted plaintiffs' motion to expand the TRO to include additional named plaintiffs hired prior to November 1994 (the "Pre-1994 plaintiffs"). On June 2, 2011, the District's Board voted to adopt certain new policies regarding applicable Termination Pay and Sick Leave Incentive Pay benefits to non-represented employees effective June 30, 2011 (the "June 2nd Motion" or "June 2 Action"). JS at ¶ 32.

Subsequently, after the parties' pleadings were at issue, the parties filed cross-motions for summary judgment. In pursuing their motion for partial summary judgment, plaintiffs explained that the "sole issue presented in count 1 of the AVC is whether the District's actions to retroactively eliminate Termination Pay and Sick Leave Incentive Pay constitute a breach of contract." (See plaintiffs' memorandum in support of motion for summary judgment at 7). Plaintiffs also submitted that the District may not "retroactively eliminate vested rights to deferred compensation in the form of accrued termination pay and sick leave for any employee, regardless of date of hire." Id. at 12. According to plaintiffs' submissions in support of their motion for partial summary judgment, "there is no question of fact or law that a contract for Termination Pay and Sick Leave Pay existed between Plaintiffs and the District;" and "there is no question of fact that the District is in breach of those agreements by revoking Plaintiffs' rights to accrued vested compensation earned during Plaintiffs' many years as District employees." Id.

Therefore, according to plaintiffs, "summary judgment should be granted in favor of Plaintiffs and against the District on Count 1 . . . ." Id.

The District contended that the granting of its cross-motion for summary judgment was appropriate as to count 1 of plaintiffs' complaint containing a claim for a breach of contract, "because there was no breach and no damages." (See defendant's cross-motion at ¶ 2-3). The District also contended in its cross-motion that as to count 3 claiming a breach of contract, summary judgment is appropriate "because plaintiffs have no enforceable employment agreement" with the District, and even assuming that plaintiffs do, the District "properly modified the agreements by offering consideration." Id. at ¶ 4. The District added that as to counts 2 and 4, the evidence does not support claims for promissory estoppel. Id. at ¶ 5.

Plaintiffs were not seeking in their motion for partial summary judgment an award of damages in counts 1 or 2, but rather a declaration of their rights as to certain Termination Pay and Sick Leave Incentive Pay employment benefits.

This court found that notwithstanding the June 2nd Motion, plaintiffs demonstrated that there remained a "concrete dispute" requiring an "immediate and definitive determination" of the plaintiffs' rights to Termination Pay and Sick Leave Incentive Pay benefits that have been accrued because they had been earned, the resolution of which would aid in the termination of at least some portion of the parties' actual and overall controversy. (See January 25, 2012 Order incorporating the court's "January 25, 2012 Ruling" at 24 of 31). This court further found that plaintiffs' "concern over their rights to the earned and accrued employment benefits they describe in count 1 or 2 based upon the underlying facts and issues raised in the pleadings is not moot or no longer ripe for the reasons the District is advancing." Id. at 25 of 31. The controversy over

plaintiffs' earned, accrued and vested rights regarding "Termination Pay" and "Sick Leave Incentive Pay" had not been entirely resolved in plaintiffs' favor as a result of the June 2nd Motion to obviate the need for a judicial determination. Id. This court determined that a declaration of plaintiffs contractual rights to their earned and accrued "Termination Pay" and "Sick Leave Incentive Pay" benefits that the District sought to eliminate by virtue of the November 18, 2010 Policy was still warranted. Id.

This court also observed that in connection with its cross-motion, "Defendant has failed to establish that the Pre-1994 plaintiffs do not have an enforceable claim of right to accrue prospectively Termination Pay and Sick Leave Incentive Pay benefits that are described in the AVC, notwithstanding the June 2nd Motion." (See January 25, 2012 Ruling at 26 of 31). However, according to the January 25, 2012 Ruling, with respect to defendant's cross-motion and any plaintiffs hired after November 1994 ("Post-1994 plaintiffs"), "defendant has made a sufficient showing that those plaintiffs who were hired after the issuance and publication of the 1994 Handbook are confronted with different factual circumstances than the Pre-1994 plaintiffs under the applicable law cited to. In view of the clear and prominently displayed disclaimer language in the 1994 Handbook, defendant has demonstrated that Post-1994 plaintiffs do not have an employment contract that cannot be amended or modified and that Post-1994 plaintiffs do not have a basis in the record for a reasonable expectation of a vested right to accrue prospectively Termination Pay and Sick Leave Incentive Pay after the June 2nd Motion." Id. at 28 of 31. This court noted that "Those Post-1994 plaintiffs have not refuted the argument made by defendant that it could and did by its June 2nd Motion amend or modify Termination Pay and Sick Leave Incentive Pay to accrue prospectively without breaching any contractual rights that the

Post-1994 plaintiffs claim they hold in the AVC. Those Post-1994 plaintiffs have not raised a genuine issue of material fact that the defendant is precluded from amending or modifying the prospective accrual of Termination Pay and Sick Leave Incentive Pay benefits pursuant to the June 2nd Motion. Defendant has established that there is no valid and enforceable agreement between it and the Post-1994 plaintiffs that could not be amended or modified by the June 2nd Motion without breaching such an agreement." Id. at 29 of 31.

After considering all the parties' submissions and arguments on the cross-motions, this court ruled that:

1. Plaintiffs' motion for partial summary judgment is granted in part and it is declared that defendant could not retroactively eliminate earned and accrued Termination Pay and Sick Leave Incentive Pay benefits by its action taken on November 18, 2010 or by its June 2nd Motion. Plaintiffs' request for injunctive relief for the reasons stated in its motion is denied.

2. Defendant's motion for summary judgment is granted in part as to Post-1994 plaintiffs only and in a limited respect. By its June 2nd Motion, defendant did not breach an enforceable employment agreement with any Post-1994 plaintiff or an unambiguous promise or statement made to any Post-1994 plaintiff regarding the claim of right to accrue prospectively Termination Pay and Sick Leave Incentive Pay that are described in the AVC. Defendant's cross-motion is also granted in part to the extent that it has been shown that the injunctive relief requested should be denied. (See January 25, 2012 Order).

All of the claims alleged by Pre-1994 plaintiffs in count 3 of the AVC were not adjudicated entirely under the January 25, 2012 Ruling, based upon the submissions and arguments presented at that time. Plaintiffs submit that twenty-seven (27) named plaintiffs have been granted summary judgment, in part, on count 1 and have defeated, in part, defendant's motion for summary judgment on count 3. (See plaintiffs' memorandum in support of motion for certification ("plaintiffs' memorandum") at 1). The twenty-seven (27) named plaintiffs were

hired by the District between 1970 and 1999. (See JS at ¶ 3). Of the plaintiffs, twenty-two (22) were hired before November 2, 1994 and five (5) were hired after November 2, 1994. (See plaintiffs' memorandum at 2). Pursuant to their motion for class certification under 735 ILCS 5/2-801 *et seq.*, plaintiffs now request that this court enter an order certifying this matter as a class action as to counts 1 and 3 of the AVC. Id. Plaintiffs explain that the twenty-seven (27) named plaintiffs in count 1 seek certification for this matter to proceed as a class action on behalf of all current non-represented employees of the District who were hired prior to January 1, 2011, who had accrued Termination Pay and/or unused Sick Leave Incentive Pay in any amount as of December 31, 2010 ("Class A Plaintiffs"). Id. at 1-2. Plaintiffs also explain that twenty-two (22) of the twenty-seven (27) named plaintiffs in count 3 seek certification of the claims alleged therein to proceed as a class action on behalf of all current non-represented employees of the District who were hired prior to November 2, 1994 ("Class B Plaintiffs"). Id. at 1-2. Plaintiffs submit in their submissions that they have satisfied the applicable statutory requirements for class certification for the claims alleged in counts 1 and 3 of the AVC and the proposed Classes that are identified. (See 735 ILCS 5/2-801).

In response to plaintiffs' motion for class certification, the District submits that plaintiffs have not met their burden under 735 ILCS 5/2-801 as "they proffer two unworkable and unmanageable classes and seek certification of classes even though, in large part, the named plaintiffs' claims have been fully resolved." (See defendant's response at 1-4). The District contends that Class A "cannot be certified as the putative representatives are not adequate and there is no advantage to certification of a Class A, given the lack of adequacy and this court's ruling, such that certification is not an appropriate vehicle for adjudication." Id at 4. Moreover,

according to the District, "plaintiffs advance an unworkable class definition for Class B," and "certification of Class B should be denied on grounds that the plaintiffs' claims are inherently individualized." Id. at 1, 4. The District adds that plaintiffs' "failures require denial of the Motion for Class Certification as to Counts I and III." Id.

The named plaintiffs seeking class certification have the burden of establishing the statutory prerequisites, which must be satisfied before the suit can proceed as a class action. 735 ILCS 5/2-801; Wheatley v. Board of Education of Township High School District 205, 99 Ill. 2d 481, 496 (1984). In deciding whether to certify a class, a court may consider matters of law or fact presented by the record; including in the pleadings, depositions, affidavits, answers to interrogatories and in other evidentiary material properly submitted for consideration. Arriola v. Time Insurance Company, 296 Ill. App. 3d 303, 306 (1st Dist. 1998). The court has certain discretion in determining whether a sufficient showing for class certification has been made. (See Avery v. State Farm Mutual Automobile Insurance Co., 216 Ill. 2d at 100, 125-126 (2005); Clark v. TAP Pharmaceutical Products, Inc., 343 Ill. App. 3d 538, 545 (5th Dist. 2003); Hayna v. Arby's Inc., 99 Ill. App. 3d 700, 711 (1st Dist. 1981); see also King v. Kansas City Southern Industries, Inc., 519 F.2d 20, 26 (7th Cir. 1975)). If, during a later stage of the litigation, evidence of a sub-classification becomes apparent, the trial court has the option of directing the class into subclasses. Lee v. Allstate, 361 Ill. App. 3d 970, 982 (2nd Dist. 2005); Gordon v. Boden, 224 Ill. App. 3d 195, 202 (1st Dist. 1991). Since the provisions in 735 ILCS 5/2-801 are patterned after Rule 23 of the Federal Rules of Civil Procedure, Illinois courts have found federal decisions to be instructive. (See e.g. Avery, 216 Ill. 2d at 125-126; Schlessinger v. Olsen, 86 Ill. 2d 314, 320 (1981)).

This court's January 25, 2012 Ruling is not an irrelevant consideration in deciding whether plaintiffs can certify the putative Classes on claims that were alleged to be legally sufficient in counts 1 and 3 of the AVC and withstood the District's motion for summary judgment. Gridley v. State Farm Mutual Automobile Insurance Company, 217 Ill. 2d 158 (2005); Avery, 216 Ill. 2d at 139; Portwood et al., v. Ford Motor Co., 183 Ill. 2d 459, 467 (1988); Health Cost Controls v. Sevilla, 365 Ill. App. 3d 795, 809 (1st Dist. 2006); Bunting v. The Progressive Corp., 348 Ill. App. 3d 575, 581 (1st Dist. 2004). The District acknowledges that "in determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of [class certification] are met." (Emphasis supplied). (See defendant's response at 7 and citing to Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 178 (1974)).

The identification of an appropriate class serves at least two purposes. First, it alerts the court and parties to the potential burdens that class certification may entail. (See Simer v. Rios, 661 F. 2d 655, 670 (7th Cir. 1981) where the Seventh Circuit indicated that "In this way the court can decide whether the class device simply would be an inefficient way of trying the lawsuit for the parties as well as for its own congested docket"). Second, "proper class identification insures that those individuals actually harmed by defendant's wrongful conduct will be the recipients of the awarded relief." Oshana v. Coca-Cola Co., 225 F.R.D. 575, 580 (N.D. Ill. 2005). Although class certification issues are typically factual, they can be decided without the benefit of discovery. P.J.'s Concrete Pumping Services, Inc. v. Nextel West Corporation, 345 Ill. App. 3d 992, 1001 (2nd Dist. 2004); Weiss v. Waterhouse Securities, Inc., 335 Ill. App. 3d 875, 884 (1st Dist. 2002).

The statutory requirements that plaintiffs refer to in their submissions are set forth in 735 ILCS 5/2-801. Initially, plaintiffs must show that the class be so numerous that joinder of all plaintiffs in one individual action is impracticable. 735 ILCS 5/2-801(1); Avery, 216 Ill. 2d at 115. The question of numerosity for purposes of maintaining a class action depends on the particular facts of each case. In re Application of Rosewell, 236 Ill. App. 3d 165, 174 (1st Dist. 1992). Plaintiffs submit that the class size for the putative Class A "is likely to be 1,150," and would include the number of current District employees "who are not subject to a collective bargaining agreement" and "who were directly affected by the November 18 Policy." (See plaintiffs' memorandum at 6). According to plaintiffs, "Virtually every one of these employees had accrued sick and termination pay as of December 31, 2010, which the District attempted to take away through its November 18 Policy change that is the subject of Count I." Id. at 6-7. Plaintiffs also submit that as to Count III, "the class size for Class B is likely to be 394" and further explain "this is the number of current District employees hired before November 2, 1994 who have a contractual right to future accrued sick and termination pay." Id. at 7. Plaintiffs have identified sufficiently defined ascertainable Classes that satisfy the numerosity statutory requirement, even though it does not appear that the District has contradicted or objected to plaintiffs' showing on this requirement. 735 ILCS 5/2-801(1); Simer, 661 F. 2d 655; Oshana, 225 F.R.D. at 580).

To meet the commonality requirement under 735 ILCS 5/2-801(2), plaintiff must establish the existence of common questions of fact or law that relate to the outcome of the litigation and predominate over the other individual issues. Arca v. Colonial Bank & Trust Co., 265 Ill. App. 3d 498, 501 (1st Dist. 1999); Gordon, 224 Ill. App. 3d at 200; Purcell & Wardrope

Chartered v. Hertz Corp., 175 Ill. App. 3d 1069, 1075 (1st Dist. 1988). In order to claim that the second requirement of section 2-801 is satisfied, a sufficient showing can be made that the "successful adjudication of one of the purported class representatives' individual claims will establish a right of recovery in other class members." (See Avery, 216 Ill. 2d at 117 citing to Goetz v. Village of Hoffman Estates, 62 Ill. App. 3d 233, 236 (1978); see also Key v. Jewel Companies, 176 Ill. App. 3d 91, 96-97 (1st Dist. 1988)).

Plaintiffs submit that there are common questions of law and/or fact in favor of the putative members of the proposed Classes that include:

Class A: Are termination and sick leave incentive pay accrued by the Class A plaintiffs prior to December 31, 2010, a vested contract right?

Class A: Is the vested right to termination and sick leave incentive pay accrued before December 31, 2010, a right that could not be eliminated unilaterally by the District by its November 2010 Policy or any future change in the District's Policy?

Class B: Is the right to future accrual and redemption of termination and sick leave incentive pay for the Class B plaintiffs (those hired before November 2, 1994) a contract right based on the District's policies and procedures?

Class B: Can the right to future accrual and redemption of termination and sick leave incentive pay be eliminated unilaterally . . . without bargained-for consideration and acceptance of a contract modification of this agreement by the employee? (See plaintiffs' memorandum at 7-8; see also AVC at 451).

Plaintiffs have established that multiple common issues of law and/or fact appear from the pleadings and submissions presented in this case, any and all of which predominate over any issues which are specific to any class member. It has also been demonstrated that the successful adjudication of the plaintiffs' breach of contract claims seeking declaratory relief arising from the District's action to eliminate Termination Pay and Sick Leave Incentive Pay benefits accrued

before December 31, 2010, and impair the future accrual and redemption of Termination Pay and Sick Leave Incentive Pay for Pre-1994 plaintiffs, or by the District's June 2011 Motion modifying any of those benefits, with respect to the Pre-1994 plaintiffs, could establish a basis of a claim for relief in at least some if not all of the putative members of the proposed Classes. Plaintiffs have established that the second statutory requirement for class certification is satisfied under the showing by plaintiffs. (See e. g. plaintiffs' memorandum at 8-9 and referring to the January 25, 2012 Ruling at 28-31 of 31 containing certain findings in favor of plaintiffs on some of their claims against defendant). If there are any individual issues regarding the specific monetary amounts that may be claimed by an individual member of the Classes on Termination Pay or Sick Leave Incentive Pay matters, it has not been shown that class certification should be denied on that account. Avery, 216 Ill. 2d at 128; Weiss, 208 Ill. 2d at 452; S37 Management, Inc. v. Advance Refrigeration Co., 2011 IL App. (1st) 102496, ¶ 17; Clark, 343 Ill. App. 3d at 549.

Plaintiffs contend that they will fairly and adequately protect the interests of the Class, and submit that they are "firmly committed to the prosecution of this action and their counsel possess ample experience to diligently prosecute this case to its conclusion." (See plaintiffs' memorandum at 9-10). The adequacy of representation requirement under 735 ILCS 5/2-811(3) focuses on the interests of the class representatives to determine if those interests coincide with those of other members of the proposed class and if such members will receive proper, efficient, and appropriate protection of their interests in the presentation of their claims by the class representatives. (See e.g. Miner v. Gillette Co., 87 Ill. 2d 7 (1981); Gordon, 224 Ill. App. 3d at 203). The adequacy or sufficiency of the legal representation of the plaintiffs does not appear to

contradict the contention being advanced by plaintiffs in their motion on the legal representation to be afforded to the Classes. Plaintiffs have also established that they have no interest that conflicts with or is antagonistic to the interests of the members of the two proposed Classes. Plaintiffs have shown that they can fairly and adequately represent the interests of the members of the specific putative Class for which each plaintiff will act as a class representative. The District's contention that this court's January 25, 2012 Ruling granting in part plaintiffs' motion for partial summary judgment on count 1 of the AVC establishes that plaintiffs are not adequate representatives of the Classes lacks support in the record and under the authority cited to. Plaintiffs did, in fact, prevail on certain claims, but it has not been shown that by prevailing, as opposed to being unsuccessful on the merits of those claims, plaintiffs can now be deemed to be inadequate class representatives.

The District refers to this court's January 25, 2012 Ruling that "fully resolved on summary judgment" plaintiff's claims alleged in count 1 of the amended complaint and to the decisions in Barber v. American Airlines, Inc., 241 Ill. 2d 450, 457 (2011) and in Wheatley, 99 Ill. 2d at 486, to support its challenge to the adequacy of plaintiffs' interests to pursue class certification. The District argues that if "plaintiffs have received their entire recovery before the filing of a motion for class certification those claims are moot." (Emphasis in original). (See defendant's response at 2, 5-6). It is not insignificant that plaintiffs are seeking declaratory relief on their claims in the AVC and are not seeking money damages against the District. While the Barber decision is instructive on the factors plaintiffs face to meet their burden on class certification, the District has not shown that the holding in the decision applies here in favor of the District on its challenge to class certification on the presented record. In Barber, the Court

addressed whether plaintiff customers' class action complaint was moot after she sued the defendant airline for breach of contract for not refunding a baggage fee she had paid for a flight that was cancelled. Id. at 1043-1044. In the decision, the Court noted that it "is undisputed that at the time defendant tendered the baggage fee refund to plaintiff, no motion for class certification was pending . . . plaintiff never filed a motion for class certification" and it was further determined that "her claim was moot." Id. at 1046. It appears that two weeks after being served with the complaint, defendant's counsel contacted plaintiff's counsel and offered to refund the $40 baggage fee. Id. at 453. The Court rejected plaintiff's "public policy concerns" in allowing a defendant to prevent class action litigation by "picking off the named plaintiff before there is an opportunity to protect the interests of absent class members by moving for certification," and observed that "Indeed, this class action could have survived if one of the remaining class members had substituted himself as the named representative." Id. at 1047. Here, the District is not contending that it tendered to plaintiffs soon after being served with the lawsuit or any time prior to answering plaintiffs' AVC, the relief plaintiffs are seeking in their pleading. Rather, plaintiffs secured a ruling in their favor on count 1 of their AVC on a motion for partial summary judgment that was opposed by the District. (See January 25, 2012 Ruling at 24 of 31). Defendant has not shown that the Barber decision stands for the proposition that plaintiffs, who prevailed in part on their motion for partial summary judgment, have claims that are now moot by virtue of the January 25, 2012 Ruling preventing plaintiffs from pursuing certain class claims alleged in the AVC.

Similarly, the facts in the Wheatley case did not appear to present a matter for review similar to what is presented on this record that includes the January 25, 2012 Ruling on the

parties' contested cross-motion summary judgment practice resulting in a partial adjudication in favor of plaintiffs. The Ruling also denies certain relief requested by both sides in their cross-motions. In Wheatley, the record seems to show that one month after the action was filed, the named representative plaintiffs accepted the defendant Board's offer of employment. Wheatley, 99 Ill. 2d at 485. The Court found that by "virtue of accepting employment," plaintiffs "were granted the essential relief demanded" and further determined that under "these circumstances, it is clear that the interests of the named representative plaintiffs are moot because there is no longer a controversy between them and the Board." Id. at 485. After noting that a substantial public interest exception has been found to the mootness doctrine, the Court did not apply it to the facts in that case. Id. It also did not appear that any other member of the class sought to substitute themselves as a named representative. Id. at 487. Plaintiffs, in this action, did not accept as part of a settlement of their claims any proposal offered by the District prior to the January 25, 2012 Ruling on the contested cross-motions for summary judgment. The holding in the Wheatley case, which is instructive on the burden that plaintiffs face on their motion for class certification, has not been shown to be dispositive in favor of the District's argument objecting to plaintiffs' motion for class certification.

Plaintiffs have argued convincingly that the District's case law authority is not binding against plaintiffs' request for certification based on the record presented here. According to plaintiffs, those cases seem to hold that a plaintiff's claim can be deemed moot by defendant's tender of the relief sought by plaintiff or by plaintiff's settlement with defendant prior to the motion for class certification being filed. Plaintiffs point out that they are seeking certification of Classes on certain claims that the District neither settled with plaintiffs nor tendered any relief to

plaintiffs to resolve those claims prior to the January 25, 2012 Ruling. (See e.g. generally plaintiffs' reply at 4-5). Plaintiffs assert that they prevailed, in part, on certain claims in count 1 of the AVC resulting from a contested cross-motion summary judgment practice. This court is persuaded by plaintiffs' argument in response to the District's challenge to the adequacy or appropriateness of the plaintiffs acting as class representatives. To the extent that the District can later show a conflict exists with respect to any named representative plaintiff and a member of a Class that would call into question the adequacy or appropriateness of that plaintiff continuing to act as a class representative, then the matter can be brought to the attention of plaintiffs' attorneys and this court properly for consideration.

In determining whether the fourth statutory requirement for class certification is met, the relevant inquiry is "whether a class action: (1) can best secure the economies of time, effort and expense and promote uniformity; or (2) accomplish the other ends of equity and justice that class actions seek to obtain." 735 ILCS 5/2-811(4); Gordon, 224 Ill. App. 3d at 203. It has been recognized that "class actions are particularly appropriate when separate suits could result in the establishment of inconsistent standards of conduct for the persons opposing the class or when a separate suit could affect the rights of the other members of the class." Rodriguez v. Credit Systems Specialists, Inc., 17 Ill. App. 3d 606, 611 (1st Dist. 1974). Plaintiffs have argued persuasively that resolution of the overall controversy through the class action mechanism will ensure a consistent standard of future conduct by the District. (See plaintiffs' memorandum at 11). Here, according to plaintiffs, absent a resolution on a class action basis of the contractual rights of the putative members of Class A to receive upon separation accrued and vested rights to Termination Pay and Sick Leave Incentive Pay, each member's right to those benefits would be

dependent on separate contract actions that could only be initiated when each member of the class retired or separated from the employment of the District, resulting in possibly separate decisions by potentially different courts at various times in the future. Id. at 11. Similarly, the claimed contractual right to the future accrual of these benefits for each Pre-1994 Class B member might have to await prospective and possibly separate court actions. Plaintiffs have made an adequate showing that the class action mechanism now proposed will serve as the appropriate means for the fair and efficient adjudication of the claims in the AVC that are being pursued among plaintiffs as class representatives, the members of the putative Classes and the District. Id. at 11.

Plaintiffs have persuasively argued on the present submissions that a class needs to be certified to allow for a declaration on the District's policy that affects all similarly situated non-represented public employees of the District, like plaintiffs who have already prevailed in part on their claims in count 1 of the AVC and have a remaining unresolved matter on their claim of right to future accrued benefits alleged in count 3 of the AVC. (See generally Rodriguez, 17 Ill. App. 3d at 611).

On the matters presented on plaintiffs' motion for class certification, this court is not convinced that it lacked discretion to decide the cross-motions for summary judgment argued by the parties prior to the filing of a motion for class certification, which had not even been filed at the time of the hearing. (See generally Purn v. Board of Ed., Comm. Unit School Dist. 300, 106 Ill. App. 3d 790, 792-793 (2nd Dist. 1982) and indicating a remand of the matter to the trial court on the issue of certification after summary judgment was entered for plaintiffs; see also generally Barber, 241 Ill. 2d at 457). In this action, plaintiffs and the District filed cross-motions for

summary judgment. Plaintiffs prevailed on the merits of certain claims in their motion, and the District also prevailed on certain arguments made in its cross-motion as well. The AVC contains allegations that state class action claims, even though no motion for class certification had been filed when this court ruled on the parties' cross-motions for summary judgment. In connection with the cross-motions for summary judgment, the record presented did not show that extensive discovery had taken place or that any deposition of the parties had been taken. Although the January 25, 2012 Ruling contains findings in favor of some of plaintiffs' claims, it does not defeat plaintiffs' motion for class certification. There is no suggestion that plaintiffs are attempting to secure certification of any claim that the District prevailed on in its cross-motion for summary judgment.

After the briefing on the motion for class certification was done pursuant to a scheduling order and a hearing date was then set, the parties made supplemental filings prior to the hearing as a result of the District's Board taking actions on April 19, 2012 (the "April 19, 2012 Motion") and on June 7, 2012 (the "June 7, 2012 Motion") that seek to affect "the employment contracts between Plaintiffs and the putative class members and the MWRD." (See plaintiffs' supplemental reply at 1-2). According to plaintiffs, the April 19, 2012 Motion authorized a "one-time sick leave incentive payment" to non-represented employees with a "District start date prior to November 2, 1994 (exception to policies adopted June 2, 2011, providing for termination pay and sick leave pay at separation)." Id. Plaintiffs also contend that the "Board's June 7th Motion is an impermissible attempt to settle the Plaintiffs' remaining claims while the motion for class certification is pending before the Court." Id. at 2. Plaintiffs maintain that "Nothing in the MRD Board's April 19 or June 17 Motions moots the Plaintiffs' right to have the Court consider and

rule on the motion for certification." Id. at 4. The District responds by stating that the "Pre-Suit Policies are being reinstated" and "recent events, since the filing of Defendants' Response Memorandum, demonstrate that not only do the putative class representatives not have any remaining cause of action against Defendants (see defendant's response at 4-9) but no putative class member has any remaining cause of action either." (Emphasis in original). (See defendant's sur-response at 1-2). The District's sur-response filing, in referring to a recently filed and presented motion for summary judgment, also states that as "is articulated more fully in MWRD's Motion for Summary Judgment, this entire case is moot." Id. at 4. The District's motion for summary judgment has not yet been responded to in writing by plaintiffs, who indicated at its presentment that plaintiffs may seek limited discovery before responding to it.

The District's sur-response raises a mootness argument that is primarily based on the District's recent June 7, 2012 Motion. It is contended that the District "has reverted to the Pre-Suit Policies for all pre-1994 employees, which includes the named Plaintiffs and all putative class members as well." (Emphasis in original). (See defendant's sur-response at 3). The District has filed its motion for summary judgment on this issue seeking a judgment in its favor on the grounds of mootness and the parties have not yet proposed a briefing schedule on the matter. It does appear that this mootness argument is also being raised by the District in the supplemental filing it made in connection with plaintiffs' class certification motion. This court, after considering the matter on the motion for class certification only, is not convinced that it provides a basis to deny plaintiffs' motion. However, this view is not a determination on the merits of the mootness argument that is set forth in the District's motion for summary judgment and which is based upon the June 7, 2012 Motion. That matter is being presented for review under applicable

summary judgment standards, including whether the District can establish that there is no genuine issue of material fact for the relief being requested for purposes of 735 ILCS 5/2-1005. The pending matter before this court involves plaintiffs' class certification motion. The mootness argument is raised by the District in its supplemental filing with the court.

The District in its sur-response refers to the case, Hanna v. The City of Chicago, 382 Ill App. 3d 672 (1st Dist. 2008), that did not involve a class certification motion or class action claims, but did involve the City of Chicago's 735 ILCS 5/2-619(a)(9) motion to dismiss plaintiff's eighth amended complaint in which a property owner complained, among other things, that his property had been unconstitutionally downzoned. The trial court dismissed the complaint as moot finding that the 2006 rezoning effectively granted plaintiff all his requested relief and was not done for an improper purpose. Id. at 677. The First District noted that "while Hanna's lawsuit had been pending for 5 years the City took action under the terms of a new Chicago Zoning Ordinance," and the City argued successfully that plaintiff's claim had been mooted by the latest rezoning since "the courts" were unable to grant him any further relief. Id. at 675. According to the City, "the court could not grant Hanna any additional relief because the original R5 zoning category had been abolished by the City's adoption of the new Chicago Zoning Ordinance, which Hanna was not challenging, and no existing zoning category would grant rights equivalent to the old R5 classification." Id. at 676. The Court explained that "Mootness occurs once the plaintiff has secured what he basically sought and a resolution of the issues could not have any practical effect on the existing controversy." Id. at 677.

In its sur-response, the District refers to language in the Hanna decision to support its contention that "where a public defendant has voluntarily ceased or reversed the objectionable

In its sur-response, the District refers to language in the Hanna decision to support its contention that "where a public defendant has voluntarily ceased or reversed the objectionable conduct, the case becomes moot" and "Simple conjecture on the part of the Plaintiff that they have 'done it before so they are likely to do it again' will not suffice." (See defendant's sur-response at 4 and citing to Hanna, 382 Ill. App. 3d at 679-680). It is also indicated in the Hanna decision that "a defendant . . . bears the burden of making an 'absolutely clear' showing that the conduct could not reasonably be expected to recur." Id. at 678 and citing to Cohan v. City Corp., 266 Ill. App. 3d 626, 629 (1st Dist. 1993). The Court found that the "facts and relevant case law" were not "in Hanna's favor" and further found that "the City has made the necessary showing. Nothing in the record suggest this defendant has temporarily ceased offensive conduct only until 'the coast is clear.'" Id. at 680 and citing to LaSalle National Bank N.A. v. City of Lake Forest, 297 Ill. App. 3d. 36, 45 (2nd Dist. 1998). The District's sur-response does not present "the necessary showing" the District needs to make on its mootness argument because of the action taken by the District's Board in their June 7, 2012 Motion. (See Hanna, 382 Ill. App. 3d at 680; see also Amoco Realty Co., v. Montalbano. 133 Ill. App. 3d 327, 335 (2nd Dist. 1985) where the Second District rejected a mootness challenge because although defendants ceased doing business from their home, they continued to claim they had a right to carry on their contracting business from there).

In connection with plaintiffs' contention challenging the nature and continuing status of the submitted policy change arguably reflected in the June 7, 2012 Motion, plaintiffs, during the hearing, also pointed to the action the District's Board has taken during this litigation in June 2011, April 2012 and in June 2012, to affect plaintiffs' employment benefits described in counts

1 and 3. The District's sur-response lacks an evidentiary submission or inferences to rebut the contentions of plaintiffs with respect to the June 7, 2012 Motion. It has been argued the District is a public entity that employs plaintiffs and the putative members of the proposed classes. The elimination and/or modification of the vested and accrued contractual rights of the members of the putative Classes, who are public employees, concerns an interest involving the District, a public entity. These contractual rights could be inpacted by the decisions of the District's Board, including the action taken in November 2010 and in June 2011 involving plaintiffs' contractual rights as claimed in the AVC and found in the January 25, 2012 Ruling. There is a public interest that plaintiffs have referred to in their arguments to allow at least for this class certification matter to proceed.

At the time of this court's scheduled ruling on plaintiffs' motion for class certification on a date which had been agreed to by the parties, the District presented an affidavit of its Executive Director "regarding" plaintiffs' motion for class certification and defendant's motion for summary judgment. (See motion for leave to file exhibit at 1). Plaintiffs have already indicated previously at the time that the District presented its motion for summary judgment that plaintiffs may request leave to take limited discovery before responding to the motion. While the affidavit does contain certain assertions that would appear to be relevant to the District's mootness argument raised in its sur-response, as well as in its motion for summary judgment, this court is not persuaded that it should delay today's scheduled ruling on plaintiffs' motion for class certification, especially when the mootness argument is also being raised in the District's motion for summary judgment that has not yet been responded to by plaintiffs. The District's affidavit, as well as any other submissions of the parties' to be presented in connection with the District's

motion for summary judgment which is awaiting a proposed briefing schedule offered by the parties, can be considered at the appropriate time.

This court finds, for purposes of 735 ILCS 5/2-801, that: (1) the members of the Classes proposed by plaintiffs are so numerous that joinder of all members is impracticable; (2) there are questions of fact or law common to the Classes proposed by plaintiffs, which common questions predominate over any questions affecting only individual members; (3) the representative parties will fairly and adequately protect the interest of the Class that each plaintiff will represent; and (4) the class action is an appropriate method for the fair and efficient adjudication of the controversy.

Finally, there may be a need to clarify the proposed Class B as defined. It appears from plaintiffs' submissions that Class B members would seem to include all current non-represented employees of the District hired prior to November 1994 who claim to have a contractual right to accrue and redeem prospective benefits for Termination Pay and Annual Sick Leave Incentive Pay after January 1, 2011. (See generally District's response at 9-10). In view of the apparent inclusion of these putative members, the Class B definition, that seems to include all non-represented employees hired before November 2, 1994, may need certain clarification. Moreover, according to plaintiffs' submissions, since twenty-two (22) of the named plaintiffs were hired before November 2, 1994, this court finds that not all plaintiffs can serve as representatives of Class B. (See plaintiffs' reply at 7).

IT IS HEREBY ORDERED, based upon the foregoing, the parties' submissions and their arguments, that :

Plaintiffs' motion for class certification is granted, subject to any need to clarify the definition for Class B that seems to refer to putative Pre-1994 members who are seeking declaratory relief to accrue prospectively Termination Pay and Sick Leave Incentive Pay benefits that are described in count 3 of the AVC.

Dated: August 2012

ENTERED:

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Richard J. Billik, Jr., Judge

ENTERED
AUG 06 2012
Judge Richard J. Billik, Jr.
Circuit Court - 1585