UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BARBARA GRUTTER,

Plaintiff,

vs.

LEE BOLLINGER, JEFFREY LEHMAN, DENNIS SHIELDS, REGENTS OF THE UNIVERSITY OF MICHIGAN, and THE UNIVERSITY OF MICHIGAN LAW SCHOOL,

Defendants.
_____/

Civil Action No.
97-CV-75928-DT

HON. BERNARD A. FRIEDMAN



**OPINION AND ORDER DENYING DEFENDANTS' MOTION FOR RELIEF FROM ORDER REGARDING CLASS CERTIFICATION AND BIFURCATION IN LIGHT OF SUBSEQUENT AUTHORITY**

This matter is presently before the court on defendants' motion for relief from order regarding class certification and bifurcation in light of subsequent authority. Plaintiff has filed a response brief, defendants have filed a reply, and the court has heard oral argument.

## I. Introduction

Plaintiff Barbara Grutter alleges that she is white and that in 1996 she applied for admission to The University of Michigan Law School. At first she was placed on a waiting list, but in June 1997 her application was rejected. Plaintiff alleges that her application was rejected because the law school uses race as a "predominant" factor, giving minority applicants "a significantly greater

167

chance of admission than students with similar credentials from disfavored racial groups." Complaint, ¶¶ 20, 23. In their answer to the complaint, defendants "state that they do have a current intention to continue using race as a factor in admissions, as part of a broad array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." Answer, ¶¶ 9, 23.

Plaintiff asserts two claims. First, she claims that defendants discriminated against her on the basis of her race, thereby violating her rights to equal protection under the Fourteenth Amendment. This claim is brought under 42 U.S.C. §§ 1981 and 1983. Second, plaintiff claims that defendants violated a federal statute, 42 U.S.C. § 2000d, which prohibits recipients of federal funds from discriminating on the basis of race. For relief, plaintiff seeks a declaratory judgment to the effect that her rights were violated; an injunction prohibiting racial discrimination in admissions; compensatory and punitive damages; an order requiring defendants to admit her to the law school; and attorney fees and costs.

In an opinion and order dated January 7, 1999, the court granted plaintiff's motion for class certification and for bifurcation of the trial into liability and damages phases. In that opinion, the court concluded that class certification is appropriate in this matter under Fed. R. Civ. P. 23(b)(1)(A) and 23(b)(2), but not under Rule 23(b)(1)(B). The court also determined that the trial should be bifurcated. In the liability phase, the court intends to rule on the lawfulness of defendants' admission policy. If the policy is found to be unlawful, damages would be determined in the second phase of the trial.

## II. Defendants' Motion for Relief from Order

Defendants' motion is entitled "motion for relief from order regarding class certification and bifurcation in light of subsequent authority." It is essentially a motion for reconsideration of the January 7, 1999, opinion. Defendants argue that the court's rulings on class certification and bifurcation are erroneous in light of two recent Supreme Court decisions: Texas v. LeSage, 120 S. Ct. 467 (1999), and Ortiz v. Bibreboard, 119 S. Ct. 2295 (1999). In response, plaintiff argues that these cases do not represent a change in the law and that the court should not change its earlier rulings.

### A. Bifurcation

Defendants first argue that the January 7, 1999, opinion erred in its statement that "[a]ny applicant who was rejected under an unconstitutional admissions policy has a cause of action, at least for nominal damages." Defendants argued previously that this case should not be certified as a class action until after plaintiff Grutter proves, in the liability phase of the trial, that she would have been admitted under a race-neutral admissions policy. The court rejected this argument on the grounds that a rejected applicant is entitled to at least nominal damages, regardless of whether he would also have been rejected under a race-neutral policy. That is, the court concluded that defendants' liability would be established if it is determined that the present admissions policy is unlawful. If a particular applicant would have been rejected even under a race-neutral policy, this fact would be relevant in assessing compensatory damages, but it would not be relevant in determining liability.

Defendants argue that a different ruling on this question is required by the Supreme

Court's decision in Texas v. Lesage, 120 S. Ct. 467 (1999). In that case, plaintiff Francois Lesage, who is white, applied to the Ph.D. program in psychology at the University of Texas. When his application was rejected, he sued on the grounds that the university gave preferential consideration to minority applicants. The university moved for summary judgment, arguing that plaintiff's application was so weak that he would not have been admitted under any circumstances. The district court granted the motion because any consideration of race was irrelevant in plaintiff's case, since the evidence showed that all of the admitted students had superior academic qualifications.

The Fifth Circuit reversed on the grounds that "[a]n applicant who was rejected at a stage of the review process that was race conscious . . . has 'suffered an implied injury' – the inability to compete on an equal footing." 120 S. Ct. at 468, quoting 158 F.3d 213, 222 (5th Cir. 1998). The court of appeals remanded the case because a factual dispute existed "as to whether the stage of review during which Lesage's application was eliminated was in some way race conscious." Id.

The Supreme Court reversed the court of appeals, stating:

> Under Mt. Healthy City Bd. of Ed. v. Doyle, even if the government has considered an impermissible criterion in making a decision adverse to the plaintiff, it can nonetheless defeat liability by demonstrating that it would have made the same decision absent the forbidden consideration. Our previous decisions on this point have typically involved alleged retaliation for protected First Amendment activity rather than racial discrimination, but that distinction is immaterial. The underlying principle is the same: The government can avoid liability by proving that it would have made the same decision without the impermissible motive.
>
> Simply put, where a plaintiff challenges a discrete governmental decision as being based on an impermissible criterion and it is undisputed that the government would have made the same decision regardless, there is no cognizable injury warranting relief under § 1983.

Id. (citations omitted). Defendants point to this portion of the Lesage opinion and argue that they should be permitted to show, in the liability phase of the trial, that plaintiff Grutter would not have been admitted even if her race had not been considered. Defendants contend that if they can prove this, then there is no basis for proceeding to the damages phase of the trial, since they will have prevailed on the issue of liability. Defendants believe Lesage undercuts the statement in the court's January 1999 opinion that all applicants would be entitled to at least nominal damages, due merely to the fact that their race was considered in rejecting their applications, if defendants' admissions policy is found to be unlawful. Thus, defendants seek to have this statement from the opinion vacated; and, in addition, they seek leave to prove in the first phase of the trial that plaintiff Grutter would not have been admitted even under a race-neutral admissions policy, in which case there will be no need to bifurcate the trial, since there will be no occasion to address the damages issue.

The second half of the opinion in Lesage shows that the relief defendants seek is not warranted. After the above-quoted passage, the Supreme Court went on to say:

> Of course, a plaintiff who challenges an ongoing race-conscious program and seeks forward-looking relief need not affirmatively establish that he would receive the benefit in question if race were not considered. The relevant injury in such cases is "the inability to compete on an equal footing." *Northeastern Fla. Chapter, Associated Gen. Contractors of America v. Jacksonville*, 508 U.S. 656 (1995). . . . But where there is no allegation of an ongoing or imminent constitutional violation to support a claim for forward-looking relief, the government's conclusive demonstration that it would have made the same decision absent the alleged discrimination precludes any finding of liability.
>
> . . . [I]n deciding that summary judgment was improper, the Court of Appeals did not distinguish between Lesage's retrospective claim for damages and his forward-looking claim for injunctive relief based on continuing discrimination. Further, in their petition for certiorari, petitioners assert that ". . . there is no allegation that the department of counseling psychology continues to use race-based admissions

> subsequent to the Fifth Circuit's *Hopwood v. State of Texas* decision." The brief in opposition does not contest this statement. It therefore appears, although we do not decide, that Lesage has abandoned any claim that the school is presently administering a discriminatory admissions process.
>
> Insofar as the Court of Appeals held that petitioners were not entitled to summary judgment on Lesage's § 1983 claim for damages relating to the rejection of his application for the 1996-1997 academic year even if he would have been denied admission under a race-neutral policy, its decision contradicts our holding in *Mt. Healthy*. We therefore grant the petition for writ of certiorari and reverse the judgment of the Court of Appeals in this respect.
>
> Lesage also asserted claims under 42 U.S.C. §§ 1981 and 2000d (Title VI). Whether these claims remain, and whether Lesage has abandoned his claim for injunctive relief on the ground that petitioners are continuing to operate a discriminatory admissions process, are matters open on remand.

120 S. Ct. at 469 (citation added).

The Supreme Court distinguished between "a discrete government decision" and an "ongoing race-conscious program." This court read Lesage as standing for the proposition that the Mt. Healthy defense can be used to defeat liability for a money damages claim where plaintiff is complaining about a "discrete" decision on an application in a particular year and where plaintiff does not allege the continuing existence of a racially discriminatory admissions policy. In the present case, plaintiff alleges the existence of such an admissions policy. Therefore, defendants cannot avoid liability by asserting the Mt. Healthy defense. Certainly, there is nothing in Lesage which suggests that the plaintiff class in the present case may not receive at least nominal damages, since "the relevant injury in such cases is 'the inability to compete on an equal footing.'" Id., 120 S. Ct. at 468. If the plaintiff in the present case proves that defendants' admissions policy is unconstitutional, then defendants' liability is established and at that point plaintiff will be entitled to at least nominal damages. If there are class members who would not have been admitted under

a race-neutral system, those individuals will not be entitled to compensatory damages; however, this is an issue which will be addressed in the damages phase of the trial. The court concludes that the January 7, 1999, opinion was correct on this issue, and there is no reason to change the order as to bifurcation.

**B. Class Certification**

In this section of their motion, defendants repeat their argument from the fall of 1998 that this case should not be certified as a class action because plaintiff's complaint seeks damages, and class-wide resolution of damages claims requires notice to all class members and an opportunity to opt out of the class. Defendants' principal case for this proposition, when the issue was first briefed and again in the instant motion, is Allison v. Citgo Petroleum Corp., 151 F.3d 402 (5th Cir. 1998). In that case, plaintiffs were a group of 130 African-American employees of defendant Citgo Petroleum Corporation, and applicants for employment. They alleged race discrimination under Title VII, and sought injunctive and declaratory relief, as well as compensatory and punitive damages. Plaintiffs sought to certify a class of all African American employees and applicants from 1979 to the present. The district court denied the motion, and the court of appeals affirmed. The basic holding of Allison is that class certification under Fed. R. Civ. P. 23(b)(2) is appropriate if the claim for non-monetary relief "predominates." Conversely, certification under this subrule is inappropriate when plaintiffs' demand for damages is not merely "incidental to" their demand for injunctive or declaratory relief. The court stated:

> By incidental, we mean damages that flow directly from liability to the class *as a whole* on the claims forming the basis of the injunctive or declaratory relief. . . . Ideally, incidental damages should be only

> those to which class members automatically would be entitled once liability to the class . . . as a whole is established. That is, the recovery of incidental damages should typically be concomitant with, not merely consequential to, class-wide injunctive or declaratory relief. Moreover, such damages should at least be capable of computation by means of objective standards and not dependent in any significant way on the intangible, subjective differences of each class member's circumstances. Liability for incidental damages should not require additional hearings to resolve the disparate merits of each individual's case . . . .

Allison, 151 F.3d at 415 (citations omitted; emphasis in original).

The court's January 1999 opinion indicated the court's belief that the primary form of relief sought in this case is injunctive and declaratory. The only damages which are being determined on a class-wide basis are clearly incidental, as they would be nominal damages to which each class member would be entitled, if the court were to find that defendants' admissions policy is unconstitutional. The court's opinion also made clear that the trial will be bifurcated, and that nothing will be determined in the first phase other than liability. This is perfectly consistent with Allison. If liability is found, the court can revisit the issue of whether class certification is appropriate before proceeding with the damages phase. It may well be that any claims for compensatory or punitive damages must proceed on an individual, not on a class action, basis.

In addition to restating their reliance on Allison, defendants now also argue that class certification is inappropriate because the class members have not been given notice of the class action and an opportunity to opt out. In this connection, defendants rely principally on a recent Supreme Court decision, Ortiz v. Fibreboard Corp.. 119 S. Ct. 2295 (1999). Defendants argue that the class members have a due process right to be given notice of the action, and an opportunity to opt out, because to the extent they have a claim for money damages they should be given the chance

to decide whether to remain in the class or to pursue their own lawsuit.

Plaintiffs correctly argue that Ortiz is readily distinguishable from the present case. Ortiz involved the certification of a class under Rule 23(b)(1)(B), which applies to "limited fund" cases. The court's January 1999 opinion specifically concluded that this subrule does not apply in the present case, as there is no "limited fund." Ortiz was an asbestos case, in which a class was certified in order to divide a $2 billion settlement fund. The Supreme Court held that class certification was inappropriate because the class excluded certain persons who should have been included, such as persons who presently had individual lawsuits pending against defendant and persons who had previously dismissed cases but retained the right to reopen in the event they became ill. The rights of these excluded persons to money damages were being litigated, and no notice or opportunity to opt out had been given. The Supreme Court also found that this was not a proper "limited fund" case because the amount of the fund was set by negotiations between the lawyers and the insurance companies.

Ortiz bears no resemblance to the present case. In the present case, the main relief at issue is declaratory and injunctive[1]; in Ortiz plaintiffs were primarily interested in money damages. In the present case, the class was certified under Fed. R. Civ. P. 23(b)(1)(A) and 23(b)(2); in Ortiz, the class was certified under Fed. R. Civ. P. 23(b)(1)(B). In the present case, the class has been certified in order to litigate the issue of defendants' liability; in Ortiz, the class was a "settlement class" which was certified to disburse a fund created for that purpose. And in the present case, the

[1] In this connection, plaintiff correctly notes at page 17 of her response brief that "[n]o class member[s] will be deprived of their jury trial right to a damages determination because the first and only class-wide phase of the bifurcated proceedings will relate solely to claims for class-wide injunctive and declaratory relief regarding defendants' race-conscious admissions policy."

issue of the constitutionality of defendants' admissions policy is of equal interest to all class members; in Ortiz, the class members all had unique, individual claims to the settlement fund, which meant that there was a great potential for conflicts of interest between class members. The court concludes that Ortiz does not call into question the propriety of the certification order.

**III. Conclusion**

For the reasons stated above, the court concludes that the correctness of its January 7, 1999, order bifurcating the trial and certifying the plaintiff class has not been called into question by subsequent Supreme Court authority. Accordingly,

IT IS ORDERED that defendants' motion for relief from order regarding class certification and bifurcation in light of subsequent authority is denied.

BERNARD A. FRIEDMAN
UNITED STATES DISTRICT JUDGE

Dated: APR 19 2000
Detroit, Michigan

Copy Mailed This Date To:

Miranda K. S. Massie, Esq.; George Washington, Esq.
Eileen Scheff, Esq.
Michael E. Rosman, Esq.; Michael P. McDonald, Esq.
Hans F. Bader, Esq.
Kierry L. Morgan, Esq.
Leonard M. Nichoff, Esq.
John Payton, Esq.; Jane Sherburne, Esq.;
John H. Pickering, Esq.
Craig Goldblatt, Esq.