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Marion Waters v. Cook's Pest Control Inc.

Judge L. Scott Coogler

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Marion Waters v. Cook's Pest Control Inc.

Keywords

Marion Waters, Cook's Pest Control, 2:07-cv-00394-LSC, Race, African American, Black, Disparate Impact, Hiring, Service

employment at any Cook's location from March 1, 2005, through the date of preliminary approval, and who were denied employment, excluding all judicial officers or employees of the Federal courts within the second degree of affinity; employees of Plaintiffs' counsel; and any other person whose presence in the class would cause mandatory recusal of any judge assigned to the case.

3. With respect to the Settlement Class, the Court FINDS and CONCLUDES that: (a) the Settlement Class Members are so numerous that joinder of all Settlement Class Members in this action is impracticable; (b) under *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997), the manageability of a nationwide class, such as manageability issues arising from legal and factual variation, is not implicated in the settlement context, and need not be considered, because "the proposal is that there be no trial"; (c) Plaintiffs' complaint raises common questions of fact and law sufficient to meet the requirements of Rule 23(a)(2); (d) the claims of the Named Plaintiff are typical of the claims of the Settlement Class; (e) the Named Plaintiff and Class Counsel have fairly and adequately represented and protected the interests of all Settlement Class Members; and (f) a class action is superior for the fair and efficient adjudication of this action.

4. Marion Waters is APPOINTED as Class Representative.

5. Samuel Fisher, Robert Childs, Jr., and Toni J. Braxton of Wiggins, Childs, Quinn & Pantazis, LLC; Thomas F. Campbell and Ray Bonner of Campbell Law, P.C.; and Samuel Hill of the firm of Hill Turner are APPOINTED as Class Counsel.

6. Tommy Warren and Settlement Services, Inc., is APPOINTED as Claims Administrator to consider Claims for Settlement Compensation in accordance with the terms of this Decree and the Settlement.

7. The Court FINDS that the Class Notice fully, fairly, and accurately informed all Class Members of the material elements of this action and the proposed Settlement, and constituted: (i) the best practicable notice; and (ii) notice that was reasonably calculated, under the circumstances, to apprise members of the Class of the pendency of this action, their right to object or exclude themselves from the proposed Settlement, and their right to appear at the Fairness Hearing; and (iii) notice in conformity with the requirements of Fed. R. Civ. P. 23(c)(2). Notice was also sent to appropriate state and federal authorities pursuant to the requirements of the Class Action Fairness Act, 28 U.S.C. § 1715.

8. The proposed Settlement is APPROVED as fair, adequate and reasonable, and not the product of collusion among the parties.

9. The parties to the Settlement are AUTHORIZED and DIRECTED to comply with and to consummate the Settlement, in accordance with its terms and provisions.

10. The Court has made no findings concerning Cook's alleged violations of Title VII, 42 U.S.C. §1981, or any other federal, state or local law, regulation, order or rule, and Cook expressly denies any wrongdoing whatsoever. Accordingly, neither the Settlement nor this Decree shall constitute, and shall not be used in this or any other case or action as an admission or evidence of any violation of Title VII, 42 U.S.C. §1981, or any other federal, state or local law, regulation, order or rule. Neither this Settlement nor Decree shall be cited, offered, or construed as an admission or evidence (including but not limited to an admission or evidence of the propriety or feasibility of certifying a class) in this Action or any other action or proceeding except for purposes of seeking approval, fulfillment, or enforcement of this Decree or the Settlement. Notwithstanding the foregoing, this Decree or the Settlement may be used in any proceeding, in this Court or in mediation or arbitration, to enforce or implement any provision of this Decree or the Settlement or implement or enforce any orders or judgments of the Court entered in connection with this Decree or the Settlement. If this Decree or the Settlement is reversed or otherwise rendered ineffective for any reason, neither the Settlement nor this Decree shall be admissible for any purpose in this or any other action, and shall not constitute an admission by Cook's as to the suitability for class action treatment of these or any other claims.

11. Duke University Law Professor James Coleman of North Carolina is APPOINTED as Decree Monitor. If, for any reason, the selected Decree Monitor cannot

serve or complete his/her term, the parties, with the assistance of the Mediator, Hunter R. Hughes and Rogers & Hardin, LLP, will select the replacement. If the parties cannot agree, then the Mediator will make the selection. The Monitor shall have all powers necessary to effectuate the terms of the Decree. Among his/her duties and powers, the Monitor will review and approve the hiring procedures developed by Cook's and will periodically review hiring rates for African-Americans by location. In the event that the hiring data for qualified applicants shows statistically significant shortfalls in the hiring of African-Americans in any of the Monitored Positions² in any of Cook's locations (using applicant flow data analysis or any other method deemed appropriate by the Monitor), then the Monitor shall investigate the reason(s) for such shortfalls. If the Monitor determines that the shortfalls are for racially discriminatory reasons, then Cook's shall work with the Monitor to resolve the issues of concern to the Monitor. If such issues are not resolved to the satisfaction of the Monitor through such process(es), he may raise the matter with the Court for resolution by the Court. Cook's shall pay the fees and expenses of the Monitor.

12. The length of the Decree shall be three years from the entry of the Decree, but may be extended to a maximum of four years, to the extent necessary to resolve any issues still pending with the Monitor at the end of three years.

13. Cook's is ORDERED to institute the following measures:

²“Monitored Positions” means the positions of sales, pest control technician, or termite technician at any of Cook's facilities.

- A. Statement of Anti-Discrimination Policy. Cook's CEO shall issue to all employees a statement affirming Cook's anti-discrimination policy and describing its implementation. The statement will describe the reporting process if an employee believes a violation of the policy has occurred, without fear of retaliation. Cook's will draft the statement and decide how the statement will be disseminated, subject to approval by the Monitor.
- B. Training. Cook's shall institute periodic training of its hiring and other management and supervisory personnel regarding the terms of the Decree, and non-discrimination in hiring, and other terms and conditions of employment.
- C. Hiring. Cook's shall hire qualified applicants at each facility without regard to race. With the assistance and approval of the Monitor, Cook's shall establish objective, facially neutral hiring criteria that shall be used in the hiring process for the Monitored Positions during the term of the Decree. The criteria may be changed during the term of the decree with the consent of the Monitor. Cook's shall retain the right to make hiring decisions on a decentralized basis, and to consider subjective factors, including those that may arise from interviews, in

making hiring decisions. Further, Cook's will retain the right to use any lawful criteria in making its hiring decisions, with approval of the Monitor.

D. Recordkeeping. Cook's shall put in place mutually agreed upon recordkeeping procedures that shall include the compilation by each facility of applicant flow data (based on voluntary self-identification by applicants) by race, the number of Monitored Position hires by race, and a summary of the reasons for selection/rejection of each applicant for the Monitored Positions, which may be in the form of a menu or checklist approved by the Monitor for this purpose. All application materials for the Settlement Period³ shall be kept for the full term of the Decree, but the Decree shall provide that all such materials are to be kept in the custody of the Claims Administrator, shall be maintained in the strictest confidence, and may not be disclosed to any person except by order of the Court; provided, however, that on inquiry made by counsel regarding a specific Class Member, the Claims Administrator shall provide information in its possession relating to that Class Member. Cook's may retain copies of any such application materials,

³"Settlement Period" means the period from March 1, 2005 through January 27, 2012.

and is not required to submit applications made after the Settlement Period to the Claims Administrator.

14. Cook's, and its officers and managers in their official capacities, are hereby

ENJOINED:

- A. from taking any action which violates the terms of this Decree and from engaging in any employment practice that has the purpose or the effect of violating the terms of the Decree or discriminating against African-Americans on the basis of their race in violation of 42 U.S.C. §1981 or Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000 et seq.; and
- B. from engaging in, implementing or permitting any action, policy or practice which has the purpose or effect of retaliating against any prospective, current or former employee because of his/her participation as a party, claimant, witness or declarant in this action.

15. The amount of the Settlement Fund is \$2,500,000.00.

- A. Qualified Settlement Fund. The Settlement Fund shall be a "Qualified Settlement Fund" as described in Section 468B of the Internal Revenue Code, as amended, and Treas. Reg. § 1.468B-1 et seq. The Claims Administrator shall serve as the Trustee of the Settlement Fund, shall act in a manner necessary to qualify the Settlement Fund as a Qualified

Settlement Fund and to maintain that qualification, and shall administer the Settlement Fund subject to Court supervision. Cook's shall hereby be deemed to have made an election under Section 468B of the Internal Revenue Code to have the Settlement Fund treated as a Qualified Settlement Fund. Cook's shall timely furnish a statement to the Claims Administrator that complies with Treasury Regulation § 1.468B-3(e) and shall attach a copy of the statement to its federal income tax returns that are filed for the taxable years in which Cook's makes the required payments to the Settlement Fund. The Parties shall cooperate to ensure treatment of the Settlement Fund as a Qualified Settlement Fund and shall not take a position in any filing or before any tax authority inconsistent with such treatment.

- B. Establishment and Funding of Settlement Fund Account. The Parties have selected Settlement Services, Inc. ("SSI") as the Claims Administrator for this Settlement, and SSI has contractually agreed to perform the duties of the Claims Administrator set forth in this Settlement for the express benefit of the Parties and the Class. Cook's will pay the fees and expenses of the Claims Administrator. The Claims Administrator will open and administer an interest-bearing

account (“Settlement Fund Account”) with a unique Taxpayer Identification Number. Cook’s shall make two payments to the Settlement Fund Account: one installment in the amount of \$1.5 Million shall be paid on or before 10 business days after the Effective Date, and shall include payment of attorneys’ fees; the remaining balance of the settlement payment shall be paid no later than the later of the end of the first week of January 2013 or sixty days after the first installment.

- C. Disposition of Settlement Fund Account. The funds in the Settlement Fund Account shall be used to make all distributions required from the Settlement Fund in the manner and at the times specified in this Decree. The distributions will occur in such a way as to ensure that a Class Member will receive one payment only.
- D. Interest. All interest on the Settlement Fund Account shall be used, as directed by Cook’s Counsel, to pay costs of settlement administration or taxes on the interest. Any such interest shall not be subject to withholding and shall, if required, be reported appropriately to the IRS by the Claims Administrator. The Claims Administrator is responsible for the payment of all taxes on interest on the Settlement Fund.

16. The Settlement Fund will be distributed as follows:

A. Class Representative Service Award. The Named Plaintiff, Marion Waters, shall receive a Service Award in the amount of \$48,000 for participation in this action and his service to the Class. The Service Award shall be paid from the Settlement Fund.

B. Awards to Class Members. The Claims Administrator will calculate the amount of the settlement payment to each Class Member who has filed a timely and complete claim form, and has otherwise met the requirements for eligibility set forth herein, as follows:

i. The Claims Administrator shall assign points to each Class Member who submits a valid, complete, and timely claim form based on the following formula: one point for having made application for employment to Cook's during the covered period ("Covered Application"); one additional point for having made application for employment to Cook's more than once during the covered period, without regard to the total number of times the Class Member may have made application within the covered period; one quarter of one additional point for

each full calendar year since the first Covered Application was submitted, and ten additional points for having made a Covered Application to Cook's Decatur District Office. All points awarded to all Class Members shall be totaled, and the total funds remaining in the Settlement Fund after payment of the Expense and Fee Award and the Service Award to the named plaintiff, Marion Waters, from the Settlement Fund shall be divided by the total number of points to determine the value of each point. The settlement payment to which each Class Member is entitled shall be determined by multiplying the result of that calculation by the number of points awarded to that Class Member; provided, however, that no Class Member other than the named class representative, Marion Waters, shall receive a monetary payment exceeding one year's average pay for the highest-compensated class position (approximately \$32,000); and further provided, that the Claims Administrator may petition the Court to make adjustment to the awards calculations to relieve

unforeseen anomalous, grossly inequitable or suspected fraudulent results, and that either party to the Settlement Agreement may request the Claims Administrator to exercise his discretion to do so; and further provided, that under no circumstances shall Cook's be liable for any payments to the Settlement Fund, class counsel, or class members beyond the payments described in this Decree.

- ii. Basic Eligibility Requirements. To be eligible to receive a settlement payment, a Class Member must have applied for employment at a Cook's location during the Settlement Period, been denied employment, and at the time of application i) had graduated from high school or had obtained a GED, ii) possessed a valid driver's license, and iii) had never been convicted of a felony.
- iii. Requirement of Timely and Complete Claim Form. To recover his or her settlement payment, a Class Member must have returned to the Claims Administrator a complete, executed Claim Form and Release postmarked on or before May 29, 2012, along with an executed copy of

the Fair Credit Reporting Act (FCRA) Release. The Claims Administrator shall have the authority to investigate the information contained on the Claim Form and Release, which shall be executed under penalty of perjury. The Claims Administrator shall have the power to require additional information and verification from anyone submitting a suspicious claim, and, if a claim is deemed to lack credibility, to deny the claim if the additional information is not provided or deemed suspect in the sole discretion of the Claims Administrator.

- iv. Failure to Return Timely and Complete Claim Form. In the event that a Claim Form and Release is postmarked after the Claim Deadline, the Claims Administrator shall not make a payment to the Class Member from the Settlement Fund. In the event that a Class Member returns an incomplete Claim Form and Release, including, for example, by failing to include required enclosures, or by failure to include and executed FCRA Release, the Claims Administrator shall not make a payment to the

Class Member from the Settlement Fund, subject to the Claims Administrator's authority to investigate and seek additional information described in Section 16(B)(iii) above.

- v. Time for Depositing Award Checks. If a Class Member does not deposit, cash or negotiate his or her settlement check within one hundred and eighty (180) calendar days after the check is mailed, (a) the settlement check will be null and void; (b) the Class Member will be barred from receiving a monetary award under this Decree except for good cause shown, which shall be determined by the Claims Administrator; and (c) subject to (b) above, the amount of such a check will revert to the Settlement Fund.

- C. Awards and Tax Documents. The Claims Administrator shall mail awards to those Class Members, or to the estates of deceased Class Members, who are entitled to receive such awards. Also, such mailings shall, to the extent practical, include any tax documents that are required to be sent to Class Members in connection with their awards;

if that is not possible, the Claims Administrator will mail any tax documents that are required to be sent to Class Members in connection with their awards as soon as practicable.

- D. Tax Allocation of Awards. The settlement awards to Class Members shall be allocated for tax purposes 18% to wages and 82% to non-wages. This allocation is based on the nature of the claims asserted (which claims Cook's denies). The amounts allocated as wages shall be treated as wages and subject to payroll taxes.
- E. Tax Obligations. The Claims Administrator shall withhold from each Class Member's award, and timely disburse to the IRS or other appropriate authorities, the employee's portion of payroll taxes and tax withholding attributable to the wages component of each Class Member's Award. The Parties shall have no responsibility or liability for any federal or state taxes owed in connection with the payments to Class Members made in connection with this Settlement Agreement.
- F. Tax Reporting. The Claims Administrator shall prepare and provide to each Class Member receiving a payment from the Settlement Fund a Form W-2 (for wages) and (if applicable) a Form 1099 (for non-wages) for these payments. The Class Representative will also receive

a Form 1099 for any Class Representative Service Award. Class Counsel will receive a Form 1099 for the attorneys' fees and costs awarded to Class Counsel. The Parties hereto shall cooperate with the Claims Administrator, each other, and their tax attorneys and accountants to the extent reasonably necessary to carry out the provisions set forth in this paragraph.

- G. Dispute Resolution. In the event of any dispute or issue raised by any of the Parties, by any Class Member or by any individual claiming to be a Class Member as to an individual's membership in the Class, an individual's timely return of a Claim Form and Release, the sufficiency or validity of a Claim Form and Release, the calculation of a Class Member's award or the Class Member's eligibility for such an award, the dispute or issue will be resolved by the Claims Administrator. The Claims Administrator's decisions on such disputes and issues shall be final, binding, and non-appealable.
- H. The Claims Administrator shall provide the Parties with a reconciliation of the Settlement Fund Account no later than ten (10) days after the Class Awards are mailed.

17. Class Counsel is AWARDED attorneys' fees, costs, and expenses in the amount of \$928,831.55 ("Expense and Fee Award"), to be paid out of the Settlement Fund. The Claims Administrator shall distribute funds in that amount to Class Counsel, or their designees, within twenty (20) days after the Effective Date. The amount of the Expense and Fee Award is independent of and apart from the amounts paid to Class Members, and Class Members shall at no time have any interest in the Expense and Fee Award. Cook's shall have no responsibility for the tax treatment of the Expense and Fee Award or any other payments paid to Class Counsel, or the tax treatment of any amounts paid under this Decree.

18. In the event that there is any residual in the Settlement Fund after the distributions required by this Settlement Agreement are completed, and subject to Section 15(D), that residual shall be donated in the parties' names (Cook's may opt to be unnamed) to the Birmingham Chapter of the United Negro College Fund. Any tax deduction associated with such donation shall belong to Cook's.

19. The following releases shall be effective:

- A. The named plaintiff, Marion Waters, shall execute a release that releases the Cook's Released Parties⁴ from any and all Released

⁴"Cook's Released Parties" means and includes Cook's Pest Control, Inc.'s past, present and future parent corporation(s), wholly and majority-owned company(ies), past, present and future affiliates, subsidiaries, divisions, joint ventures, predecessors, successors, successors-in-interest, and

Claims,⁵ and in addition waives any right to employment with Cook's and contains an agreement not to apply for employment with Cook's and that the Release constitutes a legitimate, non-discriminatory, non-pretextual and non-retaliatory reason not to hire him, or to terminate him if he has been hired pursuant to application made in violation of the Settlement.

- B. Each Class Member who has not opted out of the Class, regardless of whether the Class Member receives any monetary award pursuant to this Settlement Agreement, shall have fully, finally, and forever settled, remised, released, relinquished, acquitted, waived, and discharged any and all Released Claims against the Cook's Released Parties, and shall be forever enjoined from prosecuting all Released Claims against the

assigns; and all of these entities' employee benefit plans, fiduciaries, administrators, wage or benefit consultants, officers, directors, managers, employees, insurers and attorneys.

⁵“Released Claims” means any and all manner of actions, causes of action, suits, debts, judgments, rights, demands, damages, compensation, injuries to business, loss of service, expenses, attorneys' fees, litigation costs, other costs, rights or claims for reimbursement of attorneys fees, and claims of any kind or nature whatsoever, in law or equity, under any theory of common law or under any federal, state, or local law, statute, regulation, ordinance, or executive order that the Class Member ever had, whether directly or indirectly, that occurred from the beginning of time through December 31, 2011, WHETHER HERETOFORE OR HEREAFTER ACCRUING, WHETHER FORESEEN OR UNFORESEEN, OR WHETHER KNOWN OR UNKNOWN TO ALL OR ANY OF THE PARTIES that arise out of or in any way relate to Cook's failure to hire the Class Member because of his or her African-American race.

Cook's Released Parties. Furthermore, with respect to any and all Released Claims only, each Class Member who has not opted out of the Class, shall be conclusively deemed to, and by operation of the final judgment shall, waive and relinquish any and all rights or benefits they may now have, or in the future may have, under any law relating to the release of unknown claims. The foregoing release of claims was separately bargained for and a key element of the Settlement pursuant to which this Decree was entered.

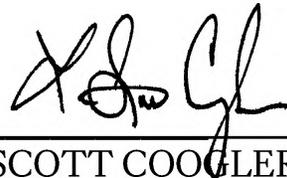
20. This Decree hereby incorporates the terms of the Protective Order previously entered by the Court.

21. Neither party, nor any counsel for either party, shall at any time make any statement to the media, post or make any public statement on the Internet or on any website or through any social medium whatsoever, including but not limited to Facebook, MySpace, Twitter and Linked-In, relative to claims asserted in this matter, this Decree, or the Settlement Agreement. The intent of the foregoing is to ensure that other than such public notices and filings made as a part of the settlement approval and administration process, this matter and its settlement are to be kept confidential by all counsel and the Named Plaintiff. Notwithstanding the foregoing, nothing in the Decree prohibits counsel from making statements regarding said Decree in any subsequent court filings.

22. This action will be dismissed with prejudice, subject to the Court's continuing jurisdiction to reopen the action in order to enforce this Decree or the Settlement. In the event the Judgment is reversed or the Decree or Settlement does not become final and binding for any reason, the Court shall vacate the dismissal with prejudice.

23. In the event that this Decree is appealed, its provisions shall automatically be stayed pending resolution of the appeal, including any motions for rehearing or rehearing en banc, or any petitions for certiorari. If the Decree is reversed or vacated, or the Settlement does not become final and binding for any reason, no Party shall be deemed to have waived any claims, objections, rights or defenses, or legal arguments or positions, including but not limited to, claims or objections to class certification, or claims or defenses.

Done this 17th day of July 2012.



L. SCOTT COOGLER
UNITED STATES DISTRICT JUDGE

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