

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION**

WILLIAM ANTHONY HILL,
ELIZEBETH A. WORTHMAN, and
GOLDA BAILEY,
On Behalf of Themselves and Others
Similarly Situated,

Plaintiffs,

v.

MERRILL GARDENS LLC,

Defendant.

CAUSE: 1:04-CV-248-TLS

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION,

Plaintiff,

v.

MERRILL GARDENS LLC,

Defendant.

CAUSE: 1:05-CV-4-TLS

ORDER

This matter is before the Court on the Stipulated Order Granting Preliminary Approval to Class Action settlement, Conditional Class Certification, and Proposed Consent Decree (“Stipulation”) proposed by the Defendant, Merrill Gardens, LLC, on June 8, 2005, as Docket Entry 50 in 1:04-CV-248 and Docket Entry 30 in 1:05-CV-4. The Stipulation is for the purposes of both of the above captioned matters, collectively referred to as the “Litigation.”

BACKGROUND

The first case, *Hill v. Merrill Gardens LLC*, 1:04-CV-248 (the “Hill Action”), was filed on June 25, 2004. In the Hill Action, the Plaintiffs brought action on behalf of themselves and others allegedly similarly situated. Specifically, they claimed that they and others allegedly similarly situated were denied employment at the Georgetowne Place community located at 1717 Maplecrest Road, Fort Wayne, Indiana, owned by Merrill Gardens LLC (“Merrill Gardens”), and that the denial of employment was on the basis of race/color, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, and § 1981 of the Civil Rights Act of 1866, 42 U.S.C. § 1981.

The second case, *EEOC v. Merrill Gardens LLC*, 1:05-CV-004 the “EEOC Action”), was filed on January 4, 2005. In the EEOC Action, the Equal Employment Opportunity Commission filed suit against Merrill Gardens (the “EEOC Action”) under authority granted by Sections 706(f)(1) and (3) and 707 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(f)(1) and (3) and -6 (“Title VII”); and § 102 of Title I of the Civil Rights Act of 1991, 42 U.S.C. § 1981(a). The EEOC’s Complaint and Amended Complaint allege that Merrill Gardens had a pattern or practice of refusing to hire non-Caucasians because of their race and/or color, in violation of § 703(a) of Title VII, 42 U.S.C. § 2000e-(2)(a); alleged that Merrill Gardens failed, in violation of § 709(c), 42 U.S.C. § 2000e-(8)(c), to make and preserve records relevant to the determination of whether unlawful employment practices have been or are being committed; and sought appropriate relief for Caroline Aduro, Samantha Bolden, Jaela Brownlee, Debra Edwards, William Anthony Hill, Elizebeth Worthman, and a class of non-Caucasian individuals who were adversely affected by the alleged unlawful employment practices.¹

¹ Each of these individuals is a part of the proposed class in the Hill Action.

As these two lawsuits overlap, the Parties in the Litigation have negotiated a proposed resolution of the cases together. The Parties request that the lawsuits be consolidated solely for the purposes of approving the requested class relief in the Hill Action and entry of a proposed Consent Decree in the EEOC Action.

The Stipulation requests that the Court grant preliminary approval of the requested class relief in the Hill Action and a proposed Consent Decree in the EEOC Action. The Parties agree that the payments proposed under the negotiated resolution for class members is one and the same, despite the fact that it is memorialized in both the Hill Action proposed Settlement Action and the EEOC Action proposed Consent Decree.

The Parties submit the Settlement Agreement attached as Exhibit “A” (hereinafter referred to as the “Settlement Agreement”) in the Hill Action and the Consent Decree attached as Exhibit “B” (hereinafter referred to as the “Consent Decree”) in the EEOC Action to this Court for preliminary approval. In tendering these proposed agreements together, the Parties have agreed that the resolution proposed in either requires approval by the Court of the other.

TERMS OF THE STIPULATION

Having carefully reviewed the Parties submissions and finding them in good order, the Court GRANTS Preliminary Approval to Proposed Class Action Settlement, GRANTS the Proposed Consent Decree (“Preliminary Approval Order”) and FINDS, CONCLUDES, ORDERS, AND ADJUDGES as follows:

I. Preliminary Order Confirming Class Certification and Approving Notice to Members of the Settlement Class

A. Class Certification

The Court grants conditional class certification to the following settlement class in the Hill Action and for the purpose of the proposed Consent Decree in the EEOC Action:

All African Americans and other minorities who: (1) submitted applications for employment at Georgetowne Place, located at 1717 Maplecrest Road, Fort Wayne, Indiana, operated by Merrill Gardens LLC; (2) between February 17, 1998 and April 18, 2005; (3) for vacant positions; (4) and who were denied employment in such vacant position; (5) where the positions were or may have been given to non-minority candidates.

This class consists of two subclasses:

1) The “Known Class”: Class Members Caroline Aduro, Samantha Bolden, Jaela Brownlee, Debra Edwards, William Anthony Hill, and Elizebeth Worthman (“Known Class Members”), each of whom participated in the Hill Action and/or the EEOC Action on and/or prior to April 18, 2005. Members of the Known Class are identified as “Known Class Members.”

2) The “Unknown Class”: Class Members, including Golda Bailey, who are not specifically identified as Known Class Members. These individuals did not actively participate in the Hill Action and/or EEOC Action on or prior to April 18, 2005. Members of the Unknown Class are identified as “Unknown Class Members.”

These two subclasses shall together be referred to as the “Settlement Class.” The Court finds that the Settlement Class appears to satisfy all requirements of Fed. R. Civ. P. 23(a) and (b)(2) and (b)(3).

The Court preliminarily appoints Plaintiff William Anthony Hill (“Plaintiff Hill”) as Class Representative of the Known Class and Golda Bailey (“Plaintiff Bailey”) as

Class Representative of the Unknown Class.² The Court conditionally appoints Plaintiff Hill's counsel, John T. Menzie and/or Shane C. Mulholland of the Burt, Blee, Dixon, Sutton & Bloom law firm, as class counsel for the Settlement Class ("Class Counsel"). The Class Counsel represents the interests of the Class with respect to the Hill Action.

The EEOC represents the interests of the Settlement Class with respect to the EEOC Action.

B. Notice

For purposes of both lawsuits, the Court approves the form and content of the Notices to be circulated via print media and the radio at Merrill Gardens' expense during a 30-day period beginning in June 2005 (the "Official Notice Period") pursuant to the schedule attached as Exhibit "C" and the text and narrative attached as Exhibit "D" (the "Notices").

When potential Class Members timely contact the EEOC within the Official Notice Period and/or within 14 days thereafter, the EEOC shall send them the appropriate written Notice set forth as Exhibits "A-1 and A-2" (the "Mailed Notices"). The Notice and Mailed Notices provide sufficient information to inform members of the Hill Action Settlement Class and EEOC Action Class of the essential terms of the Settlement Agreement and the Consent Decree, appropriate means for obtaining additional information about the Settlement Agreement and Consent Decree, appropriate information about the procedures for becoming eligible for a payment under the Hill Action Settlement and the EEOC Consent Decree, and appropriate information about

² Plaintiff Elizebeth Worthman is not being proposed as Class Representative.

their right, and the procedures, to object to the terms of the Settlement Agreement or exclude themselves from the Hill Action Settlement, if they should wish to do so. The Notice will also fairly and adequately inform members of the Hill Action Settlement Class that failing to timely obtain, execute, and return the Release attached to this Order as Exhibit “E” (the “Release”) will result in them becoming ineligible for payment under the proposed Settlement Agreement and proposed Consent Decree.

If any potential Class Member contacts legal counsel for Merrill Gardens or a manager of Georgetowne Place in response to a notice in the media or based upon some other source, Merrill Gardens will provide the EEOC with contact information as soon as possible but by no later than seven (7) days after receiving the information.

Upon the expiration of the Official Notice Period, counsel for Merrill Gardens shall file a declaration that the Notices have been published in the manner and frequency required by and specified by this Preliminary Approval Order.

The Court hereby finds and concludes that members of the Hill Action Settlement Class will be provided the best notice practicable of the Hill Action Settlement and that such notice satisfies all requirements of due process and Fed. R. Civ. P. 23.

C. Persons Excluded from the Settlement Class

The Parties may receive requests for exclusion from the Hill Action Settlement Class and will, within seven (7) days of the Fairness Hearing addressed below, file with the Court a list of those persons who have timely elected to be excluded. All persons named in the list filed with the Court as having filed timely exclusions will be excluded from the Hill Action Settlement Class, will not be bound by the terms of the Hill Action Settlement, and will not be eligible for payment under the Consent Decree.

II. Preliminary Approval of the Class Action Settlement

The Settlement Agreement appears to be fair, reasonable, and adequate and falls within the appropriate range of possible approval. In essence, the Hill Action Settlement provides that each member of the Hill Action Settlement Class and EEOC Consent Decree Class who timely submits an executed Release will receive an amount calculated pursuant to the fair and reasonable formula set forth in the attached Settlement Agreement and proposed Consent Decree.

III. Releases, Covenant Not to Sue, and Effect of Settlement Agreement

A. Releases by Settlement Class Members

The Court preliminarily finds that in consideration of the terms of the Settlement Agreement, all members of the Hill Action Settlement Class, including Plaintiff Hill and Plaintiff Bailey, who do not opt out of the Hill Action Settlement will be found, deemed, and adjudged to have fully, finally, and forever released and discharged all of the following claims they have or may have against Merrill Gardens and each of its past, present and future parents, subsidiaries, affiliated companies, affiliates, predecessors, successors in interest and assigns, and each of their respective past, present and future

officers, directors, employees, attorneys and representatives, or any of them, including any person or entity acting on behalf of or at the direction of any of them (“Released Parties”) as set forth in the Release and as set forth below:

In exchange for the valuable Consideration, Plaintiff Hill, Plaintiff Bailey, and each Class Member who has not opted out of the Hill Action Settlement release and forever discharge the Released Parties from any and all claims or causes of action—known or unknown—that were or could have been asserted in the Litigation regarding applications or requests for employment (or any alleged failure to hire) from February 17, 1998 to April 18, 2005 at Merrill Gardens. As part of this Release, Plaintiff Hill, Plaintiff Bailey, and each Class Member who has not opted out of the Hill Action Settlement release, acquit and forever discharge Released Parties from, and shall not now or hereafter institute, maintain or assert against the Released Parties, either directly or indirectly, derivatively, on their own behalf, or on behalf of a class or any other person or entity, any and all causes of action, claims, damages, award, equitable, legal and/or administrative relief, interest, demands, or rights, whether based on federal, state, or local law, statute, contract, common law, or any other source, that have been, could have been, may be or could be alleged or asserted now or in the future by Plaintiff Hill, Plaintiff Bailey, or any Class Member who has not opted out of the Hill Action Settlement against the Released Parties or any of them in the Litigation or in any other court action or proceeding before any administrative body, tribunal, arbitration, panel, or other adjudicatory body arising out of or related to, in whole or in part, applications or requests for employment (or any alleged failure to hire) at Merrill Gardens or its Georgetowne Place facility between February 17, 1998 and April 18, 2005.

B. Covenant Not to Sue

The Court preliminarily finds that in consideration of the terms of the Settlement Agreement, all members of the Hill Action Settlement Class, including Plaintiff Hill and Plaintiff Bailey, who do not opt out of the Settlement will be found, deemed, and adjudged to have (1) covenanted and agreed that neither Plaintiff Hill, Plaintiff Bailey, nor any of the Hill Action Settlement Class Members, nor anyone authorized to act on behalf of any of them, will commence, authorize, or accept any benefit from any judicial or administrative action or proceeding, other than as expressly provided for in the Settlement Agreement and/or Consent Decree, against the Released Parties, or any of them, in either their personal or corporate capacity, with respect to any claim, matter, or issue that in any way arises from, is based on, or relates to any alleged loss, harm, or injury allegedly caused by the Released Parties, or any of them, in connection with any application for employment at Merrill Gardens from February 17, 1998, to April 18, 2005; (2) waived any right to any form of recovery, compensation, or other remedy in any such action or proceeding brought by them or on their behalf, other than as expressly provided for in the Settlement Agreement and/or Consent Decree; and (3) agreed that the Hill Action Settlement Agreement shall be a complete bar to any such action.

C. Effect of a Final Judicial Determination of Invalidity or Unenforceability

If, after the entry by this Court of Judgment, a notice of appeal of Judgment is timely filed by any party, objector, claimant, or other person or entity, and if an appellate court makes a final determination that Judgment is in any respect invalid, contrary to law, or unenforceable, the Hill Action Settlement Agreement (including Merrill Garden's stipulation to the Hill Action Settlement Class provided for in the Settlement Agreement

or to the entry of the proposed Consent Decree in the EEOC Action) shall be null and void, and the parties shall return to their respective positions in the Litigation as those positions existed immediately before the execution of the Hill Action Settlement Agreement and tender of the proposed Consent Decree unless all parties agree in writing to abide by the judgment as modified.

D. No Admission of Liability

In entering into this agreement or the agreements referenced herein, Merrill Gardens does not admit that any class member in the Litigation would have been hired but for his/her race and/or color or that he/she was discriminated against on the basis of his/her race and/or color or that any claims are or would be timely. Merrill Gardens entered into this Stipulation and the agreements referenced herein to avoid further litigation.

CONCLUSION

For the reasons and in the manner stated above, the Court GRANTS the Stipulated Order Granting Preliminary Approval to Class Action settlement, Conditional Class Certification, and Proposed Consent Decree ("Stipulation") proposed by the Defendant, Merrill Gardens, LLC, as Docket Entry 50 in 1:04-CV-248 and Docket Entry 30 in 1:05-CV-4.

SO ORDERED on June 16, 2005.

S/ Theresa L. Springmann
THERESA L. SPRINGMANN
UNITED STATES DISTRICT COURT