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United States District Court, N.D. Illinois.

Helene ORLOWSKI, Melba J. Koch, Margaret Mrozowski, Carol Ann Schmall, Alma L. Aguirre, Roann D. Keaty, Georgine Arvanites, Janet M. Tripp, and Maureen Gleixner, on behalf of themselves and all other persons similarly situated, Plaintiffs,
v.
DOMINICK'S FINER FOODS, INC., Defendant.

No. 95 C 1666. | March 31, 1998.

Opinion

REPORT AND RECOMMENDATION

KEYS, Magistrate J.

***1** THE HONORABLE ELAINE E. BUCKLO
UNITED STATES DISTRICT COURT JUDGE.

This matter comes before the Court on Miner, Barnhill & Galland, P.C.'s Emergency Motion to Remove the Law Firm of Friedman & Holman as Class Counsel for the Plaintiff Class.[1] For the following reasons, this Court recommends that the motion be denied, as moot.

BACKGROUND

Plaintiffs, present and former female employees of Dominick's Finer Foods, Inc. ("Dominick's"), brought this employment discrimination lawsuit, pursuant to Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e *et seq.,* alleging that Dominick's has discriminated against female employees in job assignments, hours of work, training, and promotions.

In its February 21, 1997, Report and Recommendation, this Court recommended to the District Court that a class of former and current Dominick's female employees should be certified. That Recommendation was based, in part, upon the Court's determination that there was an adequacy of representation, pursuant to Federal Rule of Civil Procedure 23(a)(4) (which requires Court approval of both the proposed named plaintiffs *and* their attorneys). Specifically, this Court found that the named Plaintiffs, and the law firm of Miner, Barnhill & Galland, P.C. ("MBG"), could adequately represent and protect the interests of the class.

Additionally, the Court's Recommendation of class certification, under Federal Rule of Civil Procedure 23(b)(2), was based, in part, upon the fact that, at the time of class certification, Plaintiffs sought injunctive and declaratory relief, as well as backpay and damages.

On April 8, 1997, District Judge Elaine E. Bucklo adopted this Court's February 21, 1997, Report and Recommendation, and certified a class of present and former female Dominick's employees, under Rule 23(b)(2). Following the class certification, a great deal of discovery took place. More importantly, and more recently, some very serious settlement discussions have occurred. It appears that those settlement discussions (and perhaps the anticipated millions of dollars in attorneys' fees) may have instigated the now rapidly escalating morass currently before the Court.

The law firm of Friedman and Holman ("FH"), filed this lawsuit in 1995 on behalf of two women (who later became named

Plaintiffs). FH subsequently added six other women as Plaintiffs. FH entered into "retainer agreements" with each of the eight Plaintiffs that it brought into the case: Helene Orlowski, Melba Koch, Margaret Mrozowski, Alma Aguirre, Carol Ann Schmall, Roann Keaty, Janet Tripp, and Maureen Gleixner. Each of the eight retainer agreements between these Plaintiffs and FH specifies that FH shall be such individual's "sole attorneys to represent [Client] in any and all litigation, claims, actions, proceedings (administrative and/or legal) and appeals relating to Client's employment...." (Attachments to Resp. to Emergency Mot. to Remove FH, Ex. 5.)[2] The ninth Plaintiff, Maureen Arvanites, retained MBG directly, and does not appear to have any relationship with FH. (Reply Mem. in Supp. of Emergency Mot. to Remove FH, Exs. 1–3.)

***2** According to MBG's Reply Memorandum, MBG also has retainer agreements with Ms. Tripp and Ms. Gleixner, executed on June 11, 1996, and June 16, 1996, respectively. However, Ms. Tripp's and Ms. Gleixner' s new retainer agreements with FH, dated March of 1998, appear to expressly terminate MBG's representation of them. (Attachments to Resp. to Emergency Mot. to Remove FH, Ex. 5); *see supra* n. 2. Additionally, according to FH, " [s]everal of the eight named plaintiffs have told [them] that they would ... like to fire [one of the MBG firm's attorneys]."[3] (Resp. to Emergency Mot. to Remove FH at 14.)

Apparently because, among other things, FH's attorneys were not members of the Trial Bar of the Northern District of Illinois, in approximately June of 1995, they entered into an agreement with MBG that provided MBG would "serve as lead counsel for plaintiffs, and ... have final authority in all decisions (in consultation with Friedman & Holman)...." (Resp. to Emergency Mot. to Remove FH, Ex. F.)[4] It appears that the association between MBG and FH remained harmonious until approximately January of 1998, which not coincidentally seems to be when a real prospect for a monetary settlement arose.

On January 8, 1998, MBG attended a meeting with Dominick's which FH was either not apprised of or not invited to attend. (Resp. to Emergency Mot. to Remove FH at 14.) In late January of 1998, successive correspondence between FH and MBG focused on MBG's desire to re-negotiate the contract between the two firms. (*Id.* at Exs. A–B; Aff. of Judson H. Miner, Ex. 1.) There was obviously a disagreement with regard to fee sharing/fee division. (*Id.*)

On March 14, 1998, FH sent a letter to Dominick's which stated that "eight of the nine named plaintiffs in this case have retained our law firm as their sole attorneys ... and look to our office exclusively for recommendations as to settlement...." (Emergency Mot. to Remove FH, Ex. A.) According to FH, it also, at some point during their dispute, told MBG to "cease contact with the named plaintiffs who had retained FH." (Resp. to Emergency Mot. to Remove FH at 9.)

The March 14, 1998 letter sparked a flurry of written communications between the two firms from March 16, 1998 to March 23, 1998. During that time, the veneer of civility between the two firms was wearing thin. On the very next day—March 24, 1998—the gloves came off, when MBG filed the instant motion to remove FH from the case.

DISCUSSION

It is impossible, at this time, for the Court to ascertain exactly what (or, rather, which firm) started the regrettable spiral of vicious infighting among FH and MBG (and possibly among either or both of these firms and the named Plaintiffs) that resulted in the instant motion. Each firm attempts to claim the moral high ground by heralding its role as protector of the class (while excoriating the other's avarice).[5] Something has definitely gone wrong, and the situation (irregardless of where original blame may lie) has clearly degenerated to a point which now requires judicial intervention in order to ensure that the interests of class members are, and will continue to be, adequately represented. It is unnecessary to discuss each specific (sometimes petty) cross-accusation comprising the tally of exploits and misdeeds that MBG and FH have leveled against each other; however, in general, much of the squabbling concerns the quantity of money that each firm hopes to receive upon settlement of the case.[6] What is important to discuss are the classwide ramifications of this unfortunate rift between the firms (and the named Plaintiffs).

***3** As an initial matter, the relief that MBG requests—removal of FH as "class counsel"—is moot, since FH never sought to be class counsel, nor has this Court (or the District Court) ever determined whether FH could adequately represent the class. This Court, and ultimately the District Court, found that Plaintiffs and MBG could "fairly and adequately protect the interests of the class," as required by Federal Rule of Civil Procedure 23(a)(4).[7] The class certification motion made no mention whatsoever of FH, or FH's abilities. Therefore, MBG's request need not be granted, because FH is not class counsel,[8] and as such, cannot be "removed" from a position as class counsel.

Although MBG's motion could easily be disposed of as moot, the disturbing allegations and counter-allegations made in the

motion, responses, replies, attachments, and affidavits filed in connection with that motion deserve closer scrutiny, as they raise the spectre of decertification.

First, there are issues with respect to who is an adequate class representative. Second, certification pursuant to Federal Rule of Civil Procedure 23(b)(2), which focuses on injunctive relief, may have been inappropriate since it now appears that classwide monetary relief is a (possibly *the*) principal issue in the case.

After briefly restating the standards applicable to class representatives, this Court will discuss both of the above issues.
As discussed previously, with respect to this class action, Federal Rule of Civil Procedure 23 establishes a two-step process to determine whether a class action is appropriate. Initially, the preliminary requirements set forth in Rule 23(a) must be met:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

If these criteria are satisfied, then, the Court next considers whether the action falls within one of the three categories of class suits provided for in the subsections of Rule 23(b).

A. Rule 23(a)(4)
Particularly of interest here is Rule 23(a)(4)'s requirement that the named plaintiff "fairly and adequately protect the interests of the class." Adequate representation has two components: (1) adequacy of the named plaintiff's attorney, and (2) adequacy of the named plaintiff. *Retired Chicago Police Ass'n v. City of Chicago,* 7 F.3d 584, 598 (7th Cir.1993). The representative attorney must be "competent, experienced, qualified, and generally able to conduct the proposed litigation vigorously." *Chandler v. Southwest Jeep–Eagle, Inc.,* 162 F.R.D. 302, 309 (N.D.Ill.1995). The named plaintiff must not have interests that are antagonistic to, or conflict with, those of the class. *Rosario,* 963 F.2d at 1018.

***4** Both FH's and MBG's allegations raise the question as to whether any of the current class representatives can "fairly and adequately" represent the class, in light of the agreements that at least eight of the named class representatives have signed with FH that would, if enforceable,[9] prohibit them from free and open communication with class counsel, MBG. FH's allegations also raise the possibility that MBG may no longer be able to represent the class, due to what FH alleges are serious disagreements between most or all of the class representatives and MBG. Where class counsel's communication with the named Plaintiff—its client's representative—has degenerated to the point that it must send a letter to the named Plaintiff's individual attorney, it suggests that one of the two (firm or named Plaintiff) should withdraw or be removed.[10]

MBG may have a conflict of interest with the class because of its agreement with FH, which may have motivated MBG to seek an aggregated settlement structure so that its fees would be maximized, at the expense of the class (and FH). FH alleges that the agreement was that each firm would bill separately for time and expenses, and that MBG would pay all expenses out of its own recovery. Additionally, the "hit" for any court-determined duplication of efforts would be taken by MBG. In settlement, according to FH, MBG's ability to negotiate an award that is in the best interests of the class has been adversely affected because of its attempt/desire to aggregate the Plaintiffs' awards with all of the fees and expenses (so that it will be impossible to determine the allocable percentages).

FH's role in this case as representative of eight of the individual named Plaintiffs, and, according to MBG's allegations, FH's accumulation of outrageous fees on behalf of those eight named Plaintiffs, may have created a situation where it is no longer possible for those eight to represent the class, since their counsel's allegedly unreasonable fees would make a favorable class settlement impossible. FH has accumulated approximately three times the hourly fees that MBG has. According to MBG, FH has insisted, as a prerequisite to any settlement, that its fees will be fully paid (and that it will receive fees for additional "monitoring" activities—whether it actually does any monitoring or not). MBG claims FH's fees are "wildly disproportionate" in light of the fact that MBG has been lead counsel. (Emergency Mot. to Remove FH, at 3.) If FH's allegedly unreasonable fees are holding up the settlement discussions (because the eight class representatives agreed to pay these fees in their individual agreements with FH), then those individuals cannot be adequate representatives.[11]

B. Rule 23(b)(2)

Plaintiffs sought (and were granted) class certification under Rule 23(b)(2), which requires that "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." This type of certification circumvents the requirement, under Rule 23(b)(3), that all class members be given notice (and an opportunity to opt out of the class).

***5** In light of the substantial monetary settlements that are at the heart of the present feud, it appears that certification under Rule 23(b)(2) may have been improper, and possibly even a subterfuge to delay until the last possible moment the requirement of class notice, and to avoid judicial scrutiny of the difficult issues of typicality and commonality with respect to individual damage claims that would be faced in a damages action under Rule 23(b)(3).

CONCLUSION

The District Court has the power and discretion to alter, amend, or, if necessary, decertify the class. The Court's chief concern is to protect the unnamed class members, especially where, as here, they have not been notified of their membership in the class, or given the chance to opt out. Although the named Plaintiffs may choose their attorneys, the District Court has the final say about whether that choice is acceptable. The District Court also determines whether the named Plaintiffs, themselves, are acceptable representatives. Because of the recent developments, as set forth above, this Court now has serious reservations in both regards. When significant questions like those at bar arise, prior decisions as to adequacy of class representation must be reconsidered.

This Court has serious concerns about the adequacy of representation, as well as the many possible conflicts. It certainly appears that someone here (FH, MBG, and/or some, or all, of the named Plaintiffs) has lost sight of the ultimate responsibility of protecting the class. It is unfortunate that this situation has suddenly developed after more than three years were spent in litigation and discovery—and apparently on the eve of a potential settlement. Considering the enormous amount of time and effort this Court has expended over the past three years in aiding the parties in resolving their many discovery disputes, and recently having anxiously anticipated settlement of this case, the natural tendency of the Court would be to encourage the parties to resolve this matter among themselves, in the best interests of all involved. Unfortunately, however, these problems and conflicts must be addressed by the Court, since it is the responsibility of the District Court to protect the rights and interests of the unnamed class members.

Because there is not enough information available to untangle the knot of allegations, this Court recommends that a hearing be held. At that hearing, facts can be gathered, which will aid in determining whether the class must ultimately be decertified because of either inadequate representation by the named Plaintiffs, FH, or MBG, or because the class should not have been certified under Rule 23(b)(2). Thus, due to the serious nature of the issues which have arisen with respect to the rights of the class, the Court recommends that a hearing be held, with FH, MBG, and all named Plaintiffs as witnesses.

Finally, this Court recommends that Miner, Barnhill & Galland, P.C.'s Emergency Motion to Remove the Law Firm of Friedman & Holman as Class Counsel for the Plaintiff Class be denied, as moot.

Footnotes

[1] Defendant's Objection to Plaintiffs' Counsel's Motion to Seal Certain Materials and to Deny Defendant and the Class Access to Materials is hereby granted. The Court's prior ruling to the contrary is hereby vacated.

> The parties (especially unnamed class members) must be allowed access to the information at issue here; it concerns whether or not their interests are being adequately protected by their lawyers and/or named class representatives. Notwithstanding the possibly sensitive nature of this information, with a class action of this size (involving thousands of class members) it would simply be infeasible to "police" access to the documents.

[2] The retainer agreements signed by Ms. Gleixner and Ms. Tripp were dated March 9 and 10, 1998, respectively—obviously in contemplation of the instant motion. Those agreements contain slightly different language:

> The CLIENT agrees to have [FH] as her sole attorney in this case, to represent her interests and the interests of those similarly situated class members, and for [FH] to be responsible to advise CLIENT of all developments in such LITIGATION and to actively participate in prosecuting this case. The CLIENT understands that if the Court determines that this case can no longer proceed as a class action that [FH] will be her sole attorneys in her individual claim against Dominick's.

(Attachments to Resp. to Emergency Mot. to Remove FH, Ex. 5.) Thus, it appears that FH is well positioned to take over this litigation, as counsel to the eight (or at least the aforementioned two) *individual* Plaintiffs, in the event that the instant dispute results in decertification of the class.

[3] There are no affidavits from the named Plaintiffs with respect to this, or any other, issue. The Court has only FH's word that eight of the named Plaintiffs are unhappy with MBG. (Transcript of Proceedings, March 25, 1998, at 12.) Contrastingly, the Court only has MBG's word that FH and those eight named Plaintiffs are interfering with a settlement that will benefit the rest of the class.

It is unclear as to why, or even if, some (or all) of the named Plaintiffs are unhappy with either FH or MBG. Perhaps it is only the two law firms who are antagonistic? Perhaps MBG undermined FH in some way, or was simply prepared to settle for too little money, in FH's opinion? Perhaps MBG has ignored the wishes of the named Plaintiffs? Perhaps FH has thwarted the whole process by inflating the eight Plaintiffs' expectations, to the detriment of the entire class, with respect to their own incentive awards.

[4] However, according to MBG, the agreement is unenforceable because it was never signed by the Plaintiffs. (Aff. of Judson H. Miner, at Ex. 1.)

[5] It is fairly safe to assume that neither firm's involvement in the case was motivated by sheer altruism.

[6] MBG has accused FH of exaggerating its time spent working on the case by thousands of hours, and of unreasonably raising the expectations of the named Plaintiffs (to the detriment of the class and the settlement discussions). FH has, in turn, accused MBG of claiming hundreds of thousands of dollars in costs which have not actually been expended, trying to increase its own share of fees, and of possibly being in cahoots with Dominick's in such a way that the case could settle for less than it is worth.

[7] Dominick's did not challenge MBG's abilities to represent the class.

[8] Of course, there is a distinction between representing an individual and a class. Nothing herein should prevent individual Plaintiffs from retaining FH for resolution of their individual claims. If, however, the resolution of the individual claims continues to conflict with the interests of the class, such individual should be, and will be, removed as class representatives.

[9] The "sole" representation agreement seems to say that the signing individual cannot retain another attorney. Whether it is even enforceable (or is void, as against public policy) should be determined at a hearing. If enforceable, it obviously hinders the individual's ability to communicate freely and openly with class counsel—MBG. Indeed, the very actions FH has taken, in telling MBG not to communicate with "their clients", demonstrates the negative effect such agreements can have on class representation. Had the Court known about the existence of these agreements, it very well might have deemed the named Plaintiffs inadequate class representatives.

[10] Certainly, the named Plaintiffs have the right to hire and fire class counsel (subject to court approval). However, the named Plaintiffs may only do that (and may only continue to represent the class) if they are acting in the best interests of the class. To the extent that some (or all) of the named Plaintiffs are more interested in their own individual settlements than in the class settlement, they have a direct conflict that would require immediate removal as class representatives.

[11] MBG also alleges that FH has stifled the settlements by unreasonably inflating the expectations of these eight named Plaintiffs with respect to their own incentive awards, in turn leading to the named Plaintiffs putting their own interests ahead of those of the class. The possibility, and adequacy, of the ninth named Plaintiff—Ms. Arvanites—alone, representing the class, should also be explored.