1998 WL 35171217 (E.D.Mo.) (Trial Motion, Memorandum and Affidavit)
United States District Court, E.D. Missouri,
Eastern Division.

Nicole ANDERSON, et al., Plaintiffs,
v.
ST. CHARLES RIVERFRONT STATION, INC., Defendant.

No. 4:97CV-1972 RWS.
September 11, 1998.

Plaintiffs' Post Hearing Brief Supporting Class Certification

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I

CLASS DEFINITION - GEOGRAPHIC & TEMPORAL SCOPE OF THE CLASS

Plaintiffs define the class to be certified as follows:

The named individual plaintiffs as representatives of a class consisting of all African-Americans who are or were denied employment by the St. Charles Riverfront Station, Inc., in its Table Game operations, and all African-Americans who are or were employed in the Table Games operations, who were denied promotions, subjected to discipline or discharged by the St. Charles Riverfront Station, Inc., from the date the Table Games operation commenced to this date, at the facility on the St. Charles Riverfront in St. Charles, Missouri.

II

PLAINTIFFS GRIEVANCES AND THEIR CLAIMS THAT QUALIFY THEM AS A MEMBER OF THE CLASS THEY SEEK TO REPRESENT

The plaintiffs' grievances which fall within the scope of the class definition are expressed by the position that each named member has or had at the Station Casino. The individual plaintiffs fall within the categories of each grievance set out in the class definition.

The class of African-Americans who are and were denied employment are represented by:
1. Wyketta Jones;

2. Shonta Luster;

3. Johnnie Radford.

Jones and Radford would represent those black individuals who never had a job on the Station Casino and were denied employment in the Table Games Department. Luster would represent those black individuals who have a job on the Station Casino and who want to transfer to the Table Games Department because it pays better than the position she holds on the boat.

The class of African Americans who are and were denied promotions and who were never disciplined are represented by:
1. Terrance Dominick;

2. Fernando Grant.

The class of African-Americans who are and were denied promotions and who received disciplines are represented by:
1. Adrienne Wells;

2. Ryan Weems;

3. George Moore;

4. Nicole Anderson;

5. Sterling Hearnes.

The class of African-Americans who received disciplines were denied promotions, and who were terminated are represented by:
1. George Frazier;

2. Darnell Garner;

3. Juan Shivers;

4. Craig Stacker;

5. Florine Forrest;

6. Lois Crockett.

All of these individuals have a nexus to the class members they hope to represent. Each of the individuals have experienced the impact of race discrimination in a particular way through hire, promotion, discipline and termination.

In *Roby v. St. Louis Southwestern Ry Co.,* 775 F.2d 959, 961 (8th Cir. 1985), the court stated that a fundamental requirement of representatives in a class action is that they must be members of the subclasses they seek to represent. The representatives must possess the same interest and suffer the same injuries as their fellow class members. The court cited *East Texas Motor Freight System, Inc. v. Rodriguez,* 431 U.S. 395 (1977) and *Craik v. Minnesota State University,* 731 F.2d 465, 480 n. 18 (8th Cir. 1984) for authority. The court in *Craik* commented on *General Telephone v. Falcon,* 457 U.S. 147 (1982) to show that the issue in *Falcon* was a Mexican-American employee who was denied a promotion, and thus, could not maintain a class action for Mexican-American applicants for employment who were not hired. *Craik* at n. 18 shows that a thread can be woven between rank and salaries so that a person who has a valid claim on rank can have a valid claim on salaries since rank has a direct impact on salaries. Here the thread can be woven through hire, promotion, disciplines and terminations. The evidence shows that there is a prima facie case of race discrimination in the lack of hire of blacks. The lack of hires of blacks precludes the promotion of blacks, since they are not represented as they should be in the gaming tables. The promotions are also thwarted by the disciplines that are placed in the blacks personnel files, so that the constancy of disciplines imposed on blacks impacts on their ability to be promoted, and the disciplines inevitably lead to termination or through self preservation by resignation from employment at the Casino.

Embodied within the grievances complained of in Plaintiffs Second Amended Complaint is the request by plaintiffs of a class of all groups under Title VII, 42 U.S.C. §§1981 and 1981(a), as well as the Missouri Statute §213.111, R.S.Mo.

The defendant has raised the issue that each plaintiff's claim for money in the way of back pay, compensatory and punitive damages is sufficient to deny class certification Plaintiffs in their complaint have asked on all three counts for a preliminary and permanent injunction against the defendant enjoining the defendant from engaging in the unlawful discriminatory employment practices alleged in the Complaint, they ask for declaratory judgment relief and ask for affirmative equity relief

in that the defendant is requested to hire *qualified* African-Americans applicants in its Table Game operations, to promote *qualified* African-Americans to supervisory positions in the Table Games operations, and that *unlawful* and *discriminatory* disciplinary actions be removed from each personnel file, and that each plaintiff who has been impacted against, be granted their full relief for the *unlawful employment practices* engaged in by defendant. The request for money is clearly incidental to the equity relief sought by the plaintiffs.

The defendant is injecting into this litigation that class certification should not be granted because the Fifth Circuit in a 2-1 decision in *Allison v. Citgo Petroleum,* No. 9630489 (8/18/98) found a basis for refusing to certify a class by stating that the predominate relief requested was money and not equity relief. It is to be noted that there is pending before that court, a request for rehearing, etc. The dissenting Judge said:

> We have found *that no other circuit court* that has adopted a jurisdictional rule completely barring (b) (2) certification when compensatory damages are sought as well as final injunctive relief. (Emphasis supplied).

It is to be noted initially that each plaintiff applicant in accord with the individual complaint testified as to his/her experiences in trying to get a job and a promotion, plaintiffs testified as to the barriers they experienced in promotions because of built-in disciplinary techniques used to deny the black class members a promotion under a promotion policy that denies promotions to employees who have a discipline in their file within the last six months, and then inevitably the cumulative disciplines become the basis for discharge or a forced resignation.

The plaintiffs testified in accordance with the Complaint, that they are seeking relief for qualified applicants, white and black, and that in the class proceeding they are seeking a level playing field, so that white and blacks can all receive equal treatment without bias or prejudice.

Thus, it is apparent that the predominating theme here is equity considerations.

In accord with the dissenting judge in Citgo Petroleum is *Sperry Rand Corporation v. Larson,* 554 F.2d 868 (8th Cir. 1977), Judge Webster stated at p. 875:
Rule 23(b)(2) certification is appropriate when plaintiffs seek injunctive relief from acts of an employer "on grounds generally applicable to the class ... *that back pay may be a form of relief sought incidental to injunctive relief will not preclude certification under Rule 23(b)(2).* (Emphasis supplied)

In Arkansas Education Assn ' v. Board of Education of the Portland School District, 446 F.2d 763, 768 (8th Cir. 1971), the court stated:

> [a] class action for injunctive relief and damages properly brought under Rule 23(a) and (b)(2) should not be dismissed merely because a subsequent change in policy by the defendant has eliminated the the necessity for future injunctive relief, leaving only the question of past damages for determination by the Court.

In White v. National Football League, 822 F.Supp. 1389, 1410 (D. Minn. 1993) (Aff'd. 41 F.3d 402; 8th Cir. 1995), the District Court stated:

> The court thus concludes that even where a class action involves claims for money damages, mandatory non-opt-out class certification remains proper as long as the class claims for equitable or injunctive relief predominate over the claims for damages.

The court in *White* found that the injunctive relief predominated over the claims for damages.

In assessing the claims made for money by the plaintiffs, each stated that they wanted the money to be determined by a judge or jury, and that the equity claims were their primary concern in the case.

In 7A Wright & Miller, *Federal Practice & Procedure, §* 1775 at p. 470, the matter seemed to be put to rest when the text writers wrote:

> Disputes over whether the action is primarily for injunctive or declaratory relief rather than a monetary award neither promote the disposition of the case on the merits nor represent a useful expenditure of energy. Therefore, they should be avoided. If the Rule 23(a) prerequisites have been met and injunctive or declaratory relief has been requested, the action usually should be allowed to proceed under subdivision (b)(2). Those aspects of the case not falling within Rule 23(b)(2) should be treated as incidental. Indeed, quite commonly they will fall within Rule 23(b)(1) or Rule 23(b)(3) and may be heard on a class basis under one of those subdivisions. Even when this is not the case, the action should not be dismissed. The court has the power under subdivision (c)(4)(A), which permits an action to be brought under Rule 23 "with respect to particular issues," to confine the class action aspects of a case to those issues pertaining to the injunction and to allow damage issues to be tried separately.

A review of the testimony demonstrates that the predominant claims in this action are those of injunctive and declaratory relief. The monetary claims can be tried separately after there is a determination on plaintiffs' Rule 23(b)(2) request for injunctive relief. The Court of course, at this time, can make its order on class certification conditional. Rule 23(c)(1) F.R.C.P.

III

THE RULE UPON WHICH PLAINTIFFS SEEK CERTIFICATION OF THE CLASS

Plaintiffs desire that this Court certify the class under Rule 23(b)(2) which provides that:
An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied and in addition:

(2) 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 relief with respect to the class as a whole.

A case that plaintiffs had indicated to the Court in pre-class briefing, that could serve as a road map to the court, is *Wakefield v. Monsanto Company,* 120 F.R.D. 112 (D Mo 1988).

In *Wakefield,* Judge Gunn certified a class under Rule 23(b)(2) recognizing that such a request by plaintiff followed the procedure recommended by the Supreme Court in *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 360-62 (1981). The court noted that the Rule is appropriate when seeking final injunctive relief or corresponding declaratory relief. *Wakefield* at 117.

Wakefield was seeking to represent all black non-exempt employees at Monsanto who were discriminated against by reason of race in receiving lower pay, lower increases in pay, and fewer and less frequent promotions than white employees in the non-exempt category of employees.

Here plaintiffs are seeking authority from the Court to proceed under Rule 23(b)(2) since plaintiffs here as in *Wakefield* are seeking injunctive and declaratory relief and thus would fall within the parameters of the Rule. Further, the *Teamsters* case offers guidance to this court in the normal pattern and practice case as alleged here. At the initial liability stage after class certification, plaintiffs would have the burden to establish their prima facie case by showing that a policy existed of not hiring blacks, not promoting them, putting discriminatory disciplinary notices in their personnel files and discharging them for the illegal purpose of limiting the number of blacks in the Table Game Department.

The Court by certifying the class as 23(b)(2) would have an easier time to deal with the issues at the trial on the issue of the prima facie case on injunctive and declaratory relief on the policies and practices of the defendant being presented by an assertive class. If the Court would determine that injunctive and declaratory relief should be granted, the case would then go to the remedial stage of the trial. The court at that time would then determine the procedures to be employed for the determination of monetary and other relief. See *Teamsters* at 360, 361. This overall procedure would expedite the trial of the issues in the case.

If certification is made now under Rule 23(b)(3), then notices would have to be sent out to all prospective class members and

allow them to opt-in or opt-out. This would delay the trial date and complicate the proceedings. The issues in this case have now been clearly defined for the court, and an abbreviated pre-trial management order could have this case ready for trial under 23(b)(2) within a comparatively short time.

In *Sperry Rand Corporation v. Larson,* 554 F.2d 868, 875 (8th cir. 1977), the court also said that Rule 23(b)(2) certification is appropriate when plaintiffs seek injunctive relief from acts of an employer on grounds applicable to the class. It is obvious that the range of discrimination against blacks is pervasive at the Casino. The evidence before the court at this time demonstrates that plaintiffs could win on a preliminary injunction. *Dataphase Systems, Inc. v. CL Systems, Inc.,* 640 F.2d 109 (8th Cir. 1980). The Court should certify this action as a Rule 23(b)(2) action since the defendant has clearly acted on grounds applicable to the class making appropriate injunctive and declaratory relief.

IV

THE FOUR PREREQUISITES OF RULE 23(a)

Initially, the Affirmative Action Plans Submitted to the Gaming Commission each year from 1994 to 1997 support numerosity, commonality and typicality. Contrary to Jim Brown's testimony that the defendant isn't required to submit an affirmative action plan to the Gaming Commission by Federal law, and that he submits it as a voluntary plan (II - 204). A Missouri Statute 313.807 R.S.Mo. requires that the application for a gambling boat shall specify an affirmative action plan for ownership, contracting and recruiting, training and hiring of minorities and women in all employment classifications.

This mandated affirmative action plan filed by defendant reveals the core of the discrimination which affects the number of black people hired, promoted, disciplined and terminated in the Casino/Table Games Department.

The affirmative action plans have not been changed from their inception in 1994 except to change the name of the EEO Officer (P.Exhs. 6-10) from Rick Salinas to Jim Brown. With this background, plaintiffs deal with the requisites for a class action.

NUMEROSITY

Black Applicants:

The affidavit of Charles R. Oldham demonstrates that the defendant employed 372 whites in Casino/Table Games and Poker Departments and 18 blacks. The percent of black employees in the Casino/Table Games and Poker Departments is thus, 4.6%. Oldham's Affidavit also states that he reviewed the positions for supervisors and determined that in the year, 1997 there were a total of 72 whites who were in supervisory positions and no blacks (P. Exh. 13). In the discovery process, plaintiffs received about 25,000 individual forms that contained information as to the race and other information relating to each applicant. From this information, it was determined that there had been 232 black individuals who applied for a position in the Casino/Table Games and Poker Departments at the Casino St. Charles since the start of the Casino/Table Games, and that these people would constitute the applicant members of the proposed class. At the hearing, other blacks seeking employment were named by full name or first name in addition to the three prospective class members. Louis Gilden's Affidavit (P. Exh. 18) supports that the St. Louis Metropolitan Statistical area (SMSA) reflects a 16.4% black representation, in that there are 407,962 black individuals in a population of 2,492,525. Using the St. Louis SMSA, the blacks are under represented in the applicants accepted for hire by about 12% in the Table Games Department.

Plaintiffs' statistical expert, Dr. John Rice, whose credentials and qualifications as an expert are secure and should be accepted by the Court, did two (2) studies on the population employed on the boat as well as the population in the St. Louis Metropolitan area (P.Exh. 2). His statistics showed that in 1997, the last full year for which statistics are available, there were 5.43% blacks in the Casino/Table Gaming classification as against 22.27% blacks in other classifications on the boat. (The Poker Game classification was not included in Dr. Rice's study, and if it is included, the number of blacks is reduced to 4.6%, P.Exh. 13). The expert stated that the probability that this was due to chance is less than 000000000002. The percentages in the two groups are 7.04% standard deviations apart.

The second statistical test compared the 5.43% in the Casino/Table Gaming group to the 16.71% of blacks in the St. Louis SMSA. He found that the two groups are 5.7 standard deviations apart. He thus found in summation:

> the 5.43% rate of blacks in the Casino/Table group is *highly statistically* different from 22.27% rate in the group obtained by combing all other workers, and the 16.71% in the Greater Metropolitan area. (Emphasis supplied).

The defendant has complained that Dr. Rice is not an expert, and yet has not presented any evidence to rebut the mathematical calculations that support the highly statistical difference in the employment of blacks in the Table Games/Casino classification.

By contrast with this authenticity of statistics, the defendant presented the testimony of Jim Brown, who stated that the affirmative action plan has little effect on the boat's hiring practices (II-163).

Yet the 1997 Affirmative Action Plan (P. Exh. 9) states at p. 15:
XII. *Availability Analysis*

Because Station St. Charles is a business in the St. Charles area, the Company has committed to hire as many employees from the City and County of St. Charles as feasible. Therefore, the relevant recruitment area will be the City and County of St. Charles.

Labor Market Statistics for St. Charles County provided by the Missouri Division of Employment Security are based upon the 1990 census data and reflect 1993 updates.

A copy of these statistics is attached as Exhibit D. It is pertinent to note that the external availability information does not reflect the categorized availability of minorities and females in the jobs specific to the gaming industry, but is broadly categorized. Therefore, it is not possible to accurately determine with any precision the nature of the skills or abilities possessed by those minority and female persons in the workforce. This makes it difficult to determine whether the statistics reflect candidates for positions with similar content, wage rates and opportunities to the positions in the Company. The Company's analysis of availability and the establishment of goals is thus necessarily inexact.

Attached to this plan is the Labor Market Information for Affirmative Action Programs which shows that St. Charles County has a 2.3% distribution of blacks. Thus, the low numbers of the blacks hired which is submitted to the Gaming Commission would not show the Gaming Commission an underutilization of blacks since the defendant says the relevant recruitment area is the City and County of St. Charles. Further, an underutilization of blacks using the St. Louis SMSA, would have required Mr. Brown to do some work in monitoring the low number of blacks hired and promoted. He is the monitor and does not even know the number of black dealers or black supervisors in the Table Games Department (11-184, 187). It is to be noted that each of the annual affirmative action plans are basically the same, and the same statement of the relevant recruitment area is present in each plan. The self serving misstatement by the defendant of the relevant recruitment area given to the Gaming Commission runs contrary to the Supreme Court decision in *Hazelwood School District v. United States,* 433 U.S. 299 (1977), which states that the trial judge must make the determination as to whether the statistics which purported to show a prima facie violation had been gleened from the relevant labor market. 433 U.S. at 313. Dr. John Rice gave the startling figures of a difference of 5.7 to 7.04 standard deviations as to the number of blacks in the Table Games Department. In *Hameed v. International Association of Bridge, Structural and Ornamental Iron Workers, Local Union No. 396,* 637 F.2d 506, 514 (8th Cir. 1980), the court stated that a difference of two or three standard deviations is statistically significant at the five (5) per cent significance level. Also see, *Castaneda v. Partida,* 430 U.S. 482, 496-497 n. 17 (1977), in which the court stated for large samples, if the expected value in the observed number is greater than 2 or 3 standard deviations, then the jury drawing was suspect to a social scientist, and as *Hazelwood School District* at 308309 states at note 14, anything greater then 2 or 3 standard deviations would lead to a hypothesis that teachers were hired without regard to race would be suspect.

It is to be considered that in the class applicant pool in addition to the number of prospective hires are those black people who can prove that they would have applied for the gaming position had it not been for the defendant's discriminatory eligibility or selection criteria. See *Hameed* at 519, 520. *Teamsters,* 431 U.S. 367-368 (1981).

In addition, the Court has evidence that the Casino has job fairs and that it recruits in the City, and advertises in St. Louis, Chicago, New Orleans, Las Vegas, and Atlanta City, etc. (P.Exh. 35).

In fact, Lee Gibbs, an assistant shift manager, testified that he came from Mississippi, and that he heard of the opening in Las Vegas (11-138,139). It is to be noted that most of the individual plaintiffs did not live in St. Charles and St. Charles County when they applied for work in the Table Games Unit, but lived in the City of St. Louis, East St. Louis, IL, and elsewhere.

With respect to hire, defendant's evidence (D. Exh. CC) shows that there are 347 full time and extra board dealer positions which would mean that plaintiffs should have about 57 black positions assuming that the St. Louis SMSA is used which is about 16.4%. There are about twenty (20) positions now filled by blacks at this time making 37 black dealers positions available. See *Hameed* at 520-521. After certification of the class and trial on the liability phases, if plaintiffs prevail, the Court can later determine which applicants should or shall have the dealer positions.

As to promotions, D. Exh. CC shows that there are 89 supervisory positions. Until a short time ago, all supervisors were white, now there are two (2) dual-rate positions occupied by blacks, which would leave the 87 supervisory positions to be evaluated. Using the 16.4% rate for blacks, this would make 15 positions available for black supervisory positions.

With respect to termination, there were 18 terminations of blacks in 1997 (P. Exh. 11), this included plaintiffs Crockett, Forest, Garner, Grant, Moore, Shivers and Stacker.

The final count for numbers in the class is:

Applicants	232
Promotions	15
Terminations	21
	268

This number would support a finding of numerosity. The plaintiffs have briefed above that there is an interrelationship between each of the categories of hire, promotion, discipline and termination and thus, they should be a single unit for class certification.

It is the policy of the Casino to promote from within. In *Paxton v. Union National Bank,* 688 F.2d 552, 560 (8th Cir. 1982), the practice of promoting from within existed in the case, and the court held that it was not practicable to join all of the black employees who received lesser promotions or no promotions, and that none of them individually, could obtain the broad-based declaratory and injunctive relief that the class representatives sought. In *Paxton,* the court stated that the thread of discrimination should not be severed because the bank's procedures affected individual employees in different ways because of their diverse qualifications and ambitions.

The Court here should not fracture the unity of these various discriminatees for the same reasons.

COMMONALITY

The rule as set out in *Paxton* at 561 on commonality does not require that every question of law or fact be common to every member of the class, and may be satisfied for example, where the question of law linking the class members is substantially related to the resolution of the litigation even though the individuals are not identically situated.

The issue here is a pervasive race discrimination case in all categories of employment in the most sought after job on the boat. The barring of the door to blacks in the Table Games Department of the Casino obviously restricted their numbers for

promotion. The pattern and practice of disciplinary practices limited promotions, and ultimately led to the inevitable termination or forced resignation of African-Americans.

The defendant has put the plaintiffs to a high degree of proof in the class certification process, for it has raised matters involving the merits of the case in offering into evidence the answers to interrogatories of each plaintiff. This discovery was performed as a merits matter, and in substantial part is not relevant to the scope of this proceeding. Plaintiffs have previously briefed the matter of the scope of a class action proceeding to the Court, and the sole issue is whether the requirements of Rule 23 are met and not whether the claims are susceptible to a motion to dismiss or for summary judgment. *Eisen v. Carlisle & Jacqueline cf.,* 417 U.S. 156, 178 (1974). Despite this challenge on the merits by defendant, the Court has more than sufficient evidence to support the arbitrary and capricious way that promotions are handled by defendant. The right to apply when there is no discipline in your record within six (6) months is a neutral policy, certainly acceptable to the class. The issue as stated by each class member is the application of the policy. It is apparent that the ability to close down promotions to blacks is subject to supervisory control, which plaintiffs have testified is handled in a discriminatory manner. There are two road barriers to promotions; the write ups and the ranking process by superiors. The plaintiffs object to the arbitrary method of supervisors giving write-ups to blacks in a discriminatory way to prevent them from qualifying for promotions. They testified that whites are not written up for the same infractions. If blacks did qualify for promotion, the *white supervisors* rated and ranked the black dealer in his/her quest for promotion. In each case, the black applicant for promotions was told that he/she missed the promotion "by this much" with the fingers expressing a small amount. Lee Gibbs, the Assistant Shift Manager, identified the supervisor as David Williard who did this, and Williard was his boss (II-257). Mr. Gibbs said he doesn't know if the ranking process was joined in by two black supervisors, George Moore and Mitch Harper. George Moore denied that they were involved in the ranking (11-282).

Inevitably, the disciplines accumulated until there was no hope of advancement, and resignation and termination became the fulfillment of management for some of the black employees, while others were resigned to dealing with no hope of promotion.

The boat has been in existence since 1994, about four years, and it has accomplished a calculated plan of restricting the entry of black employee into the gaming unit, as well as the right of advancement.

The subtle method of accomplishing this was through the use of the St. Charles SMSA which appears to be a neutral policy, but it had a disparate impact on blacks, see *Griggs v. Duke Power Co.,* 401 U.S. 424 (1971), since it fell more harshly on them by the use of a wrong set of census figures which incorrectly used the wrong relevant labor market. Further, if the black applicant became an employee, the black employee encountered a promotion process which was also neutral in form, but fell more heavily on blacks. Under the defendant's thesis, all of the black dealers are inferior to the white dealers since all of the black dealers had write ups and did not rank as better qualified as white dealers. Even Fernando Grant and Terrance Dominick who had no write ups, could not achieve their goal of promotion since they missed it "by this much" and no reason could be given by Gibbs for the failure to promote them (II - 261,265). Thus, obviously no black is smart enough to have a full time supervisory position. This casts a cloud on all of the employment practices in the gaming unit of the boat; for they strike at the core of Title VII. The commonality requirement has easily been met since the questions of law or fact are common to the class. The commonality is shared by all of the blacks in the table games unit. The menial jobs in the restaurant and maintenance departments are replete with blacks exceeding the St. Louis SMSA.

TYPICALITY

In *Donaldson v. Pillsbury Co.,* 554 F.2d 825, 830 (8th Cir. 1977), the court stated that the requirement of Rule 23(a)(3) for typicality requires a demonstration that there are other members of the class who have the same or similar grievances as the plaintiff. This requirement was adopted as the law of the Circuit in *Wright v. Stone Container Corp.,* 524 F.2d 1058 (8th Cir. 1975).

In *Paxton v. Union Natl. Bank,* 688 F.2d 552 (8th Cir. 1982), the court stated at 562:

> The court must be shown that the representative is not alone in his or her dissatisfaction with the employer's unlawful practices so as to assure that there is a class needing representation.

It is clear that each of the plaintiffs claims of discrimination is sufficiently parallel to the interests of the other class members to assure a vigorous representation of the class.

The same single event, the use of the St. Charles SMSA which was the subterfuge given to the Gaming Commission and the public for the discriminatory polices of the defendant, became the forerunner of the employment promotion and termination discrimination policies. It is clear that claims of the plaintiffs are based on the same legal or remedial theories. *Paxton* at 561, 562.

THE PLAINTIFFS WILL FAIRLY AND ADEQUATELY PROTECT THE INTERESTS OF THE CLASS.

Each of the plaintiffs testified as to the respect that they have for the other plaintiffs, and each plaintiff has indicated he/she will fairly and adequately represent the interests of the class, and that the other members of the class will do so as well. George Frazier has testified as to his advocacy in this litigation by meeting with the press and radio, and by meeting with a civil rights group (I - 168-173).

In addition, in a class action, counsel who is experienced in class actions can give a strong weight to the adequacy of representation. Plaintiffs' counsel have filed their resumes' with the Court, and this demonstrates their familiarity with class action cases (P. Exh. 26, 27). In *Wakefield v. Monsanto Co.,* 120 F.R.D. 112,117 (D Mo. 1988), the court stated as to one of plaintiffs' counsel here:

> Wakefield's attorneys have shown that they have considerable experience in the field in which the suit [is] brought.

In addition, the plaintiffs have stated their unity in fighting race discrimination at the Casino. They want fairness, justice and equity, and they will not compromise the litigation except as approved by the Court and will pay the necessary costs to do so. A non-plaintiff black person testified that the plaintiffs would fairly and adequately represent the interest of the class. The plaintiffs have shown that the class representatives have common interests with the prospective members of the class and that the class will vigorously prosecute the interests of the class through qualified counsel. The plaintiffs have confidence in their representation by counsel here. See *Wakefield* at p. 117.

1. Plaintiffs do not see any potential conflict within the class. George Moore has testified that he disciplined Adrienne Wells and Nicole Anderson, but there are no write-ups in their files by Mr. Moore, and counsel does not see any likelihood of a conflict between Moore and Wells and Anderson.

2. Counsel has demonstrated the unity of all of the discriminatees, and does not anticipate any conflict in the class. If the Court has any concern, the certification can be conditional until a problem may arise.

PROPOSED NOTICE

Plaintiffs in view of their request for Rule 23(b)(2) certification will not have to send out notices to the class at this time. The notice requirement will occur when and if the court finds liability on the part of the Casino. Counsel attaches a form of Notice that could be sent at that time.

CONCLUSION

For the reasons stated here as well as in the briefs previously submitted to the Court, the court should certify the class defined by plaintiffs above, and then sever the liability and damage phases of the litigation and try the liability issue first.

<<signature>>

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