IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Vivian Bert, et al,	)	Case No. 1:02-cv-467
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
AK Steel Corporation,	)	
	)	
Defendant.	)	

ORDER APPROVING CLASS ACTION SETTLEMENT

This matter is before the Court on the parties' joint motion to approve the proposed class action settlement. (Doc. 192) For the reasons that follow, the Court finds that the motion to approve the settlement agreement is meritorious, and it is therefore granted.

PROCEDURAL HISTORY

Vivian Bert and fifteen other named Plaintiffs filed this lawsuit in June 2002, on behalf of themselves and a potential class of similarly-situated persons, against AK Steel Corporation. Plaintiffs alleged that AK Steel discriminated against African American applicants in its hiring practices for entry-level positions at its steel manufacturing plants in Middletown, Ohio and Ashland, Kentucky. Plaintiffs sought to represent all African-American applicants who had not been hired by AK Steel. Plaintiffs also brought individual discrimination claims under Title VII and 42 U.S.C. §1981.

Plaintiffs moved for Rule 23 class certification in 2005, on

behalf of a more narrowly-defined class, African-American applicants who took and failed a pre-employment test used by AK Steel. After extensive briefing, this Court certified two subclasses under Fed. R. Civ. P. 23(b)(2). (Doc. 96, Order of January 19, 2007) One subclass consisted of African American applicants at the Middletown plant, who failed the test on or after September 12, 2001. The second consisted of African American applicants who failed the test in Ashland on or after August 12, 2001. The current class representatives - Darlene Denise Carter, Darrell Carter, Timothy Oliphant, Kay Jackson, and Marnie Carter - dismissed their individual discrimination claims. In several subsequent orders, this Court dismissed the claims of plaintiffs Vivian Bert, Donald Edwards, Thaddeus Freeman, Mary Harris, Tiffany Jackson, Dwight Lewis, Edward James Lewis, Michael Miller, Shawn Pryor, Allen Roberts, and Ronald Sloan. Thus, in addition to the class representatives, only the individual claims of Plaintiff Roderique Russell were pending when the parties held their settlement conference in May 2008.

Both before and after the class certification order, the parties engaged in extensive discovery. An initial attempt at settlement in January 2006 was not successful. However, the parties tried again, with the assistance of mediator Hunter Hughes of Atlanta, Georgia, and were able to reach a global settlement in May 2008. They filed a motion for preliminary approval of the proposed settlement on July 2, 2008 (Doc. 188), a motion this Court granted on July 8, 2008. (Doc. 190)

The terms of the settlement agreement provide that AK Steel will cease its use of its challenged pre-employment test, and will validate (at the company's sole expense) any pre-employment test it uses over the next three years. That validation study will be approved by a qualified individual approved by counsel for the parties. (Settl. Agr. §2.2) AK Steel agrees to pay Rodrique Russell $10,000 to settle his individual claims, and also to pay incentive awards of $10,000 to each of the five class representatives. (Id., §2.6) AK Steel will establish a class payment fund, the total amount of which will equal $3,400 times the number of class members who file a timely proof of claim form. According to the affidavit of the claims administrator, 153 identified class members were mailed the settlement information and a claim form. Fifteen of those packets were returned to the administrator as undeliverable, and no updated address information could be provided for those fifteen people. Counsel informed the Court that the administrator has good addresses for the balance of the class, 138 individuals. The administrator did not receive any objections from any class member to the proposed settlement. (Doc. 192, Declaration of Claims Administrator Mark Patton.) Under the terms of the proposed settlement, claim forms will be mailed upon final approval and entry of judgment. If all 138 class members return their claim forms, AK Steel's contribution to the class payment fund will be $469,200. The actual distribution of the fund to the class will be conducted by class counsel.

AK Steel has also agreed to pay Plaintiffs' attorneys' fees and expenses, in an agreed amount of $750,000. AK Steel absorbed all costs associated with the mailing of claim forms to the class members, including the claims administrator's fees for the mailings.

DISCUSSION

Rule 23(e) of the Federal Rules of Civil Procedure controls class action settlements, and requires the trial court to approve all such settlement agreements. The Court must direct reasonable notice of the settlement to the class members, hold a hearing, and expressly find that the settlement is fair, reasonable, and adequate. Fed. R. Civ. P. 23(e)(1). The trial court may only accept or reject the settlement as agreed to by the parties; the court has no authority to modify the terms of the agreement. Brown v. County of Genesee, 872 F.2d 169, 173 (6th Cir. 1989).

Reasonable notice of the settlement in this case has been directed to the individually-identified class members, and the Court held a fairness hearing on October 21. Therefore, the Court's remaining task is to determine whether the settlement is fair, reasonable, and adequate. In making that assessment, the trial court should consider the following factors: 1) the risk of fraud or collusion; 2) the complexity, expense and likely duration of the litigation; 3) the amount of discovery engaged in by the parties; 4) the likelihood of success on the merits; 5) the opinions of class counsel and class representatives; 6) the reaction of absent class members; and 7) the public interest. See

UAW v. GMC, 497 F.3d 615, 631 (6th Cir. 2007); Granada Invs., Inc. v. DWG Corp., 962 F.2d 1203, 1205 (6th Cir. 1992).

A. The Risk of Fraud or Collusion

The parties negotiated the settlement agreement with assistance from a private mediator, Hunter Hughes, who is experienced in mediating and resolving class action discrimination claims. The participation of an independent mediator in settlement negotiations virtually insures that the negotiations were conducted at arm's length and without collusion between the parties. Hemphill v. San Diego Ass'n of Realtors, Inc., 225 F.R.D. 616, 621 (S.D.Cal. 2005); In re Toys R Us Antitrust Lit., 191 F.R.D. 347, 352 (E.D.N.Y. 2000). The docket in this case reflects several prior attempts by the parties to reach a resolution, and counsel confirmed to the Court during the fairness hearing that the negotiations were hard fought.

Accordingly, this factor weighs in favor of approving the settlement.

B. Complexity, Expense and Duration of the Litigation

This case presented many complex issues, not the least of which was the potential for successfully establishing the disparate impact of AK Steel's test upon African American applicants. The parties devoted a significant amount of time to preparation of their respective experts, and the additional expense of taking this case to trial would be significant. The case was already over four years in litigation when this Court granted class certification; significant disputes at the summary

judgment stage were pending. If the case went to trial, a bifurcated procedure would likely have been necessary, due to the limited monetary relief available to the class under Rule 23(b)(2). The Court has no doubt that the required trials or hearings would have been time consuming, and that a complete resolution of the case would not be reached for several more years. This factor clearly weighs in favor of the proposed settlement.

C. The Amount of Discovery Completed

A significant amount of discovery had been completed by the time the proposed settlement was reached. All parties were afforded the opportunity and adequate time in which to assess the strengths and weaknesses of their respective positions. This factor also weighs in favor of approving the proposed settlement. See Bell Atlantic Corp. v. Bolger, 2 F.3d 1304, 1314 (3rd Cir. 1993)("[P]ost-discovery settlements are more likely to reflect the true value of the claim and be fair.").

D. The Likelihood Success on the Merits

Plaintiffs presented a qualified expert's opinion that AK Steel's test had a disparate impact on the class. Plaintiffs were able to achieve class certification on that question, and the parties were engaged in discovery and summary judgment briefing when they negotiated the settlement agreement. AK Steel had presented several significant arguments against its liability, supported by its own qualified expert. The issue of whether the challenged test was properly validated had not yet

been reached, and additional discovery (and perhaps additional expert opinions) would have been required. Great uncertainty exists concerning the ultimate outcome of this case. The Court cannot discount the distinct possibility that further litigation would have resulted in an adverse outcome for the Plaintiffs. The mechanism of the class fund ensures that all class members will receive some compensation. Given all of these considerations, the Court finds this factor weighs in favor of the proposed settlement.

E. Opinions of Class Counsel and Class Representatives

Class counsel are all experienced class action litigators. Mr. Childs has over thirty years of experience, and his law firm specializes in class action discrimination litigation. He has been involved in dozens, if not hundreds, of such cases. (See Doc. 81, Affidavit of Robert Childs) His opinion that the proposed settlement is fair to the class is entitled to considerable weight. See Turner v. Murphy Oil USA, Inc., 472 F. Supp.2d 830, 852 (E.D.La. 2007). The same observations pertain to Mr. Tobias. This factor unquestionably supports the approval of the proposed settlement.

F. Reaction of Absent Class Members

The claims administrator received no objections from any of the class members, and no objectors appeared at the fairness hearing. This silence supports the conclusion that the class members do not oppose the proposed settlement, including its incentive payments to the class representatives.

The Sixth Circuit has observed that incentive awards may be appropriate in some cases, but has not specified the appropriate circumstances. Hadix v. Johnson, 322 F.3d 895, 897-98 (6th Cir. 2003). In this district, trial judges have approved incentive awards for class representatives after consideration of several factors, including their actions to protect the rights of the class members and whether those actions resulted in a substantial benefit to the class members, whether the class representative assumed any direct or indirect financial risk, and the amount of time and effort spent pursuing the litigation. Enterprise Energy Corp. v. Columbia Gas Transmission Corp., 137 F.R.D. 240, 250 (S.D. Ohio 1991). Given the length of this litigation, the time necessary to respond to discovery requests and giving deposition testimony, and the absence of any objection from anyone to the rather modest proposed incentive awards in this case, the Court believes the awards are fair and reasonable.

Class counsel is also entitled to be fairly compensated for the work done and the results achieved in this case. The proposed settlement agreement reflects the parties' agreement that, solely for recovery of attorney's fees, Plaintiffs may be considered prevailing parties under Title VII, and entitled to recover reasonable attorney fees under that statute. Rule 23(h) permits the Court to award reasonable attorney's fees and costs by agreement of the parties. No class member has objected to the proposed payment. The Court is well aware of the extensive efforts of class counsel during this litigation. The agreed

amount also includes the expert fees incurred by the Plaintiffs; the length and complexity of the expert's affidavits previously submitted reflect a significant amount of work performed. The Court specifically finds that the proposed settlement amount for attorney's fees is eminently reasonable.

G. The Public Interest

Finally, the Court must consider the public interest in approving the settlement. Public policy favors settlement of class action lawsuits. Whitford v. First Nationwide Bank, 147 F.R.D. 135, 143 (W.D.Ky. 1992). Here, the proposed settlement will end this litigation after more than six years. It will also provide a benefit to the class members who may have been adversely affected by the challenged employment test, without protracted proceedings involving entitlement to back pay. And the injunctive relief obtained, discontinuance of the use of the test, will inure to the benefit of all job applicants, including those not within the class. The public interest weighs in favor of approving the proposed settlement.

The Court therefore finds that each of the pertinent factors weighs in favor of approval of the proposed settlement, with one caveat. During the fairness hearing, the Court questioned class counsel concerning the specific mechanics of allocating the class payment fund to the individual class members. It is clear that the specifics of a distribution plan have not yet been finalized; class counsel stated that it is likely that a "floor" payment will be set which every class member will be entitled to receive.

Final allocation of the additional funds will be based on submission of information from the class members concerning other employment. The Court has great respect for class counsel and has no doubt concerning their highest professional ethics. However, Rule 23 vests responsibility with the Court to protect all class members, and the Court has broad discretion to enter appropriate orders to achieve that goal. For that reason, the Court will retain jurisdiction over the settlement distribution procedures, and will require class counsel to submit a report to the Court prior to the final distributions, explaining the method of allocation of the funds and the reasons for the method chosen. Class counsel did not object to this Court's limited retention of jurisdiction for that purpose.

In all other respects, the Court approves the proposed settlement as presented.

CONCLUSION

For all of the foregoing reasons, the Court GRANTS the joint motion of the parties to approve the proposed settlement. (Doc. 192) The Court finds that, under Fed. R. Civ. P. 23(e), the settlement agreement is fair, reasonable, and adequate. Class counsel shall file a report with the Court **prior to** any distribution of funds to class members, explaining the basis for the distributions to each member. That report, or a progress report and a request for additional time, shall be filed no later than February 20, 2009.

SO ORDERED.

Dated: October 23, 2008

s/Sandra S. Beckwith
Sandra S. Beckwith, Chief Judge
United States District Court