2000 WL 33313540
Only the Westlaw citation is currently available.
United States District Court, E.D. New York.

Dorothy SHEPPARD, et al., Plaintiffs,
v.
CONSOLIDATED EDISON COMPANY,
Defendant.

No. 94–CV–403 (JG).
|
Dec. 21, 2000.

Attorneys and Law Firms

Esmeralda Simmons, Reginald A. Boddie, Medgar Evers College of the City, University of New York, Brooklyn, New York, Jacob D. Fuchsberg, the Jacob D. Fuchsberg Law Firm, New York, New York, Daniel L. Alterman, Alterman & Boop, P.C., New York, New York, for Plaintiffs.

Kenneth G. Standard, Carrie A. Bond, Morgan, Lewis & Bockius, New York, New York, Mary Schuette, Larry Carbone, Jeanmarie Schieler, New York, New York, for Consolidated Edison Company of New York, Inc.

MEMORANDUM AND ORDER

GLEESON, J.

***1** Dorothy Sheppard, along with seven other named plaintiffs, brought this putative class action against her former employer, Consolidated Edison Company of New York, Inc. ("Con Ed"), under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.,* alleging race discrimination in employment. The parties have submitted a proposed Stipulation of Settlement ("the Settlement"). Inasmuch as plaintiffs seek to represent a class of approximately 2400 present and former Con Ed employees, and the Settlement seeks to compromise the claims of all members of that class who have not opted out, the Settlement requires my approval. *See* Fed.R.Civ.P. 23(e). For the reasons set forth below, I decline to approve it.

FACTS

A. *The Plaintiffs' Allegations*
The plaintiffs are African–American employees at Con Ed who have tried to advance through a system in which, they claim, it was difficult for African–Americans to move from upper union to management and from lower management to middle management. The eight named plaintiffs, who seek to represent a proposed class of approximately 2400 people, fall into two categories. Dorothy Sheppard, Leonard B. Middleton, James M. Carter, Harold McKinzie and Derick C. Hewitt were denied promotions within management ranks. Irma J. Mushatt, James W. Austin and Robert W. Berry were denied promotions from union positions into management positions.

Dorothy Sheppard was employed as a Senior Systems Analyst in Con Ed's Central Service Organization. She claims that, despite her excellent performance appraisals, she was denied promotion while less qualified white employees were advanced ahead of her. As an example, Sheppard claims that John Zerga, a meter reader with less education and less experience than Sheppard, was promoted ahead of her to run Con Ed's Brooklyn Planning and Analysis Department.

Leonard B. Middleton claims that he was discriminated against in 1991, when he was denied promotion to Manager of Workers' Compensation even though the retiring manager had groomed him for the slot. Although Middleton claims that the departmental succession plan designated him as the replacement, the position was awarded to a white employee without relevant experience. Despite being denied the position, Middleton trained the new manager and filled in for him during absences.

James M. Carter has been a Con Ed Contract Administrator for nineteen years, but has never received a promotion. Carter asserts that in 1992 he was denied a

promotion to Division Manager of Contract Administration in Staten Island Electrical Operations, while a white male, who made no application, received the promotion. Subsequently, Carter was transferred laterally to become the first assistant to the new Division Manager, and performed many of his supervisor's duties, receiving outstanding reviews. Carter claims that he continues to be denied promotion to higher level management positions within Con Ed.

Harold McKinzie, with over thirty-five years at Con Ed, serves as a Customer Service supervisor. McKinzie claims that he has sought promotions since 1974, but twenty or more white supervisors, with equal or lesser qualifications, were promoted ahead of him.

***2** Derick C. Hewitt is currently retired, but worked for over thirty-five years at Con Ed. Hewitt has an undergraduate degree in economics and a masters in business administration. Hewitt claims that unfounded, discriminatory criticism of his job performance, which he unsuccessfully appealed, damaged his career. During his last two decades with Con Ed, Hewitt served as a first line manager, and was never promoted.

Irma J. Mushatt, a Con Ed Customer Service employee since 1974, claims that she was the victim of discrimination in the 1980s, and that she received a promotion after intervention by the State Division of Human Rights. Mushatt further asserts that she has been the victim of discrimination since that promotion, receiving no more promotions while twenty white co-workers were promoted.

James W. Austin is a Junior Accountant in Con Ed's Finance Organization. He asserts that he was more qualified than at least nine white employees who were promoted from weekly to management positions. Austin also claims that the discrimination is demonstrated by the promotion of two white employees who graduated from the same college and started at Con Ed at the same time he did.

Robert W. Berry works in Con Ed's Finance Organization as a Senior Engineering Technician. He contends that he was discriminated against because there were management level positions which he could not apply for because they were never posted.

B. *Procedural History*

This proceeding began in 1992 and 1993, when the named plaintiffs filed separate charges with the New York City Commission on Human Rights ("NYCCHR") and subsequently commenced this action on January 28, 1994. Thereafter, the named plaintiffs withdrew their NYCCHR charges and filed a Second Amended Complaint on May 23, 1994.

The complaint, which alleges the discrimination described above as well as broad claims of company-wide discrimination outside of the promotion context, *see, e.g.,* Complaint ¶ 9, asserts claims on behalf of the named plaintiffs individually and as representatives of a class of:

> present, as well as former, black and/or African–American employees of CON ED, who are either high level union employees or lower to middle level management employees, qualified in terms of seniority and experience, who have received good performance reviews, and were denied promotion or transfer because of their race and/or color.

Complaint ¶ 10. Con Ed has denied the material allegations in the Complaint and asserted numerous affirmative defenses. *See* Defendant's Answer to Second Amended Complaint.

The parties engaged in extensive discovery spanning several years and employing multiple experts. Plaintiffs moved for class certification in late 1998, and on September 9, 1999, Magistrate Judge Joan M. Azrack issued a recommendation that I grant the motion by certifying a class of African–American employees occupying high-level union and management positions, except officers, whose claims accrued as early as 1984. On December 1, 1999, at the parties' request, I held the motion for class certification in abeyance pending settlement negotiations. On June 9, 2000, I reinstated the motion, setting a briefing and argument schedule for Con Ed's objections to Judge Azrack's recommendation that I certify the class.

***3** The parties promptly responded by filing the Settlement, the proposed notice to the members of the

putative class, and other documents in support of the Settlement. In an order dated June 20, 2000, preliminarily approving the Settlement, I set a schedule for, *inter alia,* notice to the class members, opt-outs and objections, and scheduled the fairness hearing for November 1, 2000.

By order dated July 28, 2000, I informed the parties that, notwithstanding my preliminary approval of the Settlement, I had "grave concerns" about the reasonableness of (a) the proposed incentive payments to the eight named plaintiffs and (b) the proposed attorneys' fees.

C. *The Terms of the Settlement*

Each of the approximately 2400 class members will receive a cash payment from a $4.5 million fund, based on the relative likelihood that he or she experienced discrimination. The $4.5 million will be apportioned among the class members in payments ranging from a low of $566 to a high of $3,502. *See* Settlement § X.A.; *see also* Affidavit of Kenneth G. Standard at ¶ 11. The named plaintiffs are each to receive $400,000, and class counsel are to be paid $1,797,500 in fees and $262,500 for disbursements, subject to the approval of the Court. *See* Settlement §§ XI, XII.

Additionally, the Settlement provides for non-monetary relief, including the following: Con Ed will conduct a one-day conflict resolution/diversity training session for all employees as part of its EEO/diversity training program (Settlement § XIII.E); most management job openings will be posted company-wide (Settlement § XIII.G); Con Ed's Chairman will send a letter to all employees reaffirming the company's commitment to equal employment opportunity and explaining the rationale for the Settlement, and he will discuss the letter with company officers (Settlement § XIII.A); Con Ed will mail its newly-revised equal employment opportunity policy to all employees (Settlement § XIII.A), and will include adherence to that policy in management performance reviews (Settlement § XIII.D); and Con Ed will notify employees when significant organizational or personnel changes are being made in order to assist them with management career planning (Settlement § XIII.G).[1]

DISCUSSION

A proposed settlement of a class action must be approved by the district court. Fed.R.Civ.P. 23(e). As Chief Judge Edward R. Korman recently observed, the fairness of a proposed settlement has two elements—one procedural and the other substantive. *In re Holocaust Victim Assets Litig.,* 105 F.Supp.2d 139, 145 (E.D.N.Y.2000). The procedural component focuses on the "negotiating process by which the settlement was reached." *Weinberger v. Kendrick,* 698 F.2d 61, 73 (2d Cir.1982). "The process must be examined 'in light of the experience of counsel, the vigor with which the case was prosecuted, and the coercion or collusion that may have marred the negotiations themselves." ' *In re Holocaust Victim,* 105 F.Supp.2d at 145–46 (quoting *Malchman v. Davis,* 706 F.2d 426, 433 (2d Cir.1983)).

***4** The most common threat to an untainted settlement process in a class action is the financial interest of counsel to the class, "who may be improperly influenced to accept certain settlement terms, or to accept a settlement at all, thereby 'subordinat[ing] the interests of class members to the attorney's own economic self-interest." ' *Id.* (quoting John C. Coffee, Jr., "Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation," 100 *Colum. L.Rev.* 370, 371–72 (2000)). The proposed settlement in this case implicates another threat: incentive payments to the class representatives. If, as in the Settlement, class representatives receive "special awards in addition to their share of the recovery, they may be tempted to accept suboptimal settlements at the expense of class members whose interests they are appointed to guard." *Weseley v. Spear. Leeds & Kellogg,* 711 F.Supp. 713, 720 (E.D.N.Y.1989) (Nickerson, J.) (citing *Women's Comm. for Equal Employment Opportunity v. Nat'l Broad. Co.,* 76 F.R.D. 173, 180 (S.D.N.Y.1977)).

Factors relevant to the substantive fairness of a proposed settlement include: (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. *City of Detroit v. Grinnell*

Corp., 495 F.2d 448, 463 (2d Cir.1974).

After considering the facts and arguments in the papers submitted, as well as proceedings at the fairness hearing on November 1, 2000, I decline to approve the proposed settlement. The distribution of monetary payments under the proposal is grossly unfair to the absent members of the class. Because of that conclusion, I need not and do not address the still-troubling issue of the size of the separate fund set aside for attorneys' fees.

As a preliminary matter, the proposed settlement distinguishes itself from many others involving incentive payments to class representatives in that the amounts of the incentive payments at issue are not readily ascertainable from the Stipulation of Settlement. According to plaintiffs, the $400,000 figure for each named plaintiff is reached as follows:

> • "earnings loss" is established through the use of "comparators"—fellow Con Ed employees "in the same cohort" as the plaintiffs "who appear not to have suffered the discrimination and lack of promotion that is alleged in this case." (Plaintiffs' Memorandum at 21.)
>
> • interest is added to that amount (*id.*)
>
> ***5** • then comes "the addition of compensatory (and punitive damages) in the amount of $150,000 for each plaintiff" (*id.*)
>
> • then, plaintiffs contend, "[i]t is submitted that the difference between the total thus achieved and the actual award could be conceived of as an incentive award" (*id.* at 21–22).

This approach is misleading in two respects. First, the Settlement contains no such calculation. Rather, under Section XII, each of the eight named plaintiffs simply gets $400,000 within 30 days of the effective date of the Settlement, with the option of receiving $250,000 of that amount in deferred payments instead. *See* Settlement § XII.[2]

Second, plaintiffs' suggestion that the amount to be "conceived of as an incentive award" does not include the $150,000 in compensatory (and punitive) damages[3] is especially misleading. No other class members get that $150,000 payment. To my mind, that makes the $150,000 part of the "incentive payment" to the named plaintiffs.

In a conference call with all counsel on December 19, 2000, I informed counsel that, in my view, the amount of an incentive payment to a named plaintiff equals $400,000 (the amount they are to receive) minus the amount that plaintiff would receive under the Settlement if he or she were an absent class member, and thus compensated pursuant to Section X of the Stipulation of Settlement. None of the attorneys even attempted to argue otherwise. By that common sense measure, every named plaintiff will receive incentive payments of more than $396,000 (not including the 10% raises to be given to Berry and Austin).

I accept the proposition that incentive awards to class representatives may properly be included in class action settlements. I also agree that there are significant differences between being a class representative in a securities fraud class action and being such a plaintiff in an action based on claims of discrimination in the workplace. In discrimination cases, the plaintiff is frequently a present employee whose position and experience in the workplace may be affected simply by having brought the case. *See Thornton v. East Texas Motor Freight,* 497 F.2d 416, 420 (6th Cir.1974) ("We also think there is something to be said for rewarding those drivers who protest and help to bring rights to a group of employees who have been the victims of discrimination"); *Women's Comm.,* 76 F.R.D. at 182 ("plaintiffs here ... undertook significant obligations, perhaps at some risk to job security and good will with co-workers, resulting in broad-ranging benefits to the class").

On the other hand, taking time away from work to respond to discovery requests and to be deposed are among the "normal obligations of class representation." *Weseley,* 711 F.Supp. at 720. Laudable though it may be for class representatives to suffer the inconvenience associated with the prosecution of the case, "[a] class representative is a fiduciary to the class," *id.,* and generally is expected to endure such inconvenience without special compensation. Moreover, whereas the *fear* of retaliation for having filed the action and represented the class may sustain a modest incentive award to the named plaintiffs, I question the appropriateness of allowing actual incidents of retaliation, which are independently compensable as separate claims, to form the basis of incentive payments that effectively reduce the amount of funds available to the class as a whole.

***6** Although both Con Ed and the plaintiffs cite *Roberts v.*

Texaco. Inc., 979 F.Supp. 185 (S.D.N.Y.1997), in support of the incentive awards in this case, *Roberts* merely demonstrates the extraordinary nature of the proposed incentive payments in this case. *Roberts* was also an employment discrimination class action. The settlement approved by the court called for payments to class members in amounts ranging from $60,000 to $80,000. *Id.* at 203. The lead plaintiff, Roberts, who was entitled to damages at the low end of that range, had been threatened with physical violence and subjected to verbal abuse following the filing of the action. *Id.* at 202. Also, like all the class representatives, she suffered the anxiety of knowing that Texaco had in fact engaged in retaliation against persons who had filed previous employment discrimination claims. *Id.* Against that backdrop, the Special Master recommended, and the court approved, an incentive payment to Roberts of $85,000, which was expressly described as "an upward departure from cited precedent." *Id.* at 203. One other named plaintiff received an incentive award of $50,000; three received awards of $25,000, and one received $2,500. *Id.* at 204–05.

Thus, even in the special circumstances of *Roberts,* only one of six incentive awards exceeded the top end of the range of payments to be made to the class members, and did so by approximately 6%. In this case, the top end of the range of payments to the class members is $3,502. The incentive awards to all eight plaintiffs are more than 100 times that figure.[4]

Apart from the preposterous size of the incentive awards in this case, even as compared to the "upward departure" for such awards for the lead plaintiff in *Roberts,* the justifications advanced for the payments are not compelling. For example, plaintiffs' counsel asserts that the named plaintiffs "submitted to and [were] demeaned at depositions." (Plaintiff's Memorandum at 20). But submitting to depositions, as noted above, is a normal obligation of class representation. And a review of the affidavits of the class representatives suggests to me that the allegedly "demeaning" treatment of them has been overstated. Ms. Sheppard, for example, complains about having been asked whether she would prefer to be called "Ms." or "Miss," a question she perceived as a subtle reminder that she is an unwed mother. (Affidavit of Dorothy Sheppard dated October 16, 2000, at ¶ 9.) Mr. McKinzie asserts that Con Ed's lawyers' apparent desire that he contradict himself in deposition testimony, and their attempt to undermine his claim of discrimination, were "intimidating, humiliating and even accusatory ." (Affidavit of Harold McKinzie dated October 16, 2000, at ¶ 5.)

I do not intend to diminish the significance of the nonmonetary relief included in the Settlement. Nor do I mean to suggest that the fairness of incentive payments in particular cases inevitably depends on some specific proportionality to the payments to be made to the absent class members. Finally, I have no suspicion that the proposed settlement in this case is in fact the product of conscious collusion or bad faith. To the contrary, my impression is that the parties have negotiated vigorously and in good faith in their effort to settle the case.

***7** But the principle remains—class representatives are naturally more inclined to accept a settlement that is not in the best interests of the absent class members they represent if the named plaintiffs are permitted to receive an award in addition to their share of the recovery. The larger the reward, the greater the inclination will be. The reward in this case is staggering—the eight named plaintiffs will share $3.2 million, whereas the nearly 2,400 fellow class members they represent will share $4.5 million. The justifications for this differential treatment are flimsy, and I have no doubt, considering all the circumstances, that the proposed settlement unfairly undercompensates the absent class members.

Employees and former employees of Con Ed who would be included in the class have submitted objections to the monetary payments proposed in the Settlement. Rosa Nobles–Turner states that it is not fair for an employee of ten or fifteen years to recover the same amount as an employee of thirty-one years, as she is. She also complains that there is no compensation for the injury she suffered when she was not promoted to management. Howard Washington, a former employee, objects to the Settlement on the ground that after fourteen years of employment with Con Ed, he was unfairly terminated (essentially, he claims, because of his allegations of discrimination), and that therefore the compensation he receives in this settlement should reflect his lost wages since that time. Renaldo Clarke submitted a request for changes in the proposed settlement based on the belief that "[t]he settlement offer of 4.5 million dollars falls short of true restitution for the many years of personal anguish, financial instability, and economic hardship we all suffered," and that a central component of such unfairness is the disproportionate amounts for named plaintiffs and members of the class. Lois L. Pounds also objects to the proposed settlement on the grounds that it offers too small an amount and is allocated unfairly. As she explains, "to have such a wide variance between the monetary relief to the named Plaintiffs and the Class

Members does not afford true and fair compensation to Class Members."

I agree with Ms. Pounds. As the guardian of the interests of the absent members of the class, *see generally* Jack B. Weinstein and Karin S. Schwartz, "Notes From the Cave: Some Problems of Judges in Dealing With Class Action Settlements," 163 F.R.D. 369 (1995), I feel constrained to reject the Settlement.

CONCLUSION

In a telephone conference on December 19, 2000, I expressed to counsel my concerns about the incentive payments to the class representatives. Today I received a letter from counsel for Con Ed, on behalf of all parties, seeking time for them "to negotiate a settlement in this case that addresses the Court's concerns." Letter from Kenneth G. Standard dated December 21, 2000, at 1. I hereby deny that request. "The district court judge should not take it upon himself to modify the terms of the proposed settlement decree, nor should he participate in any bargaining for better terms ." *Plummer v. Chemical Bank,* 668 F.2d 654, 656 n. 1 (2d Cir.1982). A process by which the parties propose modifications to the Settlement in an effort to meet my concerns would inevitably violate that principle.

***8** For the foregoing reasons, I decline to give my approval to the Settlement. A status conference will be held on January 4, 2001, at 9:30 a.m.

So Ordered.

All Citations

Not Reported in F.Supp.2d, 2000 WL 33313540

Footnotes

1 The Settlement also contains other provisions for non-monetary relief, including, *inter alia,* providing career counseling services for those employees who indicate that they are interested in promotions to or within management; promoting two of the named plaintiffs; and forming a Human Resources Committee made up of four management employees, one officer the Director of the Equal Employment Opportunity Affairs Office, and the director of Human Resources to make recommendations on certain EEO issues. *See* Settlement §§ XIII.C, XIII.G.

2 Two of the plaintiffs, James Austin and Robert Berry, also get promotions and 10% salary increases.

3 While plaintiffs' memorandum characterizes this $150,000 as both compensatory and punitive damages (Plaintiffs' Memorandum at 11), the Settlement explicitly states that no part of the $400,000 is allocated to punitive damages. Settlement § XII.

4 The other cases relied upon by plaintiffs and Con Ed do not counsel in favor of approving the settlement in this case. *See Selzer v. Bd. of Educ. of New York,* 1993 WL 42787, at *4 (S.D.N.Y. Feb. 16, 1993) ("Where a settlement agreement provides for payment to the named plaintiffs in an amount or proportion not payable to other members of the class, the arrangement merits careful scrutiny;" nevertheless, in light of factual deficiencies in the case resulting in a settlement involving no monetary compensation to class members, and where plaintiffs' counsel waived their claim to fees, approving "modest" $47,000 payments to two class representatives who put on hold their entitlement to individual relief and devoted "hundreds or thousands of hours of their own time to the case");

Yap v. Sumitomo Corp. of America, 1991 WL 29112, at *4– *5,*9 (S.D.N.Y. Feb. 22, 1991), (approving "relatively modest" ($30,000) incentive payments to two named plaintiffs, as part of decree providing retroactive payments to class members of up to $17,000 and prospective salary increases of up to $8,000, because named plaintiffs actively participated in the preparation of the case and in discovery, undertook risk that they would be subject to retaliation by the employer, and were required to leave the company as of the time of the settlement); *Avagliano v. Sumitomo Shoji America, Inc.,* 1987 WL 14653, at *4– *5 (S.D.N.Y. Mar. 30, 1987), (approving settlement providing for, *inter alia,* payments to class members of amounts ranging from $1,500 to $6,000 and "relatively modest" payments of $15,000 to each of two named plaintiffs who "participated actively in the preparation of this case, and in fact one was deposed for five days," and undertook the risk that they would be subject to retaliation by the employer); *Kuck v. Berkey Photo, Inc.,* 87 F.R.D. 75, 77 (S.D.N.Y.1980) (Weinfeld, J.) (in context of a settlement providing for, *inter alia,* payments to class members ranging from $241 to $963, approving, without discussion, payments to seven named plaintiffs averaging less than $9,000); *Women's Comm.,* 76 F.R.D. at 173 (approving, as part of proposed settlement calling for, *inter alia,* $14,000,000 in front and back pay awards to class of 2700, incentive payments averaging $11,000 to sixteen named plaintiffs).