UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JENNIFER GRATZ and
PATRICK HAMACHER,

Plaintiffs,

v.

LEE BOLLINGER, JAMES J. DUDERSTADT, THE UNIVERSITY OF MICHIGAN, and THE UNIVERSITY OF MICHIGAN COLLEGE OF LITERATURE, ARTS, AND SCIENCE,

Defendants.
_____/

CASE NO.: 97-CV-75231-DT
HON. PATRICK J. DUGGAN

OPINION AND ORDER
DENYING DEFENDANTS' MOTION FOR RELIEF FROM ORDER

At a session of said Court, held in the U.S. District Courthouse, City of Detroit, County of Wayne, State of Michigan, on MAY 01 2000.

PRESENT: THE HONORABLE PATRICK J. DUGGAN
U.S. DISTRICT COURT JUDGE

On October 14, 1997, plaintiffs filed a class action against defendants asserting that defendants had denied plaintiffs equal protection of the laws and engaged in racial discrimination in violation of 42 U.S.C. § 1983 by considering race as a factor in their admissions policy. Plaintiffs seek injunctive, declaratory, and monetary relief.

On December 23, 1998, this Court issued an Opinion and Order bifurcating the trial into a liability and damages phase, stating that "[i]f the Court enters a finding that defendants' admissions

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policy is unconstitutional, the Court will then make a determination as to how to proceed with the damage phase of the trial." (Dec. 23, 1998 Op. at 16). In the same opinion, the Court certified a class, to be represented by Mr. Hamacher, pursuant to Federal Rule of Civil Procedure 23(b)(2)[1] solely on the issue of declaratory and injunctive relief, *i.e.*, "whether defendants' use of race as a factor in admissions decisions violates the Equal Protection Clause of the Fourteenth amendment,"[2] consisting of:

> Those individuals who applied for and were not granted admission to the College of Literature, Science & the Arts of the University of Michigan for all academic years from 1995 forward and who are members of those racial or ethnic groups, including Caucasian that defendants treated less favorably on the basis of race in considering their application for admission.

(*Id.* at 15). The class was specifically "limited to injunctive and declaratory relief." (*Id.*). The Court also expressly stated that it would not consider any claims for damages during this phase of the trial and declined to rule regarding class certification for the damages phase until after liability had been determined. (*Id.*).

This matter is now before the Court on defendants' "Motion for Relief from Order Regarding Class Certification and Bifurcation in Light of Subsequent Authority." Defendants specifically request relief from those portions of the Court's December 13, 1998 Opinion and Order providing: "(1) that the constitutionality of the defendants' admissions policies be determined without regard to whether any particular plaintiff would have been admitted under an admissions system that did

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[1] Rule 23(b)(2) permits certification of a class action when "the party opposing the class has acted or refused to act on grounds that are generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." FED. R. CIV. P. 23(b)(2).

[2] The Court labeled this as the "liability" phase of the litigation.

not consider race as a factor in admissions; and (2) that this case be certified as a class action." (Defs.' Br. Supp. Mot. Relief Order at 1). For the following reasons, defendants' motion shall be denied.

Discussion

1. Bifurcation Order

Defendants do not *per se* object to bifurcation of this action into a liability and damages phase. (*Id.* at 3). Defendants, however, relying upon the United States Supreme Court's recent decision in *Texas v. LeSage*, - - U.S. - -, 120 S. Ct. 467, 145 L. Ed. 2d 347 (1999), contend that "an applicant who would not have been admitted under a race neutral admissions decision lacks standing to sue for damages." (*Id.* at 5). According to defendants, under *LeSage,* they would be entitled to a judgment in their favor during the *liability* phase of the trial if they were to demonstrate that the individual plaintiffs "(1) do not intend to apply to the University of Michigan in the future; and (2) would not have been admitted at the time they applied under an admissions system that did not involve the consideration of race."[3] (*Id.*). Therefore, based upon their understanding of *LeSage*, defendants request that this Court "vacate its determination that the question of liability is limited to the issue 'whether defendants' use of race as a factor in admissions decisions violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution.'" (*Id.*).

The Supreme Court's decision in *LeSage*, however, did not turn upon the distinction between the liability and damages phases of an action, but rather between the type of relief requested, *i.e.*,

[3] Defendants acknowledge that they "have not decided whether to advance such an argument, and in any event cannot say whether the intervening defendants may elect to defend the lawsuit on this basis." (*Id.* at 5).

whether the plaintiff is asserting "a retrospective claim for damages [or] a forward-looking claim for injunctive relief based on continuing discrimination." *LeSage*, 120 S. Ct. at 469. If the plaintiff is asserting a retrospective claim for compensatory damages, a defendant may defeat its *liability for such damages* "by proving that it would have made the same decision without the impermissible motive." *Id.* at 468. However, "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." *Id.* Rather, "[t]he relevant inquiry in such cases is 'the inability to compete on equal footing.'" *Id.* (quoting *Northeastern Fla. Chapter, Ass'n. Gen. Contractors of Am. v. Jacksonville*, 580 U.S. 656, 666, 113 S. Ct. 2297, 2303, 124 L. Ed. 2d 586 (1993)).

The "liability" phase of this action, which has been identified as "whether defendants' use of race as a factor in admissions decisions violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution," has been specifically limited to plaintiffs' claims for injunctive and declaratory relief. (Dec. 23, 1998 Op. at 15). As such, the relevant inquiry under *LeSage* is not whether any individual plaintiff may have been denied admission regardless of defendants' allegedly impermissible motive, but rather, whether plaintiffs have been denied the inability to compete for admission on equal footing. Therefore, the Court declines to vacate that portion of its December 23, 1998 Opinion and Order that certifies for class determination the sole issue of whether defendants' use of race as a factor in admission decisions violates the Constitution and reiterates that whether a particular plaintiff would, in fact, have been admitted under an admissions system that did not consider race is irrelevant to such an inquiry.

The Court, and the parties, recognize that the "damages" phase of this lawsuit, for which the

Court has not as of yet certified a class, also includes a "liability" factor. The "damages" phase, however, relates to defendants' ultimate "liability" for damages *vis a vis* each individual plaintiff. For example, for a particular plaintiff to establish his or her entitlement to compensatory damages, such plaintiff must establish not only that defendant employed an unconstitutional policy, but also that such unconstitutional policy was a "proximate cause" of harm to such plaintiff. In other words, defendants are not "liable" to a particular individual for compensatory damages if defendants establish that they would have denied admission to that plaintiff irrespective of the challenged policy. *See LeSage*, 120 S. Ct. at 468.

The Court notes that, consistent with *LeSage*, there is nothing currently barring defendants from arguing as a defense to their "liability" for compensatory damages with respect to a particular plaintiff during the "damages" phase of this action that they would have made the same decision regardless of the allegedly impermissible motive, or that class certification should be denied for the "damages" phase with respect to compensatory damages because such a defense would necessarily involve a very individualized inquiry. Accordingly, the Court is satisfied that its December 23, 1998 Order regarding bifurcation does not run afoul of the Supreme Court's decision in *LeSage*.

2. Class Certification

Defendants also seek relief from this Court's Order granting class certification for the liability phase arguing (1) that under the holding of *LeSage*, many of the purported class members are not entitled to *any* relief, and (2) that the United States Supreme Court's recent decision in *Ortiz v. Fibreboard*, 527 U.S. 815, 119 S. Ct. 2295, 144 L. Ed. 2d 715 (1999), "make[s] clear that insofar as this lawsuit *also* seeks damages (in addition to injunctive relief), a *mandatory* class action (such as is provided by Rule 23(b)(2)) that does not provide class members with notice of the litigation and

the opportunity to opt out is violative of those absent class members' due process rights." (Defs.' Br. Supp. Mot. Relief Order at 6-7) (emphasis in original). Defendants' arguments, however, are without merit.

First, defendants contend that under *LeSage,* many of the purported class members are not entitled to relief because they "(1) applied in the past; (2) would not have been admitted under an admissions system that did not involve the consideration of race as a factor; and (3) [do] not intend to apply in the future." (*Id.* at 6). As discussed *supra*, defendants' contentions would have merit if the liability phase of this action were addressing plaintiffs' claims for compensatory damages. However, the liability phase of this action has been identified as "whether defendants' use of race as a factor in admissions decisions violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution," and specifically limited to plaintiffs' claims for injunctive and declaratory relief; therefore, the only relevant inquiry is whether defendants' alleged discriminatory policy denies plaintiffs' the ability to compete on equal footing. *LeSage*, 120 S. Ct. at 468.

Second, defendants argue that a mandatory class action pursuant to Rule 23(b)(2) is inappropriate because class members are not provided with notice or an opportunity to opt out.[4] In support of their argument, defendants' erroneously contend that "every member of the class - - and there are thousands - - is now having his or her individual claim for money damages tried to this Court." (Defs.' Br. Supp. Mot. Relief Order at 7). As noted *supra,* however, only plaintiffs' claims for injunctive and declaratory relief are being addressed during the "liability" phase of this action. Therefore, the class members' claims for damages are not currently before the Court. In fact, in its

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[4] Notice and an opportunity to opt out are only required in Rule 23(b)(3) class actions. *See* FED. R. CIV. P. 23(c)(2); *Jefferson v. Ingersoll Int'l, Inc.*, 195 F.3d 894, 896 (7th Cir. 1999).

December 23, 1998 Opinion and Order, the Court specifically declined to rule regarding class certification for the damages phase of this action. (Dec. 23, 1998 Op. at 15).

Defendants contend that the mere fact that the Court declined to certify a class for the damages phase of this action "does not protect the rights of unnamed class members" because "[i]n the event defendants prevail on the question of liability, the unnamed class members would find their claims - - including their claims for monetary damages - - barred by virtue of the class action determination on the question of liability." (Defs.' Br. Supp. Mot. Relief Order at 9-10). Such an assertion, however, is true in every class action involving injunctive relief regardless of whether the action is bifurcated into a liability and damages phase or proceeds as a single action. If the Court were to accept defendants' argument, it would be inappropriate to certify a Rule 23(b)(2) class whenever damages are sought, regardless of whether such damages were incidental to the injunctive relief requested.

The Court agrees with defendants' contention that any class action that includes a claim for damages necessarily implicates, to some extent, concerns regarding notice and an opportunity to opt out. The Court, however, does not read *Ortiz v. Fibreboard* as requiring relief from class certification for the injunctive phase of this litigation. In *Ortiz,* the Supreme Court, addressing whether it was proper to certify a mandatory settlement class under a limited fund theory pursuant to Rule 23(b)(1)(B) when the settlement itself created the limited fund, was faced with a significantly different scenario than the one currently before this Court, which has certified a mandatory class only as to the issue of injunctive and declaratory relief.

Defendants' reliance upon *Jefferson v. Ingersoll Int'l, Inc.*, 195 F.3d 894 (7th Cir. 1999), is also unavailing. In *Jefferson*, the Seventh Circuit, citing *Ortiz*, held that it was improper for the

district court to automatically certify a mandatory Rule 23(b)(2) class in an employment discrimination case without considering whether the plaintiffs' claims for damages "were more than incidental to the equitable relief in view." *Id.* at 899. Contrary to the case *sub judice*, however, the district court in *Jefferson* had certified a mandatory Rule 23(b)(2) class on the issues of both injunctive relief and damages. In vacating the district court's certification order and remanding for further consideration, the Seventh Circuit specifically noted that in discrimination cases in which both claims for injunctive relief and damages are asserted:

> Divided certification also is worth consideration. It is possible to certify the injunctive aspects of the suit under Rule 23(b)(2) and the damages aspects under Rule 23(b)(3), achieving both consistent treatment of class-wide equitable relief and an opportunity for each affected person to exercise control over the damages aspects.

Id. at 898. Therefore, it appears to the Court that defendants' own authority supports the action taken in this case: certification of the injunctive aspects of this suit under Rule 23(b)(2).

Conclusion

For the reasons stated above,

IT IS ORDERED that defendants' motion for relief from Order regarding class certification and bifurcation is **DENIED.** #119

Patrick J. Duggan

PATRICK J. DUGGAN
UNITED STATES DISTRICT JUDGE

Copies to:

Kerry L. Morgan, Esq.
David F. Herr, Esq.
Michael E. Rosman, Esq., Michael P. McDonald, Esq., Hans F. Bader, Esq.
John Payton, Esq., Jane Sherburne, Esq.
Leonard M. Niehoff, Esq.

Godfrey J. Dillard, Esq., Milton R. Henry, Esq.
Elaine R. Jones, Esq., Theodore M. Shaw, Esq.
Christopher A. Hansen, Esq., Steven R. Shapiro, Esq., Deborah N. Archer, Esq.
Brent E. Simmons, Esq.
Michael J. Steinberg, Esq.
Patricia Mendoza, Esq.