No Good Deed Goes Unpunished: Protecting Gender Discrimination Named Plaintiffs from Employer Attacks

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I don’t believe anyone ever wants to sue their employer, and I, while I believed that this company would be sued for sexual harassment, I did not believe it was going to be me. There just seemed to be no choice other than to quit or be forced to quit a job that paid well and had great benefits. First, I did it for myself, keeping the other women who would be impacted in mind. Second, the choice to make this a class action, giving the other similarly situated women the option to stand up for themselves, seemed the right thing to do and had nothing to do with “safety in numbers.” Third, I had the support of many men, union and management, who encouraged me and stood by me. Others had laid the groundwork — a class action was the next step.1

I. INTRODUCTION

Discrimination against women in the workplace comes in many forms and can be systemic. When system-wide employment practices operate as barriers to prevent advancement for many women, class action litigation is often the most efficient way to dismantle these discriminatory systems. Class action litigation requires at least one named plaintiff2 to represent the

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1. Telephone Interview with Lois Jenson, Named Plaintiff, Jenson v. Eveleth Taconite Co. (Jenson II), 130 F.3d 1287 (8th Cir. 1997), in Minn. (Oct. 8, 2008) (reflecting on her case).

2. I will use the term “named plaintiff” throughout this Note because it is the most expansive. Named plaintiffs are listed in the initial complaint and subject to deposition and
claims of the class. This role is not easy and, in many instances, makes the individual a target for intense scrutiny and retaliation. Some employers use a strategy of trying to “knock out” named plaintiffs (either procedurally or through intimidation) to make the lawsuit go away.

When courts permit attacks (such as overly intrusive discovery), it is often because defendants have argued that there is a procedural “hook” between the federal rule on class actions, Federal Rule of Civil Procedure 23 (“Rule 23”), and the discovery sought. For instance, Rule 23, among other things, requires that a named plaintiff be an adequate representative of the class. Under this prong, employers have justified intrusive discovery to attempt to find any non-job-related “skeletons in the closet” as weapons to use in arguing that the named plaintiff is inadequate. An analysis of particularly abusive instances raises the question of whether these attacks serve an ulterior motive to threaten, harass, or embarrass named plaintiffs into dropping out of their roles. These tactics may have the even further-reaching repercussion of deterring others from coming forward.

This Note will cast light upon the frequent attacks deployed against women serving as named plaintiffs in sex discrimination class actions under Title VII of the Civil Rights Act of 1964. Because the bulk of these practices are “behind the scenes” of litigation and typically are not described in judicial opinions, this Note will tell the anecdotal stories gleaned from interviews with prominent plaintiffs’ class counsel and a named plaintiff.

A core belief underlying this Note is that sex discrimination class actions are an essential tool for civil rights reform. Those brave enough to put their names and livelihoods front and center in these contentious, high-stakes proceedings are performing what Nantiya Ruan describes as an “essential and difficult public service.”4 Hopefully, exposing abusive prac-

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discovery. Once a class is certified, named plaintiffs are called “class representatives.” Not all named plaintiffs remain in that role; some may be dismissed while others may be added to represent additional claims or to better represent existing claims. See 5 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 23.25[6] (Jerold S. Solovy et al. eds., 3d ed. 2008) (discussing remedies for inadequate class representation).


(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race color, religion, sex, or national origin; or (2) to limit, segregate, or classify . . . employees or applicants . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.


tices will lead to greater protections for named plaintiffs in sex discrimination cases.

Employment sex discrimination cases can attract a great deal of press because they often involve recognizable companies and compelling stories of wrongdoing. This can amount to intense pressure on those serving as the public "faces" of absent class members.\(^5\) Considering the massive size of many of the classes in these cases (for example, *Dukes v. Wal-Mart Stores, Inc.* is on behalf of a class of 1.6 million\(^6\) and *Shores v. Publix Super Markets, Inc.* anticipated a class of approximately 100,000\(^7\)), named plaintiffs are thrust onto a public stage to which they are most likely unaccustomed.

Those challenging such powerful corporations often face controversy and backlash from many fronts. Vocal critics abound; some seemingly would have discrimination class actions abolished outright.\(^8\) Faced with charges of widespread sex discrimination, employers tend to immediately decry the allegations as false and attack those who come forward, rather than scrutinizing the allegedly discriminatory systems.\(^9\)

Nonetheless, effecting social change by litigating discrimination against women at work is a key feminist strategy. As activist and Professor Ellen Bravo succinctly reasons, "We've got lots of work to do on personal relationships, but to be on equal footing at home or successfully leave an

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5. See Ruan, *supra* note 4, at 409.


8. See *e.g.*, *Review & Outlook – A New Way to Sue*, WALL ST. J., Nov. 13, 2006, at A16:

Talk about stereotyping. The idea that a court should assume every female member of the class suffered the same amount of emotional distress seems, well, sexist. . . . [T]hese lawyers are ready to tee up every deep-pocketed retailer in America on similar accusations if courts let them. . . . If mere statistical imbalances can trigger a class action, companies will be forced to make pay decisions based on statistics rather than performance and merit. Ultimately, that leads to racial and gender quotas, all in an effort to avoid frivolous lawsuits. If these radical legal theories hold up in the Costco and Wal-Mart cases, the trial bar will gain tremendous leverage.

9. ELLEN BRAVO, *TAKING ON THE BIG BOYS: OR WHY FEMINISM IS GOOD FOR FAMILIES, BUSINESS, AND THE NATION* 106 (2007). See also Telephone Interview with Noelle Brennan, Partner, Noelle Brennan & Assoc., in Chicago, Ill. (Mar. 5, 2008) ("Employers should respond with, 'We are surprised but we take this seriously and we want to remind people not to retaliate;' instead they often send the opposite message, which is more like 'We think they're a bunch of liars and you should too.'").
abusive relationship, women must have economic sufficiency.”10 The statistics make clear that, as a whole, women are not yet on equal footing in the workplace — for some employers, it seems that litigation is the only way to change these discriminatory conditions.11

Section II of this Note briefly presents the history and evolution of Title VII sex discrimination class actions and the procedural requirements of Rule 23. This Section particularly focuses on the additional challenges posed by class actions with sexual harassment claims because these cases often provide more discussion of abusive discovery practices and vivid examples of these employer tactics. Section III analyzes the challenges named plaintiffs face and makes some observations about the backgrounds and characteristics of those who become named plaintiffs. Section IV presents common tactics that employers use to attack named plaintiffs in defending against litigation. Finally, Section V provides suggestions for plaintiffs' attorneys to prevent and defend against abusive defense tactics and offers some suggestions for reform.

II. THE UNIQUE HISTORY AND STRUCTURE OF SEX DISCRIMINATION CLASS ACTIONS

A. SOCIAL AND LEGAL SIGNIFICANCE

Class actions, though relatively rare,12 are powerful vehicles for social change. By statute, the Equal Employment Opportunity Commission (“EEOC”) is responsible for enforcing Title VII, under which plaintiffs bring their employment discrimination class actions. However, the EEOC has been under-funded since the Reagan administration cut back on the agency's budget and staffing levels in the 1980s.13 In the 2007 fiscal year, the agency estimated that it would have a backlog of 47,516 cases.14 Agency staff numbers have diminished by nineteen percent since 1991 due

10. BRAVO, supra note 9, at 17.
11. Though litigation is a powerful tool, it is designed to remedy discreet harms. Lasting and maintainable positive change for workers is more likely to be attained through organizing. The two strategies may be symbiotic. Lisa Featherstone reasons that the publicity generated by Dukes about Wal-Mart’s employment practices may inspire workers to organize. FEATHERSTONE, supra note 6, at 176. Former Wal-Mart employee Joyce Moody, now a United Food and Commercial Workers Union organizer, decided to file a declaration in hopes of Dukes furthering the chances of a unionized Wal-Mart. Id. at 186-87.
12. Id. at 171 (noting that civil rights class actions have been on the decline for over thirty years: there were 1,174 employment class actions in 1976 compared with only thirty-nine in 1991, although 2001 showed a slight improvement with seventy-three filings).
to budget cuts and a longstanding partial hiring freeze.\textsuperscript{15} In an attempt to reduce its budget, the EEOC outsourced its intake calls to a Vangent, Inc. contract call center in Lawrence, Kansas, from 2005 until late 2007.\textsuperscript{16} However, the call center employees each received only one week of training to learn the necessary skills of client counseling, intake, and legal basics.\textsuperscript{17} The budget cuts and the EEOC's burden in trying to adjust to them make the EEOC an unlikely source of widespread reform. Thus, the private employment discrimination class action has risen in importance as a much-needed tool for achieving progress in civil rights.

Despite the lack of EEOC resources, the number of claims continues to increase, a trend which likely signals an overall rise in discrimination.\textsuperscript{18} In the era of the "big box" or chain retailer, class actions are formidable to employers and capable of establishing change at a more systemic level than individual lawsuits.\textsuperscript{19} Because individual discrimination claims are often settled on a confidential basis for monetary relief only, the threat of class-wide litigation — which generally results in greater damage awards and widespread publicity — is a much more serious impetus for employers to audit their policies and practices for indicators of discrimination.\textsuperscript{20} Furthermore, unlike individual cases, class action discrimination suits often demand sweeping injunctive relief.

The injunctive relief ordered in civil rights class actions has resulted in major changes in hiring practices, promotion, training, compensation, and the corporate culture at many national and regional businesses.\textsuperscript{21} The success of injunctive relief depends on its structure, the level of judicial involvement, and, perhaps most importantly, the willingness of the corporation to change.\textsuperscript{22}

\begin{itemize}
\item \textsuperscript{15} Lee, \textit{supra} note 14.
\item \textsuperscript{16} Press Release, U.S. EEOC, EEOC Votes to Replace National Contact Center with In-House Phone System Using Federal Employees (Aug. 13, 2007), \url{http://www.eeoc.gov/press/8-13-07.html}.
\item \textsuperscript{17} FY 2008 Appropriations for EEOC, Including Defunding the EEOC's Contract Call Center Before the H. Appropriations Subcomm. on Commerce, Justice and State, 110th Cong. (2007) (statement of Gabrielle Martin, President, Nat'l Council of EEOC Locals, No. 216, AFGE/AFL-CIO), available at \url{http://www.council216.org/docs/leg/20070424martincjstestimony.pdf}.
\item \textsuperscript{18} BRAVO, \textit{supra} note 9, at 92.
\item \textsuperscript{19} See Ruan, \textit{supra} note 4, at 405-06 ("In today's workplace, where a handful of conglomerates employ increasing numbers of . . . workers, the importance of being able to attack unfair labor practices on a class-wide scale cannot be overlooked.").
\item \textsuperscript{20} \textit{Id.} at 407-08.
\item \textsuperscript{22} Interview with Teresa Demchak, Partner, Goldstein, Demchak, Baller, Borgen & Dardarian, in San Francisco, Cal. (Mar. 4, 2008).
\end{itemize}
Discrimination class action lawsuits are particularly important in the struggle for women's economic equality. Women face unique and complex challenges in attaining workplace equality due to biases in society and inadequacies in current law. The proposed Equal Rights Amendment has not yet been ratified. Therefore, constitutional challenges to gender discrimination based on equal protection are afforded a lower level of scrutiny than those based on race discrimination. Women also confront heightened workplace challenges due to more subtle discrimination based on family responsibilities and the design of the workplace to fit the male breadwinner model. In 2006, the wage gap between women and men remained virtually unchanged from the previous five years, with women making an average of 76.9 percent of what men earn. Over her lifetime, the average female high school graduate loses $700,000 to the wage gap. Female college graduates lose an average of $1.2 million, and women with graduate degrees lose $2 million.

The wage gap also persists across industries. According to its interpretation of 1997 data from the Bureau of Labor Statistics ("BLS"), Equal Rights Advocates estimates that women earn less than men in ninety-nine

23. Though this note focuses on sex discrimination class action cases, I will also draw from race, color, and national origin discrimination case law to illustrate the particular challenges women in these roles face. Title VII is limited, and in many ways it lags behind state and international discrimination law. For example, unlike the laws of some states, Title VII neglects to protect persons from discrimination based on sexual orientation, gender identity, body size, or familial status, among others. Identity is not as tidy as the Civil Rights Act legislators viewed it in 1964. There is a wealth of scholarship on the limitations for "sex plus" plaintiffs, such as women of color and disabled women. For a discussion of these challenges, see Phillip M. Kannan, Structuring a Case Against Complex Multidimensional Discrimination, 36 U. MEM. L. REV. 335, 356-62 (2006) (arguing that Title VII's protection for subclasses such as African-American women is canonically weak and proposing an alternate theory).


26. See JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 65 (2000) ("Requiring workers, if they want to achieve equality, to exercise the social power typically available only to men — to command a flow of family work, to have the kind of body machines are designed around, to relate to others in masculine terms — constitutes discrimination against women.").


28. Id.

29. Id.

30. Equal Rights Advocates is a nonprofit law firm that has pursued impact litigation since 1974 with the goal of "protect[ing] and secur[ing] equal rights and economic opportunities for women and girls through litigation and advocacy." Equal Rights Advocates, About ERA, http://equalrights.org/about/about_era.asp (last visited Oct. 13, 2008).
percent of the fields that reported data. Data on the wage gap for mothers versus non-mothers presents an even bleaker picture. Mothers who work full-time earn only sixty percent of the wages earned by fathers who work full-time. Single mothers earn the lowest percentage of men’s average pay. Furthermore, women have the highest rates of poverty. Seventeen percent of women and only one percent of men working full-time earn an average of $15,000 per year or less. Women comprise more than ninety percent of long-term low wage earners. A recent study found that nearly forty percent of poor, working women could afford to stop receiving welfare benefits if they were to receive pay equity increases to bring their wages in line with those of male coworkers. These statistics demonstrate that despite significant gains in equal rights, women are still very much constrained by the glass ceiling. By not promoting women, businesses trap women in a life of overwork and poverty. Though women represent approximately forty-six percent of the United States workforce, they still hold only five percent of the top-level jobs.

In addition, sexual harassment is still shockingly common. Studies estimate that between thirty-five and fifty percent of women are sexually harassed at some point in their careers. Women of color tend to be harassed in higher numbers than white women, and disabled women are more often harassed than able-bodied women. As all of these statistics illustrate, the task of ending discrimination against women in the workplace is far from accomplished.

B. HISTORICAL UNDERPINNINGS

Congress passed the Civil Rights Act of 1964 in the furor of the aftermath of the assassination of John F. Kennedy. The law initially aimed to cover only race, religion, color, and national origin as protected classes, but at the last minute, Howard W. Smith, a segregationist Democrat from Virginia, inserted “sex,” hoping it would be a poison pill. Smith had previ-
ously bragged, "I have certainly tried to do everything that I could to hinder, delay and dilapidate this bill." Following jocularity from Smith and his male congressional cohorts about the ugly women who would use the law to sue for a husband, Martha Wright Griffiths, one of only fourteen women in the House, challenged their behavior.

"We've sat here for four days discussing the rights of blacks and other minorities," she told them, "and there has been no laughter, not even a smile. But when you suggest you shouldn't discriminate against your own wives, your own mothers, your own daughters, your own granddaughters, or your own sisters, then you laugh."

To Smith's chagrin, his provision stayed.

Rule 23 is similarly rooted in a civil rights tradition. Rule 23 has been frequently used to further the rights of under-represented and under-privileged individuals, particularly in civil rights and environmental cases. In 1966, Section (b)(2) was added. This section allows for certification of classes that plead class-wide injunctive relief and was designed by the Rules Committee with the Civil Rights Movement in mind.

Despite statutory support for class actions, a series of Supreme Court decisions in the late 1980s ratcheted up the burden on Title VII plaintiffs. In response to these decisions, Congress passed the Civil Rights Act of 1991, which reversed some of those decisions and provided more expansive remedies for Title VII plaintiffs. However, some circuits have restrictively interpreted the 1991 amendments in the Rule 23 context to the point of refusing to certify classes that pray for the expanded remedies. Thus,

43. BRAVO, supra note 9, at 78.
44. Id.
45. Id.
46. Id.
47. Ruan, supra note 4, at 400.
48. Id.
49. FED. R. CIV. P. 23 advisory committee's note on 1966 amendments.
50. Ruan, supra note 4, at 400. The other two types of certifiable actions fall under Rule 23(b)(1), which is rarely used in civil rights litigation, and Rule 23(b)(3) which is used in claims for damages and requires class counsel to give more extensive notice to class members.
52. See, e.g., Allison v. Citgo Petroleum Corp., 151 F.3d 402, 407 (5th Cir. 1998) (because the 1991 amendments provided a $300,000 damages cap and an attorney's fee provision, individual cases would be economically viable and class treatment was not a "superior" method of litigation); Reeb v. Ohio Dep't of Rehab. & Corr., 435 F.3d 639 (6th Cir. 2006); Cooper v. Southern Co., 390 F.3d 695 (11th Cir. 2004); Murray v. Auslander, 244
Despite their progressive aims, Title VII and Rule 23 have had a somewhat limited progressive impact in class actions seeking to further those civil rights.

C. THE PROCEDURAL REQUIREMENTS FOR A RULE 23 CLASS ACTION

Discrimination class action cases are far more likely to end up in federal court than state court. The prerequisites of Federal Rule of Civil Procedure 23(a) are deceptively simple: numerosity, commonality, typicality, and adequacy of representation. Because these elements are necessary for certification, they are subject to extensive litigation. Named plaintiffs are commonly attacked under Rule 23(a)(3) typicality and Rule 23(a)(4) adequacy theories.

1. Numerosity

Rule 23(a)(1) requires that the class be sizeable enough that joinder of the plaintiffs would be impracticable. This prerequisite is relatively straightforward and subject to the least controversy in litigation. There is no set number of class members, and courts have held that there is no "magical formula" that will guarantee satisfaction of this requirement. As a general rule, classes numbering greater than forty-one individuals satisfy the numerosity requirement. When the numerosity determination is a close one in a Title VII class action, some courts have found the requirement satisfied, since cases can always be de-certified later. Though a statutory requirement, numerosity rarely presents a significant issue in class action litigation.

2. Commonality

Rule 23(a)(2) requires that there be "questions of law and fact common to the class." This rule does not require that each member of the class be

F.3d 807 (11th Cir. 2001). The Second and Ninth Circuits have adopted a more flexible ad hoc test that focuses on the intent of the plaintiffs in bringing the suit. See, e.g., Robinson v. Metro-North Commuter R.R. Co., 267 F.3d 147 (2d Cir. 2001); Molski v. Gleich, 318 F.3d 937 (9th Cir. 2003). The Seventh and D.C. Circuits have taken a "middle ground" hybrid approach and will certify claims using Rules 23(b)(2) and 23(b)(3). See, e.g., Jefferson v. Ingersoll Int'l Inc., 195 F.3d 894 (7th Cir. 1999); Eubanks v. Billington, 110 F.3d 87 (D.C. Cir. 1997).


56. Foster, 89 F.R.D. at 626.

57. FED. R. CIV. P. 23(a)(2).
identically situated, only that there be substantial questions of law or fact common to the class as a whole.\textsuperscript{58} Furthermore, individual variation among plaintiffs' claims does not defeat underlying legal commonality.\textsuperscript{59} To the extent that the parties’ commonality arguments overlap with the merits, courts must evaluate all relevant evidence to determine commonality.\textsuperscript{60} Commonality questions often lead to a "battle of the experts" in fields such as statistics, social science, labor economics, and psychology.\textsuperscript{61}

In early Title VII class actions, courts interpreted the commonality requirement permissively and routinely certified "across the board" Title VII class actions.\textsuperscript{62} Such cases challenged every aspect of a workplace in one complaint, often including hiring, compensation, promotion, and disparate treatment.\textsuperscript{63} However, the Supreme Court curtailed this format in 1982, finding that it was too broad.\textsuperscript{64} It set precedent requiring district courts to "rigorously analyze" all 23(a) prerequisites before certifying a class.\textsuperscript{65} To satisfy commonality, only one question needs to be common, not every issue.\textsuperscript{66} The inquiry into whether there are common questions does not require plaintiffs to prove the answers to those questions.\textsuperscript{67}

3. Typicality

Rule 23(a)(3) applies specifically to named plaintiffs and requires "claims or defenses of the representative parties" to also be "typical of the claims or defenses of the class."\textsuperscript{68} Courts have acknowledged that in certification analysis, commonality and typicality tend to merge.\textsuperscript{69} However, plaintiffs' claims need not be identical.\textsuperscript{70} "To be considered typical for purposes of class certification, the named plaintiff need not have suffered an identical wrong. Rather, the class representative must be part of the class and possess the same interest and suffer the same injury as the class members."\textsuperscript{71}

\textsuperscript{58} Ellis, 240 F.R.D. at 640.
\textsuperscript{59} Id. at 641.
\textsuperscript{60} Id.
\textsuperscript{61} See, e.g., Ellis, 240 F.R.D. at 640 (discussing both sets of Ellis experts and concluding that "plaintiffs have satisfied the court that there are common issues of fact and theories of law as to gender disparities in promotions ... [and] the nature of Costco's culture and its effect on women").
\textsuperscript{62} See, e.g., E. Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 405 (1974) (acknowledging that "suits alleging racial or ethnic discrimination are often by their nature class suits, involving class wrongs," though declining to certify such a broadly defined class on the facts of the case before it).
\textsuperscript{63} Id. at 402 (discussing the Fifth Circuit's factual findings).
\textsuperscript{64} Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 160-61 (1982).
\textsuperscript{65} Id.
\textsuperscript{66} See, e.g., Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998); Dukes v. Wal-Mart, Inc., 509 F.3d 1168, 1177 (9th Cir. 2007).
\textsuperscript{67} Hnot v. Willis Group Holdings, 241 F.R.D. 204, 211 (S.D.N.Y. 2004).
\textsuperscript{68} Fed. R. Civ. P. 23(a)(3).
\textsuperscript{69} Falcon, 457 U.S. at 157 n.13.
\textsuperscript{70} Staton v. Boeing, 327 F.3d 938, 957 (9th Cir. 2003).
\textsuperscript{71} Id.
A named plaintiff may also assert separate, individual claims on her own behalf in a class case. For example, a plaintiff in a sex discrimination class action may file a separate claim when she has been retaliated against.

4. Adequacy of Representation

Rule 23(a)(4) also applies directly to named plaintiffs and requires that they “fairly and adequately protect the interests of the class.” Resolution of two questions determines legal adequacy: (1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class? Adequacy challenges may rely on alleged wrongdoing of the named plaintiff, which defendants offer to show that she is not credible or trustworthy, or not qualified for the job in the first place.

5. Other Requirements for Named Plaintiffs

Named plaintiffs in class litigation maintain a different position than plaintiffs in individual litigation. In individual litigation, the plaintiff controls the litigation and makes decisions in her own interest, whereas in class litigation, the named plaintiff may not advance her interests over the interests of the absent class members.

It is also important to note that the role of the named plaintiff varies greatly depending on the type of case. At minimum, class litigation must have one named plaintiff (though there are usually more). Employment discrimination classes often have four or five named plaintiffs, though some have proceeded with far more.

72. See, e.g., Shores v. Publix Super Mkts., Inc. (Shores I), No. 95-1162-CIV-T-25(E), 1996 U.S. Dist. LEXIS 3381, at *22-23 (M.D. Fla. Mar. 12, 1996) (“[T]he mere fact that questions peculiar to each individual member of the class remain after the common questions of the defendant's liability have been resolved does not dictate the conclusion that a class action is impermissible.” (citations omitted)). But see 5 MOORE ET AL., supra note 2, § 23.25[2][b][vii] (collecting cases in which the court found a conflict of interest when a named plaintiff had class claims and individual claims).

73. Before 2003, this rule applied to both named plaintiffs and plaintiffs' attorneys. The requirements for adequacy of class counsel are now codified in Rule 23(g).

74. Hanlon v. Chrysler Corp., 150 F.3d 1011, 1020 (9th Cir. 1998).


76. Id.

77. Ruan, supra note 4, at 409 (reasoning that employment discrimination class action named plaintiffs are “litigating about their past (and sometimes current) employment histories that often include painful memories and emotional difficulties[, whereas] named plaintiffs in consumer and securities class actions have none of these hurdles to face”).

78. See FED. R. CIV. P. 23(a).

79. See Allison v. Citgo Petroleum Corp., 151 F.3d 402, 407 (5th Cir. 1998) (affirming denial of class certification in an “across the board” case with more than 130 named plaintiffs).
While it is not necessary to represent each geographical region amongst the named plaintiffs, it is wise to select representatives from various job sites and regions. To achieve class certification, each named plaintiff must have suffered an injury caused by each defendant that is representative of the claims of the class. For example, if the plaintiffs wish to make a claim regarding discrimination in promotions, at least one named plaintiff must have been denied a promotion. Courts generally allow the class to substitute a new named plaintiff if one is dismissed or decides to drop out.

Finally, Title VII has administrative exhaustion requirements. Courts have interpreted this as requiring at least one named plaintiff to have filed a timely EEOC charge containing claims that are related to the class claims and to have received a right-to-sue letter prior to filing suit. Likewise, it is necessary for at least one named plaintiff to meet jurisdictional requirements to establish venue.

III. WHAT DOES IT TAKE TO BE A NAMED PLAINTIFF?

A. RESPONSIBILITIES AND RISKS OF THE ROLE

More than other types of class actions, plaintiffs in employment discrimination class actions face a time consuming and, in some ways, risky undertaking. Named plaintiffs face particularly difficult experiences in discovery, including grueling depositions, intense scrutiny into their personal lives, and questions about their knowledge of the case and its legal issues. Both current and former employees face the risks of retaliation, isolation, ostracism by coworkers, and "blacklisting" by future employers. The role requires an extensive time commitment, especially during the investigation and discovery phases.

80. Interview with Teresa Demchak, supra note 22.
81. See 5 MOORE ET AL., supra note 2, §§ 23.24[1], 23.24[6][a].
84. See, e.g., Beckmann v. CBS, Inc., 192 F.R.D. 608, 616 (D. Minn. 2000) ("The 'piggybacking' rule will apply if two essential requirements are met: (1) the charge being relied upon must be timely and not otherwise defective; and (2) the individual claims of the filing and non-filing plaintiffs must have arisen out of similar discriminatory treatment in the same time frame." (citing Calloway v. Partners Nat'l. Health Plans, 986 F.2d 446, 449 (11th Cir. 1993))).
85. Ruan, supra note 4, at 396-97.
86. Id. at 397.
87. Id.
In most cases, at least one named plaintiff is closely involved in the litigation from the outset.\(^{88}\) Before filing a class action, the plaintiffs' attorneys conduct investigations that may take months.\(^{89}\) During that time, the named plaintiff is an important fact witness, providing crucial information on the employment practices at issue, including decision making, promotion, hiring practices, and organizational hierarchy.\(^{90}\) After filing EEOC charges, named plaintiffs also engage in the EEOC investigation process and review drafts of the complaint.\(^{91}\)

Like any other adversarial undertaking, litigation can be very stressful for named plaintiffs. This can be aggravated if named plaintiffs already have post traumatic stress disorder or other psychological conditions.\(^{92}\) "The very act of litigation may affect symptoms by a process . . . termed 'retraumatization.'"\(^{93}\) Researchers have found that people engaged in ongoing litigation may suffer psychological harm.\(^{94}\)

[T]he need to confront the traumatic history through interviews with attorneys, depositions, and courtroom testimony thwarts the victim's characteristic efforts at avoidance. This predictably results in the resurgence of intrusive ideation and increased [provocation]. Further, this is done in an adversarial system that pits the plaintiff against the defendant, who through the occurrence of the traumatic event may already be seen as the enemy.\(^{95}\)

Particularly in cases that involve harassment, a close examination of the plaintiff's conduct "for indications that she provoked or enjoyed the harassment provides women with a painful reminder of the law's historical mistreatment of rape victims."\(^{96}\)

1. The Cautionary Tale of *Jenson v. Eveleth Taconite*

*Jenson v. Eveleth Taconite Co.* was the first sexual harassment class action to be certified.\(^{97}\) This extraordinary and heartbreaking case inspired

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\(^{88}\) Ruan, *supra* note 4, at 409.

\(^{89}\) Id.

\(^{90}\) Id.

\(^{91}\) Id.


\(^{94}\) Id.

\(^{95}\) Id.

\(^{96}\) Korzek, *supra* note 92, at 317-18.

a nonfiction book and served as the inspiration for *North Country*, an Academy Award nominated film. The eleven-year long litigation provides a cautionary tale about abusive discovery and unchecked judicial discretion. Though hostile work environment cases are rare, they provide vivid examples of the abuses that may arise in a gender discrimination class action. These cases also illustrate the challenges of pleading emotional distress damages, thus "opening the door" to intrusive questioning about mental state and past trauma.

Lois Jenson initiated a hostile work environment case by filing a complaint with the Minnesota Department of Human Rights after suffering extreme sexual harassment that included stalking, slurs, vulgar graffiti directed towards her, and sexual attacks. Other named plaintiffs in that case endured similar abuse. For example, on multiple occasions, Judy Jarvela opened her locker to find semen on her clothing. Shirley Burton suffered such extreme harassment that she carried a can of mace, a pocketknife, and a length of rope to tie the door to her work area shut. Kathy O'Brien carried a sharpened screwdriver in her boot after a coworker harassed and physically assaulted her during her first month of work. Even when the women complained to management or to the union, little, if any-

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98. See BINGHAM & GANSLER, supra note 97.
99. NORTH COUNTRY (Warner Bros. Pictures 2005). Named plaintiff Lois Jenson became "Josie Aimes" in the film. The plot changed significantly from the true story — the writers concocted a love story between Aimes and her attorney "Bill White," and Jenson’s family story was changed. Id. In 2004, Jenson reported that she did not plan on seeing the film. Larry Oakes, *Iron Range Feels Good but Uneasy About 'Class Action,'* STAR TRIB. (Minneapolis), Oct. 17, 2004, at 3B. She also reported that six of the other named plaintiffs with whom she had spoken felt the same way and that they were upset it would be filmed in Eveleth, Minnesota. Id. Jenson reported that the other women felt “exploited.” Id. Jenson also said that while she was proud of the case, she was appalled over its portrayal in Bingham and Gansler’s book. Id. Jenson said that the book portrayed an overly grim and one-sided picture of the workplace and community, especially in regard to some of the male miners who stood up for the women. Id.
100. See Melissa Hart, Book Review, *Litigation Narratives: Why Jenson v. Eveleth Didn’t Change Sexual Harassment Law, But Still Has a Story Worth Telling,* 18 BERKELEY WOMEN’S L.J. 282, 288 (2003) (finding that between 1995 and 2002 there were only ten reported sexual harassment class actions that were certified and ten with certification denied).
101. BINGHAM & GANSLER, supra note 97, at 108. The details of Jenson’s harassment are recounted in Chapters 3 and 5 of Bingham & Gansler’s book.
102. Id. at 47.
104. BINGHAM & GANSLER, supra note 97, at 54-55. In the lunchroom, a coworker named Frank Lipka yelled out in front of many others, “Hey Kathy, do you fuck on the job?” Id. Subsequently, Lipka tormented O’Brien by trapping a bat in the phone call box and then announcing over the P.A. system that O’Brien had a phone call. Id. O’Brien was afraid of bats and very startled by the incident. Id. She was sitting at a bench to calm down when Lipka came up and said, “I’ll show you what will really scare you.” Id. Then he twisted O’Brien’s nose between the knuckles of his middle and index fingers until her nose bled. Id. He then grabbed her feet and flipped her backwards off the table, causing her to knock her head against the wall. Id. Lipka was never formally disciplined but was moved to a different crew. Id. O’Brien started carrying a sharpened screwdriver in her boot and continued to do so for the next nine years. Id.
thing, was done to remedy the situation. Instead, they faced retaliation for making complaints. In an interview with the author, Jenson recalled her disappointment with the lack of support from her union. "The union pushed it to the point where we had to name them as defendants. We didn't want to name them because we all thought unions were important. Also, we knew if we named the union, it would be more difficult for us and we would face more opposition." In litigation as a proposed class, counsel for the mines engaged in a "nuts and sluts" strategy, attempting to paint the plaintiffs as unstable and sexually promiscuous. After the court certified the class and found the employers liable, it appointed Patrick McNulty as Special Master to manage discovery on damages. Despite the plaintiffs' objections, the scope of discovery against the named plaintiffs was virtually limitless. McNulty allowed a total of 7,469 pages of testimony during a seven-week trial and issued a 416-page Report and Recommendation. Defendants explored Jenson's past extensively and intrusively in discovery, including scrutinizing an incident in her past when she was raped, which resulted in her pregnancy with her first child. Though Jenson's attorneys objected to the scope of discovery, their objections were overruled. The only concession plaintiffs received from McNulty was that this information was at least to remain under seal. Jenson was deeply afraid that her son would learn the painful story of his conception. But Jenson was betrayed in a strikingly unprofessional and unethical move by

105. BINGHAM & GANSLER, supra note 97, at passim. See also Telephone interview with Lois Jenson, supra note 1.
106. BINGHAM & GANSLER, supra note 97, at passim.
107. Telephone interview with Lois Jenson, supra note 1.
108. This rhyme may have been coined by author David Brock who, commenting on the confirmation hearings of Clarence Thomas, characterized Anita Hill as "a bit nutty, and a bit slutty." David Brock et al., The Real Anita Hill, THE AMERICAN SPECTATOR, Mar. 1992, at 18, 27. Hill accused Thomas of sexually harassing her with lurid sexual comments and pornography while she was his subordinate at the U.S. Department of Education and at the EEOC. BRAVO, supra note 9, at 98. See also Anita Hill, The Smear This Time, N.Y. TIMES, Oct. 2, 2007, at A25 ("Regrettably, since 1991, I have repeatedly seen...character attack(s) on women and men who complain of harassment and discrimination in the workplace... Those accused of inappropriate behavior also often portray the individuals who complain as bizarre caricatures of themselves — oversensitive, even fanatical, and often immoral — even though they enjoy good and productive working relationships with their colleagues.").
110. BINGHAM & GANSLER, supra note 97, at 277.
111. See Jenson v. Eveleth Taconite Co. (Jenson II), 130 F.3d 1287, 1290-91 (8th Cir. 1997).
113. Jenson II, 130 F.3d at 1292.
114. Id. at 1293.
115. BINGHAM & GANSLER, supra note 97, at 349.
116. See id.
the judge, who revealed as part of his voluminous opinion that "[i]n 1967, Jenson became pregnant by reason of what she now characterizes as rape. . . . [T]his characterization of the event is not particularly important, in and of itself. . . . [but] has importance as a reflection on credibility." 117 Another plaintiff, Jan Friend, dropped out of the case because she found it too painful to answer prying questions about her family, especially questions about her son, who had been convicted of murder. 118

McNulty awarded staggeringly low damages, a total of $182,500 for the entire class. 119 The plaintiffs appealed McNulty's findings, and the Eighth Circuit reversed and remanded for a new trial. 120 The federal district court judge to whom the case was assigned on remand was much more responsive to the plaintiffs' requests — one of his first preliminary rulings was that anything that had happened in the women's lives more than one year prior to the class period was not relevant, not discoverable, and not admissible. 121 On the eve of trial, the remaining fifteen plaintiffs settled for $3.5 million dollars, which amounted to more than $233,000 per person. 122

This case sheds much light on the travails named plaintiffs face and on the sometimes disappointing results, despite the hard work, courage, and effort named plaintiffs and their attorneys put into the case. Cases like Jenson could discourage named plaintiffs from representing legitimate class claims, since to do so may put them at risk of court-condoned abuse, negative public exposure, and retaliation by coworkers. The individual willing to undertake the role of named plaintiff, as demonstrated by Jenson, must have great fortitude and courage to survive the defendant who turns the legal system into a tool to pursue abusive practices.

In an interview with the author, Jenson reflected on her case and shared the advice she gives women who ask her if they should sue their employers over discrimination as Jenson did:

Several women have talked to me about their experiences of being sexually harassed . . . or other discrimination issues. Some have apologized for not fighting back. Most who have fought back are cautiously proud they took action, others not. In each discussion, there are the lingering effects of the issue(s) that made them feel powerless. I am not a cheerleader for any position. Some women

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118. Korzek, supra note 92, at 313-14 (quoting BINGHAM & GANSLER, supra note 97, at 286).
119. BINGHAM & GANSLER, supra note 97, at 346.
120. Jenson v. Eveleth Taconite Co. (Jenson II), 130 F.3d 1287, 1304 (8th Cir. 1997).
121. BINGHAM & GANSLER, supra note 97, at 368.
122. Id. at 374-75.
need to walk away, others need to fight. I have had numerous calls from women in mid-stream of a case who are exhausted and on the edge of breaking. I urge them to do what is best for them. No matter what you do or try to do about a wrong done it remains that what has been done has been done. There is no taking it back [or] undoing it, but there is facing it, thoughtfully deciding what you want to do and being able to live with the choices you make.

On the question of being a named plaintiff or lead plaintiff — you are signing up for the long haul. Some of those who sign on will demand much attention. Lead plaintiff does not mean psychologist, advisor or best friend. It means taking care of yourself first so you can take care of your responsibilities. Put energy into the process not the outcome. You cannot control others or outcomes but you can control how you feel and act.\textsuperscript{123}

2. The Availability of Incentive Payments to Named Plaintiffs

For a role with so many pitfalls and risks, the potential rewards for named plaintiffs are often disproportionately small. The plaintiffs' bar and many scholars advocate incentive payments in settlements for named plaintiffs above and beyond any compensatory damages awarded to all class members.\textsuperscript{124} The rationale for these payments is that named plaintiffs give much more of their time and energy to the case than absent class members, and therefore they deserve additional compensation for their service to the class. However, these awards are sporadically and inconsistently awarded in employment discrimination class actions in general. Researchers studying 374 class action opinions for the years 1993 to 2002 found that less than half (forty-six percent) of employment discrimination awards included incentive payments for class representatives.\textsuperscript{125}

\textit{Women’s Committee for Equal Employment Opportunity v. National Broadcasting Corp.} extolled the virtues of named plaintiffs in discrimination class actions and granted incentive awards in the settlement.\textsuperscript{126} \textit{Women’s Committee} provided a six-factor test for granting incentive awards: (1) effect of settlement as a whole on class members; (2) the possibility of collusion between named plaintiffs and counsel; (3) objections to

\begin{footnotes}
\begin{enumerate}
\item[123.] E-mail from Lois Jenson, Named Plaintiff, \textit{Jenson v. Eveleth Taconite}, to author (Oct. 24, 2008, 14:41:00 PST) (on file with author).
\item[124.] See Ruan, \textit{supra} note 4, at 397.
\end{enumerate}
\end{footnotes}
settlement made by class members; (4) whether class members who had already filed their own claims of discrimination would relinquish their option to pursue these claims as a result of the suit; (5) the efforts made by named plaintiffs, their contribution to the litigation, and the social benefit of their suit (specifically acknowledging that the plaintiffs had undertaken significant obligations, "perhaps at some risk to their job security and good will with coworkers"); and (6) the overall policy in favor of amicable settlement of legal disputes.127

Because of the sporadic and inconsistent nature of these incentive awards, class counsel considering such an award should:

(1) keep time and expense records for named plaintiffs; (2) document risks and retaliation; (3) plead individual claims; (4) negotiate individualized awards for each named plaintiff; (5) create a record that the settlement negotiations and final settlement package are fair; (6) evaluate proportionality between class awards and named plaintiff awards; and (7) keep client expectation low because of the uncertainty of incentive payments.128

B. OBSERVATIONS ABOUT NAMED PLAINTIFFS

In literature about discrimination class action cases, named plaintiffs often reflect that their primary goal was institutional change, not monetary gain. For example, Jenson's initial demand in response to the egregious harassment she suffered at the Eveleth Mine was merely for the implementation of a sexual harassment policy and to not have to work with her harasser.129

Brenda Schillaci was a plaintiff in the EEOC v. Mitsubishi Motor Manufacturing of America, Inc. sexual harassment case.130 Schillaci was reluctant to join the suit after having quit a job rife with harassment — she

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129. BINGHAM & GANSLER, supra note 97, at 109.

130. Ellen Warren & Nancy Millman, Abuse on the Line, CHI. TRIB., Feb. 15, 1998, at 10C. The plaintiffs in Mitsubishi claimed that they suffered widespread sexual harassment in the Normal, Illinois, Mitsubishi plant. Press Release, EEOC, Mitsubishi Motor Manufacturing and EEOC Reach Voluntary Agreement to Settle Harassment Suit (Jun. 11, 1998), available at http://www.eeoc.gov/press/6-11-98.html. This case was the largest sexual harassment class action ever brought under Title VII. The case settled eventually, with $34 million going to the class and an injunction that implemented changes to prevent sexual harassment at Mitsubishi. Press Release, EEOC, Monitors Say Mitsubishi in Compliance with EEOC Consent Decree (Sept. 6, 2000), available at http://www.eeoc.gov/press/9-6-00.html.
did not want to relive the trauma. However, she decided to join after an EEOC attorney urged her to bring these abuses to light. Prior to the eventual $34 million class settlement, Shillaci’s husband described their decision-making process: “The more we thought about [joining the suit], the more we thought we could help to change conditions for the women at the plant. And, though a possible cash settlement wasn’t the first thought, that, too, was a consideration. The monetary thing — [Brenda] deserves something.” Carol Carr, another Mitsubishi plaintiff, agreed: “What I’d like to see come out of this is the guys treat the women like civil human beings — like they’d like their mothers to be treated.” Pioneer employment discrimination class action attorney Barry Goldstein reasons, “Clients who experience discrimination regularly understand, accept, and embrace the concepts implicit in representing a class.”

Betty Dukes, a named plaintiff in Dukes, is proud to speak on behalf of Wal-Mart women and recognizes that the suit can do what one person cannot:

“There was a lot of women in my store that felt . . . disenfranchised. Like I did. But who are you to stand up? You are just a little dog, and they got a dozen pit bulls.” . . . [After seeing the pleadings, she said,] “Betty Dukes versus Wal-Mart Stores . . . . It hasn’t quite sunk in . . . . Now I’m in federal court . . . . And the lawsuit is in my name. And now they are spending millions of dollars defending themselves . . . . We, the women of Wal-Mart, will have our day in court . . . . They will answer our charges: that they have treated us unfairly and we deserved better. Because we are the backbone of their company, and we have made them wealthy. We have made them wealthy.”

Barry Goldstein reports that early race discrimination named plaintiffs were “natural leaders” who were involved in unionization efforts prior to the class action suit. In his experience, union leaders typically make strong named plaintiffs because they already have experience leading their peers and are typically less intimidated by management than those without

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131. Warren & Millman, supra note 130.
132. Id.
133. See Jon Bigness, Mitsubishi Settlement Checks on the Way; 486 Women Workers to Share $34 Million, Chi. Trib., June 26, 1999, at 1N.
134. Warren & Millman, supra note 130.
135. Id.
136. Goldstein, supra note 75, at 510.
137. FEARNERSTONE, supra note 6, at 259-60. See also id. at 257 (quoting witness Joyce Moody who says she is not involved in the suit for money but rather for the company to become a better place for women).
138. Interview with Barry Goldstein, Of Counsel, Goldstein, Demchak, Baller, Borgen & Dardarian, in Oakland, Cal. (Jan. 17, 2008).
such experience. Bill Lann Lee, a leading civil rights attorney and a former United States Assistant Attorney General for Civil Rights, has also observed this trend in his practice. Lee reasons that women's historical lack of access to leadership opportunities in unions has indirectly led to female named plaintiffs with less access to a built-in leadership system than male named plaintiffs. Lee adds that he has found qualified named plaintiffs by looking for leaders in churches or community organizations. Jenson plaintiffs' attorney Jean Boler remembered named plaintiff Pat Kosmach as a natural leader.

The rest of the women could rally around her.... She was a little older, and she'd been through a lot in her life already. She was fiery and articulate, but with the women she could be a mother figure. Even when she was in the hospital, the other women would go to her.

Kosmach was a devoted union leader for years before the lawsuit, but her role as a named plaintiff in the suit drove a wedge between her and her union.

In Lee's experience, a fairly high number of single mothers have served as named plaintiffs. Lee reasons that this was because of the likelihood of their heightened economic vulnerability. Since single mothers

139. Interview with Barry Goldstein, supra note 138.
141. Interview with Bill Lann Lee, supra note 140.
142. Id.
143. Doug Grow, Unsung Hero in Fight Against Eveleth Mines, STAR TRIB. (Minneapolis), Jan. 4, 1999, at 2B.
144. Grow, supra note 143.
145. BINGHAM & GANSLER, supra note 97, at 65 ("Pat's commitment to the union movement and her authoritative personality landed her in a place where no woman had been before — the senior membership of the Steel Worker's Local 6860 .... Pat had a reputation at work for dragging men to Alcoholics Anonymous meetings, sending women with bruises on their faces to Range Mental Health, and keeping everyone's secrets. She was both opinionated and nurturing."); Telephone interview with Lois Jenson, supra note 1 ("Pat Kosmach felt like she was betraying her union by joining the lawsuit, but at the same time, the union wasn't standing by the women. She was a union officer who worked on human rights issues. This case was all about human rights. It wasn't until Pat saw the union president talking to the company attorney during the trial and learning that he would testify against us that she got so upset that she knew she had to make a choice to cooperate more with our side. She had [initially] signed on with the case but was unwilling to provide evidence that would clarify the union's obligation regarding discrimination. And it hurt her a lot to see the union take that side against the women.").
146. Interview with Bill Lann Lee, supra note 140. This also may simply be reflective of the workforce. For example, many Wal-Mart hourly employees are single mothers. Compare Dukes v. Wal-Mart, Inc., 509 F.3d 1168 (9th Cir. 2007) (list of named plaintiffs), with FEATHERSTONE, supra note 6, at 111, 117, 189 (describing named plaintiffs in Dukes as single mothers).
147. Interview with Bill Lann Lee, supra note 140.
are the breadwinners for their families, discrimination that results in lower wages or lack of promotion opportunities puts their families in greater economic jeopardy.\textsuperscript{148} They likely have more to gain from eradicating discriminatory systems than do women in dual income households.\textsuperscript{149} However, this economic vulnerability is a double-edged sword; the threat of losing their jobs to retaliation is a heightened economic risk for these women and their families.\textsuperscript{150}

Though his case was an individual one, Percy Green may be seen as a precursor to the types of people who represent classes today. Green was the plaintiff in the foundational \textit{McDonnell Douglas v. Green}, which set the standard for Title VII race discrimination suits.\textsuperscript{151} He was a passionate and well-known civil rights activist in St. Louis prior to litigating his case.\textsuperscript{152} Green had been arrested over 100 times in civil rights protests spanning forty years.\textsuperscript{153} He had utilized various high-profile tactics, such as climbing the St. Louis Gateway Arch while it was under construction to call attention to the lack of black workers on the project and revealing the secret identity of the "veiled prophet" master of ceremonies at an all-white charity ball by literally unmasking him at the event.\textsuperscript{154} On August 28, 1964, a month after Green climbed the arch, he was laid off from his job at McDonnell Douglas.\textsuperscript{155} His subsequent lawsuit is perhaps the most cited and well-known Title VII case.\textsuperscript{156} His courage in pursuing civil rights for others remains an inspiration for named plaintiffs seeking to eradicate discriminatory employment practices for themselves and the class.

It takes great fortitude of character to serve as a named plaintiff. Acknowledging the bravery of named plaintiff Brenda Berkman in a protracted sex discrimination class action against the New York City Fire Department, her attorney Laura Sager proclaimed:

\begin{quote}
Brenda performed the role of named plaintiff in a class action as well as anyone could possibly do. She did not merely lend her name to the case, but provided real leadership and support to the other women who wanted to be firefighters, the class members. This case went on for a long time [ten years], and Brenda was subjected to an extraordinary degree of animosity and hatred, even receiving death threats. But she never wavered in her determination to see the case through and to become a firefighter.\textsuperscript{157}
\end{quote}

\begin{footnotes}
\footnote{148. Interview with Bill Lann Lee, \textit{supra} note 140.}
\footnote{149. \textit{Id.}}
\footnote{150. \textit{Id.}}
\footnote{152. Oppenheimer, \textit{supra} note 41, at 13.}
\footnote{153. \textit{Id.}}
\footnote{154. \textit{Id.}}
\footnote{155. \textit{Id.} at 23.}
\footnote{156. \textit{Id.} at 35.}
\footnote{157. Brenda Berkman et al., \textit{Roundtable Discussion}, 26 \textit{FORDHAM URB. L.J.} 1355,}
\end{footnotes}
IV. COMMON EMPLOYER TACTICS

A. EMPLOYERS USE RULE 23 AND MOTIONS FOR SUMMARY JUDGMENT TO JUSTIFY INTRUSIVE DISCOVERY AND ATTACKS ON NAMED PLAINTIFFS

Through discovery requests, including deposition questioning and requests for documents, defendants attempt to line up summary judgment and Rule 23 challenges against named plaintiffs. Defendants sometimes push these justifications too far in attempts to either gain discrediting information or simply to beleaguer or implicitly threaten named plaintiffs. The theory is that if defendants can “knock out” named plaintiffs, they can curtail the litigation altogether. Though the case law does not strongly support this theory, the collateral damage against named plaintiffs and potential named plaintiffs who are too intimidated to step forward is significant.

1. Motions for Summary Judgment Against Individual Named Plaintiffs’ Claims

With increasing frequency, defendants move for summary judgment against each named plaintiff before certification. In anticipation of these motions, defendants sometimes move for dismissal of named plaintiffs on the merits during the class discovery period. The defendants’ motions then attempt to knock out the individual named plaintiffs’ claims using the higher burden imposed on plaintiffs by the McDonnell Douglas framework for individual claims, rather than the Teamsters v. United States or Griggs v. Duke Power model for groups of plaintiffs. If defendants are successful in asking the court to consider the claims under McDonnell Douglas, the plaintiffs lose the Teamsters’ presumption of discrimination established by statistical evidence. This places the named plaintiffs under even closer scrutiny from the very beginning of the suit. Accomplished civil rights attorney Teresa Demchak posits that defendants try to knock out

158. Interview with Teresa Demchak, supra note 22.
159. Id.
160. See 411 U.S. 792, 802 (1973). The Court requires the complainant to show: (i) that she is a member of a protected class; (ii) that she applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite her qualifications, she was rejected; and (iv) that, after her rejection, the position remained open and the employer continued to seek applicants from persons of plaintiff’s qualifications. Id. The burden then shifts to the employer to articulate some legitimate, nondiscriminatory reason for the employee’s rejection. Id.
the named plaintiffs' claims as a strategy to defeat the case. However, new named plaintiffs may be substituted if others are dismissed on summary judgment. Yet, if the plaintiffs who are dismissed have claims on which the statute of limitations rests, defendants may be able to narrow the class period or class size with this tactic. After observing the treatment and scrutiny of the original named plaintiffs, Demchak points out that new named plaintiffs are likely to be very reluctant to step up.

2. Resisting Class Certification on Rule 23 Grounds

To prepare typicality and adequacy challenges, employers will often subpoena sensitive personal records from plaintiffs. Demchak reports, "Defendants frequently try to subpoena prior work records, school transcripts, domestic relations records, criminal records, and even bankruptcy records." Defendants will almost always attack named plaintiffs in their opposition to class certification motions. Though employers will not usually attack named plaintiffs on Rule 23(a)(1) numerosity grounds, they may nonetheless attempt to cast doubt on the likelihood of the absent class members' claims or willingness to participate by submitting declarations from employees asserting that they have not been discriminated against. Attacks based on commonality under Rule 23(a)(2) are more frequent than numerosity challenges, but these are more likely to focus on the claims of the class and the plaintiffs' expert reports on this issue. Defendants most commonly attack the typicality and adequacy of the named plaintiffs under Rule 23(a)(3) and Rule 23(a)(4).

Wal-Mart attacked the Dukes named plaintiffs for not being typical of the purported class because some plaintiffs were paid more than most men in their stores. Although a few of the named plaintiffs were among the highest paid workers in their stores, the plaintiffs argued that these women would have been paid more if they were men. For example, Christine Kwapnoski was one of the higher wage earners in her store after a seventeen-year tenure. Yet Kwapnoski was paid the same as a male coworker who had worked for Sam's Club (a Wal-Mart subsidiary) half that time.

163. Interview with Teresa Demchak, supra note 22.
164. Id.; See, e.g., Larkin v. Pullman-Standard Div., Pullman, 854 F.2d 1549, 1560 (11th Cir. 1988) (additional named plaintiffs had been added upon leave being granted by the court). See also Dukes Complaints, supra note 82.
165. Interview with Teresa Demchak, supra note 22.
166. Id.
167. Id.
168. See, e.g., Shores v. Publix Super Mkts., Inc. (Shores I), No. 94-1162-CIV-T-25(E), 1996 U.S. Dist. LEXIS 3381, at *9 (M.D. Fla. Mar. 12, 1996) ("Although Defendant did not directly address the issue of numerosity, it did submit hundreds of affidavits from women who believe that they have not been discriminated against.").
169. FEATHERSTONE, supra note 6, at 136-37.
170. Id. at 138.
171. Id.
172. Id.
In named plaintiff Edith Arana’s deposition, the line of questioning pointed to a Rule 23(a)(3) typicality challenge.\textsuperscript{173} Arana’s attorney, Debra Smith of Equal Rights Advocates, recalls the defense counsel saying, "You’ve got more raises than anybody we know! How can you say you were discriminated against? Look you got a dollar raise."\textsuperscript{174} Defendants typically try to paint any positive employment action, minor as it may be, as probative of a lack of discrimination and also as a characteristic that causes the named plaintiff to diverge from other class members. Wal-Mart’s typicality challenges were not successful.\textsuperscript{175}

In Ellis v. Costco Wholesale Corp., a sex-discrimination class action alleging that Costco discriminatorily failed to promote women, the defendant unsuccessfully argued that the named plaintiffs lacked typicality because each presented unique claims.\textsuperscript{176} Thus, defendant argued, they were atypical of the class.\textsuperscript{177} Costco also argued that they lacked typicality because Costco intended to present unique defenses to the gender discrimination claims of each named plaintiff.\textsuperscript{178} The court rejected this argument by stating that it “need not address the merits of each of the proposed defenses; rather, it is enough to say that as a general matter, individualized defenses do not defeat typicality.”\textsuperscript{179}

Costco also attacked the named plaintiffs on adequacy grounds. First, the employer argued that those named plaintiffs who were former employees were inadequate because “they have little incentive to seek injunctive relief on behalf of current employees.”\textsuperscript{180} Costco then argued that the named plaintiff, who was then an Assistant General Manager, would have little incentive to seek injunctive relief for women seeking promotion to Assistant General Manager.\textsuperscript{181} However, the court reasoned that only if all of the named plaintiffs were only former employees, who would not stand to benefit from injunctive relief, might there be a conflict of interest with members of the class.\textsuperscript{182} Finally, Costco attacked Ellis’ credibility based on reports of her alleged mistreatment of employees and alleged misrepresentations on her job application.\textsuperscript{183} The court ruled against Costco on all these arguments, recognizing

\begin{itemize}
  \item 173. Featherstone, supra note 6, at 141-42.
  \item 174. Id. at 141. This dollar raise was the result of Arana’s negotiation skills; the original offer was a raise of $0.25 per hour. Id.
  \item 175. See Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 188 (N.D. Cal. 2004) (granting class certification), aff’d, 509 F.3d 1168, 1193 (9th Cir. 2007).
  \item 177. Id.
  \item 178. Id. at 640-41.
  \item 179. Id. at 641 (citing Hanon v. Dataproducts Corp., 976 F.2d 497, 508-09 (9th Cir. 1992)).
  \item 180. Id.
  \item 181. Id.
  \item 182. Id.
  \item 183. Ellis, 240 F.R.D. at 641. See, e.g., Costco’s Opposition to Plaintiffs’ Motion for Class Certification, Ellis, 240 F.R.D. at 627 (No. C04-3341 MHP) (“Ellis’s abrasive style . . . resurfaced . . . when many employees complained about her brusque, demoralizing manner.”).
\end{itemize}
that even if the allegations against Ellis were proven true, they "would not rise to the level of prejudice to the unnamed class members." 184

Defendants will also try to attack the financial ability of the named plaintiffs to pursue claims on behalf of the class. Traditionally, class counsel could advance the costs of civil rights litigation instead of having the whole financial liability fall on the named plaintiffs. 185 Today, some courts require plaintiffs to show ability to reimburse the attorney, some only permit cost advances on a contingent basis, and some continue to subject cost advancement to special scrutiny to ensure that class counsel isn't standing in as a class representative. 186 Barry Goldstein recalls from his years working in litigation with the NAACP Legal Defense Fund that the organization diligently promoted the argument that it was legitimate for attorneys to assume financial liability so as not to deter meritorious claims. 187 Still, it was common — and remains so — for defendants to vigorously question named plaintiffs in depositions about their financial ability to pay, as well as their level of education under the Rule 23(a)(4) adequacy requirement. 188

3. Settlement Offers to "Pick Off" Named Plaintiffs

Depending on the court, defendants are sometimes permitted to try to moot the case by "picking off" named plaintiffs with Federal Rule of Civil Procedure 68 full offers of judgment before class certification. 189 Some courts have viewed these offers as mooting the case, even if the plaintiffs do not accept the offer of judgment. 190 These courts view the plaintiffs as having lost Article III standing by no longer having a personal stake in the litigation if the defendant offers to surrender all that the individual plaintiff seeks in the action. 191 Other courts look upon this practice unfavorably, since the class action vehicle is not only to vindicate the interests of named plaintiffs but also those of the absent class members. 192

184. Ellis, 240 F.R.D. at 641.
185. See 5 MOORE ET AL., supra note 2, § 23.25[2][d][iv].
186. Id.
187. Interview with Barry Goldstein, supra note 138.
188. Id.
189. David Hill Koyszsa, Note, Preventing Defendants from Mooting Class Actions by Picking Off Named Plaintiffs, 53 DUKE L.J. 781, 781 (2003). Federal Rule of Civil Procedure 68 provides that more than ten days before trial, a defendant may make a full offer of judgment. FED. R. CIV. P. 68(a). If the offer is not accepted, and what the plaintiff gets in the final judgment is not more favorable than the rejected offer, the plaintiff must pay the defendants' costs incurred after the offer. FED. R. CIV. P. 68(d).
190. Koyszsa, supra note 189, at 782.
191. Id. at 786-87 (citing Greisz v. Household Bank, 176 F.3d 1012, 1015 (7th Cir. 1999) ("You cannot persist in suing after you've won.").
192. Id. at 792-93.
4. Discovery

Abuse in depositions is disturbingly common and takes many forms. To begin with, the process itself is undoubtedly stressful and is typically a new and intimidating experience for the named plaintiff. To add to the stress, "[d]epositions are the toughest place to protect a client because there isn’t a trial judge in the room to tell the lawyers to behave themselves."

The questions themselves can be designed to intimidate rather than to gather useful evidence.

Federal Rule of Civil Procedure 26 ("Rule 26") governs discovery and provides:

Unless otherwise limited by court order... [p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense... Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

The permissiveness of the federal rule makes it difficult for class counsel to keep abusive discovery requests at bay. An employment discrimination plaintiff is likely to be served with requests for document production and questioned in depositions about her qualifications, her job performance, and all of her factual allegations in the case. It does not always stop there. Named plaintiffs have been asked about such embarrassing personal matters as child custody arrangements, sexual history, sexual orientation, criminal record, divorce proceedings, problems with her children, medical history, past childhood abuse, past sexual abuse, past psychological treatments, spousal drinking problems, spousal gambling problems, fidelity to her husband, her bra size, and the size of her husband’s penis.

A deposition from Ellis provides an illustration of the types of intimidating, even hostile, questions asked of named plaintiffs. In the deposition, Costco’s attorney aggressively questioned the plaintiff about a traumatic experience at work where her warehouse manager sexually assaulted

193. BINGHAM & GANSLER, supra note 97, at 191.
194. Jane H. Aiken, Protecting Plaintiffs’ Sexual Past: Coping with Preconceptions Through Discretion, 51 EMORY L.J. 559, 560-61 (2002) (arguing that defendants use the threat of abusive discovery to intimidate plaintiffs into dropping their cases or dropping out as named plaintiff).
195. FED. R. CIV. P. 26(b)(1) (emphasis added).
196. Interview with Linda Dardarian, Partner, Goldstein, Demchak, Baller, Borgen & Dardarian, in Oakland, Cal. (Oct. 22, 2008).
197. Id.
198. Id.
199. Id.
201. Telephone Interview with Noelle Brennan, supra note 9.
202. Id.
her. At one point, Costco’s attorney even directed the plaintiff to physically reenact the assault.

Under the current rules, this type of questioning is impossible to avoid completely. It is worth noting that the plaintiffs in Ellis did not pray for class relief under a hostile work environment theory. Nor did the Ellis named plaintiff file any individual claims for sexual harassment. The harassment was mentioned in the motion for class certification as anecdotal evidence of a discriminatory environment, not as a separate claim. In its opposition to the plaintiffs’ motion for class certification, Costco attacked the named plaintiff under the Rule 23(a)(3) typicality requirement because she had experienced sexual harassment in addition to discrimination in promotion. Costco argued that her claims were thus unique and atypical of the class. In certifying the class, Judge Patel rejected these arguments because there were no allegations in the complaint that would suggest the named plaintiffs pled sexual harassment claims as part of the action.

In Shores, named plaintiff Susan Sharp endured an extremely abusive deposition. Linda Dardarian, an attorney involved in Shores, has been practicing civil rights law for nearly twenty years. Dardarian says that employers often prepare for depositions by interviewing all of the named plaintiffs’ coworkers. During the Shores litigation, Publix interviewed everyone in the named plaintiffs’ work sites, including employees who were also personal friends and acquaintances of the plaintiffs. This can be coercive to the employees who are not necessarily accustomed to being interviewed by attorneys. In those interviews, Publix was able to discover information not related to the workplace and information that was bound to be embarrassing. Publix discovered one such story about

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204. Deposition of Plaintiff, Ellis, 240 F.R.D. at 627.
205. Id.
206. Id. at 641 (“There are no allegations in the complaint that would suggest that [the named plaintiffs] have brought sexual harassment claims as part of this action . . . ”).
207. Id.
209. Costco’s Opposition to Plaintiffs’ Motion for Class Certification, supra note 183 at *14.
211. Id. at 641.
212. Interview with Linda Dardarian, supra note 196.
213. Id.
214. Id.
215. Id.
216. Id.
217. Id.
Sharp. At one point during her employment, while trying to joke around and "fit in" with her coworkers in the meat department, Sharp performed fellatio on a banana. Publix used this to argue that all of the sexual harassment Sharp was subjected to was welcome. The banana incident was not part of Sharp's individual sexual harassment claim, which was based on her manager fondling her, pressing her up against a wall, kissing her against her will, making harassing comments, quid pro quo harassment, and threats of retaliation. The class claims were for failure to promote.

Barbara B. Brown of Paul, Hastings, Janofsky & Walker deposed Sharp. At one point in the deposition, Brown began questioning Sharp about the "banana incident," which made Sharp very uncomfortable. Brown continued to press Sharp about the details of the banana incident, over her counsel's objections. Brown then pulled a banana out of her briefcase, pointed it at Sharp, and asked Sharp to demonstrate her actions on the banana, all while the deposition was being videotaped. Sharp broke into sobs and was unable to speak. Her attorney objected to the questioning and halted the deposition. This incident upset Sharp terribly and stayed with her throughout the litigation. She repeatedly considered dropping out of her role as a named plaintiff, even though her claims were very strong. In the end, she nearly halted the settlement because she felt she deserved more money than was being offered for all that she had gone through, not only because of the discrimination she suffered at Publix, but also because of the way Publix's attorney treated her during this deposition.

In the private Mitsubishi case, the employer pursued an inundation strategy for discovery. Mitsubishi issued 500 subpoenas to former employers, doctors, gynecologists, and psychologists of the twenty-eight named plaintiffs. Defense counsel questioned Mitsubishi named plaintiffs so aggressively in depositions that many of the women felt like they were the ones

218. Interview with Linda Dardarian, supra note 196.
219. Id.
220. Id.
221. Id.
222. Id.
223. Id.
224. Id.
225. Id.
226. Id.
227. Id.
228. Id.
229. Id.
230. Id.
231. Id.
232. There was both a private case and a subsequent EEOC case related to the Mitsubishi harassment.
233. BRAVO, supra note 9, at 110. Some in the plant referred to these plaintiffs derisively as the "dirty thirty." Warren & Millman, supra note 130.
234. BRAVO, supra note 9, at 110.
on trial.\textsuperscript{235}

Former EEOC attorney, Noelle Brennan, now in private practice with the plaintiffs' firm of Noelle Brennan & Associates, recalls numerous deposition abuses in the landmark Mitsubishi and EEOC v. Dial Corp. sexual harassment class cases that she litigated.\textsuperscript{236} In Dial, Brennan defended the deposition of a plaintiff whose mental health records had been subpoenaed.\textsuperscript{237} Dial's lawyers asked the plaintiff questions about her divorce, her relationship with her children, and detailed questions about decades-old instances of childhood sexual abuse.\textsuperscript{238} At one point, one of Dial's attorneys loudly whispered to her colleague, "Ask her if there was actual penetration."\textsuperscript{239} The whisper was audible on the other side of the table, and the plaintiff said on the record, "I heard that."\textsuperscript{240} Brennan objected frequently and asked opposing counsel to limit the abusive inquiry, but they relentlessly argued that their questions were within the scope of discovery.\textsuperscript{241} "The questions were a way to intimidate, embarrass, humiliate, and recreate the feelings of abuse," Brennan said.\textsuperscript{242} Brennan also observed more invidious psychological consequences for this client. "These questions made her feel like there was something wrong with her; that she must have brought it on herself."\textsuperscript{243}

In a subsequent Dial deposition, another plaintiff spoke in detail about twenty instances of touching and lewd comments.\textsuperscript{244} One of the defense attorneys leaned over and whispered to her colleague, "Oh she must have been really popular."\textsuperscript{245} Again, this comment was audible to the room.\textsuperscript{246} Brennan ended the deposition immediately.\textsuperscript{247} The plaintiff eventually received an apology.\textsuperscript{248}

These depositions were not just taxing in the types of questions asked or comments made, but also in the time defendants took to depose named plaintiffs or the logistics involved in getting to the deposition site. In 2000, the maximum time allotted for deposition of an individual witness or party was reduced to "one day of seven hours."\textsuperscript{249} This was a great help to

\begin{itemize}
\item \textsuperscript{235} BRAVO, supra note 9, at 110.
\item \textsuperscript{236} Telephone Interview with Noelle Brennan, supra note 9. See EEOC v. Dial Corp., 156 F. Supp. 2d 926 (N.D. Ill. 2001).
\item \textsuperscript{237} Telephone Interview with Noelle Brennan, supra note 9.
\item \textsuperscript{238} Id.
\item \textsuperscript{239} Id.
\item \textsuperscript{240} Id.
\item \textsuperscript{241} Id.
\item \textsuperscript{242} Id.
\item \textsuperscript{243} Id.
\item \textsuperscript{244} Id.
\item \textsuperscript{245} Id.
\item \textsuperscript{246} Id.
\item \textsuperscript{247} Id.
\item \textsuperscript{248} Id.
\item \textsuperscript{249} See FED. R. CIV. P. 30 advisory committee's note (2000).
\end{itemize}
named plaintiffs, who, prior to the amendment, were often subpoenaed for multiple days of depositions. Their attorneys were simply unable to sufficiently protect them under the prior discovery rules since defendants had the right to virtually unlimited deposition time if the judge would allow it. This tactic was particularly taxing on the working-class male and female named plaintiffs that Lee represented in the *Barefield v. Chevron* race discrimination class action. The depositions, in addition to being frustrating, time-consuming, and emotionally taxing, were logistically difficult as the plaintiffs would need to arrange travel, childcare, and time off from work.

The *Jenson* plaintiffs suffered under the pre-2000 rule allowing for longer depositions. Lois Jenson’s first deposition in 1990 lasted five hours, during which she was relentlessly questioned about her children, being raped, a suicide attempt, and whether or not she swore at work. Jenson reflected later, “I felt like a house had been dropped on my head.” Claire Bell, Jenson’s therapist, explained, “Just think of every painful thing that has happened in your life, [and] imagine it being brought up by an adverse attorney in some sterile boardroom.” Jenson’s second deposition lasted nine hours and twenty minutes.

B. RETALIATION AGAINST PLAINTIFFS AND CLASS MEMBERS STILL EMPLOYED BY THE DEFENDANT; COERCIVE ACTIONS TO DETER OTHERS FROM JOINING THE SUIT

1. Adverse Employment Actions Against Named Plaintiffs

Named plaintiffs incur significant risks involving their employment if they are currently working for the defendant. Title VII prohibits materially adverse employment actions as a response to a legally protected activity, such as complaining of discrimination to the human resources department, filing a charge with the EEOC, or initiating a private lawsuit. Despite Title VII protection, retaliation against those who challenge discrimination is frequent. In addition to the more overt adverse actions such

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250. Interview with Bill Lann Lee, *supra* note 140. Other plaintiffs’ attorneys have agreed that this was a positive change for their clients. See Interview with David Borgen, Partner, Goldstein, Demchak, Baller, Borgen & Dardarian, in Oakland, Cal. (Oct. 22, 2008) (“Depositions used to be much longer and were worse for the plaintiffs. There’s nothing civil about civil litigation!”); Interview with Linda Dardarian, *supra* note 196.

251. Interview with Bill Lann Lee, *supra* note 140.

252. *Id.*

253. *Bingham & Gansler, supra* note 97, at 192-95.

254. *Id.* at 195.

255. *Id.*

256. *Id.* at 196.


as termination, pay cuts, or demotions, harder-to-prove retaliation occurs in the forms of alienation, "smear campaigns," and threats, discussed at greater length in the next section.\footnote{Telephone Interview with Noelle Brennan, \textit{supra} note 9.}

In a gender discrimination class action against Morgan Stanley, named plaintiff Allison Schieffelin was overtly retaliated against after filing her EEOC charge.\footnote{\textit{BRAVO}, \textit{supra} note 9, at 14-15. \textit{See generally} \textsc{Susan Antilla}, \textit{Tales from the Boom Boom Room: Women vs. Wall Street} (2002).} Schieffelin had worked for fourteen years at Morgan Stanley.\footnote{\textit{BRAVO}, \textit{supra} note 9, at 15.} She recalls her employer's initial response:

\begin{quote}
[S]enior managers at the firm sought to denigrate my work, ostracize me. . . . They took away projects that I had worked on for years. They diminished my daily responsibilities. I believe that they thought that if they made my day-to-day life miserable enough that I would just pack up and leave.\footnote{[\textit{I}d.; \textsc{Antilla}, \textit{supra} note 260, at 266.}

When Schieffelin did not resign, she was terminated.\footnote{\textit{Id.}}

Patricia Shiu, a leading plaintiffs' attorney and vice president at The Legal Aid Society-Employment Law Center,\footnote{The Legal Aid Society-Employment Law Center is a nonprofit organization based in San Francisco, California, that aims to promote the stability of low income and disadvantaged workers and their families by addressing the issues that affect their ability to achieve self-sufficiency. The organization serves thousands in the community each year through litigation, direct services, and legislative advocacy. \textit{See} Legal Aid Society-Employment Law Center, \textit{About Us}, http://www.las-etc.org/aboutus.html (last visited Oct. 25, 2008).} has litigated numerous individual and class gender discrimination cases.\footnote{Interview with Patricia Shiu, Vice President, Programs, Legal Aid Society-Employment Law Center, in San Francisco, Cal. (Feb. 14, 2008).} Shiu reports that the most common forms of retaliation against her class and individual clients include pay cuts, demotions, assignments to less desirable shifts and locations, loss of one's office, and denials of training.\footnote{\textit{Id.}} If someone had complained about the discriminatory conduct prior to litigation, retaliation against her was likely to be quite severe.\footnote{\textit{Id.}} Shiu recalls a former client who had filed an individual pregnancy discrimination suit and then later returned to work after maternity leave.\footnote{\textit{Id.}} Her assignments devolved from substantive and rewarding work, like what she had done prior to her leave, to full-time photocopying.\footnote{Interview with Patricia Shiu, \textit{supra} note 265.}

It is worth noting that the \textit{Wal-Mart} defendants have sometimes employed a different strategy. Though named plaintiffs report retaliation,
some also received long-sought raises and promotions, in what were perhaps attempts to set up subsequent typicality challenges.

2. Alienation From Coworkers and Workplace “Smear Campaigns”

An employee who continues to work for the defendant after filing suit is likely to suffer “ostracism and disrespect in an extremely uncomfortable and hostile environment.” Teresa Demchak reasons that a major problem with existing retaliation protections is that the retaliation is often more of a subtle backlash than termination, demotion, or a pay cut.

For example, Dukes witness Micki Earwood believed that her participation in the lawsuit prompted her store managers to conduct a “smear campaign” against her among her coworkers. Earwood claimed the managers lied and told coworkers that she had breached the confidentiality obligations of her job and had discussed employee wages with other coworkers. Earwood felt that she had lost friends over these rumors. She recalled an incident in which she ran into a former coworker at a mall. As they talked, the friend seemed very nervous even to be seen speaking with her. For Earwood, this alienation carried over to other jobs as well. Earwood said, “You know, you have an outstanding interview and everything goes well, and they were gonna call your references, and you never hear from them again. And you have to wonder...”

Stephanie Odle, the named plaintiff who initiated the Wal-Mart suit, was retaliated against in subsequent jobs with Old Navy and Aeropostale for her public involvement in the case. Odle told author Lisa Featherstone, “Just because you’re trying to fight for your constitutional rights and make a change, make a difference! You’d think people would be like, ‘You go!’ But instead you’re labeled a troublemaker.” As it stands now, unfortunately, “being a named plaintiff is not a good career move, unless the employer is unique and willing to learn from mistakes.”

270. FEATHERSTONE, supra note 6, at 122 (Named plaintiff Christine Krapnoski tried to get promoted for years but once the lawsuit was filed, reflected, “I have a very intricate promotion timeline. It just depends what the lawsuit is doing.”).
271. Hubscher, supra note 127, at 470.
272. Interview with Teresa Demchak, supra note 22.
273. FEATHERSTONE, supra note 6, at 254.
274. Id.
275. Id.
276. Id.
277. Id.
278. Id. at 256.
279. Id.
280. Id. at 256-57.
281. Id. at 257. See also Hubscher, supra note 127, at 470 (“Even an employee who was wrongly discharged and no longer maintains a relationship with her employer may suffer from a scarred reputation as a trouble-maker within the industry where she works, and may thereby experience difficulty obtaining a new job.”).
282. Interview with Teresa Demchak, supra note 22.
3. Coercion of Potential Class Members

In addition to retaliation against plaintiffs, employers frequently pressure potential class members to refrain from complaining and to support the defense of their case. Like the tactic of facilitating coworker alienation, employers may attempt to spread misinformation and to intimidate class members into opting out of the class. In addition to the obvious coercion that can result, these tactics further affect named plaintiffs by isolating them from their peers.

In Jenson and Mitsubishi, the employers initiated petitions from other female employees to attest that they had not been harassed or discriminated against. In Mitsubishi, fifty-eight buses, paid for by the company, transported 3,000 workers (on the clock) to the EEOC headquarters in Chicago to picket the agency’s court filing. It was later discovered that many of the plaintiffs’ coworkers felt pressured to attend this rally and feared retaliation if they did not attend.

A few months before the Jenson class certification hearing, four female miners were called for a meeting with the union’s lawyer. Though he did not disclose it, one of the lawyers present was an attorney for the mine. The union representative told the women that the plaintiffs in the lawsuit were suing the union for all of its money but that there was no reason for the case to go to court. The women were then presented with highlighted sections of Pat Kosmach’s and Lois Jenson’s depositions. “Those were the sections they wanted us to say didn’t happen,” recalled one employee. The union representative also said that the plaintiffs were using these “petty complaints” to bankrupt the union and get rich.

In Shores, the defendant waged an aggressive workplace campaign against the lawsuit. In granting an order to compel Publix to provide “curative notice” to its employees to counteract its communications with employees, the court stated:

Publix has complete control over the information disseminated directly to its employees at the workplace. Publix utilizes several in-house communication tools to communicate with its employees and it has used each of these tools to inform employees of the

283. BINGHAM & GANSLER, supra note 97, at 224-25.
284. Warren & Millman, supra note 130.
285. Id.
286. BINGHAM & GANSLER, supra note 97, at 199.
287. Id.
288. Id.
289. Id. at 200.
290. Id.
291. Id.
company's position on this litigation... The Court is gravely concerned about the impact Publix's past communications may have had on class members.293

Upon review of the communications, the court agreed with the plaintiffs that the communications were "intended to discourage class members from participation in this litigation."294 The court cited an example of Publix using its communications to discourage participation in the suit through its assertions concerning the potential availability of relief.295 Soon after class certification was granted, defendants released a "Publix Pulse" video that included these statements:

   Even if Publix is found liable in court, which we believe is unlikely, each member of the class will still have to prove the merits of her case on an individual basis to receive any payment.

   In a case represented by the same attorneys against Safeway Stores, class members averaged $250 each before taxes, while their lawyers collected 2.5 million dollars.296

   Publix also distributed brochures that implied that employees' participation in the litigation would harm the company and their coworkers.297 The brochure included in its question-and-answer section: "Can Lawsuits Against Publix Affect Me? Yes. The cost of defending even baseless lawsuits can hurt our profits, our gross, our careers and our job security."

   The court's extensive order directed Publix to distribute notice directly to thousands of class members, enclose the notice with their paychecks, and to post the notice in employee lounges, by the time clocks, and in the newsletter.299 The court further required that the notice include a description of the lawsuit, options for class members, and the contact information for all class counsel, including a toll-free number.300

C. ATTACKS AGAINST NAMED PLAINTIFFS OUTSIDE THE WORKPLACE

1. Private Investigation

   Named plaintiffs also face retaliation outside the workplace. Patricia Shiu surmises that private investigators were hired in approximately ninety percent of her cases to "dig up dirt" on her clients.301

294. Id. at *5.
295. Id. at *6.
296. Id.
297. Id. at *7-8.
298. Id. at *8 (internal quotations omitted).
299. Id. at *12-13.
300. Id. at *14-17, *20-21.
301. Interview with Patricia Shiu, supra note 265.
This practice often causes named plaintiffs to feel persecuted, like they are the ones on trial.\textsuperscript{302} Shiu concludes that it takes a “stable and secure person to withstand this level of scrutiny and insult.”\textsuperscript{303} Shiu emphasizes that because of this reality, it is absolutely critical to investigate clients’ backgrounds before litigation in order to protect them from any “skeletons” defendants might find.\textsuperscript{304}

2. Attacks in the Press

Defendants often try to use their media leverage to gain public support for their position and to turn public sentiment against the plaintiffs. In the contentious EEOC Mitsubishi case the defendant waged a vitriolic “press war” against the EEOC.\textsuperscript{305} Mitsubishi challenged the EEOC’s contact with potential class members and publicly moved for sanctions against the agency for communications with potential complainants.\textsuperscript{306} The motion was denied and the judge chastised Mitsubishi for its tactics: “There is nothing new here, and Mitsubishi’s attempt to incite public opinion against the EEOC by publicizing such a fact . . . comes closer to violating the court’s prior rulings than the EEOC’s letter.”\textsuperscript{307} The judge later characterized Mitsubishi’s intransigence with the EEOC’s conciliation efforts as a “cat-and-mouse” game.\textsuperscript{308} Mitsubishi’s attacks were ultimately unsuccessful. Mitsubishi eventually settled for $34 million, the largest sexual harassment settlement in history at that point.\textsuperscript{309}

Given the anti-class action sentiment from the business community, corporations have the deck stacked in their favor with certain news sources. Some commentators will do their work for them. After Judge Jenkins granted class certification in Dukes, Wal-Mart found support in the business press: “[T]he Wall Street Journal editorial page . . . went far beyond Wal-Mart’s own argument, not only contesting the class certification but asserting that Betty Dukes didn’t deserve to be promoted . . . .”\textsuperscript{310}

However, many media outlets were far less sympathetic to Wal-Mart’s position. After receiving negative press from the Dukes suit, Wal-Mart, for

\begin{itemize}
  \item \textsuperscript{302} Interview with Patricia Shiu, supra note 265.
  \item \textsuperscript{303} Id.
  \item \textsuperscript{304} Id.
  \item \textsuperscript{305} See Judge Chides Mitsubishi on EEOC Matter, CHI. TRIB., Oct. 28, 1997, at 4N (discussing Mitsubishi’s attempts to “incite public opinion against the EEOC”). See also EEOC v. Mitsubishi Motor Mfg. of Am., Inc., 990 F. Supp. 1059, 1091. See supra note 284 and accompanying text (discussing Mitsubishi busing 3,000 employees to protest outside EEOC headquarters in Chicago).
  \item \textsuperscript{306} Judge Chides Mitsubishi on EEOC Matter, supra note 305.
  \item \textsuperscript{307} Id.
  \item \textsuperscript{308} Mitsubishi, 990 F. Supp. at 1091.
  \item \textsuperscript{309} See Bigness, supra note 133.
  \item \textsuperscript{310} FEATHERSTONE, supra note 6, at 246.
\end{itemize}
the first time in its history, hired a public relations firm to conduct "reputation research," which resulted in an ad campaign with a new spin.\textsuperscript{311} This campaign included commercials featuring "Margaret," a district manager who confides to the audience that Wal-Mart helps her balance family and career, as well as advertisements featuring women in nontraditional jobs, like trucking.\textsuperscript{312}

In addition to its extensive internal campaign against the lawsuit, Publix also waged a public press campaign against it.\textsuperscript{313} Judge Adams chided both parties for the heavy publicity on both sides and noted that the defendant took advantage of its public position.\textsuperscript{314} "A myriad of newspaper articles and television programs have featured aspects of this litigation. Additionally, Publix has waged an aggressive publicity campaign directed at its customers with paid newspaper advertisements; posters, fliers and grocery bags."\textsuperscript{315}

Noelle Brennan views these press attacks as harmful to named plaintiffs in many ways.\textsuperscript{316} Perhaps most importantly, the employers’ vigorous defense sends an implicit encouragement to employees to retaliate against those who come forward.\textsuperscript{317} The press attacks also make it more dangerous for other employees to cooperate with the EEOC investigation or to serve as witnesses.\textsuperscript{318} Plaintiffs’ attorneys have difficulty doing “damage control” after press attacks because it is often impossible to identify which employees have been affected by the campaigns.\textsuperscript{319}

3. Threats of Violence or Other Criminal Activity

Named plaintiffs in some major workplace discrimination cases have faced violent retaliation. For example, a week after filing a union grievance against the supervisor who had been stalking her, Lois Jenson found all four tires of her car slashed.\textsuperscript{320}

In Mitsubishi, after charges were filed, the plant provided a sexual harassment training session. One of the class members was at the training and observed a male coworker stand up and proclaim to the auditorium, "I’ll tell you one f-ing thing. Whoever turns me in and tries to cause me

\textsuperscript{311.} FEATHERSTONE, supra note 6, at 250-51.
\textsuperscript{312.} Id. at 246. Wal-Mart launched a website, http://www.walmartfacts.com, to counteract bad press in January 2005. Id. at 261.
\textsuperscript{314.} Shores II, 1996 U.S. Dist. LEXIS 22396, at *3.
\textsuperscript{315.} Id.
\textsuperscript{316.} Telephone Interview with Noelle Brennan, supra note 9.
\textsuperscript{317.} Id.
\textsuperscript{318.} Id.
\textsuperscript{319.} Id.
\textsuperscript{320.} BINGHAM & GANSLER, supra note 97, at 111.
to lose my job is going to lose theirs too.” 321 No one, including the train-ers or manager present, said a thing. 322 In another incident at the plant, someone wrote, “If any cunt causes me to lose my job, I am going on a cunt hunt,” in the women’s bathroom. 323

Retaliation occurred at the Dial factory in response to complaints of harassment as well. According to Brennan, “After a woman complained of sexual harassment against her supervisor, a co-worker came up to her and grabbed her by the crotch (lifting her off the ground), jerking her up-wards, and screamed, ‘you f-ing bitch, do you like this?’ Unfortunately, I have tons of examples like these.” 324 Brennan believes that the em-ployer’s failure to condemn this type of retaliation discouraged more women from coming forward. 325 Stories of retaliation also instilled fear in those who would otherwise cooperate with the EEOC investigation. 326 Though plaintiffs’ lawyers did their best to limit these practices and vig-erously monitor for retaliation, it was very difficult to determine who was being affected beyond the plaintiffs, and it was sometimes difficult to prove retaliation when no overt adverse employment action had been taken. 327

Patricia Shiu has also represented plaintiffs who have been threatened with violence against themselves and their families as a result of the li-tigation. 328 Shiu adds that plaintiffs who are immigrants or women of color may often be subjected to some of the most reprehensible retali-a tion. 329

V. PROTECTING NAMED PLAINTIFFS

A. PROCEDURAL AND PRACTICAL TACTICS FOR PROTECTING NAMED PLAINTIFFS FROM ABUSE, EMBARRASSMENT, AND RETALIATION

1. Protective Orders and Sanctions

Plaintiffs’ counsel should not hesitate to move for protective orders and sanctions in response to abusive discovery requests. 330 When protec-

321. Telephone Interview with Noelle Brennan, supra note 9.
322. Id.
323. Id.
324. E-mail from Noelle Brennan, Partner, Noelle Brennan & Associates, to author (Mar. 5, 2008, 14:40:00 PST) (on file with author).
325. Telephone Interview with Noelle Brennan, supra note 9.
326. Id.
327. Id.
328. Interview with Patricia Shiu, supra note 265.
329. Id.
330. Rule 26(b)(2)(C) provides:

On motion or on its own, the court must limit the frequency or extent of dis-covery otherwise allowed by these rules or by local rule if it determines that:
(i) the discovery sought is unreasonably cumulative or duplicative, or can be
tive orders are not successful, or defendants’ conduct is extreme, it is vital for plaintiffs’ counsel to move for sanctions quickly.331 Rule 23 encourages and broadly allows for judicial intervention into the management of the case. Rule 23(d)(1)(B) grants the judge the explicit authority to require that, “to protect class members and fairly conduct the action,” notice be given to some or all class members to apprise them of the proceedings and to give the class members an opportunity to voice their concerns, intervene, or give their opinion of the class counsel’s quality of representation.332 The judge may also, in her discretion, “impose conditions on the representative parties,”333 and she possesses a catchall authority to “deal with similar procedural matters.”334 Rule 23(d)(1)(A) allows the court to “determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument.”335

These discretionary grants of authority provide the judge the power to preemptively limit discovery to protect named plaintiffs. The Federal Rules of Civil Procedure clearly anticipate that the judge will need to protect the absent class members. However, as demonstrated by the experi-

obtained from some other source that is more convenient, less burdensome, or less expensive;
(ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
(iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of discovery in resolving the issues.

FED. R. CIV. P. 26(b)(2)(C). Rule 26(c)(1) provides:
A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending. . . . The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:
(A) forbidding the disclosure or discovery;
(B) specifying terms, including time and place, for the disclosure or discovery;
(C) prescribing a discovery method other than the one selected by the party seeking discovery;
(D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;

(F) requiring that a deposition be sealed and opened only on court order;

(H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

FED. R. CIV. P. 26(c)(1) (emphasis added).
331. Interview with Patricia Shiu, supra note 265.
332. FED. R. CIV. P. 23(d)(1)(B).
333. FED. R. CIV. P. 23(d)(1)(C).
335. FED. R. CIV. P. 23(d)(1)(A).
ence of named plaintiffs in sex discrimination cases, a greater measure of protection is necessary for them. Judges should be urged to extend the same protective role reserved for class members to named plaintiffs as well.

An example of the court imposing sanctions against an employer can be found in *Bockman v. Lucky Stores*, where defendants vigorously attacked the named plaintiffs and their counsel on adequacy grounds by alleging that the attorneys had colluded with a named plaintiff. Defendants claimed the information came from a phone call from the former husband of a named plaintiff. Defendants could produce no further evidence of the call. In their motion to decertify, defendants asserted that “[p]laintiffs’ counsel’s ethical violations are patent and unambiguous . . . and concluded that such conduct renders plaintiffs’ counsel, and hence plaintiffs, inadequate class representatives.” The court denied the motion and chastised the defendants for “cho[osing] to rely solely upon the unreliable word of a man who was not directly involved in this litigation.” The court imposed sanctions of attorneys’ fees and costs for the wasted time after finding that the defendants had not followed the requirements of Federal Rule of Civil Procedure 11, which provides that signed court filings must include assertions “formed after a reasonable inquiry” and not presented for an improper purpose.

Plaintiffs’ attorneys should always be vigilant about retaliation and stay in close contact with their clients on this matter. If retaliation occurs, counsel should amend the complaint to include the retaliation and file a retaliation charge with the EEOC if appropriate. These remedial actions may discourage employers from using such tactics in any future litigation.

2. The Use of Federal Rule of Evidence 412 against Discovery Requests Involving Sexual Past or Predisposition of Plaintiffs

Federal Rule of Evidence 412 (“Rule 412”), the “Rape Shield” rule, was established in 1978 to protect crime victims. In 1994, it was extended by statute (after the Supreme Court rejected the advisory committee’s change to the rule) to include civil cases. It is designed to prevent find-

337. *Id.*
338. *Id.*
339. *Id.* Note that this case predates the 2003 separation of adequacy of counsel from the Rule 23(a)(4) requirements. This requirement was subsequently added as Rule 23(g).
340. *Id.* at 298.
343. See *Aiken*, *supra* note 194, at 563-64. Rule 412 provides, in relevant part:

(a) EVIDENCE GENERALLY INADMISSIBLE. The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual
ers of fact from placing excessive probative value on matters that should not affect their decisions. 344 Though plaintiffs in civil actions premised on sexual misconduct have the same concerns that give rise to the need for rape shield legislation in criminal cases, Rule 412’s protections for victims of crime are greater than those afforded to parties in civil cases. 345

Despite the limitations of Rule 412, plaintiffs’ attorneys should be vigilant about discovery requests that delve into sexual past or “predisposition” of named plaintiffs. The drafters of Rule 412 were aware that the same concerns at trial existed throughout the discovery process and thus urged judges to curb abuses throughout litigation. 346 The advisory committee’s notes to the revised Rule 412 state, “Courts should presumptively issue protective orders barring discovery unless the party seeking discovery makes a showing that the evidence sought to be discovered would be relevant . . . and cannot be obtained except through discovery.” 347 Federal courts have significant

misconduct . . .:
(1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.
(2) Evidence offered to prove any alleged victim's sexual predisposition.
(b) EXCEPTIONS.
(1) In a criminal case, the following evidence is admissible . . .:
(A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury or other physical evidence;
(B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and
(C) evidence the exclusion of which would violate the constitutional rights of the defendant.
(2) In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim’s reputation is admissible only if it has been placed in controversy by the alleged victim . . .

FED. R. EVID. 412 (emphasis added).

344. Aiken, supra note 194, at 560.
345. Id. at 559-60, 575-76. Unfortunately, the broad grant of judicial discretion of Rule 412(b)(3) has resulted in divergent rulings on the admissibility of even substantially similar evidence. Given the disparity in resources between a typical plaintiff and a typical defendant in a sexual harassment case, plaintiffs’ need for protection is at least as great as that of crime victims. Some courts have acquiesced to the admission of sexual character evidence without even referencing Rule 412. Compare Rodriguez-Hernandez v. Miranda-Velez, 132 F.3d 848, 855-56 (1st Cir. 1998), with Barta v. City and County of Honolulu, 169 F.R.D. 132 (D. Haw. 1996). See also McCleland v. Montgomery Ward & Co., Inc., No. 95 C 237, 1995 U.S. Dist. LEXIS 14012, at *3, *6 n.1 (N.D. Ill. Sept. 25, 1995) (admitting, over plaintiffs’ Federal Rules of Evidence 401 and 403 objections, evidence of “any preadolescent or adolescent parental sexual, physical, mental or emotional abuse” in a non-class sexual harassment case with multiple plaintiffs where Rule 412 did not apply because the purpose of the evidence was not for sexual behavior or predisposition but for defending against emotional distress causation claims).
346. Aiken, supra note 194, at 566.
347. FED. R. EVID. 412 advisory committee’s note (1994).
power, should they choose to use it, to grant protective orders to limit abusive defenses that implicate Rule 412 issues.\textsuperscript{348} However, the plaintiff must affirmatively invoke the Rule 412 protections through a motion for a protective order.\textsuperscript{349}

3. Preparing Named Plaintiffs for the Challenges of the Role

It is important for plaintiffs’ attorneys to research named plaintiffs thoroughly before filing the initial complaint. This includes, with permission, pulling criminal records of the named plaintiff and her family and asking about any medical condition that may be embarrassing to discuss. Research into family law issues, including domestic violence, divorce, or custody issues that may be sensitive to the named plaintiff, is also important. It is also prudent to go through the potential named plaintiffs’ résumés with them and ask about any inaccuracies or inconsistencies. The existence of vulnerabilities is not necessarily a reason not to file suit, but it is important to avoid any surprises by formulating a damage control plan from the outset.\textsuperscript{350} “It’s very common to have [the employer’s attorney] attack plaintiffs,” says Barry Goldstein in reflection on Haynes v. Shonies.\textsuperscript{351} “It’s one of the things you have to counsel plaintiffs about, especially if you bring a big suit. But nobody’s record is perfect. Nobody’s a perfect employee. You don’t have to be a perfect employee to be a successful Title VII plaintiff.\textsuperscript{352}

It is key to brief the named plaintiffs on the legal requirements of representing a class and what will be expected of them.\textsuperscript{353} Class counsel are wise to require potential named plaintiffs to sign Named Plaintiff Agreements, in addition to the routine retainer agreement,\textsuperscript{354} to ensure that named plaintiffs are aware of the rigorous duties of their role in the litigation.

Named plaintiffs also must be thoroughly informed and prepared for the onslaught of employer attacks. Linda Dardarian reasons:

It is not possible to prevent these abuses altogether. The best thing to do is prevent damage through thorough preparation. Plaintiffs’ attorneys must foster a very trusting and open relationship with their clients. Plaintiffs need to feel comfortable and to trust you enough to tell you about any possible “skeleton in the closet.”

\textsuperscript{348} Aiken, \textit{supra} note 194, at 566-67.
\textsuperscript{349} \textit{Id.} at 567.
\textsuperscript{350} Interview with Bill Lann Lee, \textit{supra} note 140. \textit{See, e.g.}, Tevlin, \textit{supra} note 103 (discussing the \textit{Jenson} plaintiffs: “It hasn’t been easy. Some of the plaintiffs grew up rough, and had all the characteristics of imperfect people from imperfect families. Drinking problems. Domestic abuse. Rape. Incest. Divorce. The mine’s lawyers made sure it all became public when the women filed suit . . .”).
\textsuperscript{351} \textit{STEVE WATKINS, THE BLACK O 38 (1997).}
\textsuperscript{352} \textit{Id.}
\textsuperscript{353} Goldstein, \textit{supra} note 75, at 523.
\textsuperscript{354} \textit{Id.}
fore defendants get a hold of it. The best practice is to warn plaintiffs about potential abuses and assure them that you will vigorously work to prevent this. It is important to explain to them the bottom line, that these abusive tactics are merely a sideshow.355

Lois Jenson offers a named plaintiff’s perspective on how named plaintiffs should prepare themselves, and on how plaintiffs’ attorneys can best serve their clients in what may be a rough time:

Ask questions, let me know you have heard what I am saying versus what your secretary just handed you or the paper you are reading on your desk . . . .

Keep in touch with clients, six months without contacting a client is too long.

Don't forget to let me know a judge’s ruling . . . A person who goes to a lawyer is depending on them to be ethical, informed and professional. Don't call your client a liar, play devil’s advocate with them, criticize them or complain to them about your personal life . . . . Don't assume! Understand that when people hire lawyers they want lawyers who are looking out for their client’s best interests because if they do that the client will recommend and stand tall with the attorney at the end . . . . [T]he client hires a lawyer, the lawyer works for the client — not the other way around. And don't screw it up so you can stand tall with your clients at the end. Your job is [a] lawyer but it is a client’s life (figuratively and sometime for real). It is not about you. It is about your client(s). It is about the job you do and how well you represent your client — that [part] is about you.356

4. Effective Use of the Press

To counterbalance the ill effects of negative press on named plaintiffs and on the case, plaintiffs’ lawyers should effectively use the press to publicize their clients’ claims. This publicity can indirectly show support and publicly acknowledge the bravery of named plaintiffs. Engaging public sympathy for the case is important and can be heartening to the named plaintiffs in the more difficult times in litigation. Teresa Demchak suggests that plaintiffs’ lawyers pursue initial publicity in a balanced manner; statements should not be too negative nor should they be too emotional.357 It is important to have a good relationship with the media, and it is common to see

355. Interview with Linda Dardarian, supra note 196.
356. E-mail from Lois Jenson, supra note 123.
357. Interview with Teresa Demchak, supra note 22.
websites and press releases from class counsel throughout the litigation process.\footnote{358} The goal should be to educate the public and effectively utilize these communications as the first introduction of your case to the defendants.\footnote{359} Demchak cautions, "[Plaintiffs’ attorneys] shouldn’t be throwing bombs."\footnote{360} Noelle Brennan agrees and suggests writing press releases to correspond with each filing.\footnote{361}

The plaintiffs’ class action firm of Sprenger & Lang, which has offices in Minneapolis, MN and Washington, DC, keeps a New York City-based publicist on retainer to keep the press and the legal community aware of its activities.\footnote{362} Nonetheless, not all publicity works as well as planned. In the Jenson case, Paul Sprenger made a somewhat incendiary statement about the case that backfired and caused the named plaintiffs to lose community support.\footnote{363} After a day in court, Sprenger described the harassment at Eveleth Mines: "I think that the behavior was... barbaric, inhuman, they’ve been through a lot. They’re frightened to death."\footnote{364} Shortly thereafter, a local paper ran a cartoon of a tourist couple driving, passing a road sign depicting a caveman carrying a club and dragging a woman by the hair.\footnote{365} The female passenger in the cartoon says, "Oh look, Larry, we must be near Eveleth Mines!"\footnote{366}

That was not the only incident where use of the media backfired. A photo of Lois Jenson appeared in a profile about the case by Glamour Magazine.\footnote{367} Later, defaced copies of her picture from the article were repeatedly plastered on mine bulletin boards.\footnote{368}

\textbf{B. PROPOSALS FOR REFORM}

Though there are many tools that can and should be used by plaintiffs’ attorneys to protect against discovery abuse, the system, itself, must be reexamined. The very fact that these abuses are so common is symptomatic of a system failing to promote justice for named plaintiffs.


\footnote{359} Interview with Teresa Demchak, \textit{supra} note 22.

\footnote{360} \textit{Id}.

\footnote{361} Telephone Interview with Noelle Brennan, \textit{supra} note 9.

\footnote{362} David Phelps, \textit{From Eveleth to Hollywood}, \textit{STAR TRIB.} (Minneapolis), Apr. 21, 2002, at 1D.

\footnote{363} \textit{BINGHAM & GANSLER}, \textit{supra} note 97, at 215-16.

\footnote{364} \textit{Id}.

\footnote{365} \textit{Id}.

\footnote{366} \textit{Id}.

\footnote{367} \textit{Id} at 242-43.

\footnote{368} \textit{BINGHAM & GANSLER}, \textit{supra} note 97, at 243.
1. Legislative Changes

Rule 23 should be amended to mandate even closer discovery management by judges. A subsection could address class certification discovery in bifurcated trials and enumerate narrower limits for the showing necessary for Rules 23(a)(3) and Rule 23(a)(4). Limiting the adequacy and typicality inquiries to matters closely related to the claims would protect named plaintiffs from the current level of unnecessary intrusion into their personal lives.

Numerous legislative solutions have been proposed to remedy discovery abuses in sexual harassment cases. Many scholars have argued against the different standards for admissibility of sexual past or predisposition evidence for civil and criminal cases under Rule 412. They argue that the danger of the retraumatizing effect is just as manifest in civil cases as in criminal ones. Jane Aiken suggests amending Rule 412(b)(2) to bring it in line with the criminal rule, minimize judicial discretion, and eliminate the opportunity for defendants to use embarrassing information for "harassment value" alone. To remedy the gap between the Federal Rules of Civil Procedure on discovery and the Federal Rules of Evidence, Richard Bell argues that Rule 26 should be amended to protect plaintiffs in discovery by mandating that sexual evidence be granted presumptive confidentiality.

Perhaps a more compelling proposal is to amend Rule 26 to include more explicit limitations for discrimination plaintiffs. The rule should acknowledge that abuses can occur and thus create a presumption against discovery requests regarding sensitive material, including, but not limited to, childhood sexual abuse, past sexual assault, child custody arrangements, financial information, and medical records. With this presumption, the burden would fall on defendants to justify the need for sensitive evidence and show with precision how the sensitive matters requested are likely to lead to the discovery of admissible evidence.

2. Reform at a Local Level

Federal District Court Local Rules often provide specific requirements for class actions that go beyond what Rule 23 requires. Advocating for


370. Aiken, supra note 194, at 582, 584.


District Courts to amend their local rules to provide greater protection in discovery for discrimination class action named plaintiffs, though piecemeal, could curb abusive practices. A proposed local rule subsection follows:

**DISCOVERY IN EMPLOYMENT DISCRIMINATION CLASS ACTIONS:** In a bifurcated action, the scope of class certification discovery shall be confined narrowly to the claims propounded. Owing to the sometimes sensitive nature of the claims, and the relative bargaining power of the parties, defendant(s) must make an affirmative showing of a substantial likelihood of the discovery of relevant evidence before seeking information from plaintiffs and putative class members about:

(a) personal records predating the class period, including but not limited to, medical records and domestic relations court orders;

(b) highly sensitive matters of a sexual nature likely to cause embarrassment or discomfort;

(c) any other matter the Court, in its discretion, deems to have a high likelihood of abuse and a low likelihood of probative value.

To address concerns about retaliation, case management provisions of local rules could be amended to require the judge to monitor for retaliation. This could create something of a judge’s “checklist,” affirmatively and continually ensuring that there are no instances of retaliation and sending the message to defendants that retaliation will not be tolerated.

Another tactic is to emphasize judicial education. Patricia Shiu served on California’s Gender Bias Task Force, a group of lawyers, judges, legislators, and advocates appointed by California Supreme Court Chief Justice Rose Byrd, whose mission was to raise awareness about and design judicial education and courtroom protocols addressing gender bias against female litigants, witnesses, and attorneys. Such task forces evaluate the presence of bias in the courts and seek to cure it.
forces should focus attention on the abuses detailed above and offer suggestions for reform. Shiu urges more public accountability of this sort because consciousness of gender bias has led to pragmatic reforms and systematic changes that could be useful in the sex discrimination class action context. 377

Finally, judges are often at least partially responsible for the instances when settlement terms are not effectively enforced and discrimination is permitted to persist. Since the level of court supervision required after litigation is high, many judges do not actively participate or are unable to continue actively supervising settlements because of their workloads. 378 Improving judicial education on the process and importance of effective monitoring of injunctive remedies could compel judges to more fully appreciate the important responsibility of this role.

VI. CONCLUSION

Though the attacks on named plaintiffs are varied in form, they can be devastating to the people involved. These attacks compromise the integrity of the justice system while also deterring potential plaintiffs from coming forward. Rule 23 was enacted to create the opportunity to provide relief to groups of people who have suffered the same harm. This important goal is undermined when employers are permitted to attack the representative parties with the intent of creating a headless class through a "divide and conquer strategy." The focus should not be on the individuals serving as named plaintiffs but rather on their claims and those of the class. While defense counsel has a duty to zealously advocate for their clients, this duty must not extend to engaging in behavior with the intent to harm, intimidate, threaten, or harass. Plaintiffs' attorneys have a variety of tools they can use to protect against these attacks, but more must be done to protect these individuals. Legislative reform, changes in local rules, and judicial education are some suggestions to advance a system in which good deeds are celebrated, not punished.

377. Interview with Patricia Shiu, supra note 265.
378. See Featherstone, supra note 6, at 168.