Minute Order Form (06/97)

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Joan B. Gottschall	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	98 C 7093	DATE	March 27, 2000
CASE TITLE	LISA ELLIS, et al v. ELGIN RIVERBOAT RESORT, et al.		

MOTION: [In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3rd party plaintiff, and (b) state briefly the natu of the motion being presented.]

DOCKET ENTRY:

(1) ☐ Filed motion of [use listing in "Motion" box above.]

(2) ☐ Brief in support of motion due _____.

(3) ☐ Answer brief to motion due_____. Reply to answer brief due_____.

(4) ☐ Ruling/Hearing on _____ set for _____ at _____.

(5) ■ Status hearing set for April 18, 2000 at 9:30 a.m.

(6) ☐ Pretrial conference[held/continued to] [set for/re-set for] on _____ set for _____ at _____.

(7) ☐ Trial[set for/re-set for] on _____ at _____.

(8) ☐ [Bench/Jury trial] [Hearing] held/continued to _____ at _____.

(9) ☐ This case is dismissed [with/without] prejudice and without costs[by/agreement/pursuant to]
☐ FRCP4(m) ☐ General Rule 21 ☐ FRCP41(a)(1) ☐ FRCP41(a)(2).

(10) ■ [Other docket entry] Enter Order. The plaintiffs' motion for class certification [8-1] is granted with modification for reasons stated in the attached order, and the court certifies the following class: All African-Americans who were qualified for employment as "dealers" who applied for positions as "dealers" at the Grand Victoria casino, but who were not hired from December 25, 1997 to the present. Status is set for April 18, 2000, at 9:30 a.m.

(11) ■ [For further detail see order attached to the original minute order.]

	No notices required, advised in open court.
	No notices required.
	Notices mailed by judge's staff.
	Notified counsel by telephone.
X	Docketing to mail notices.
	Mail AO 450 form.
	Copy to judge/magistrate judge.

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LISA ELLIS, et al.	)	
	)	
Plaintiffs,	)	
v.	)	Case No. 98 C 7093
	)	
ELGIN RIVERBOAT RESORT, et al.	)	Judge Joan B. Gottschall
	)	
Defendants.	)	

ORDER

I. Introduction

Plaintiffs Lisa Ellis, Marcia English, Derrick Denson and Yvonne Mason ("plaintiffs") have brought suit against Elgin Riverboat Resort d/b/a Grand Victoria Riverboat, Nevada Landing Partnership and RBG Ltd., ("defendants"), alleging violation of Title VII of the Civil Rights Act. The plaintiffs are African-Americans who applied for positions as dealers at the Grand Victoria Casino but were not offered positions. In the present motion the plaintiffs seek to have a class of individuals certified pursuant to Rule 23 of the Federal Rules of Civil Procedure. They seek to have certified the following proposed class:

> All African-Americans who were qualified for employment as "dealers" at the Grand Victoria casino, but who were not hired from December 25, 1997 to the present.[1]

The defendants oppose certification of the class, arguing that the plaintiffs have failed to meet any of the requirements of Rule 23(a).

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[1]The plaintiffs initially proposed a class consisting of "all Black African-Americans who applied and were rejected for employment as dealers by Grand Victoria Casino, or were deterred from applying for employment from December 25, 1997 to the present." The plaintiffs proposed the narrower class definition in their Reply Brief.

II. Discussion

Rule 23 of the Federal Rules of Civil Procedure provides a two-step analysis to determine whether class certification is appropriate. First, the plaintiffs must meet the four requirements of Rule 23(a): (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses or the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. Failure to meet any one of these elements precludes certification of a class. *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 596 (7th Cir. 1993).

Second, the action must satisfy one of the conditions of Rule 23(b). The plaintiffs contend that they have satisfied Rule 23(b)(2), which states that "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."

The plaintiffs bear the burden of showing that class certification is proper. *Trotter v. Klincar*, 748 F.2d 1177, 1184 (7th Cir. 1984). If the party class certification meets each of the certification requirements, the court must certify the proposed class. *Jefferson v. Windy City Maintenance, Inc.*, 1998 WL 474115, at *2 (N.D.Ill. Aug. 4, 1998). The court has broad discretion concerning whether a proposed class satisfies certification requirements, but should err in favor of maintaining class actions. *Id.*

In this case, plaintiffs' proposed class covers "[a]ll African-Americans who were qualified for employment as 'dealers' at the Grand Victoria casino, but who were not hired from December 25, 1997 to the present." The proposed class includes both those who applied for

employment and were not hired, and those who were discouraged from applying.

A. Numerosity

1. Scope of the Class

Before reviewing the requirements of Rule 23, the court must as an initial matter review the scope of the proposed class. The plaintiffs contend that those qualified applicants who were deterred from applying for work with Grand Victoria should be included. The defendants argue that this proposed class is overbroad because it will be impossible to prove whether or not someone was deterred from applying at Grand Victoria due to an allegedly discriminatory hiring practice.

An identifiable class exists if its members can be ascertained by reference to objective criteria, but not if membership is contingent on the prospective member's state of mind. *Elliot v. ITT Corp.*, 150 F.R.D. 569, 574 (N.D.Ill. 1992). When class membership depends upon an individual's state of mind, courts have typically found the class to be too indefinite. *Harris v. General Dev. Corp.*, 127 F.R.D. 655, 659 (N.D.Ill. 1989). "In attempting to cull the truly deterred applicants from such an expansive universe, a tremendous amount of valuable court time and resources would be consumed, placing a severe burden on the court and litigants." *Id.*

The proposed class is too indefinite because class membership depends upon an individual's state of mind. *See Harris*, 127 F.R.D. at 659 ("The proposed class of persons who allegedly were discouraged from applying at GDC is too imprecise and speculative to be certified."). However, it is within the court's discretion to limit or redefine the scope of the class. *Id.* Because of the speculative nature of the proposed class, the court will exercise its discretion and limit the class to those African-Americans who were qualified for employment as 'dealers'

and applied for work as 'dealers' at the Grand Victoria casino, but were not hired from December 25, 1997 to the present.

The plaintiffs argue that the theory that the class should be limited to minority dealers who actually applied and were not hired has been "repeatedly rejected." In support of this contention they cite *Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546 (5th Cir. 1986), and *Jones v. Firestone Tire and Rubber Co., Inc.*, 977 F.2d 527 (11th Cir. 1992). However, neither of these decisions addressed the issue of persons who were discouraged from applying for positions in the context of class certification under Rule 23, and the plaintiffs cite no cases that support their contention that those who were discouraged from applying for work at Grand Victoria may be included to satisfy numerosity requirements. Such a contention is inconsistent with the law in this district. *See, e.g., Elliot,* 150 F.R.D. at 574; *Harris,* 127 F.R.D. at 659. *See also Rosario v. Cook County,* 101 F.R.D. 659, 663 (N.D.Ill. 1983)(claims of representative parties who applied for promotion and were denied not typical of claims of parties who were discouraged from applying for promotion under Rule 23(a)(3)).

2. Speculation

The defendants argue that the plaintiffs' proposed class size is merely speculative. In their motion, the plaintiffs argue that the defendants employed 409 dealers, 24 of whom were African-American (5.87%). The plaintiffs contend that this percentage is far lower than at other casinos in the Chicagoland area, where African-Americans comprise 40% of the dealer workforce. Plaintiffs claim that but for the alleged discriminatory policy, it is likely that more than one hundred African-American dealers would be presently employed by Grand Victoria. The defendants counter that the plaintiffs offer no evidence supporting their numerosity

argument, only the opinion of plaintiff Ellis.

"To satisfy this numerosity requirement, it is not necessary to determine the precise number of members in a proposed class; a reasonable estimate will suffice." *Dhamer v. Bristol-Myers Squibb Co.*, 183 F.R.D. 520, 525 (N.D.Ill. 1998) A putative class representative must provide some evidence as to the size of the class. *Narwick v. Wexler*, 901 F.Supp. 1275, 1278 (N.D.Ill. 1995) The plaintiffs cannot rely on conclusory allegations or speculation as to the size of the class in order to prove numerosity. *Id.* A finding of sufficient numerosity can be based on common sense assumptions or reasonable inferences. *Marder v. Bank One Milwaukee*, 1995 WL 758413 (N.D.Ill. Dec. 15, 1995). The issue of whether the numerosity requirement is satisfied is extremely fact-specific. *Chandler v. Southwest Jeep-Eagle, Inc.*, 162 F.R.D. 302, 307 (N.D.Ill. 1995). In making this determination, the court is entitled to make common-sense assumptions. *Buycks-Roberson v. Citibank Federal Savings Bank*, 162 F.R.D. 322, 329 (N.D.Ill. 1995).

The numerosity requirement should not be mechanically employed to defeat class certification in employment discrimination cases, because this type of suit "is necessarily a class action as the evil sought to be ended is discrimination on the basis of a class characteristic." *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 719 (7th Cir. 1969). *See Harris*, 127 F.R.D. at 660. "We recognize that 'suits alleging racial or ethnic discrimination are often by their very nature class suits, involving class-wide wrongs.'" *Rosario*, 101 F.R.D. at 660-61 (quoting *East Texas Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 405 (1977)).

The plaintiffs' estimate of class size of one hundred does not satisfy the requirements of Rule 23(a)(1). The plaintiffs base their estimate of class size on statements by plaintiff Ellis. She stated in her deposition that she based this number on hearsay, and that she did nothing to

determine whether her estimate was accurate. This is insufficient for establishing numerosity. A plaintiff need not plead an exact number of persons included in the proposed class, but conclusory allegations that joinder is impracticable and speculation as to class size are not sufficient. *Shields v. Local 705, Int'l Bhd. of Teamsters*, 1996 WL 616548 (N.D.Ill. Oct. 23, 1996).

The plaintiffs do not dispute the lack of basis for Ellis' estimate. Instead, they counter in their Reply Brief with EEO reports from four of the seven casinos in the local area that show that 303 African-Americans work at these casinos. They argue that all of them would be interested in working at Grand Victoria because it pays a substantially higher wage. The defendants counter that this new estimate is unreasonable because it makes no effort to allege how many applied, or even considered applying, for employment with Grand Victoria. They further argue that the proposed class fails to consider whether any of the 303 are qualified to work at Grand Victoria.

The plaintiffs' estimate based on the total number of dealers at other casinos also does not satisfy the numerosity requirement. The plaintiffs merely rely on a conclusory allegation that because Grand Victoria pays dealers substantially more than other casinos, every African-American dealer at the other casinos in the area would want to work there. The plaintiffs have made no attempt to make a reasonable estimate as to how many, if any, of these dealers actually applied for work at Grand Victoria. The plaintiffs' conclusory allegation here is wholly inadequate for establishing numerosity.

"When in doubt about numerosity, courts often certify the class, with the option under Fed.R.Civ.P. Rule 23(c)(1) of decertifying if it later appears that joinder was practicable." *Pennington v. Ward*, 1986 WL 8038, at *1 (N.D.Ill. July 14, 1986). In the present case, the

plaintiffs may be able to demonstrate numerosity. According the McGill affidavit, approximately 25% of its employees are dealers (409 of a workforce of over 1600). *See* McGill Aff. at ¶ 4. Grand Victoria received in excess of 2,100 applications for employment in 1998. Grand Victoria had exceeded that number of applications during the first eight months of 1999. McGill Aff. at ¶ 5. It is therefore reasonable to assume that 25% of these 4,200+ applications, or at least 1,050, were for dealer positions. Presumably a number of these were from African-Americans qualified as dealers who were not offered employment. Although it is unclear whether the number is great enough to make joinder impracticable, the court finds that the plaintiffs have conditionally established numerosity. The court has the option under Fed.R.Civ.P. Rule 23(c)(1) of decertifying the class later, if a review of Grand Victoria's computer employment records demonstrates that joinder is practicable.[2]

B. Commonality

The plaintiffs next claim that the proposed class meets the commonality requirement of Rule 23(a)(2). The defendants argue that the plaintiffs have failed to allege a question of law or fact that is common to the claims of the named class members and the members of the putative class.

"Where a question of law refers to a standardized conduct of the defendants toward members of the proposed class, a common nucleus of operative facts is typically presented, and the commonality requirement of Rule 23(a)(2) is usually met." *Franklin v. City of Chicago*, 102

[2]Grand Victoria has computer records of all people who applied for work at Grand Victoria. Although the records do not include the races of the applicants, they include addresses, phone numbers, positions applied for, and whether the applicants were ultimately hired. The number of African-American applicants qualified as dealers who applied for work as dealers and were not offered positions is thus ascertainable. *See* McGill Aff., ¶ 7.

F.R.D. 944, 949 (N.D.Ill. 1984). All questions of law or fact need not be common among the class members; a single issue common to all class members will suffice for the commonality requirement. *Harris*, 127 F.R.D. at 661.

Here, the plaintiffs have met the commonality requirement. The plaintiffs allege racial discrimination in hiring, and "[d]efendants' allegedly discriminatory conduct affected all members of the class in a similar fashion. As a consequence, most if not all of the elements of the resulting cause of action will be common to the class." *Harris*, 127 F.R.D. at 661. The plaintiffs' allegations satisfy the requirements of Rule 23(a)(2).

The defendants cite *Patterson v. General Motors Corp.*, 631 F.2d 476 (7th Cir. 1980), for the proposition that a class action is not appropriate in all instances in which discrimination in employment was racial, and that the claims of the individual members of the class are fact specific and require adjudication of individual facts. However, *Patterson* can be distinguished from the present case. The court in *Patterson* found that it was not a typical Title VII case, and that the facts alleged related solely to plaintiff's personal grievances. *Id.* at 480. In contrast, the plaintiffs here allege a policy of discriminatory hiring policies, a fact which if proven is common to all claims. This is sufficient to meet the commonality requirement.

C. Typicality

The plaintiffs next argue that they have satisfied the typicality requirement of Rule 23(a)(3). The defendants claim that the claims are not typical because Grand Victoria's hiring decisions are made on a highly individualized basis, and that the major focus of the litigation will be on defenses unique to the named plaintiffs.

The typicality requirement is satisfied if the claims of the representative parties arise from

the same event or practice or course of conduct that gives rise to the claims of the other class members, and if the claims are based on the same legal theory. *Harris*, 127 F.R.D. at 661. Typicality is not defeated by factual distinctions between the named plaintiffs and those of other class members. *Orlowski v. Dominick's Finer Foods, Inc.*, 172 F.R.D. 370, 374 (N.D.Ill. 1997). Also, typicality is determined with reference to the defendant's actions towards the plaintiff class, not particularized defenses against individual class members. *Wagner v. Nutrasweet Co.*, 95 F.3d 527, 534 (7th Cir. 1996).

The plaintiffs have satisfied the typicality requirement. All claims of the named plaintiffs arise from the same course of conduct that gives rise to the claims of the other class members, namely, Grand Victoria's discriminatory hiring practices. Furthermore, the claims are based upon the same legal theory under Title VII. All four named plaintiffs are African-Americans who allege that they applied for positions at Grand Victoria as dealers but were not hired. This is sufficient to establish typicality.

D. Adequate representation

The plaintiffs next claim that they have satisfied the requirements of Rule 23(a)(4). They argue that the named plaintiffs do not have interests that are antagonistic to those of the class. The defendants counter that the claims of the named plaintiffs are potentially antagonistic, and as a result the requirement for adequate representation is not met.

A class is not fairly and adequately represented if the class members have antagonistic or conflicting claims. *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992). The defendants claim that the plaintiffs' claims are potentially antagonistic. However, the court finds this contention to be without merit. The defendants offer mere speculation that the claims are

"potentially" antagonistic, and they "cannot destroy the certification of the class if the basis of their conflict with the class' claims is speculative." *Id.* at 1019.

The court finds that the plaintiffs have satisfied the requirements of Rule 23(a).

E. Rule 23(b)

In addition to satisfying the requirements of Rule 23(a), the plaintiffs also must satisfy one of the requirements of Rule 23(b). The plaintiffs contend in their motion that they have satisfied the requirements of Rule 23(b)(2). The defendants do not dispute this contention, so the class will be certified under Rule 23(b)(2).[3]

IV. Conclusion

The plaintiffs' motion for class certification [8-1] is granted with modification, and the court certifies the following class:

> All African-Americans who were qualified for employment as "dealers" who applied for positions as "dealers" at the Grand Victoria casino, but who were not hired from December 25, 1997 to the present.

ENTER:

JOAN B. GOTTSCHALL
United States District Judge

DATED: March 27, 2000

[3]The plaintiffs also make reference to Rule 23(b)(3) in their reply brief. However, at no point do they argue that they have satisfied the requirements of this rule, so the court will not address the issue of class certification under Rule 23(b)(3).