

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FILED

FEB 06 2003

MARTIN C. ASHMAN
UNITED STATES MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT

LISA ELLIS, et. al.,)	
)	
Plaintiffs,)	No. 98 CV 7093
)	
v.)	Magistrate Judge Ashman
)	
ELGIN RIVERBOAT RESORT, et. al.,)	
)	
Defendants.)	

DOCKETED
FEB 11 2003

DEFENDANTS' MOTION TO DECERTIFY THE CLASS

Defendants Elgin Riverboat Resort d/b/a Grand Victoria Casino, et. al. (collectively "Grand Victoria"), by and through their attorneys, and pursuant to Rule 23(c) of the Federal Rules of Civil Procedure, hereby move for entry of an order decertifying the class conditionally certified by this Court on March 27, 2000. Decertification is warranted because recent discovery has confirmed that this lawsuit does not satisfy any of the preconditions for maintenance as a class action as set forth in Rule 23(a) and (b), Fed. R. Civ. P. In support of this Motion, Grand Victoria submits its Memorandum of Law together with an evidentiary Appendix.

As further support for this Motion, Grand Victoria states as follows:

1. This Title VII lawsuit is brought by the extant named Plaintiffs Lisa Ellis, Derrick Denson and Marcia English, who contend that they applied for a dealer position with Grand Victoria, but were rejected due to their race, African-American. Amended Complaint ("Am. Complt."), ¶¶ 5-10.¹ The named Plaintiffs also purport to bring this action in a representative capacity on behalf

¹Another original named Plaintiff, Yvonne Mason, brought similar claims, but has since died. Ms. Mason's daughter, Shemina Lewis, has been substituted for her in this action as a special representative of her estate.

of all qualified African-American applicants for the dealer position who were not hired by Grand Victoria. Am. Compl., ¶ 12.

2. On March 27, 2000, after a limited initial discovery period, Judge Gottschall conditionally certified a class defined as follows: "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." Order at 10. Judge Gottschall acknowledged that Plaintiffs' assertions as to numerosity were wholly conclusory and speculative. The Court stressed, however, that it retained the option of later decertifying the class should subsequent factual development warrant such a determination. *Id.* at 7.

3. After the entry of Judge Gottshall's conditional certification order, the parties conducted written discovery and engaged in motion practice with respect to various discovery disputes. Then, on November 5, 2001, the parties arrived at a tentative settlement of the case. The parties appeared before this Court again on May 29, 2002, after months of negotiations over the terms of a proposed settlement, on which date the tentative settlement foundered. Shortly thereafter, on June 14, 2002, this Court set a pre-trial schedule and the parties resumed discovery. In the ensuing months, the parties have conducted extensive discovery, including over a dozen depositions.

4. Recent discovery confirms that the class should be decertified because Plaintiffs cannot satisfy any of the requirements for certification set forth in Rule 23(a), Fed. R. Civ. P. – i.e., numerosity, commonality, typicality and adequacy of representation. Each is addressed briefly below:

First, it is apparent that Plaintiffs cannot establish the requisite numerosity. If the term "applied" in the class definition is properly and sensibly interpreted to encompass only those persons

who auditioned for a dealer position, then there are only eight (8) class members (including two of the three extant named Plaintiffs). The remaining putative class members submitted written applications only that provided no indication of their race. Although Grand Victoria submits that the existing class definition will bear the more restrictive interpretation urged in this Motion, it is nevertheless filing a motion to formally modify the express language of the class definition to eliminate any possible ambiguity on this point. Furthermore, even if the class is not limited to those who auditioned for a dealer position, Plaintiffs still fail to satisfy the numerosity requirement. Contrary to Plaintiffs' initial, unfounded assertions, the class encompasses nowhere near "a hundred or more persons." Rather, it consists of slightly more than 50 individuals, nearly all of whom live in the Chicago metropolitan area. Joinder of such persons is not impracticable.

Second, Plaintiffs cannot satisfy the requirement that there be common issues of fact. Plaintiffs have failed to identify any employment practice or policy uniting the various class members' claims. At bottom, this lawsuit consists of a collection of unrelated anecdotes involving hiring decisions made by numerous different decisionmakers as part of a highly decentralized hiring process, at different times, and under different competitive conditions. Put differently, if this case is allowed to proceed as a class action, it will devolve into a series of more than 50 mini-trials. Each such mini-trial will require an individualized inquiry into the class member's qualifications, Grand Victoria's hiring needs at the time of the application, the qualifications of those persons, if any, who were hired at the time, as well as an examination of the individual factors bearing upon each class member's claim for back pay damages. In sum, the only fact common to these claims is the class members' shared race, African-American. That is not enough to justify class treatment.

Third, the named Plaintiffs' claims are not typical of the class as a whole. There is no "common core" of allegations linking Plaintiffs' claims to those of the class. For example, Plaintiffs Ellis and English claim to have auditioned, whereas most of the class members submitted written applications only. Furthermore, given the lack of an identifiable discriminatory policy or practice, the decentralized nature of Grand Victoria's hiring process, and the individualized inquiry that will be required as to each claim, the entire notion of "typicality" is simply nonsensical. Moreover, the named Plaintiffs will be subject to unique defenses that render their claims atypical. These defenses include Ellis' status as a two-time former Grand Victoria employee, and the fact that English is a full-time teacher who expressed a preference for a part-time position.

Fourth, Plaintiffs are not adequate class representatives because their interests conflict with those of the class as a whole in several respects. For example, the interests of those class representatives who claim to have auditioned – i.e., Ellis and English – conflict with other class members who applied but were not given the opportunity to audition. Similarly, Plaintiff English's asserted preference for part-time employment is in conflict with the interests of nearly all the other class members who desired full-time employment as dealers. Finally, the fact that, as noted above, Ellis and English are subject to unique defenses detracts not only from the typicality of their claims, but also from their adequacy as class representatives.

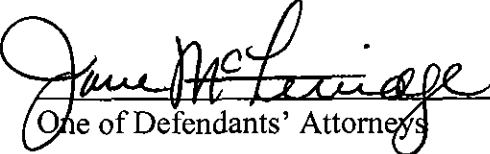
5. Plaintiffs also fail to satisfy the additional requirements for class certification set forth in Rule 23(b), Fed. R. Civ. P. This lawsuit should not have been conditionally certified under Rule 23(b)(2) where, far from being merely "incidental" to Plaintiffs' case, monetary relief predominates over the declaratory or injunctive relief, if any, that Plaintiffs may seek. Nor is Rule 23(b)(3) certification warranted where Plaintiffs cannot show that common issues, if any, predominate over

the morass of individual issues presented by this case.

WHEREFORE, for all of the foregoing reasons, as well as those more fully set forth in its accompanying Memorandum of Law, Grand Victoria respectfully requests that this Court enter an order decertifying the class.

Dated: February 6, 2003

Respectfully submitted,

By: 
One of Defendants' Attorneys

Jane M. McFetridge
Attorney No. 06201580
Joel W. Rice
Attorney No. 06186471
Matt D. Strubbe
Attorney No. 6216918
FISHER & PHILLIPS LLP
420 Marquette Building
140 South Dearborn Street
Chicago, Illinois 60603
(312) 346-8061

Attorneys for Defendants