

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF ALABAMA  
NORTHERN DIVISION

IN RE:	)	
	)	
EMPLOYMENT DISCRIMINATION	)	
LITIGATION AGAINST THE STATE	)	
OF ALABAMA, et al.,	)	
EUGENE CRUM, JR., et al.,	)	CIVIL ACTION NO.
	)	CV-94-T-356-N
Plaintiffs,	)	
	)	
v.	)	
	)	
STATE OF ALABAMA, et al.,	)	
	)	
Defendants.	)	

**REQUEST FOR A RULING ON THE MOTION FOR CLASS CERTIFICATION**

COME NOW the State of Alabama Personnel Department, the State of Alabama Personnel Board and Department, and Jackie Graham in her Official Capacity and move this Court to issue an order within thirty (30) days denying the Motion for Class Certification which has been pending before this Court for over six (6) years. As the basis for this motion, these Defendants show this Court the following:

1. This litigation or some portion of it has been pending before this Court since November 21, 1991. What follows is an abbreviated procedural history of this case: On November 21, 1991, ROBERT SMITH, one of the Plaintiffs, filed suit against SPD and the Commission on Aging. *Smith v. State of Alabama Personnel Department*, CV-91-1414 (*Smith I*), Doc. 1. A second complaint was filed on behalf of ROBERT SMITH asserting claims against SPD, the Alabama Department of Conservation and the State Docks on December 30, 1992. *Smith v. Ballard*, CV-92-1609 (*Smith II*), Doc. 1. The second complaint sought the certification of a class. These two cases were ultimately consolidated on May 3, 1993. *Smith II*, Doc. 17.

2. On March 9, 1993, ELLEN TOLBERT and GENEICE SMITH filed suit against the Alabama Department of Corrections alleging that DOC had engaged in gender discrimination against them relating to lay-offs. *Tolbert v. State of Alabama*, CV-93-287, Doc. 1.

3. On March 30, 1993, Judge Truman Hobbs, Sr. denied class certification in the second lawsuit filed by ROBERT SMITH on the grounds that the Plaintiff had orally withdrawn his request for certification of a class. *Smith II*, Doc. 12.

4. On April 2, 1993, EUGENE CRUM filed suit against SPD and the Alabama Development Office complaining of racial discrimination and seeking certification of a class of similarly situated persons. *Crum v. Ballard*, CV-93-423, Doc. 1.

5. On April 12, 1993, ELLEN TOLBERT and GENEICE SMITH were joined by LYNN CARTER as a plaintiff in their suit and they added allegations of racial discrimination. *Tolbert*, Doc. 3.

6. Ten days later, TOLBERT, SMITH and CARTER sought leave to amend their Complaint to include a request that a class be certified. *Tolbert*, Doc. 5. They failed to serve any of the Defendants with a copy of said motion or the proposed Amended Complaint. The motion for leave to amend was subsequently granted on April 26, 1993. *Tolbert*, Doc. 6.

7. On May 13, 1993, 12 potential plaintiffs (“the Huntley intervenors”) sought to intervene in the lawsuit originally brought by TOLBERT and SMITH (“the *Tolbert* action”). *Tolbert*, Doc. 10. Their motion was not served on the Defendants and did not include a proposed Complaint-in-Intervention. An Amended Complaint-in-Intervention was filed with the Court on May 20, 1993 but was not served on the Defendants. *Tolbert*, Doc. 11.

8. Despite the opposition of SPD as reflected in its June 14, 1993 filing, the Court granted the Huntley intervenors’ Motion to Intervene on June 16, 1993. *See: Tolbert*, Docs. 21

and 23, respectively. Fourteen days later, ROBERT SMITH sought to consolidate his first lawsuit with the lawsuit brought by EUGENE CRUM. *Smith I*, Doc. 37.

9. On July 19, 1993, ETHELENE DUSTER and SAMUEL PRICE sought to intervene in the *Tolbert* action. *Tolbert*, Docs. 28 and 29. CAROL BANKS filed a Motion to Intervene (which did not include a proposed Complaint-in-Intervention) in the *Tolbert* action on August 26, 1993. *Tolbert*, Doc. 37.

10. Over SPD's objections, the District Court granted DUSTER and PRICE's Motion to Intervene on September 3, 1993. *Tolbert*, Doc. 43. On September 7, 1993, the original plaintiffs in the *Tolbert* action and the subsequent 12 Huntley intervenors filed their Third Amended Complaint-in-Intervention and DUSTER and PRICE filed their Amended Complaint-in-Intervention. *Tolbert*, Doc. 57.

11. On September 20, 1993, five days after SPD objected to BANKS' Motion to Intervene, the District Court granted that motion as well. *Tolbert*, Doc. 65.

12. On November 8, 1993, twenty-three (23) individuals sought to intervene in the *Tolbert* action and add a number of additional state agencies as defendants. *Tolbert*, Doc. 101. On December 28, 1993, over SPD's objections, this Court granted this Motion to Intervene. *Tolbert*, Doc. 124.

13. At a status conference on February 2, 1994, counsel for the Plaintiffs in the *Tolbert* action orally suggests consolidation of the *Tolbert* action with the *Crum* action, the two ROBERT SMITH cases and the case filed by YVONNE JENNINGS on May 21, 1993. On March 24, 1994, over SPD's objections, this Court consolidated all of these cases and EUGENE CRUM was made the lead named plaintiff. *Tolbert*, Doc. 216.

14. On September 15, 1994, the Plaintiffs and Plaintiffs-in-Intervention file a Motion for Class Certification. Docs. 122 and 124. <sup>1</sup> On June 21, 2001, this Court dismissed the Plaintiffs' original Motion for Class Certification with leave to re-file. Doc. No. 445.

15. On March 17, 2003, the Plaintiffs filed a new motion seeking certification of both Plaintiff and Defendant classes. Doc. No. 606.

16. On May 16, 2003, SPD and the other Defendants filed their evidence and brief in opposition to the proposed class certification. These materials were updated on August 13, 2004 to include new data from the 2000 census and again on January 31, 2005 to include additional arguments based upon the recently released Eleventh Circuit decision *Cooper v. Southern Co.*, 390 F.3d 695 (11<sup>th</sup> Cir. 2004). Subsequently, this Court informed the parties that it would not rule on the pending Motion for Class Certification until it had ruled upon the Defendants' pending Motion for Summary Judgment. On May 3, 2005, this Court denied the State's Motion for Summary Judgment. Doc. 737.

17. On March 24, 2006, the Defendants requested that the Court rule on the pending Motion for Class Certification based upon the materials submitted and without a hearing. Doc. 756. On May 23, 2006, *over three (3) years ago*, this Court granted the State's Motion to Rule on the pending Class Certification Motion without a hearing and indicated an intention to rule on said motion by mid-July, 2006. Doc. 761.

18. On July 7, 2006, this Court informed the parties that it hoped to issue an order in August, 2006. Doc. 767. To-date, this Court has not yet ruled upon the Motion for Class Certification.

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<sup>1</sup> Reference to "Docs. xxx" is referring to documents filed in this matter.

19. While this Court has issued a number of orders starting in October, 2006 which have in effect spun off the claims of the Intervenor, ***the Motion for Class Certification has been pending for over six (6) years.*** This litigation or at least portions of it have been pending for over seventeen (17) years and absent a ruling of the pending Motion for Class Certification shows no sign of coming to any resolution in the foreseeable future. While the individual intervenor's cases have moved forward during this interim, the claims of the original Plaintiffs have sat stagnant waiting on a ruling of the Motion for Class Certification.

20. All of the parties, both the Plaintiffs and the Defendants, are entitled to a ruling on this Motion so that the litigation can proceed.

21. As the United States Supreme Court has noted in the context of a Sixth Amendment challenge, "excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify." *Doggett v. United States*, 505 U.S. 647, 655 (1992). The same is true in this case. Here, issues concerning promotions, terminations, disciplinary actions, etc. go back over seventeen years. During the intervening years, people retire, die, become ill, move, etc., documents are inadvertently lost and/or destroyed and memories most certainly fade. "Time's erosion of ... evidence and testimony can rarely be shown. And though time can tilt the case against either side one cannot generally be sure which of them it has prejudiced more severely." *Doggett*, 505 U.S. at 655 (internal citations omitted). All of which prejudices not only the Defendants as they seek to explain their prior actions (especially since the individuals in supervisory positions presumably had held those positions and/or been with the State for some years prior to the commencement of the action in 1991) but also the Plaintiffs.

22. The United States Supreme Court has noted that legislative history of Title VII clearly demonstrates that the act and its attendant provisions for the issuance of right to sue letters was designed to ensure “that all avenues [are] left open for quick and effective relief.” *Occidental Life Insurance Company of California v. Equal Employment Opportunity Commission*, 432 U.S. 355, 366 (1977).

23. Title VII not only provides for means of allowing potential plaintiffs “avenues for quick and effective relief”, it also provides a measure of protection for potential defendants, namely the inclusion of deadlines for filings, *i.e.* statute of limitations. The purpose of such is, as Justice Story noted in 1828, “to afford security against stale demands, after the true state of the transaction may have been forgotten, or be incapable of explanation, by reason of the death or removal of witnesses.” *Bell v. Morrison*, 26 U.S. 351, 360 (1828).

24. This particular Motion for Class Certification has been pending for over six (6) years and the question of whether to certify a class has been an issue from almost the inception of the first lawsuit filed by ROBERT SMITH over seventeen years ago. The delay in deciding this issue has not only robbed the Plaintiffs of any “quick and effective relief” but deprived the Defendants of the security from stale claims afforded them by Title VII.

25. The delay not only prejudices the parties in terms of their ability to prosecute/defend and deprives both of them of the certain protections afforded them by Title VII, it has also resulted in a substantial financial burden on the State of Alabama. The State has retained expert witnesses who it is anticipated would testify at any eventual trial should a class be certified. Any such testimony would be based upon statistical information gleaned from past and current information regarding the composition of the work-force of various state agencies. Since this information is constantly changing, the experts are likewise required to constantly review and

analyze this new information in anticipation of a ruling and subsequent trial. The State of Alabama has spent \$9,687,485.51 since the beginning of Fiscal Year 2003 (which commenced on October 1, 2002) *on expert witnesses alone* and of that amount \$1,990,364.12 has been spent during Fiscal Years 2006, 2007, 2008 and 2009. *See:* the Affidavit of Marilyn Dozier which is attached hereto, marked as Exhibit “A” and incorporated by reference as if fully set forth herein. It will continue to incur similar expenses until such time as the Motion for Class Certification is ruled upon. *Id.*

26. The delay not only impacts upon the parties to this action, but also putative unnamed class members who are affected by the delay in ruling since they do not know whether they are a member of a class or need to bring an independent action. *See Davis v. Coca-Cola Bottling Co. Consolidated*, 516 F.3d 955, 984 (11<sup>th</sup> Cir. 2008)(“Where a complaint alleges that the employer is engaging in a pattern or practice of race discrimination against a class of similarly situated employees and seeks declaratory and injunctive relief, *the court must determine without delay* whether the plaintiffs are bringing a Rule 23(b) class action or not. The rights of the putative unnamed class members may be affected – one way or another.”)(emphasis added).

27. There is a clear duty on the part of this Court to rule upon the pending Motion. “Applications for a mandamus to a subordinate court are warranted by the principles and usage of law in cases where the subordinate court, having jurisdiction of a case, refuses to hear and decide the controversy, or where such a court, having heard the cause, refuses to render judgment or enter a decree in the case...” *Ex parte Newman*, 81 U.S. 152, 165 (1871); *accord, The Life and Fire Insurance Company of New York v. Adams*, 34 U.S. 573 (1835); *Ex parte United States*, 287 U.S. 241 (1932); *Roche v. Evaporated Milk Ass’n*, 319 U.S. 21 (1943); *Will v. Calvert Fire Insurance Company*, 437 U.S. 655 (1978); *In re Sharon Steel Corporation*, 918 F.2d 434 (3<sup>rd</sup> Cir.

1990); and *In re Hood*, 135 Fed. Appx. 709 (5<sup>th</sup> Cir. 2005).

28. This Court's delay in ruling on the long-pending certification motion has, in effect, "frozen the litigation" to the detriment of the parties and putative class members. *In re Smith*, 926 F.2d 1027, 1039 (11<sup>th</sup> Cir. 1991). For the benefit of the parties, the putative class members and the Court, the time has come for the Court to rule on the Motion for Class Certification.

Accordingly, these Defendants request that this Court rule upon the pending Motion for Class Certification within the next thirty (30) days.

Respectfully submitted on this 28th day of July, 2009.

/s/ Keith S. Miller  
Keith S. Miller (MIL080)  
Attorney for the Defendants State of Alabama  
Personnel Department, State of Alabama Personnel  
Board and Department, and Jackie Graham in his  
Official Capacity

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 28th day of July, 2009, the foregoing document was filed electronically with the Clerk of the Court via the CM/ECF system which will send notice of electronic filing to the following:

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF ALABAMA  
NORTHERN DIVISION**

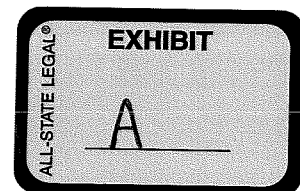
<b>IN RE:</b>	)	
	)	
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<b>EUGENE CRUM, JR., et al.,</b>	)	<b>CIVIL ACTION NO.</b>
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<b>Plaintiffs,</b>	)	
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<b>v.</b>	)	
	)	
<b>STATE OF ALABAMA, et al.,</b>	)	
	)	
<b>Defendants.</b>	)	

**AFFIDAVIT OF MARILYN DOZIER**

Before me, the undersigned authority, a Notary Public in and for said County and State, personally appeared Marilyn Dozier, who, after being duly sworn, deposes and says as follows:

1. My name is Marilyn Dozier. I am over the age of nineteen (19) years and am competent to make this Affidavit. The statements contained in this Affidavit are based upon my personal knowledge of the facts and circumstances stated herein and/or when so noted based upon my review of documents which are (1) regularly kept in the course of the work or business of the State of Alabama's Department of Finance (DOF); (2) regularly created by DOF in the discharge of its duties as a state agency; and (3) regularly created at or near the time of the events set forth therein as required by DOF.

2. I am presently employed by DOF as an Accounting Director. My job duties include: managing and directing the operations of the Division of Finance Accounting and Administration,



budgeting, financial reporting, and purchasing. I have held this position since January, 2007. I have been employed by Finance since June, 2006 and with the State of Alabama since 1975.

3. As a result of my position, I am personally familiar with the sums of money which the State of Alabama has paid to expert witnesses who are expected to testify in this matter.


4. It is my understanding any such testimony would be based upon statistical information gleaned from past and current information regarding the composition of the work-force of various state agencies. Since this information is constantly changing, the experts are likewise required to constantly review and analyze this new information in anticipation of a ruling and subsequent trial.

5. The State of Alabama has spent \$9,687,485.51 since the beginning of Fiscal Year 2003 (which commenced on October 1, 2002) *on expert witnesses alone* and of that amount \$1,990,364.12 has been spent during Fiscal Years 2006, 2007, 2008 and 2009.

6. It is my understanding that the State will continue to incur similar expenses until such time as the Motion for Class Certification is ruled upon.

7. I hereby affirm that the information contained in this Affidavit is true and correct to the best of my knowledge and belief.

Further, Affiant saith not.

  
MARILYN DOZIER

STATE OF ALABAMA )  
 )  
MONTGOMER COUNTY )

I, Karen Mitchell, a Notary Public in and for said County and State, hereby certify that Marilyn Dozier, whose name is signed to the foregoing Affidavit and who is known to me, swore to and subscribed before me this day, and being advised of the contents thereof, voluntarily executed the same on the day of its date.

Given under my hand and seal this the 21st day of July, 2009.

Karen Mitchell

Notary Public

My Commission Expires: 10.06.12

