

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

JAMES C. MILLER, Individually and on Behalf of all Others Similarly Situated Plaintiffs,	:	CIVIL ACTION
	:	
v.	:	
	:	
HYGRADE FOOD PRODUCTS CORPORATION and SARA LEE CORPORATION	:	
	:	
Defendants.	:	NO. 01-3953

Reed, S.J.

May 23, 2002

MEMORANDUM

Plaintiff James C. Miller (“Miller”) brought this putative class action alleging retaliation on the basis of race in violation of 42 U.S.C. § 1981 arising from the closure, in the summer of 2001, of the Philadelphia operations of Defendant Hygrade Food Products Corp., a division of Sara Lee Corporation (“Hygrade”). Presently before this Court in this pre-certification class action, is the motion of Miller to voluntarily dismiss this action with prejudice, (Document No. 12), pursuant to Federal Rules of Civil Procedure 23(e) and 41(a). For the following reasons, this Court will grant the motion.

I. Background

In September 1999, nine African-American employees of Hygrade, including Miller, filed a putative class action under § 1981 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, alleging racial discrimination and a racially hostile work environment. Miller v. Hygrade, No. 99-1087 (E.D. Pa.). This Court denied the motion of plaintiffs for class certification. See Miller v. Hygrade, 198 F.R.D. 638 (E.D. Pa. 2001). Thereafter, an additional one hundred and thirty (130) African Americans who had been putative members of the class

sought to be certified filed individual actions against Hygrade. These actions were consolidated for pre-trial purposes before this Court. In re Hygrade Employment Practices Litigation, No. 99-1087 (E.D. Pa.).

In June 2001, Hygrade announced that it would immediately cease operations at the Philadelphia plant. Thereafter, Miller commenced this retaliation action.

As the parties were negotiating the terms of discovery and case management orders in the individual actions, the Court inquired as to whether the parties were willing to consider settlement negotiations. The parties agreed to do so under the supervision of Magistrate Judge Linda K. Caracappa. With Judge Caracappa's very able assistance, a global settlement was reached providing for monetary relief for each of the one hundred thirty-nine (139) plaintiffs. The terms of the agreement were memorialized in a Confidential Settlement Agreement and Mutual General Release (the "Settlement Agreement") for each individual. Each individual plaintiff has executed the Settlement Agreement, and the parties have filed stipulations for dismissal with this Court retaining jurisdiction to enforce the settlements in each individual case.

Paragraph 3 of the Settlement Agreement provides, in relevant part, "Plaintiff further agrees to authorize his/her counsel to take all actions necessary to dismiss the Retaliation Action with Prejudice and to withdraw his/her claim(s) and rights to claim any moneys as a putative class member in the Retaliation Action."

No formal discovery or class certification procedures have taken place in this matter since the case was filed, although there has been some informal discovery and sharing of information between counsel for the parties.

II. Analysis

Federal Rule of Civil Procedure 41(a) governs voluntary dismissals of actions subject to the provisions of Rule 23(e) which provides: “A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.” The plain language of Rule 23(e) does not indicate whether the Rule applies to class actions which have not yet been certified.

The Court of Appeals for the Third Circuit agrees with the majority of the courts that any “suit brought as a class action should be treated as such for purposes of dismissal or compromise, until there is a full determination that the class action is not proper.” Kahan v. Rosensteil, 424 F.2d 161, 169 (3d Cir. 1970). See also Diaz v. Trust Territory of Pac. Islands, 876 F.2d 1401, 1408 (9th Cir.1989); Glidden v. Chromalloy Am. Corp., 808 F.2d 621, 626 (7th Cir.1986); 7B Charles A. Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure, § 1797 at 347 (2d Ed. 1986). But see Shelton v. Pargo, Inc., 582 F.2d 1298, 1314 (4th Cir. 1978) (oft cited opinion in which court held that while the “laborious process” required by Rule 23(e) is not mandated, court must be satisfied that there has been “no abuse of the class action device and no prejudice to absent putative class members.”).

While the majority of courts apply Rule 23(e) to not yet certified class actions, the same courts have also persuasively reasoned that the precise standards of that Rule do not apply because the dismissal is not *res judicata* against the absent members. See Diaz, 876 F.2d at 1408; In re Austrian and German Bank Holocaust Litig., No. 98 Civ. 3938 SWK, 2001 WL 228107, at *4 (S.D.N.Y. Mar. 8, 2001); In re Nazi Era Cases Against German Defs. Litig., 198

F.R.D. 429, 439 (D.N.J. 2000); Larkin Gen. Hosp., Ltd. v. AT&T, 93 F.R.D. 497, 501 (E.D. Pa. 1982).

Courts have thus focused on two inquiries in determining whether to grant dismissal of a pre-certification class action: (1) whether the dismissal is the result of collusion between plaintiffs and defendants or their counsel; and (2) whether the dismissal would prejudice absent class members. See Diaz, 876 F.2d at 1408; Holocaust Litig., 2001 WL 228107, at *4; Nazi Era Cases, 198 F.R.D. at 439; Gupta v. Penn Jersey Corp., 582 F. Supp. 1058, 1060 (E.D. Pa. 1984); Larkin, 93 F.R.D. at 501-02.

Counsel for plaintiffs has declared under penalty or perjury that the settlement negotiations were “lengthy and hard fought,” (Decl. of Stephen A. Whinston (“Whinston Dec.1”) at ¶ 6). Courts have determined that a statement of counsel attesting to the lack of bad faith or collusion, in the absence of evidence to the contrary, is sufficient, Nazi Era Cases, 198 F.R.D. at 440. More importantly, however, the individual settlements of which this dismissal is an integral part, were negotiated vigorously by both sides under the close and careful supervision of Magistrate Judge Caracappa who held a four day settlement conference ensuring that the final resolution of every case was the product of fair compromise by all of the parties. I therefore conclude that the dismissal is not collusive.

The prejudice inquiry is given less weight because a pre-certification dismissal is not legally binding on absent class members, and the absent members have at best a speculative reliance interest. See, e.g., Holocaust Litig., 2001 WL 228107, at *4; Nazi Era Cases, 198 F.R.D. at 440. Here, one hundred thirty-eight putative class members, as well as the named plaintiff, were specifically advised that this case would be dismissed as part of the overall

settlement. Each of those individuals agreed in writing to waive whatever rights they may have as putative class members here. (Whinston Decl. ¶¶ 5-6.)

It is possible that the one hundred thirty-nine (139) plaintiffs who have explicitly waived any potential recoveries under this case may not be the entire class as described in the Complaint.¹ There may be African American employees of Hygrade as of the date of the closure of the plant who engaged in protected activities but did not file a discrimination suit. Indeed, after settlement negotiations were concluded, twelve individuals approached plaintiffs' counsel seeking to join the litigation. (Whinston Decl. ¶ 7.) These individuals either had not responded to counsel at the time the individual cases were commenced, or had been previously unknown to counsel. (Id.) Plaintiffs' counsel declined to represent these individuals. (Id.) However, to guard against any potential prejudice, plaintiffs' counsel has certified that such individuals were notified in writing that this case is being dismissed and that they have the ability to commence litigation raising these issues. (Id.)

In addition, counsel for plaintiffs has certified to this Court under penalty of perjury that extensive efforts were made to identify as many individuals as possible who could be plaintiffs in the individual actions, In re Hygrade Employment Practices Litigation, No. 99-1087 (E.D. Pa.), and putative class members in this action. (Supp. Decl. of Stephen A. Whinston at ¶ 2). These efforts included conferring with the nine named plaintiffs of the putative class action filed in September, 1999, as well as with leaders of the Committee for Human Dignity, an organization of Hygrade employees, and urging these plaintiffs to provide counsel with names and addresses of potential plaintiffs or class members. (Id. at ¶ 3). Counsel held several open meetings inviting

¹ In addition, some of the one hundred thirty-nine plaintiffs are not members of the putative class, since their employment tenures with Hygrade ended before the plant closed.

potential plaintiffs or class members so that they could learn about their right to file individual cases and to participate in this putative class action. (Id.) Counsel made telephone calls and sent correspondence to individuals who appeared at the meetings, but did not follow through on submitting information. (Id.) These efforts continued through the course of the litigation. (Id. at ¶ 3). Counsel certifies that he is not aware of any additional potential absent members beyond the twelve aforementioned individuals. I therefore conclude that the likelihood of prejudice to absent members is extremely minimal and does not warrant denying the present motion. (Whinston Decl. ¶ 7.)

The question of whether to require notice is murkier. It is important to note that Rule 23(e) requires notice “in such manner as the court directs,” and the majority of courts have determined that the Rule does not contain an absolute notice requirement. See Diaz, 876 F.2d at 1408; Nazi Era Cases, 198 F.R.D. at 441; Larkin, 93 F.R.D. at 503; Gupta, 582 F. Supp. at 1060. This Court is inclined to hold that because there is no evidence of collusion and only negligible evidence of prejudice, notice is not mandated here. See Diaz, 876 F.2d at 1408; Nazi Era Cases, 198 F.R.D. at 441-42; Larkin, 93 F.R.D. at 503. However, this Court need not engage in a specific analysis of whether notice is warranted here because to the extent any notice is required, it is not necessary since, as detailed above, counsel for plaintiffs took all appropriate and reasonable steps in contacting every potential absent member.

III. Conclusion

Having found no evidence of collusion and no likely prejudice to absent class members, this Court will grant the motion of plaintiff Miller to voluntarily dismiss this action with prejudice and will not require notice to absent members. An appropriate Order follows.

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Plaintiffs,	:	
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v.	:	
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HYGRADE FOOD PRODUCTS CORPORATION and SARA LEE CORPORATION	:	
	:	
	:	
Defendants.	:	NO. 01-3953

ORDER

AND NOW, this 23rd day of May, 2002, upon consideration of the motion of James C. Miller to voluntary dismissal this action with prejudice, (Document No. 12), pursuant to Federal Rules of Civil Procedure 23(e) 41(a), based upon this Court's findings aforesaid, and for the reasons set forth in the foregoing memorandum, it is hereby **ORDERED** that the motion is **GRANTED** and this action against Hygrade Food Products Corp., a division of Sara Lee Corporation, is **DISMISSED** with prejudice; each party to bear their own costs and counsel fees.

This is a final order.

LOWELL A. REED, JR., S.J.