

No. _____

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

LISA ELLIS, MARCIA ENGLISH, AND
DERRICK DENSON, INDIVIDUALLY AND FOR A CLASS,

Plaintiffs-Appellants

v.

ELGIN RIVERBOAT RESORT, d/b/a
GRAND VICTORIA CASINO, NEVADA LANDING
PARTNERSHIP AND PG INVESTORS,

Defendant-Appellee.

Petition for Permission to Appeal from the United States District Court
for the Northern District of Illinois
No. 98 CV 7093 —**Martin Ashman** Magistrate-Judge.

PETITION FOR PERMISSION TO APPEAL

Petitioners-plaintiffs Lisa Ellis, Marcia English, and Derrick Denson, on behalf of the class decertified in the district court's order entered on August 22, 2003, respectfully request permission to appeal from that order.

I. FACTS NECESSARY TO UNDERSTAND THE QUESTIONS PRESENTED

Plaintiffs are African-Americans employed in the gaming industry as dealers. Each plaintiff applied for employment as a dealer with defendant, who operates the Grand Victoria Casino in Elgin, Illinois. Defendant refused to hire any of the plaintiffs and instead filled vacant dealer positions with persons who are not African-American. In addition to rejecting qualified African-American

applicants, defendant gave a preference to persons (all non-African-American) referred for employment through its "Bring a Friend" program.¹ Defendant also afforded a preference to persons who completed its in house dealer training program.²

A. Certification as a Class Action

Plaintiffs³ filed this action individually and for a proposed class following receipt of notices of right to sue from the EEOC.⁴ On March 27, 2000 Judge Gottschall ordered (Appendix 1-11) that the case may proceed as a class action for:

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

In a subsequent order, Judge Gottschall set the closing date for the class as the date "two weeks prior to the scheduled pretrial conference in this action."

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1. Defendant paid a bonus of two hundred and fifty dollars for each new employee hired as a result of a referral from an incumbent employee. Defendant hired 45 "friends" though this program from January 1, 2000 through the end of November, 2002. None of these "friends" are African-American.
 2. This program is limited to persons already employed by defendant. Defendant transferred eighty-four employees to dealer positions from 1998 through 2002; four of the transferees are African-American.
 3. The case was originally filed by plaintiffs Lisa Ellis, Marcia English, and Yvonne Mason. Derrick Denson was added as a plaintiff in an amended complaint filed on July 8, 1999. (Appendix 33 n.6.) Ms. Mason died during the litigation and was replaced on May 30, 2002 by her daughter Shemina Lewis, as a special administrator.
 4. Each plaintiff included class allegations in her (or his) EEOC charge.

(Appendix 14-15.) Thereafter, in an order dated August 1, 2001, Judge Gottschall denied defendant's motion to reconsider the closing date for the class. (Appendix 14-15.)

B. Settlement and Consent to Proceed before Magistrate-Judge Ashman

Following a settlement conference before Magistrate Judge Ashman, an order was entered on November 6, 2001 reciting that the case had been settled (Appendix 16):

Settlement conference held. *Case settled.* Status hearing set to 10:00 11/20/01 (emphasis supplied)

To facilitate implementation of the settlement, the parties consented to proceed before the magistrate who had negotiated the settlement.

C. Magistrate Judge Ashman's Refusal to Enforce the Settlement

After entry of the order reciting that the case has been settled, disagreements arose between the parties about the terms of the settlement: Defendant asked the magistrate to include in the notice of settlement provisions that each class member agree not to seek future employment with defendant and that each class member agree not to again seek employment with defendant. (Motion by defendants concerning class action settlement agreement, filed March 15, 2002, Appendix 17-20.) Defendant did not object to the distribution formula proposed by class counsel. (Appendix 19.) Class counsel objected to these demands and filed a formal motion requesting the magistrate judge to enforce the settlement agreement: class counsel described the settlement as involving "abandonment by the class of claims for preferential hiring, a 50% reduction in the backpay that each class member would have obtained had they prevailed on the merits, and an equal reduction in the attorneys' fees that would be sought." (Motion by plaintiffs to enforce settlement agreement, March 15, 2002, Appendix 21-22.)

The magistrate judge denied plaintiff's motion to enforce the settlement. (Order, March 25, 2002, Appendix 24.) A subsequent settlement conference resulted in an order that "[c]ase not settled." (Order, May 29, 2002, Appendix 25.)

D. The Magistrate's Order Decertifying the Class

After the parties had completed all discovery save expert discovery (Order, February 10, 2002, Appendix 26), defendant moved to decertify the class. The magistrate judge granted this motion in an order dated August 21, 2003 and entered on August 22, 2003. (Appendix 27-60.)

The magistrate judge held that he was free to consider de novo whether the case should be allowed to proceed as a class action. (Appendix 36.) The magistrate judge rejected plaintiffs' reliance on the deferential standard that this Court had applied in *Best v. Shell Oil Co.*, 107 F.3d 544, 546 (7th Cir. 1997) and held that "Rule 23 clearly requires this Court to review the propriety of class certification in light of new evidence and pretrial litigation, regardless of which judge initially certified the case." (Appendix 36.) In the view of the magistrate judge, "every aspect of a court's certification order is necessarily conditional because of the court's obligation to modify or decertify the class if the course of litigation reveals that certification is no longer proper." (Appendix 59.)

Applying this de novo standard of review, the magistrate rejected Judge Gottschall's reasoning that the case presented a common question of law or fact because plaintiffs "allege a policy of discriminatory hiring policies, a fact which if proven is common to all claims." (Appendix 9.) In the view of the magistrate judge, the case did not present any common question of law or fact because defendant had a "decentralized hiring procedure" at its single facility.

(Appendix 45.) The magistrate concluded that such a "decentralized hiring procedure" makes it impossible for plaintiffs to show "that an employer engages in a pattern or practice of discriminatory hiring as a standard operating procedure." (Id.)

The magistrate also rejected Judge Gottschall's conclusion that "[t]he 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." (Appendix 9-10.) Under the legal standard applied by the magistrate, the claims of the class representatives are not typical because plaintiffs "failed to establish a standard operating procedure rising to the level of a pattern or practice of discriminatory hiring." (Appendix 56.)

Finally, the magistrate rejected Judge Gottschall's conclusion that the class members did not have antagonistic or conflicting claims. (Appendix 10.) Judge Gottschall had characterized as "mere speculation" the defendant's argument of antagonistic claims. (Appendix 10-11.) The magistrate accepted this speculation, however, concluding that the named plaintiffs could not adequately represent the class because "class members very likely completed against each other for dealer positions at the casino, presenting antagonistic and conflicting claims within the class," and because defendant had "unique defenses" for two of the named plaintiffs. (Appendix 59.)

II. QUESTIONS PRESENTED

1. When the parties to an employment discrimination class action consent to proceed before a magistrate judge after that judge has entered an order reciting that the case has been settled, may the magistrate judge, after holding for nought his order that the case had been settled, decertify the class by disregarding the legal standards that had been applied by the district judge who had previously ordered that the case could be maintained as a class action?
2. Is the typicality requirement of Rule 23(a) of the Federal Rules of Civil Procedure satisfied if the claims of the class 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?
3. Is the commonality requirement of Rule 23(a) of the Federal Rules of Civil Procedure satisfied when the plaintiffs in an employment discrimination class action allege a practice of discriminatory hiring?
4. May an employer, who has refused to hire qualified African-American applicants because of their race, defeat class certification by speculating that "class members very likely completed against each other" for vacant position?

III. RELIEF SOUGHT

Plaintiffs request that this Court reverse the order of the magistrate judge decertifying the case and either remand the case to the magistrate judge with instructions to enforce the settlement referred to in his order of November 5, 2001, or, in the alternative, remand the case to Judge Gottscall for trial.

IV. JURISDICTION

The Court has jurisdiction to hear this appeal pursuant to Rule 23(f) of the Federal Rules of Civil Procedure: an order decertifying a class is within the scope of Rule 23(f), *Gary v. Sheahan*, 188 F.3d 891, 893 (7th Cir. 1999), and plaintiffs file this petition for permission to appeal on September 8, 2003, the tenth court day following entry on the civil docket on August 22, 2003 of the order decertifying the class.

V. REASONS WHY THIS RULE 23(f) APPEAL SHOULD BE ALLOWED

In *Blair v. Equifax Check Services, Inc.*, 181 F.3d 832 (7th Cir. 1999), this Court noted that under the 1998 amendment to Rule 23(f) authorizing an interlocutory appeal it has "unfettered discretion to permit the appeal" from an order granting or denying class action certification. *Id.* at 633, quoting from the Committee Note accompanying Rule 23(f). Plaintiffs request that the Court exercise this discretion to permit an appeal in this case because the magistrate judge — in disregarding his order that the case was settled and in subsequently disregarding the district's court prior order certifying the case as a class action — has so far departed from the accepted and usual course of judicial proceedings to call for an exercise of this Court's supervisory power.

The Magistrate Judge Refused to Follow Prior Orders

"[A] fundamental precept of common-law adjudication is that an issue once determined by a competent court is conclusive." *Arizona v. California*, 460 U.S. 605, 619 (1983) Just as "questions affecting titles to land, once decided, should no longer be considered open," *id.*, so too an order of a magistrate judge reciting that a case has been settled should mean (at the very least) that the parties had agreed to resolve the material issues in the case and to permit the court to fill in the blanks on any subsidiary issues.

-I-

In this case, Magistrate Judge Ashman presided at a settlement conference and directed the entry of an order reciting "case settled." (Appendix 16.) After the parties had consented pursuant to 28 U.S.C. §636(c) to wind up the case before Magistrate Judge Ashman, the magistrate refused to enforce the settlement (Appendix 24) and subsequently declared that the case was "not settled." (Appendix 25.) An order reciting that a settlement conference before a magistrate judge has produced a settlement should be irrevocable and should be enforced by the judicial official who negotiated the settlement.

-II-

Magistrate Judge Ashman afforded a similar lack of respect to orders previously entered in this case by Judge Gottschall, when he applied a different (and erroneous) legal standard to questions of class maintainability.⁵ The

5. The different views of Magistrate Judge Ashman and Judge Gottschall about the requirements of Rule 23 are set out at 4-5 above. We show below at 9-13 that Magistrate Judge Ashman's views on these questions are manifestly in error.

magistrate's de novo consideration of class maintainability flies in the face of this Court's decision in *Best v. Shell Oil Co.*, 107 F.3d 544 (7th Cir. 1997),

In *Best*, this Court held that "[a] variant of the law of the case doctrine relates to the re-examination of a prior ruling by a different member of the same court, as opposed to a judge's reconsideration of her own earlier ruling." *Id.* at 546. There, the parties consented to reassignment of a case from Judge Holderman to Magistrate Judge Bobrick after Judge Holderman had granted summary judgment on one claim and denied summary judgment on a second claim. Thereafter, Magistrate Judge Bobrick reconsidered Judge Holderman's order and granted summary judgment to defendant on all claims. This Court reversed and remanded, stating the legal principal that was ignored by the magistrate judge in this case:

Although the second judge may alter previous rulings if he is convinced they are incorrect, "he is not free to do so. . . merely because he has a different view of the law or facts from the first judge.' [citations omitted] Instead, the presumption is that earlier rulings will stand, even though it can be overcome for compelling reasons (such as new controlling law or clear error)

Best v. Shell Oil Co., 107 F.3d at 546.

-III-

The magistrate judge relied on neither controlling law nor clear error in his order decertifying the class. The principal case relied on by the magistrate judge, *Stastny v. Southern Bell Tel. and Tel. Co.*, 628 F.2d 267 (4th Cir. 1980), had been decided more than twenty years before Judge Gottschall ordered that the case could be maintained as a class action. The magistrate judge cited *Stastny* ten times in his opinion, but failed to note that the Fourth Circuit had long ago limited *Stastny* to an employer who operated facilities statewide, each

of which employed autonomous management, and which did not select from a state wide labor pool. *Chisholm v. United States Postal Service*, 665 F.2d 482, 492 (4th Cir. 1981). *Stastny* is, at best, irrelevant in this case that involves employment decisions made by a small number of decisionmakers at a single facility.

-IV-

The magistrate judge sought to justify his rejection of Judge Gottschall's order by making a host of factual determinations about defendant's hiring procedures, (Appendix 47-49), culminating in the following:

Decisions on each applicant were therefore made as a result of a decentralized decision making procedure considering both objective and subjective factors, and while each Plaintiff might have an individual claim of discrimination, the plaintiffs have not established a pattern or practice of discrimination common to the class sufficient to satisfy Rule 23(a)'s commonality requirement. (Appendix 51.)

* * *

Absent any central, objective decisionmaking, and absent any anecdotal or statistical evidence to justify an inference that despite facially neutral procedures Elgin engaged in a standardized, discriminatory course of conduct, the plaintiffs have not demonstrated that a common question of law or fact exists to unite their claims with those of the entire class. (Appendix 54.)

Neither this Court nor the Supreme Court has ever held that Rule 23 requires the plaintiffs to prove a "pattern or practice of discrimination" in order to satisfy the commonality requirement of Rule 23(a). Such a rule was applied by the district court in *Thiessen v. General Elec. Capital Corp.* 13 F.Supp.2d 1131, 1141 (D.Kan. 1998) when it decertified a class because the plaintiffs had "failed to come forward with sufficient evidence of a causal link between the blocker policy or plaintiffs' purported blocker status and the challenged employment actions." *Id.* at 1141. The Tenth Circuit squarely repudiated this rule when

it reversed the order decertifying the class. *Thiessen v. General Elec. Capital Corp.* 267 F.3d 1095, 1106 (10th Cir. 1998).

-V-

Judge Gottschall applied the accepted and ordinary understanding of commonality in her order granting class certification, when she held that plaintiffs' intention to prove that defendant had engaged in discrimination towards hiring African-Americans dealers satisfied the "common nucleus of operative fact" standard of *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992). That a defendant may be able to demonstrate at trial that it did not discriminate against African-American is not a basis for refusing to certify a case as a class action. "As the Supreme Court has long held, courts may not examine whether 'plaintiffs have stated a cause of action or will prevail on the merits' in order to determine whether class certification is appropriate." *In re Veneman*, 309 F.3d 789, 795 (D.C.Cir. 2002), quoting *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974). A "determination of the propriety of class certification should not turn on likelihood of success on the merits." *Payton v. County of Kane*, 308 F.3d 673, 677 (7th Cir. 2002).

-VI-

The magistrate judge accepted the defendant's arguments that "individualized inquiries" about the damages due to each class member (Appendix 30) as well as the existence of defenses unique to two of the three named plaintiffs (Appendix 30-31) meant that none of the three named plaintiffs could satisfy the typicality requirement of Rule 23. (Appendix (30-31.) The magistrate judge was unable to justify his rejection of Judge Gottschall's contrary holding (Appendix 9-10), other than to assert that "every aspect of a court's certification is necessarily conditional." (Appendix 29.) Judge Gottschall was right on these

issues; the contrary rulings of the magistrate-judge are manifestly erroneous: Claims are "typical" when they are based on the same legal theory and arise out of the same conduct of the defendant. *De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir. 1983). That defendant may have particular defenses to the claims of two of the three class representatives should not defeat typicality, because "[t]ypicality under Rule 23(a)(3) should be determined with reference to the company's actions, not with respect to particularized defenses it might have against certain class members." *Wagner v. Nutrasweet Company*, 95 F.2d 527, 534 (7th Cir. 1996). Nor does the need for "individualized inquiries" about damages defeat typicality: the Supreme Court recognized that individual damage hearings are part of "Stage II" proceedings in Title VII class action in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977).

-VII-

The magistrate judge held that the named plaintiffs could not adequately represent the class because "class members very likely competed against each other for dealer positions at the casino, presenting antagonistic and conflicting claims within the class." (App. 59.) Judge Gottschall had correctly rejected this argument as "mere speculation." (Appendix 10-11.)

The magistrate judge was unable to identify any change in the law to justify his refusal to abide by Judge Gottschall's earlier ruling. Instead, the magistrate judge relied on his belief that "every aspect of a court's certification order is necessarily conditional." (Appendix 59.)

Judge Gottschall was right to reject defendant's speculation; the contrary rulings of the magistrate-judge are manifestly erroneous: a conflict must be more than hypothetical or speculative. *Rosario v. Livaditis*, 963 F.2d 1013,

1017 (7th Cir. 1992); *In re Visa Check/MasterMoney Antitrust Litigation*, 280 F.3d 124, 145 (2d Cir. 2001).

VI. CONCLUSION

It is therefore respectfully requested that this petition for permission to appeal be granted.

Respectfully submitted,

KENNETH N. FLAXMAN
CECILE SINGER
200 South Michigan Avenue
Suite 1240
Chicago, Illinois 60604
(312) 427-3200
attorneys for petitioning-plaintiffs