

No. 77-1502

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

WESLEY P. BERNARD, et al.,

Plaintiffs-Appellants

v.

GULF OIL COMPANY, et al.,

Defendants-Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

The following question ^{1/} will be addressed by the United States: whether the district court in this Title VII class action abused its discretion under Rule 23 of the Federal Rules of Civil Procedure when it issued a notice to the potential class and simultaneously imposed broad restrictions on communications between plaintiffs' counsel, the NAACP Legal Defense and Education Fund, and potential class members in the absence of any factual showing of actual or threatened misconduct by plaintiffs or their attorneys.

^{1/} EEOC has authorized the Department of Justice to represent to the Court that EEOC concurs in the arguments presented in this brief. EEOC is filing an amicus curiae brief addressing the other questions presented.

INTEREST OF THE UNITED STATES

The United States Department of Justice, along with EEOC, is responsible for enforcing the Nation's civil rights laws and executive orders relating to the field of civil rights, and accordingly has a strong interest in ensuring that the effective prosecution of civil rights cases by private parties and their counsel is not unduly frustrated by the imposition without cause of broad restraints on communications between plaintiffs or their counsel, and the prospective class.

Cf. 42 U.S.C. 1988. The United States is also interested in guaranteeing that the beneficiaries of settlement agreements negotiated between the government and employers have an opportunity to make an informed choice between accepting the settlement and pursuing a private right of action. Finally, since in the Fifth Circuit EEOC is subject to the requirements of Rule 23 of the Federal Rules of Civil Procedure when it prosecutes employment discrimination complaints, EEOC v. D. H. Holmes Co., 556 F.2d 787 (5th Cir. 1977), cert. denied, 436 U.S. 962 (1978), the United States has an interest in protecting its own ability under Rule 23 to communicate with alleged victims of discrimination.

STATEMENT

1. Procedural history

This class action was filed on May 18, 1976, by six present and former employees of Gulf Oil Company, alleging that the defendants had engaged in systematic and continuing employment discrimination against blacks at Gulf's plant in Port Arthur, Texas, in violation of Title VII of the Civil Rights Acts 1964 and 42 U.S.C. 1981 (App. 4).^{2/} Named as defendants are Gulf Oil Company and Oil, Chemical and Atomic Workers International Union, Local Union No. 4-23 (App. 66). The complaint charges that Gulf intentionally discriminated against blacks in its hiring, job assignments, promotions, pay, and training programs. It also challenges Gulf's discharge and discipline policies (App. 70-72). The local union, it is alleged, agreed to or acquiesced in these discriminatory practices (App. 72-73). The plaintiffs seek to represent a class composed of all present and past employees at the Port Arthur plant and all unsuccessful black applicants (App. 67). They request extensive declaratory, injunctive and monetary relief (App. 74-76).

As more fully explained below, the court without requiring any factual showing of need entered three orders shortly after the complaint was filed prohibiting the plaintiffs and their attorneys from communicating with prospective class members (App. 30, 56-59, 157). On January 11, 1977, the

^{2/} "App." references are to the separately bound appendix and "Supp. App." references are to the supplemental appendix attached to appellants' brief. "R." refers to the record.

court granted summary judgment to the defendants on the ground that the plaintiffs' claims were barred by the applicable statutes of limitations and the doctrine of laches (App. 181-185).

The plaintiffs then appealed to this court, asserting jurisdiction under 28 U.S.C. 1291. On June 15, 1979, a panel composed of Judges Thornberry, Godbold and Hill unanimously reversed the district court's grant of summary judgment and remanded the case for further proceedings. Bernard v. Gulf Oil Company, 596 F.2d 1249 (5th Cir. 1979), petition for rehearing en banc granted, No. 77-1502 (Sept. 27, 1979). They found that the plaintiffs' Title VII claims had been filed within the 90-day statutory time limit, that the Section 1981 claims were not barred by the applicable two-year statute of limitations, and that none of the claims was barred by the doctrine of laches. Ibid. However, the panel split on the question of the validity of the district court's order restricting communications with class members. Judges Thornberry and Hill, in part IV of the majority opinion, upheld the restraints. Ibid. at 1258-62. Judge Godbold, in a dissenting opinion, concluded that the restraints conflicted with Rule 23 of the Federal Rules of Civil Procedure and violated the First Amendment rights of the named plaintiffs, their counsel, and prospective class members. Ibid. at 1262-1276.

All parties petitioned for rehearing en banc. On September 27, 1979, the petitions were granted.

2. Facts

On April 14, 1976, Gulf, EEOC and the United States Department of Interior entered into a conciliation agreement in settlement of a Commissioner's charge, filed in 1967, alleging widespread racial discrimination by Gulf against black employees at its Port Arthur plant.^{3/} Under the agreement, Gulf agreed to cease allegedly discriminatory practices, to establish an affirmative action program which included goals for hiring and promotions, and to offer back pay to alleged victims of past discrimination (App. 15-28). Each person identified as an "affected class member" under the agreement was to receive a letter, signed jointly by Gulf and EEOC, explaining the back pay offer and instructing those who wished to accept it to sign an enclosed waiver releasing Gulf from "any and all claims against [it] as a result of events arising from its employment practices occurring on or before the date of release, or which might arise as the result of the future

^{3/} The Commissioner's charge, in addition to alleging discrimination on the basis of sex, claims that Gulf's Port Arthur plant failed to hire blacks while hiring whites, assigned black but not white Helper Pool workers to particularly dirty jobs, gave permanent promotions to whites but not blacks, and maintained segregated facilities. Brief of EEOC as amicus curiae, App. C.

Shortly before the Commissioner's charge was filed, a large number of Gulf employees filed individual charges of discrimination against Gulf. After a broad investigation and a finding of reasonable cause, EEOC attempted to conciliate these complaints but was unable to do so.

effects of past or present employment practices" (App. 20). Gulf agreed to mail the employees their back pay checks upon receiving the signed release. The notice was not required to mention the affirmative action goals or any of the other provisions of the conciliation agreement (App. 20).

Approximately two weeks after the conciliation agreement was signed (App. 36), Gulf sent letters offering back pay and soliciting releases to 614 present and former black employees and 29 female employees at the Port Arthur plant (Supp. App. 3-A).^{4/} The tendering of back pay and solicitation of waivers continued until this suit was filed on May 18, 1976, at which time Gulf temporarily suspended these activities (App. 29).

According to affidavits later filed by plaintiffs' counsel, the named plaintiffs held a meeting in Port Arthur on May 22, 1976 with members of the potential class as defined in the complaint (App. 51, 53). At the plaintiffs' request, their attorneys attended the meeting and answered questions

^{4/} The May 1 notice is attached to this brief as Exhibit 1. Although we were unable to locate this notice in the record, the notice sent by the district court to the prospective class pursuant to its June 22 order (App. 60-61) refers to and briefly describes Gulf's May 1 notice. See note 6, *infra*. We therefore assume that the contents of the May 1 notice were before the district court and may properly be considered by this Court.

On May 6, EEOC also sent a notice to the approximately 40 employees who had previously filed charges against Gulf.

concerning the conciliation agreement and the Title VII litigation (App. 51, 53). Because they are affiliated with the NAACP Legal Defense and Education Fund, a nonprofit organization, the attorneys at no time expected or agreed to receive compensation from the named plaintiffs or the class (App. 48). ^{5/}

On May 27, 1976, before responding to the complaint, Gulf filed a two-sentence motion for an order prohibiting communications between the parties or their counsel and actual or potential class members (App. 14). The motion was accompanied by an unsworn brief asserting that plaintiffs' attorneys at the May 22 meeting had told the employees not to accept Gulf's back pay offer and had represented that they could recover twice as much back pay in the pending suit (Supp. App. 4-5A). Gulf argued that a court order prohibiting communication between the attorneys and the prospective class was necessary in order for Gulf to proceed without prejudice in its defense of the case and its conciliation efforts (Supp. App. 5-A). In its brief, Gulf revealed that

^{5/} Any fees ultimately awarded by the court against the defendants will be paid to the Legal Defense Fund rather than to the individual attorneys (App. 48).

as of May 24, approximately 452 of the 643 employees eligible for back pay had accepted the offer and executed general releases (Supp. App. 4-A).

The following day, District Judge Steger, in Chief Judge Fisher's absence, heard oral argument on the motion, and the plaintiffs' attorneys denied Gulf's allegations. Judge Steger on the same day entered a temporary order prohibiting without exception all communications with potential class members. The order was effective until Judge Fisher could return and resume control over the case. It was not accompanied by findings of fact or conclusions of law (App. 30-31).

On June 8, 1976, Gulf filed an unsworn motion to modify the temporary order so that it could resume offering back pay awards and receiving releases pursuant to the conciliation agreement (App. 32). Again by an unsworn brief attached to its motion, Gulf added a new allegation of misconduct, claiming that the plaintiffs' attorneys had recommended to the persons at the meeting that even if they had already signed the release they should return the checks to Gulf (Supp. App. 7-A).

The plaintiffs filed a responsive brief challenging the constitutionality of the order and the district court's authority to issue it. Judge Fisher held a hearing on June 10 and allowed time for additional briefs. Accompanying their

next brief, the attorneys who attended the May 22 meeting filed affidavits in which they specifically denied each of Gulf's unsworn allegations of misconduct (App. 51, 54). The affidavits also asserted that it was necessary for the plaintiffs and their counsel to communicate with members of the proposed class in order to investigate the case, to complete discovery, and to define the issues involved and that, in light of the back pay offers made by Gulf under the conciliation agreement, it was of crucial importance that the plaintiffs' attorneys be able to provide information about the litigation and answer prospective class members' questions concerning their rights (App. 49, 51-52, 54). In their brief, the plaintiffs noted that many of the issues encompassed by the suit were not included in the matter covered by the conciliation agreement and that the relief provided was inadequate because the goals were improper, there was no firm commitment to timetables, and there was no relief from illegal testing. They also noted that the back pay notices did not explain how the back pay was computed and made no mention of the other relief provided in the agreement (R. 104-105).

On June 22, without making findings of fact, Judge Fisher entered a modified order prohibiting communications between the parties and the prospective class (App. 56-59). The order, explicitly modeled on a suggested order in the Federal Judicial Center's Manual for Complex Litigation, §1.41 (1977) (hereafter cited as the Manual), reprinted in 1 Moore's Federal Practice ¶1.41 (2d ed. 1979), generally forbids communications by all parties and their attorneys with proposed class members concerning the lawsuit without prior court approval of the proposed communications (App. 56-57). Exceptions from this prohibition include

communications between attorney and client, communications between attorney and prospective client when initiated by the prospective client, and communications in the "regular course of business" (App. 57). In addition, communications to which "any party or counsel for a party asserts a constitutional right" may take place without prior restraint as long as the party or attorney files with the court a written copy or summary of the communication within five days of its occurrence (App. 57). Finally, the order instructs the Clerk of the Court to mail a notice to employees covered by the conciliation agreement stating that they have 45 days in which to accept Gulf's back pay offer (App. 58). 6/

6/ The notice reads as follows (App. 60-61):

Pursuant to the Court's order, I have been asked to notify you that there is pending in the United States District Court for the Eastern District of Texas a lawsuit styled Bernard, et al v. Gulf Oil Company and Oil, Chemical and Atomic Workers International Union, Local Union No. 4-23, being Civil Action No. B-76-183-CA. This is a suit by six individual employees at Gulf's Port Arthur Refinery who have brought this suit on their behalf and on behalf of all other individuals who are similarly

On July 6, 1976, the plaintiffs moved for permission to communicate with members of the proposed class (App. 62-64).

6/(continued)

situated, and alleging that Gulf and the Union have discriminated against them and the class they represent in violation of Title VII of the Civil Rights Act of 1964 and the Civil Rights Act of 1866. This notice is being sent to you because you have been identified as an actual or potential class member who at some later date may be entitled to become a member of the class which the named Plaintiffs seek to represent.

You have received a notice from Gulf dated May 1, 1976, that you are entitled to an award of back pay under a Conciliation Agreement which has been negotiated on your behalf by the United States Equal Employment Opportunity Commission and the Office for Equal Opportunity, U.S. Department of Interior. The Court has asked me to inform you that at this time you have a choice of whether to accept the offer from Gulf dated May 1, 1976, and receive the back pay award as stated in that letter or you may decline to accept that offer at this time and at some later date be considered for inclusion in the class of individuals which the Plaintiffs seek to represent in the above mentioned lawsuit. If you decide to accept Gulf's offer, you should execute the receipt and release enclosed in Gulf's letter to you dated May 1, 1976, and return it to Gulf within 45 days from the date of this letter. If this is done, you will receive your back pay awarded [sic] shortly thereafter.

2

Claiming that the communication was constitutionally protected,^{7/} they attached to the motion the notice which they proposed to distribute, which urged black employees to consult a lawyer before signing the release (App. 65). The motion alleged that both Gulf's back pay offer to the employees sent in May and the notice sent by the Clerk failed to explain in full the terms of the conciliation agreement (App. 63). On August 10, two days after the 45 days for accepting Gulf's offer had expired, the court denied the plaintiffs' motion in a one-sentence order without explanation or findings (App. 157). This appeal followed the court's entry of summary judgment for the defendants on January 11, 1977 (App. 181-185).

6/(continued)

If you do not execute the receipt and release and deliver it to Gulf within 45 days from the date of this letter, it will be presumed that you do not wish to accept the offer contained in Gulf's letter of May 1, 1976. Any award you might receive as a result of the above mentioned lawsuit will depend upon whether you are included in any class so certified by the Court and whether the class is declared entitled to an award of back pay by the Court.

/s/
Clerk, U.S. District Court
Eastern District of Texas

7/ Although the order of June 22 allows the plaintiffs to engage in constitutionally protected communications prior to obtaining court approval if copies or summaries are filed within 5 days, the plaintiffs decided to seek court permission first since they had already been charged with unethical conduct.

SUMMARY OF ARGUMENT

Shortly after this Title VII class action against Gulf Oil Company was filed, the district court imposed broad restrictions on the plaintiffs' and their attorneys' ability to communicate with members of the potential class. This action was an abuse of the district court's discretion under Rule 23 of the Federal Rules of Civil Procedure because it was not based upon a specific showing of actual or threatened misconduct or abuse of the class action procedure which has prejudiced or will prejudice the defendants.

The efforts of plaintiffs and their attorneys to provide information about the lawsuit to potential class members and to answer questions concerning their rights were fully consistent with Rule 23. The plaintiffs and their attorneys are entitled under Rule 23 to encourage common participation in a lawsuit. They are also entitled to assist the potential class members in deciding to accept or reject the conciliation agreement negotiated between EEOC and Gulf. This assistance is particularly justified in this case because Gulf has failed to fully inform the potential class of the terms of the proposed settlement and of the consequences of signing the release. Moreover, Gulf has failed to substantiate its unsworn allegations of unethical and improper conduct.

The district court also abused its discretion under Rule 23(d) in directing the Clerk of the Court to notify the potential class members of Gulf's back pay offer. The notice is defective on its face because it fails to adequately describe this litigation or the consequences of accepting Gulf's offer and fails to name counsel for the parties. In addition, by giving the employees a second chance to accept Gulf's back pay offer without fully describing it, the notice unfairly reinforces Gulf's position.

ARGUMENT

THE DISTRICT COURT ABUSED ITS DISCRETION UNDER RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE WHEN IT ISSUED A NOTICE TO THE POTENTIAL CLASS AND SIMULTANEOUSLY IMPOSED BROAD RESTRICTIONS ON COMMUNICATIONS BETWEEN PLAINTIFFS' COUNSEL, THE NAACP LEGAL DEFENSE AND EDUCATION FUND, AND POTENTIAL CLASS MEMBERS WITHOUT REQUIRING ANY SHOWING OF ACTUAL OR THREATENED MISCONDUCT BY PLAINTIFFS OR THEIR ATTORNEYS

- A. Judicial Restrictions on Communications With Potential Class Members Initiated by Plaintiffs or Their Counsel Can Only be Imposed Under Rule 23 of The Federal Rules of Civil Procedure In "Appropriate" Cases, Requiring at a Minimum a Specific Showing of Actual or Threatened Misconduct or Abuse of The Class Action Device Which Has Prejudiced or Will Prejudice the Defendants

The restrictions imposed by the district court on the plaintiffs' and the Legal Defense Fund's ability to communicate with members of the potential class of black employees raises serious questions under the First Amendment. In re Primus, 436 U.S. 412 (1978); NAACP v. Button, 371 U.S. 415 (1963). See also United Transportation Union v. State Bar of Michigan, 401 U.S. 576 (1971); United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217 (1967); Brotherhood of Railroad Trainmen v. Virginia ex rel. State Bar, 377 U.S. 1 (1964). Judge Godbold, in his dissenting opinion, 596 F.2d at 1270-1275, and the appellants have presented cogent arguments on these questions. Where a statutory basis exists for reaching a decision, however, the constitutional questions need not be addressed. Hagans v.

Lavine, 415 U.S. 528, 543 (1974). Since we believe that the question of whether the district court abused its discretion under Rule 23 in restricting communications between the plaintiffs and their attorneys on the one hand and the potential class on the other is dispositive, this amicus curiae brief only addresses this question.

Rule 23 authorizes the district court to issue "appropriate orders * * * (3) imposing conditions on the representative parties or on intervenors * * *." The purpose of the rule is to give the trial judge power to avoid potential abuses of the class action device and to safeguard the interests of absent class members by authorizing properly framed orders controlling the conduct of class actions. 3B Moore's Federal Practice ¶23.70 (2d ed. 1979). Orders which are commonly issued under this authority include orders consolidating several actions, designating general counsel, requiring the party asserting class action status to submit a more precise definition of the class, and fixing reasonable cut-off dates for intervention. Id. ¶23.73. Although the grant of authority is broad, it is not unlimited. See, e.g., Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) (finding that the district court lacked authority under Rule 23 to condition maintenance of a class action on a preliminary showing by the plaintiffs of substantial probability of prevailing on the merits); Coles v. Marsh, 560 F.2d 186 (3d Cir. 1977)

(finding that an order virtually identical to the order of June 22 issued in this case was inconsistent with Rule 23 and was not based on proper statutory authority). See also Hitt v. Nissan Motor Co. (In re Nissan Motor Co. Antitrust Litigation), 552 F.2d 1088,1096 (5th Cir. 1977). Orders issued under Rule 23(d) must be consistent with the purposes underlying Rule 23, warranted by the particular facts of the case, and within the court's "sound judicial discretion." 3B Moore's, supra, ¶23.73 at 23-492.

Since the district court's orders restricting communications with the class were based on its authority under Rule 23(d), the question before the district court was whether the orders sought by the defendants were "appropriate" given the record before it. As Judge Godbold points out in his dissent from the panel's opinion, the determination of what is appropriate in a given case involves an exercise of discretion, and orders that go beyond sound judicial discretion are subject to reversal on appeal. 596 F.2d at 1267.

The government submits that in employment discrimination cases it is never "appropriate" or within the district court's sound judicial discretion under Rule 23 to place such broad restrictions as were imposed in this case on the plaintiffs' and their attorneys' ability to communicate with potential class members in the absence of any factual showing of actual or threatened misconduct or abuses of the class action device which have prejudiced or will prejudice the defendants. At a minimum, this much is required in order to protect the

interests of the potential class, and the plaintiffs' rights to discover their case and to encourage common participation in a lawsuit in accordance with Rule 23. Coles v. Marsh, 560 F.2d 186 (3d Cir. 1977).

A similar standard has been adopted by the Third Circuit, the only Court of Appeals that has considered the issues raised by restrictions on contacts with class members.^{8/} The court has repeatedly struck down such restrictions, all of which were imposed without any factual showing of misconduct or prejudice, as both inconsistent with Rule 23 and violative of the First Amendment. In Rodgers v. United States Steel Corp., 508 F.2d 152 (3rd Cir. 1975), cert. denied, 423 U.S. 832 (1975), a Title VII case, the court invalidated a local rule imposing a complete ban on unapproved counsel-initiated contacts with the class, holding that the district court has no statutory power to require prior judicial approval of communications between the plaintiffs and potential class members where such communications seek to encourage common

^{8/} Although several district courts have issued orders restricting communications between the parties and the class, only one has given thorough consideration to the court's statutory and constitutional power to do so. In Waldo v. Lakeshore Estates, Inc., 433 F. Supp. 782 (E.D. La. 1977), the district court (J. Boyle) upheld a local rule modeled upon the Manual's proposal. The bulk of the opinion addresses the constitutional arguments against its validity (discussed in Judge Godbold's dissent, 596 F.2d at 1274-1275). In a final paragraph, the court dismisses the argument that the rule is inconsistent with Rule 23. Its reasons for doing so are largely inapplicable in this case, and are not persuasive. See pp. 27-28, infra.

participation in the lawsuit. After the class action had been filed but before it had been certified, the defendants sought and received permission to solicit releases from and award back pay to members of the potential class pursuant to the terms of an industry-wide consent decree negotiated between EEOC and the steel industry. United States v. Allegheny-Ludlum Industries, Inc., 63 F.R.D.1 (N.D. Ala. 1974), aff'd 517 F.2d 826 (5th Cir. 1975), cert. denied sub nom. Harris v. Allegheny-Ludlum Industries, Inc., 425 U.S. 944 (1976). However, the district court, without making any findings of need to restrict contacts, denied the plaintiffs' motion to communicate with the class. The Third Circuit found that the local rule was an attempt to regulate the practice of law rather than an effort to protect the integrity of court procedures and that it impermissibly restricted the availability of the class action device "to those litigants willing to submit to an assertion of a dual power by the court -- the power to postpone class action determination and to impose a prior restraint in the meantime." Supra at 162.^{9/}

^{9/} The court found that the local rule violated the Rules Enabling Act, 28 U.S.C. §2071 (1970), and Rule 83 of the Federal Rules of Civil Procedure. These provisions give the district courts authority to adopt local rules which are consistent with Acts of Congress and the Federal Rules of Civil Procedure.

The local rule invalidated in Rodgers contained neither the enumeration of prohibited conduct (see pp. 27-28 infra) nor the exceptions (see pp. 10-11, supra) found in Judge Fisher's order of June 22. Coles v. Marsh, 560 F.2d 186 (3d Cir. 1977), however, made clear that these additions were not sufficient to overcome constitutional and statutory objections to orders restricting communications with potential class members. Coles involved a Title VII action in which the district court prior to class certification issued an order virtually identical to the order of June 22 issued by Judge Fisher in this case. The defendants' motion for the order was based on deposition testimony of the named plaintiff in which she indicated that she had contacted potential class members and the NAACP in an effort to interest them in the suit and that her attorney had made no effort to restrict her communications. Again finding that the order frustrated the purposes of Rule 23 and was an unauthorized attempt to regulate the practice of law, the Third Circuit set forth the standard to be applied by the district courts in ruling on motions to restrict certain communications, id. at 189:

We hold that to the extent that the district court is empowered under Rule 83 to restrict certain communications in order to prevent frustration of the policies of Rule 23, it may not exercise the power without a specific record showing by the moving party of the particular abuses by which it is threatened. Moreover, the district court must find that the showing provides a satisfactory basis for relief and that the relief sought

would be consistent with the policies of Rule 23 giving explicit consideration to the narrowest possible relief which would protect the respective parties. Imposition of an order on anything less than a clear showing of particularized need to remove it from the area of discretion unreviewable by mandamus.

This standard should be adopted by the this Court.^{10/}

A necessary implication of the panel's majority opinion is that orders restricting communications with the potential class are "appropriate" in every uncertified Title VII class action. For a number of reasons, this position is untenable.

10/ Judge Godbold, in his dissenting opinion, articulates the standard as follows, 596 F.2d at 1269:

Pretermittting constitutional limits, it seems to me that the district court must find that restrictions are "appropriate" upon a factual showing by the moving party that unsupervised communications between counsel and named plaintiffs on one hand and potential class members on the other have materialized into actual abuses of the class action device or that abuses are imminently threatened.

See also Seymour, The Use of "Proof of Claim" Forms and Gag Orders in Employment Discrimination Class Actions, 10 Conn. L. Rev. 920, 943 (1978).

First, it seriously handicaps the named plaintiffs' ability to litigate their individual claims of employment discrimination. Victims of employment discrimination have an unquestionable statutory right under Title VII to fully litigate their grievances in federal court and to have access to the full range of federal procedural protections and remedies available to other federal court litigants. Recognizing the strong national policy against employment discrimination, the Supreme Court has consistently upheld the right of private individuals to seek a full remedy from the effects of employment discrimination. Franks v. Bowman Transportation Co., 424 U.S. 747 (1976); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975). This right necessarily includes full access to the discovery techniques contemplated by the Federal Rules of Civil Procedure, which can be restricted only upon a showing of "good cause." Rule 26(c). By limiting the plaintiffs' right to contact class members, the court necessarily interferes with their discovery of the case and their efforts to further define the issues involved. Access to potential class members is essential in order to investigate their complaints, to prepare witnesses and to supplement through interviews the documentary material available from the defendants.

actions to eradicate unlawful discrimination are advancing a national policy of "the highest priority." Newman v. Piggy Park Enterprises, Inc., 390 U.S. 400, 401-402 (1968); Oatis v. Crown Zellerbach Corp., 398 F.2d 496 (5th Cir. 1968). It is inconsistent with these policies to restrict the utility and effectiveness of a class action suit without some showing of need.

Finally, as a practical matter a general restriction on communications with potential class members unreasonably restricts their access to counsel at a time when they may be in the process of deciding, as they were in this case, whether to pursue their rights to litigate their claims of employment discrimination or to accept the terms of a conciliation agreement. Seymour, supra, 10 Conn. L. Rev. at 937-939. The interests of absent class members are best protected if plaintiffs' counsel is available to provide information about the litigation and to explain their rights. This consideration is discussed more fully in specific reference to the facts of this case at pp. 31-34 infra.

B. The Efforts of Plaintiffs' Attorneys to Provide Information About the Lawsuit to Potential Class Members and to Answer Questions Concerning Their Rights Were Neither Unethical nor an Abuse of The Class Action Procedure but Instead Furthered the Interests of Plaintiffs and Potential Class Members in Accordance With Rule 23

1. Defendant's unsworn allegations of misconduct by the plaintiffs' attorneys at the May 22 meeting have been specifically denied by plaintiffs' attorneys and therefore are entitled to no weight

The basis for the defendants' original motion for an order prohibiting communications between the parties and the potential class was the claim that the plaintiffs' attorneys had engaged in unethical conduct at the May 22 meeting by discussing the conciliation agreement and the lawsuit and urging the potential class members to participate in the litigation rather than accept Gulf's back pay award. ^{11/}

Defendants argue that an order was necessary "[i]n order to prevent further communications of this type by all parties and their counsel to this suit * * *" (Supp. App. 5-A).

The allegations of misconduct, however, were contained in an unsworn brief and were never subsequently confirmed by affidavit or sworn testimony. Similarly, in support of their motion to modify the original order so that Gulf could continue soliciting releases and awarding back pay, the defendants made unsworn allegations of misconduct and those allegations also remain unsubstantiated (Supp. App. 7-A). In contrast, the attorneys present at the May 22 meeting have specifically denied under oath each allegation of the defendants. (App. 51,54) On this state of the record, there is no basis for finding that any unethical conduct occurred or was likely

^{11/} Although these allegations are denied in affidavits by the plaintiffs' attorneys (App. 51-54), it is by no means clear that they allege unethical conduct. The defendants' failure to substantiate the allegations, however, makes consideration of this question unnecessary.

to occur in the future. Despite Gulf's presentation of the allegations as if they had been tried and found, the defendants have failed to present any evidence of actual or threatened misconduct by the plaintiffs or their attorneys. To the extent that the court's order was based on Gulf's allegations, it was a clear abuse of discretion.

2. Defendants have failed to make any showing of actual or threatened abuse of the class action procedure

The order entered by Judge Fisher on June 22 adopts in substance a proposed local rule recommended in §1.41 of the Manual, forbidding unapproved direct or indirect written or oral communications by formal parties or their counsel and class members who are not formal parties. The Manual was written by the Federal Judicial Center, and provides guidelines to federal district courts for the efficient administration of complex and multidistrict litigation. It is not a binding authority.

The Manual's proposal is designed to prevent four types of potential abuses of the class action process, which are specifically enumerated in both the proposal and Judge Fisher's order: (a) solicitation of legal representation of class members who are not formal parties, (b) solicitation of fees, (c) solicitation by defendants of requests to opt out of the class pursuant to Rule 23(b)(3), and (d) "[unauthorized direct or indirect] communications from counsel or a party,

which may * * * misrepresent the status, purposes and effects of the class action, and of any actual or potential Court orders therein which may create impressions tending, without cause, to reflect adversely on any party, any counsel, this court, or the administration of justice." (App. 57). The first two types of abuses are inapplicable in this case because the plaintiffs' attorneys are affiliated with the NAACP's Legal Defense and Education Fund and have no financial interest in soliciting potential class members (App. 48). The third type of abuse is not at issue in this case.

The only arguable basis for a finding of potential abuse of the class action process is (d). Misrepresentation of the status, purpose or effects of the action and of court orders by either party or the attorneys might well be cause for concern, if it occurs. But in this case, as already discussed, there is no showing of misrepresentation or even the reasonable likelihood thereof. The mere possibility of misrepresentation, present in every case, is not sufficient justification to impose such sweeping restrictions on communications. Coles v. Marsh, supra, 560 F.2d at 189.

The Manual cites Craig v. Harney, 331 U.S. 367 (1947), Bridges v. California, 314 U.S. 252 (1941), and United States v. Tijerina, 412 F.2d 661 (10th Cir.), cert. denied, 396 U.S. 990 (1969), in support of the district court's inherent power to prohibit unapproved contacts with class members. In each of these cases, the First Amendment rights of the press and the parties to comment on pending trials were balanced against the right to a fair trial. In the two Supreme Court cases, the First Amendment rights were held to outweigh the right to a fair trial. These cases simply do not support unbridled discretion in the district court to regulate communications between counsel and class members. The Third Circuit was undoubtedly correct when it found that the authors of the Manual "probably went too far" in relying on these cases. Rodgers, supra, 508 F.2d at 165; see also Seymour, supra, 10 Conn. L. Rev. at 942-943. The district court's reliance on the Manual without requiring a factual showing of actual or potential abuses of the class action procedure was an abuse of discretion.

3. The efforts of plaintiffs' attorneys to provide information about the lawsuit to potential class members and to answer questions concerning their rights were proper in all respects and fully consistent with Rule 23

In order to expedite the disposition of similar cases, Rule 23 authorizes named plaintiffs to encourage common participation in a lawsuit. Coles v. Marsh, supra, 560 F.2d at 189. It is noteworthy that the defendants have not challenged the named plaintiffs' right to conduct meetings for this purpose. Absent a showing of unethical conduct, the plaintiffs' attorneys, as agents of the plaintiffs, are as free as the plaintiffs to attend and participate in such meetings.

In this case, the attorneys were invited by the plaintiffs to attend the May 22 meeting "to discuss the issues involved in the lawsuit, the types of relief requested, and to generally explain some of the administrative and legal problems inherent in fair employment litigation." Affidavit of Ulysses Gene Thibodeaux at 2 (App. 51). Their actions of attending the meeting, providing information about the lawsuit, and answering questions of potential class members were in no sense improper and were fully consistent with the plaintiffs' authority under Rule 23 to encourage common participation in a lawsuit.

Another primary concern underlying Rule 23 is the protection of the interests of absent class members. 3B Moore's Federal

Practice ¶23.70. (2d ed. 1979).^{12/} The information provided by the attorneys about the recently filed lawsuit had a critical bearing on the employees' choice of accepting Gulf's settlement offer or proceeding with the litigation. These efforts to inform potential class members of their rights were fully consistent with the goal of safeguarding the interests of absent class members.

The conduct of plaintiffs and their attorneys was not in any respect rendered improper by the existence of a conciliation agreement in the process of implementation by Gulf. To the contrary, given the record in this case as discussed below, the efforts of plaintiffs' attorneys to provide information to the potential class were fully justified and proper attempts to protect the interests of the named plaintiffs and to ensure that minority employees made an informed and voluntary choice between accepting the benefits of the conciliation agreement and pursuing their private right of action.

^{12/} The policies underlying Rule 23 are applicable prior to the court's determination of whether the action may proceed as a class action. 3B Moore's Federal Practice ¶ 23.80 [3] (2d ed. 1979). The obligations of the court, the named plaintiffs and their counsel to protect the interests of the potential class arise immediately upon the filing of a class action complaint. See, e.g., Kahan v. Rosensteil, 424 F. 2d 161, 169 (3d Cir. 1970), cert. denied, 398 U.S. 950 (1970); Held v. Missouri Pacific Railroad Co., 64 F.R.D. 346 (S.D. Tex 1974); Rothman v. Gould, 14 F.R. Serv. 2d 1541, 1542 (S.D.N.Y 1971).

Although there is a strong federal policy favoring voluntary settlement of employment discrimination claims, individual victims of employment discrimination have an absolute right under Title VII to reject the terms of a conciliation agreement negotiated between the government and the employer. United States v. Allegheny-Ludlum Industries, Inc., 517 F.2d 826, 848 n. 26 (5th Cir. 1975), cert. denied sub nom. Harris v. Allegheny-Ludlum Industries, Inc., 425 U.S. 944 (1976). The individual claimant can proceed to trial even after the conciliation agreement has been approved by the court as fair, lawful and reasonable. Ibid.; Rodriguez v. East Texas Motor Freight, 505 F.2d 40 (5th Cir. 1974), vacated on other grounds, 431 U.S. 395 (1977).

In order to ensure that victims of employment discrimination have a meaningful opportunity to choose between accepting the terms of a conciliation agreement and proceeding with an independent lawsuit, the courts have carefully scrutinized the contents of court notices sent to employees. The employee must be given full appraisal of all relevant facts. United States v. Allegheny-Ludlum Industries, Inc., 63 F.R.D. 1 (N.D. Ala. 1974), aff'd, 517 F.2d 826 (5th Cir. 1975); Rodgers v. United States Steel Corp., 70 F.R.D. 639 (W.D. Pa. 1976). The employee also must be given "ample opportunity to reflect and seek advice" concerning his or her choice. Id. at 647. Releases solicited in conjunction with an offer of settlement pursuant

to a conciliation agreement or consent decree must be the product of a knowing and voluntary waiver by the employee of his or her rights. Alexander v. Gardner-Denver Co., 415 U.S. 36, 52 n. 15 (1974). A waiver of remedial rights guaranteed by federal civil rights laws "is not lightly to be inferred." Watkins v. Scott Paper Co., 530 F.2d 1159, 1172 (5th Cir.), cert. denied, 429 U.S. 861 (1976). Before it may be concluded that an employee has elected to waive the right to present a claim of discrimination in a judicial forum, it must be shown that at the time of executing the release the employee was given a full explanation of the consideration for the waiver and that the employee fully understood the extent of the bargain. Cox v. Allied Chemical Corp., 538 F.2d 1094, 1098 n. 5 (5th Cir. 1976), cert. denied, 434 u.S. 1051 (1977).

In this case, the potential class members were faced with a choice between accepting Gulf's back pay offer or being considered for possible inclusion in the plaintiffs' class action. Prior to the May 22 meeting, the only information they had received concerning their options was Gulf's letter offering back pay. See note 3, supra. They had never seen a copy of the conciliation agreement entered into between Gulf and EEOC, or had its terms explained to them. Nor had they seen a copy of the Commissioner's charge that triggered the settlement discussions.

The information made available to the potential class members prior to the May 22 meeting, contained in Gulf's notice, was clearly insufficient to enable them to make an intelligent choice between accepting Gulf's back pay offer and pursuing their private right of action. The notice does not describe any provisions of the agreement, such as the affirmative action goals, other than the back pay offer. Its description of the back pay offer fails to explain the formula used to compute the amount of each employee's offer or the general basis for the offer. Rather than encouraging the employees to reflect on and seek advice concerning the offer, the notice instructs the employees not to discuss the offer with anyone. It urges employees to sign a general release but at the same time informs them that they otherwise retain full rights to administrative and legal processes (Ex. 1).

Since the employees had never seen the conciliation agreement or had it explained to them, they had no way of knowing that it did not address several major areas of alleged discrimination, including testing and seniority, which were alleged in the plaintiffs' complaint and which would be waived by signing the release. Under all of these circumstances, the plaintiffs and their attorneys were certainly justified in meeting with the potential class in order to provide objective information concerning the suit. Rather than attempting to undermine the settlement, the plaintiffs and their attorneys were acting in a manner that was fully consistent with Rule 23.

C. The Notice Issued by the District Court to the Potential Class Inadequately Describes the Litigation and the Employees' Choice of Accepting or Rejecting the Back Pay Offer, Fails to Name Counsel for the Parties, and Unfairly Reinforces Gulf's Position

The court directed the Clerk of the Court to send a notice to employees affected by Gulf's back pay offer pursuant to its authority under Rule 23(d)(2) of the Federal Rules of Civil Procedure, which reads as follows:

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: * * * (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action * * * .

Rather than protecting the interests of absent class members, however, the court's notice unreasonably restricts their opportunity to make a meaningful choice between accepting Gulf's offer and remaining as a potential class members in the plaintiffs' litigation.

The notice is defective on its face in at least two respects. First, it fails to give a complete description of the litigation, mentioning only that a claim of employment discrimination has been filed by six employees on behalf of the class and naming the suit. This description contrasts sharply with the lengthy, thorough description of the litigation and the employee's rights approved in United States v. Allegheny-Ludlum Industries, supra, and in Rodgers v. United States Steel Corp., 70 F.R.D. 639, 644-645 (W.D. Pa. 1976). Second, it fails to name the attorneys for the parties. As a result, potential class members who had questions concerning their rights were deprived of the most likely sources of information. See Waldo v. Lakeshore Estates, Inc., 433 F. Supp. 782, 790 (E.D. La. 1977).

In addition, considering the preceding events, the notice appears to give Gulf's position the court's stamp of approval by giving affected employees a second chance to accept the offer and also by failing to supplement Gulf's first notice of May 1. Although the order restricting communications with the class on its face applies equally to all parties, the effect of the court notice is to give Gulf another opportunity to persuade its employees to accept its offer, while at the same time depriving the plaintiffs of an opportunity to contact the potential class.

CONCLUSION

For the foregoing reasons, the orders of the district court should be reversed and the judgment should be vacated and the case remanded to the district court for further proceedings.

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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of October, 1979,
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