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OCT 29 2008

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND
SOUTHERN DIVISION

BY

AT GREENBELT
CLERK U.S. DISTRICT COURT
DISTRICT OF MARYLAND DEPUTY

John O'Bannon, et al.,

Plaintiffs,

v.

Friedman's, Inc.

Defendant.

Case No. AW-03-623

~~RECEIVED PROPOSED~~ ORDER
GRANTING PRELIMINARY APPROVAL
OF CONSENT DECREE, CONDITIONAL
CERTIFICATION OF SETTLEMENT
CLASS, APPOINTMENT OF CLASS
COUNSEL, DESIGNATION OF CLASS
REPRESENTATIVES, APPROVAL OF
CLASS NOTICE, AND SCHEDULING OF
FINAL FAIRNESS HEARING; AND
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION

Plaintiffs John O'Bannon, Rondall Mitchell, Sandra Moore, and Ronald Hampton ("Plaintiffs") request that this Court: (1) grant Plaintiffs' motion for preliminary approval of the Consent Decree, including an award of individual and class monetary relief, notice and administration costs; (2) certify a settlement class for equitable relief pursuant to Fed. R. Civ. P. ("Rule") 23(b)(2) and for monetary relief pursuant to Rule 23(b) (3); (3) appoint Plaintiffs' attorneys to serve as counsel for the class under Rule 23(g); (4) approve the proposed notice for mailing to the class, together with dates and procedures for class members to opt out of or object to the settlement, as specified in the notice; and (5) and set a final fairness hearing.

Plaintiffs filed the complaint on March 26, 2003, alleging a pattern of intentionally discriminatory employment practices of Friedman's against African American employees and applicants. Plaintiffs seek to represent a class of both applicants for, and employees in, store positions between a date four years prior to filing of the complaint (based on the applicable statute of limitations for §1981 claims), and December 9, 2005, when Friedman's emerged from bankruptcy. No motion for class certification was filed in this case.

In 2003, Plaintiffs and Friedman's conducted initial discovery and engaged extensive informal information exchanges in an attempt to settle the case. With the assistance of mediator

John Bates of JAMS at a series of three mediation conferences in January through April 2004, the parties reached a tentative settlement including extensive injunctive relief and monetary relief, with Friedman's insurers paying the lion's share. The monetary portion of the settlement was, however, contingent on acceptance and funding by Friedman's insurers, who ultimately declined to approve the settlement.

On January 14, 2005, Friedman's filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code in the United States District Court for the Southern District of Georgia. This filing triggered an automatic stay of this case. Friedman's continued to operate its business as debtor-in-possession. Plaintiffs and their counsel filed Proofs of Claim in the bankruptcy proceedings, but Friedman's at all times during those proceedings possessed the ability to rescind the contractual agreements it had made for injunctive relief, and to discharge all claims for monetary relief made by Plaintiffs on behalf of themselves and the class.

On November 8, 2005, Plaintiffs successfully obtained a stipulated order of the Bankruptcy Court that permitted them to continue prosecution of the action in this Court on the condition that plaintiffs could not recover any monetary relief from Friedman's, but only from any available proceeds of its applicable insurance policies. An additional provision of that order required Plaintiffs to indemnify Friedman's for any costs it incurred in participating in the litigation, as specified in language that later came under dispute between the parties. On November 2005, the parties engaged in mediation before Hon. Erwin Katz (Ret.) of the U.S. Bankruptcy Court for the Northern District of Illinois, but the mediation failed to produce a settlement that included the insurers.

The stay on this litigation was subsequently dissolved at about the same time that Friedman's emerged from bankruptcy as a reorganized company, in December 2005. That left Plaintiffs free to pursue recovery on their monetary claims from Friedman's insurers, in this Court.

The only insurance policy under which Friedman's insurers did not dispute coverage had a \$5 million limit that had already been substantially used in the defense of other covered claims

and defense of the present action. That policy continued to be consumed as the litigation continued. Friedman's pursued its coverage dispute with its carriers by demanding arbitration of the coverage issues. However, just a few weeks before the scheduled arbitration hearing, Friedman's elected to drop its arbitration claim for insurance coverage entirely in January 2006. This left Plaintiffs to assert Friedman's interest in the disputed policies as well as to litigate their own substantive discrimination claims.

On June 28, 2006, the Court granted Plaintiffs' motion to amend the complaint to add Friedman's two insurers, Federal Insurance Company and St. Paul Mercury Insurance Company, as defendants. The Court granted Plaintiffs' motion to compel discovery responses by the insurers on September 7, 2006. The insurance company Defendants moved to dismiss the amended complaint, but the Court denied their motions on April 30, 2007. Then Plaintiffs obtained a stay of proceedings on the discrimination claims so that they could first litigate the insurance coverage claims to determine whether there would be a non-judgment proof party against which to proceed on the monetary claims for employment discrimination. (Order entered April 11, 2007).

On March 3, 2007, the Court entered an order that interpreted the Bankruptcy Court's Order dissolving the litigation stay as requiring Plaintiffs to bear Friedman's litigation costs, at least for discovery initiated by Plaintiffs, and ordered Plaintiffs to reimburse Friedman's for certain costs incurred in the case (Order entered March 3, 2007). Plaintiffs had to pay Friedman's over \$20,000 for costs of responding to their first, preliminary written discovery pursuant to that order. The Court further ordered the parties to file cross-motions for summary judgment, which were filed but not heard before the presently proposed settlement was reached. Throughout this process, the amount of funds remaining available on the single insurance policy on which a defense had been tendered to Friedman's continued to dwindle.

Plaintiffs mediated their claims with Friedman's and Federal Insurance Company on October 16, 2007, under the auspices of JAMS. Hon. Edward Panelli (Ret.), of the California Court of Appeal and Supreme Court, served as the mediator. As a result of that mediation

session, counsel for Plaintiffs, Friedman's and Federal Insurance Company agreed to a full monetary settlement of all individual and class claims in the amount of \$1,150,000 to be funded solely by the one Federal policy which has been providing the costs of Friedman's defense. The parties agreed that the settlement was to be consummated by a Consent Decree incorporating the earlier Partial Settlement Agreement providing for injunctive relief as well as the above-stated monetary settlement.

Before the papers incorporating and presenting this settlement could be completed and filed with this Court, on January 22, 2008 some of Friedman's creditors filed a petition to declare it bankrupt in the United States Bankruptcy Court in Delaware (Bankruptcy Petition No. 08-10161-CSS). Notice of this bankruptcy petition and the automatic stay resulting thereby was given to this Court on February 1, 2008. This petition has been converted to a Chapter 7 proceeding and Friedman's is in the process of liquidation. Given these dire circumstances, the non-monetary injunctive relief set forth in the Partial Settlement Agreement, which was to be incorporated in the Consent Decree originally agreed to by the parties, is now rendered moot and no longer able to be effectuated.

On July 8, 2008, the Bankruptcy Court entered an order lifting the stay to permit the parties to submit the proposed Consent Decree to this Court. The Consent Decree provides for recovery of \$1,150,000 plus interest accruing on that amount until payout, for monetary relief for plaintiffs and class members in the form of equitable back pay and compensatory damages, the expenses of notice and administration of the settlement, and plaintiffs' litigation expenses and attorneys' fees, in exchange for a release of claims, including those alleged in the operative complaint and any other claim that could be brought for employment discrimination on the basis of race against Friedman's, by Plaintiffs and class members who do not exclude themselves from the settlement.

All parties were represented by counsel at the October 23, 2008 hearing on this motion. Upon review of the proposed Consent Decree, the Preliminary Approval Motion, the declarations in support of the Motion, the statements of counsel for the parties, and the entire record in this

matter, and in recognition of the Court's duty (1) to make a preliminary determination as to the certification of the case as a class action, (2) to make a preliminary determination of the reasonableness of the proposed class action settlement, (3) to give notice to class members of the settlement and their rights to opt out or object to it, and (4) to conduct a hearing on the fairness, adequacy and reasonableness of a proposed class action settlement before making any final determination on the settlement, the Court makes the following findings and orders:

I. ORDER CONDITIONALLY CERTIFYING A SETTLEMENT CLASS AND APPOINTMENT OF CLASS REPRESENTATIVES AND CLASS COUNSEL

The Court finds that certification of this case as a class action is appropriate under Fed. R. Civ. P. 23(b)(2) and (b)(3). The Court finds that certification of the equitable backpay aspects of the case under Fed. R. Civ. P. 23(b)(2) and the compensatory damages aspects under Fed. R. Civ. P. 23(b)(3) is appropriate for settlement purposes only. The following Settlement Class is certified (solely for the purpose of implementing this Consent Decree) pursuant to Fed. R. Civ. P. 23(b)(2) and 23(b)(3):

A. All African American employees who are or were employed by the Company in any retail store or in the store Field Organization, for any length of time, between March 6, 1999 and December 9, 2005; and

B. All African American applicants who applied for employment at the Company in any retail store or in the store Field Organization between March 6, 1999 and December 9, 2005, who were not hired on such application.

The Court finds that the class meets the requirements of numerosity, commonality and typicality to justify certification; that common questions of fact and law predominate over individual questions; and that resolution of this matter through a class action is superior to other available methods. The Court finds that Plaintiffs John O'Bannon, Sandra Moore, and Ronald Hampton are adequate class representatives and appoints them as such.

The Court further finds, pursuant to Fed. R. Civ. P. 23(g), that Plaintiffs' counsel Goldstein, Demchak, Baller, Borgen & Dardarian and the Law Offices of Thomas A. Warren have thoroughly investigated potential class claims, have extensive experience in handling class

actions and employment discrimination claims of the type asserted in the action, and have committed substantial resources to representing the class, and therefore have more than adequately represented the class and are appointed as "Class Counsel."

II. PRELIMINARY APPROVAL OF PROPOSED CONSENT DECREE

The Court has reviewed the proposed Consent Decree and the settlement terms and payments incorporated therein. The Court finds on a preliminary basis that it appears to be within the range of reasonableness of a settlement that could ultimately be given final approval by the Court. The Court further finds on a preliminary basis that the equitable and monetary relief provided under the settlement is fair to all potential class members, particularly in the difficult circumstances presented by Friedman's two bankruptcy proceedings and ultimate liquidation. The Court finds that the enhanced awards for persons who were named plaintiffs, filed charges, or provided testimony in the case is warranted considering those individuals' time, effort, and service to the class. The Court further finds on a preliminary basis that the amount for Plaintiffs' attorneys' fees and costs as provided under the settlement is fair and reasonable. It further appears that the parties have conducted extensive investigation, discovery, and sufficient litigation of the issues such that counsel for the parties are able at this time to make informed and reasonable assessments of their respective positions. It further appears that settlement at this time will avoid additional substantial litigation costs, as well as the delay, risk and uncertainty further prosecution of the litigation would present. It further appears that the proposed settlement is the result of extensive, non-collusive, arm's-length negotiations between experienced and well qualified counsel, assisted by three well-qualified and experienced mediators. It further appears that continued litigation of this case would likely result in diminishing amounts of funds available by Defendants for resolution of this case. The Court therefore preliminarily approves the Consent Decree as fair, adequate, and reasonable.

III. APPROVAL OF CLASS NOTICE PROCEDURES

The Court has reviewed the proposed Class Notice forms, which are attached as Exhibits 6a (Notice to former Friedman's employees for whom Friedman's has last known addresses, to

be given by mail) and 6b (Notice to rejected applicants and others for whom accurate address information is unavailable, to be given by publication in USA Today nationally) to the Motion for Preliminary Approval, and finds that the proposed Class Notice fairly and adequately advises the class of the terms of the proposed settlement and the process available to class members to obtain monetary relief provided by the settlement, the rights of class members to object to the settlement and/or to opt out of the monetary settlement class, and to appear at the Final Fairness Hearing the Court will conduct in this matter on the date set forth below. Settlement Class members may opt out of the monetary relief settlement by mailing a notice of intent to opt out which must be mailed to the O'Bannon v. Friedman's Settlement Administrator, Post Office Box 471, Tallahassee, Florida 32302-0471 and postmarked no later than thirty (30) days prior to the scheduled Final Fairness Hearing. The Court further finds that the proposed distribution of the Class Notice by first class mail to each identified class member at her last known address (with a database search for additional addresses and remailing of any initially undeliverable notices) and by publication to rejected applicants and other class members for whom no accurate address information exists is reasonable, fair and adequate, and complies with due process requirements.

Accordingly, the Court approves the Notice presented by the parties and the methods and time periods for giving notice and permitting class members to opt out of the settlement and/or object to the settlement as reasonable, adequate, and consistent with due process.

IV. FINAL FAIRNESS HEARING

The Court hereby sets a Hearing on February 11, 2009, at 1:30 p.m. (by telephone if there are no objections; Class Counsel to arrange the conference call)(the "Final Fairness Hearing") to determine whether the Consent Decree shall be given final approval.

Settlement Class members who object to the proposed settlement may appear and present such objections at the Final Fairness Hearing in person or through counsel, provided that the objecting class member submits a written statement containing the name and address of the objecting class member and the basis of that person's objections, together with a notice of the

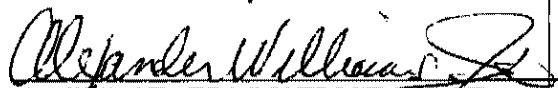
intention to appear, if appropriate, which must be mailed to by the Settlement Administrator, c/o Settlement Services, Inc., Post Office Box 471, Tallahassee, Florida 32302-2523 and postmarked no later than thirty (30) days prior to the scheduled Final Fairness Hearing. No member of the Settlement Class or his/her counsel, will be heard, nor will any objection be received or considered, except for good cause shown, if the Settlement Class member or his/her counsel fails to timely submit his/her objection in writing in the manner prescribed above.

Class Counsel shall file Plaintiffs' motion for final approval of the settlement, including the proposed award of attorneys' fees and costs, including evidentiary support therefore, and their responses to any objections, no later than January 30, 2009.

Counsel for Friedman's also may file a memorandum in support of the settlement no later than the date set for Plaintiffs' submission.

If the Court for any reason does not grant final approval of the Consent Decree, all evidence and proceedings held in connection with this settlement approval process shall be without prejudice to the rights of the parties and the parties to this case will be returned to the positions they were in prior to the submission of the proposed Consent Decree, as more specifically set forth in the Consent Decree.

IT IS SO ORDERED, this 29th day of October, 2008.


UNITED STATES DISTRICT JUDGE