

## Washington v. Reno

United States District Court for the Eastern District of Kentucky, Lexington Division

October 11, 1995, Decided ; October 11, 1995, Filed

CIVIL ACTION NOS. 93-217 & 93-290

**Reporter:** 1995 U.S. Dist. LEXIS 22245

CONCHITA WASHINGTON, ET AL., PLAINTIFFS VS:  
JANET RENO, ATTORNEY GENERAL, ET AL.,  
DEFENDANTS

**Disposition:** [\*1] Ms. Darks's Docket Entry # 357 construed to be motion to opt-out of this class DENIED. All objections or other comments which construed as requests to opt-out of class DENIED.

**Counsel:** For GLORIA BATTON ROBINSON, ANTOINETTE M. FRINK, CONCHITA WASHINGTON, PATRICIA M. DARKS, NORMA FAY COOK, MARTHA MARIE PRESTON, LOVEN L. LEWIS, LORI SAUNDERS, RESHAWN RICHARDSON, plaintiffs: Douglas L. McSwain, Sturgill, Turner, Barker & Maloney, PLLC, Lexington, KY.

CONCHITA WASHINGTON, plaintiff, Pro se, Ft. Worth, TX.

OZIE B. COLLINS, plaintiff, Pro se, Florence, CO.

For JANE DOE(S), JOHN HOE, JANE ROE, JANE POE, JANE MOE, JANE TOE, JANE ZOE, intervenor plaintiffs: Douglas L. McSwain, Sturgill, Turner, Barker & Maloney, PLLC, Lexington, KY.

For KATHLEEN HAWK, JANET RENO, FEDERAL BUREAU OF PRISONS, DAVID WOODY, MICHAEL A. ATWOOD, USA, ARTHUR F. BEELER, defendants: David L. Bunning, U.S. Attorney's Office, Covington, KY.

For KATHLEEN HAWK, JANET RENO, FEDERAL BUREAU OF PRISONS, DAVID WOODY, MICHAEL A. ATWOOD, USA, defendants: Henry A. Azar, Jr., Vincent M. Garvey, Kathleen E. Moriarty, U.S. Department of Justice, Washington, DC.

For JANET RENO, defendant: Raphael O. Gomez, U. [\*2] S. Department of Justice, Washington, DC.

For USA, defendant: Jeff Clair, U.S. Department of Justice, Washington, DC.

For JANET RENO, intervenor defendant: David L. Bunning, U.S. Attorney's Office, Covington, KY.

For JANET RENO, intervenor defendant: Henry A. Azar, Jr., Vincent M. Garvey, Kathleen E. Moriarty, U.S. Department of Justice, Washington, DC.

For KATHLEEN HAWK, USA, BUREAU OF PRISONS, ARTHUR F. BEELER, intervenor defendants: David L. Bunning, U.S. Attorney's Office, Covington, KY.

For KATHLEEN HAWK, USA, BUREAU OF PRISONS, intervenor defendants: Henry A. Azar, Jr., Vincent M. Garvey, Kathleen E. Moriarty, U.S. Department of Justice, Washington, DC.

PATRICIA M. DARKS, movant, Pro se, Fort Worth, TX.

MELVIN P. DEUTSCH, movant, Pro se, Otisville, NY.

JAMES A. MCKINES, movant, Pro se, Lompoc, CA.

JIMMY G. NIXON, SR., movant, Pro se, Texarkana, TX.

BILLY RAY HASTINGS, movant, Pro se, Marianna, FL.

JAMERS A. MCKINES, movant, Pro se, Lompac, CA.

WILLIE BUD REED, JR., movant, Pro se, Miami, FL.

MICHAEL JOSEPH KEARNS, movant, Pro se, Texarkana, TX.

GEORGE D. FARQUHAR, movant, Pro se, Texarkana, TX.

**Judges:** HENRY R. [\*3] WILHOIT, JR., JUDGE.

**Opinion by:** HENRY R. WILHOIT, JR.

### Opinion

#### MEMORANDUM ORDER

This matter is before the Court for consideration of Docket Entry # 357, filed September 12, 1995, by *pro se* Plaintiff Patricia Darks, which is styled "SETTLEMENT & FAIRNESS HEARING MOTION TO DISMISS ATTORNEY EX PARTE MOTION," and for consideration of what is apparently a response to Docket Entry # 357, which is Docket Entry # 423, styled "*RESPONSE TO MOTION TO DISMISS ATTORNEY, AND RESPONSE TO REQUEST TO BE EXCLUDED FROM CLASS*," which was filed September 26, 1995, by Class Counsel Gene Lynn Humphreys of Sturgill, Turner & Truitt.

In Docket Entry # 357, Patricia Darks "moves this Honorable Court to disjoin her legal representation from Court Appointed Counsel: Douglas McSwaine [sic]." Plaintiff Darks indicates that she objects to the proposed settlement agreement negotiated by Appointed Class Counsel Douglas McSwain. Ms. Darks further sets forth:

I am in the process of hiring private counsel, in Kentucky. Meanwhile I will be represented by Attorney Jack Diamond at: 15233 Ventura Blvd. # 304, Sherman Oaks, California 90402, and all legal investigations, and research by L.A. LAW P.O. Box 17944, [\*4] Encino, California 91314-7944.

*See Docket Entry # 357.*

In what is construed to be the response to Docket Entry # 357, in Docket Entry # 423 Class Counsel sets forth that he "hereby responds to the Motion of Patricia Darks...to dismiss class counsel as her attorney in this matter."

Class Counsel states, "to the extent Ms. Darks is requesting that separate counsel be appointed to represent her individually, class counsel does not object." There is nothing that this Court can construe in Docket Entry # 357 to indicate that Ms. Darks' "MOTION TO DISMISS ATTORNEY" in any way seeks for this Court to appoint anyone to represent her individually. Thus, to the extent the Class Counsel's response entertains such a notion, that entertainment is unwarranted.

To the extent the Class Counsel has considered the matter of whether Ms. Darks seeks to obtain private counsel to represent her individually at her own expense in this matter, such consideration presents no question for this Court as, in Docket Entry # 357, Ms. Darks merely says that she is "in the process of hiring private counsel, in Kentucky." She further asserts that "meanwhile I will be represented by Attorney Jack Diamond. [\*5] ..." As Attorney Jack Diamond has not submitted this motion represented by Docket Entry # 357, and as there is no motion to make an entry of appearance in this Court by Attorney Jack Diamond, and as the record is completely void of any indication that Attorney Jack Diamond is aware that he represents Patricia Darks in this matter, or that he has attempted to make this Court aware of any such representation, this Court cannot and will not leap to the conclusion that Attorney Jack Diamond has reached an agreement with Plaintiff Patricia Darks to represent her individually in this case.

In the plaintiffs' "*RESPONSE TO MOTION TO DISMISS ATTORNEY, AND RESPONSE TO REQUESTS TO BE EXCLUDED FROM CLASS*" Class Counsel indicates:

"Ms. Darks also asks class counsel to provide her and/or her new counsel with copies of all pleadings and discovery obtained in this action. As Ms. Darks is proceeding *in forma pauperis*, she has asked class counsel to provide those copies to her and/or her attorney at no cost. Class counsel seeks direction from the Court with regard to this request." Docket Entry # 357 as it has been received by this Court contains no such request. As this matter is not before [\*6] the Court in Docket Entry # 357, the Court cannot rule on the matter and Class Counsel is not required to provide any copies until the matter is appropriately brought before the Court and Class Counsel is required by order of the Court to meet such a request.

In the Response (Docket Entry # 423), Class Counsel speculates, "it may be possible to read Ms. Darks' motion as a motion to remove class counsel as counsel for the entire class." Based on Attachment A, copy of Docket Entry # 357 as it is received by this Court, it is not plausible to read Ms. Darks' motion as a motion to remove Class Counsel as counsel for the entire class; and no such consideration will be given to such a construction as the Court does not agree that any such construction of this *pro se* pleading was intended by Plaintiff Darks or can be reasonably discerned from the pleading as it was submitted to this Court.

As Plaintiff Darks merely moves this Court to "disjoin her legal representation from Court Appointed Counsel," this Court construes her pleading as a motion to opt-out of this class. Class Counsel also styles its motion entered as Docket Entry # 423 "*RESPONSE TO REQUESTS TO BE EXCLUDED FROM CLASS* [\*7] ." Thereafter, Class Counsel apparently also construes Patricia Darks's motion [D.E. # 357] as a motion to opt-out of the class and further responds to motions of other class members to be excluded from the class. At n.1, Class Counsel states:

Several members of the class have filed objections or other comments that could be construed as requests to "opt out" of the class. This Response is directed to these requests and the Motion of Patricia Darks only, and class counsel reserves the right to respond later to the substantive objections that have been filed to the Settlement Agreement.

Thereafter, Class Counsel's memorandum states:

Finally, to the extent Ms. Darks, or any other member of the class, is requesting to not be bound by the Settlement Agreement, these requests should be overruled. n.2 The Court certified this as a class action pursuant to *Fed.R.Civ.P. 23(b)(1)* and *(b)(2)*.  
*See Order*

Certifying Class Action, entered 11/18/93. Only class members in class actions certified pursuant to Fed.R.Civ.P. 23(b)(3) have the option to be excluded from the class. Thus, this action is not an "opt-out" class action. The Settlement Agreement, if approved by the Court, will [\*8] be binding on all class members.

It is clear that the Court certified this as a Class Action pursuant to Federal Rule of Civil Procedure 23(b)(1) and 23(b)(2) by Order certifying the class action entered November 18, 1993, and found in the record at Docket Entry # 109. There is no automatic right to opt-out of a Rule 23(b)(2) class. See e.g., Ticor Title Ins. Co. v. Brown, 511 U.S. 117, 128 L. Ed. 2d 33, 114 S. Ct. 1359, 1361 (1994). Even if a district court has discretion to permit a class member to opt-out, see e.g., Crawford v. Honig, 37 F.3d 485, 487 n.2 (9th Cir. 1994), the Court's refusal to do so cannot be deemed error where only equitable relief has been sought. See Palmigiano v. Garrahy, 443 F. Supp. 956, 959 (D.R.I. 1997). "The privilege to opt-out of the action should be operable only when the class action is maintainable under [Rule 23(b)(3)] alone." 7A Charles A. Wright, et al., Federal Practice and Procedure § 1777, at 521.

#### CONCLUSION

Accordingly, IT IS HEREBY ORDERED that:

(1) Ms. Darks's Docket Entry # 357 is not construed as a motion for this Court to appoint anyone to represent her individually;

[\*9] (2) Ms. Darks's Docket Entry # 357 is not a motion to substitute counsel or bring any additional counsel into this case;

(3) Ms. Darks's Docket Entry # 357 is not a motion to provide copies;

(4) Ms. Darks's Docket Entry # 357 is not a motion to remove Class Counsel as counsel for the entire class;

(5) Ms. Darks's Docket Entry # 357 is construed to be a motion to opt-out of this class, which is hereby DENIED;

(6) To the extent the Class Counsel's response [Docket Entry # 423] seeks for this Court to issue a general order that members of a class certified pursuant to Fed.R.Civ.P. 23(b)(1) and (b)(2) may not opt-out of the class action, IT IS FURTHER HEREBY ORDERED that all objections or other comments which can be construed as requests to opt-out of the class are hereby DENIED.

This 11 day of October, 1995.

HENRY R. WILHOIT, JR., JUDGE