

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

BARBARA GRUTTER,

Plaintiff,

vs.

LEE BOLLINGER JEFFREY LEHMAN,

DENNIS SHIELDS,

REGENTS OF THE UNIVERSITY OF MICHIGAN,

and THE UNIVERSITY OF MICHIGAN LAW SCHOOL

Defendants

Civil Action No 97-CV-75928-DT

HON. BERNARD A. FRIEDMAN

OPINION AND ORDER GRANTING PLAINTIFF'S MOTION FOR CLASS CERTIFICATION AND  
BIFURCATION

This matter is presently before the court on plaintiff's motion for class certification and bifurcation of the liability and damages phases of the trial. The motions have been fully briefed, and the court has heard oral argument. For the reasons stated below, the court shall grant the motion.

Plaintiff Barbara Grutter alleges that she is white and that in 1996 she applied for admission to The University of Michigan Law School. At first she was placed on a waiting list, but in June, 1997 her application was rejected. Plaintiff alleges that her application was rejected because The law school uses race as a "predominant" factor, giving minority applicants "a significantly greater chance of admission than students with similar credentials from disfavored racial groups," Complaint, para. R20,23. In their answer to the complaint, defendants "state that they do have a current

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intention to continue using race as a factor in admissions, as part of a broad array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." Answer, 119, 23.

Plaintiff asserts two claims. First, she claims that defendants discriminated against her on the basis of her race, thereby violating her Rights to equal protection under the Fourteenth

Amendment. This claim is brought under 42 U. S.C. secs. 1991 and 1983. Second, plaintiff claims that defendants violated a federal statute, 42 U.S.C. sec. 2000d, which prohibits recipients of federal funds from discriminating on the basis of race. For relief, plaintiff seeks a declaratory judgment to the effect that her rights were violated; an injunction prohibiting racial discrimination in admissions; compensatory and punitive damages; an order requiring defendants to admit her to the law school; and attorney fees and costs.

### Plaintiff's Motion for Class Certification

In this motion, plaintiff seeks to certify a class consisting of all persons who:

(A) applied for and were not granted admission to the University of Michigan Law School for the academic years since (and including) 1995 until the time that judgment is entered herein; and

(B) were members of those racial or ethnic groups, including Caucasian, that Defendants treated less favorably in considering their applications for admission to the Law School.

The motion is governed by Fed. R. Civ. P. 23. The relevant provisions of this rule state:

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only

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if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole;...

For plaintiff's motion to be granted, all four of the requirements of Rule 23(a) must be met; and, in addition, the case must come within at least one of the "class actions maintainable" described in Rule 23(b). See *Sprague v. General Motors Corp.*, 133 F.3d 388, 397 (6th Cir. 1998)(en banc). Further, the "[t]he party seeking class certification bears the burden of proof." *In re American Med. Sys., Inc.* 75 F.3d 1069,1079 (6th Cir. 1996).

Plaintiff argues that all of the prerequisites of Rule 23(a) are, met, and that the case is maintainable as a class action under Rule 23(b)(1) and (2) Defendants make a weak argument

that some. of the 23(a) prerequisites are not met, and a somewhat stronger argument that the case does not properly fall within 23(b)(1) or (2). Having considered all of the parties' arguments, the court is persuaded that class certification is appropriate in this case.

#### Rule 23 (a)

The numerosity requirement of Rule 23(a)(1) inquires into the impracticability of Joining all class members. See *In re American Med. Sys., Inc.*, 75 F.3d at 1979. This requirement is obviously met in the present case, as the proposed class could have thousands of members, In the class of 1998, for example, there were 4,073 applicants, of whom 1,059 were accepted and 3,014 were rejected, liven if only one-half of the rejected applicants fall within the proposed class, there would be over 1,500 class member for each academic year, At the moment, there are four such years in question (1995-1996, 1996-1997, 1997-1998, and 1998-1999). With over 6,000 potential class members there is no question that would be impracticable and that the numerosity requirement is satisfied.

The commonality requirement of Rule 23(a)(2) "is qualitative rather than quantitative, that is, there need be only a single issue common to all members of the class." *In re American Med. Sys. Inc.*, 75 F.3d at 1080, quoting I. H. Newberg & A. Conte, *Newberg on Class Actions* sec. 3.10. This requirement is also clearly met in this case. Plaintiff's claim is typical of in fact, it is completely the same as those of the class members. Plaintiff, like all of the proposed class members, claims that the law school's admission policy racially discriminates against non-minority

applicants

The typicality requirement of Rule 23(a)(3) "determines whether a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct." *In re American Med. Sys., Inc.*, 75 F.3d at 1082, quoting *Newberg on Class Actions* sec. 3.13. The requirement is satisfied "if the claims or defenses of the representatives and the members of the class stem from a single event or are based on the same legal or remedial theory." 7A C, Wright & A. Miller, *Federal Practice and Procedure* para. 1764, p. 243 (1986).

Defendants argue that plaintiff should not be permitted to represent the class until after she has shown that she would not have been rejected but for her race. In other words, if plaintiff would not have been admitted regardless of her race, she was not "injured" by the law school's admission policy, and in this event her situation would not be "typical" of those non-minority applicants who would have been admitted under a race-neutral procedure. Defendants therefore argue that the court should defer ruling on the class certification issue until after plaintiff has proven causation in her own case. Plaintiff correctly points out that defendants would have her prove the merits of her case at an improperly early stage of the litigation. Class certification is a procedural device for aligning similarly situated parties, and its application should not be contingent on the class representative proving the substantive merit of the underlying claim. In the present case, plaintiff and the proposed class members all have the same claim,

based on the same legal theory and stemming from defendants' use of the same admissions policy. The typicality requirement is

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clearly met[1]

For similar reasons, plaintiff is also an adequate representative of the class, as required by Rule 23(a)(4). The Sixth Circuit has indicated that this requirement has two components: "1) that the representatives must have common interests with unnamed class members, and 2) it must appear that the representatives will vigorously prosecute the interests of the class through qualified counsel." *In re American Med. Sys., Inc.* 75 F.3d at 1083, quoting *Senter v. General Motors Corp.*, 532 F.2d 511, 525 (6th Cir. 1976). Here, defendants repeat their argument 'that plaintiff does not have a "common interest" with the class until she shows that she would have been admitted under a race-neutral admissions policy. Again, however, defendants' argument fails because the adequacy of plaintiff's representation does not depend on the underlying merits of her claim. The legal issue is the same for plaintiff and all class members. Additionally, the court is persuaded that plaintiff, through competent counsel, will vigorously prosecute, the class claims.

For these reasons, the., court concludes that plaintiff has satisfied all of the requirements of Rule 23(a) numerosity, typicality, commonality, and adequacy of representation.

Rule 23(b)

The next issue is whether the case qualifies as one of the "class actions maintainable" under Rule 23(b)(1)(A), 23(b)(1)(B), or 23(b)(2). Plaintiff need only show that the case falls within one of these categories in order for her motion to prevail.

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Fn 1 In addition, neither plaintiff nor any of the class members need prove that they would have been admitted. As noted below, if the admissions policy is unconstitutional, then all non-minority applicants who were rejected have a claim for at least nominal damages.

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Rule 23(b)(1)(A)

As noted above, a class action is maintainable under Rule 23(b)(1)(A) if "the prosecution of separate actions by ... individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class."

This standard clearly is met in the present case. If the class members would prosecute 'individual claims, before different courts or before different judges of this court, there would be a "risk of inconsistent or varying adjudications.~ Some courts might find defendants' admission Policy unconstitutional, While others might uphold the policy. Different courts might find the policy to be unconstitutional for different reasons. And different courts might order different remedies For example, some courts might find it unconstitutional for race to be used at all and order that future applications be reviewed without any regard to race, while others might allow race to be considered but in a less prominent way than is now

the case.

Defendants argue that this case does not qualify under Rule 23(b)(1)(A), but their arguments are quite unpersuasive. First, defendants argue that Rule 23(b)(1)(A) does not apply to cases in which damages are sought, as this rule addresses the scenario where different results in different cases would subject defendants to "incompatible standards of conduct." Defendants argue that plaintiff has no standing to seek injunctive relief, and that therefore only her claim for damages remains.

This argument fails because plaintiff clearly does have standing to seek injunctive relief. Defendants rely on a line of cases holding that a plaintiff may not seek injunctive or declaratory relief unless there is a substantial risk that plaintiff will again be subjected to the same

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type of harm she suffered in the past, The leading case is *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), in which the Supreme Court held that plaintiff could not seek an injunction preventing the Los Angeles police department from using choke holds. A choke hold was used on plaintiff once, but there was no likelihood that he would ever be subjected to one again in the future. The present case bears no resemblance to *Lyons*. Plaintiff Grutter says that she would still apply to the law school, if she thought her application would be reviewed in a race-neutral fashion. If she proves that defendants' policy is unconstitutional, then she would be entitled to a declaration and an injunction in order to prevent defendants from violating her Fourteenth Amendment rights when she reapplies for admission

Second, defendants argue that Rule 23(b)(1)(A) does not apply because there is no risk of "incompatible standards" being imposed by different courts. Defendants acknowledge that some courts might find the policy constitutional, while others might reach the opposite conclusion. However, defendants see no possibility that they might be placed in a position where incompatible or conflicting orders would be issued. Defendants also argue that if there is such a risk, they should be permitted to assume the risk. This approach jeopardizes judicial economy, If the class is not certified, the constitutionality of defendants' admissions policy could be relitigated repeatedly in many individual lawsuit Judicial resources should be used efficiently. The constitutionality of defendants' admission policy should be determined in a single proceeding, not in a long procession of individual actions in various courts.

Rule 23(b)(1)(B)

Certification is appropriate under Rule 23(b)(1)(B) if "the prosecution of separate

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actions by ... individual members of the class would create a risk of adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests."

Defendants correctly argue that this subsection of Rule 23(b) does not apply in the present case. Rule 23(b)(1)(B) "allows class actions to be brought in cases in which separate suits might have undesirable effects on the class members, rather than on the opposing party." *Federal Practice and Procedure* sec. 1774, p. 437. Typically, such cases involve "class members [who] have claims against a fund that may prove insufficient to satisfy all of them." *Id.* at 441. In "limited fund" or "common fund" cases, the class

members assert similar claims against a limited amount of money, or against a defendant with limited resources. The danger is that some plaintiffs will collect while others will not, unless all claims are handled in a single proceeding.

This is not a "limited fund" case. Plaintiff is seeking primarily declaratory and injunctive relief, not damages. She does not contend that the law school would be unable to pay any damages which might eventually be awarded to the class members. Plaintiff argues that the "limited fund" rationale should be applied here due to the limited number of applicants who can be accepted

Plaintiff's argument is unpersuasive. Aside from the lack of support authority, the problem with this argument is that it would be impossible for the court to order that the limited number of law school seats be divided among the members of the class. In cases, where the class members are asserting similar claims against a limited fund, the court can order that the fund be divided pro rata among the class members. This cannot be done in the present case because the "limited resources" must be divided among all applicants, not just the class members, and

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whether a seat is awarded to a particular applicant will depend on individual consideration. This case simply does not lend itself to "limited fund" analysis.

Rule 23(b)(2)

Finally, a class action is maintainable under Rule 23(b)(2) if "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."

This subdivision of Rule 23(b) is the one which applies most directly to the present case. Plaintiff's claim is that defendants' admissions policy is racially discriminatory. If this claim is correct, then defendants have acted in a way "generally applicable to the class" and an injunction and/or declaration applicable to all non-minority law school applicants would be appropriate

Defendants make a number of arguments as to why the court should not certify under this subdivision. Again, however, the arguments are quite unpersuasive. Defendants' main argument is that certification under Rule 23(b)(2) is appropriate only when the class seeks primarily injunctive relief, and the proposed class does not seek injunctive relief. The first part of defendants' argument is correct, as both the plain wording of rule, and the case law, clearly indicate that Rule 23(b)(2) applies to cases where injunctive or declaratory relief is sought.

It is the second part of defendants' argument which breaks down. Plaintiff proposes to certify a class of those who "applied for and were not granted admission to the University of Michigan Law School for the academic years since (and including) 1995 until the time that judgment is entered herein." Clearly, the class seeks relief not only on behalf of those who applied in the past,

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but also on behalf of those who will apply in the future. Defendants argue that those who have applied in the past may seek only damages, The argument also fails because the class includes future applicants and defendants ignore the possibility that past applicants may reapply in the future. Plaintiff Grutter testified specifically at her deposition that she would reapply if the law school would review her application

without considering her race.

Defendants also argue that plaintiff, and the proposed class, seek "primarily monetary damages," not injunctive relief. Defendants point to the facts that plaintiff seeks damages for emotional injury and has demanded a jury trial, which presupposes a claim for money damages. However, the more fact that plaintiff has included in her complaint a claim for money damages doesn't begin to demonstrate that the claim *primarily* seeks damages. To the contrary, at her deposition plaintiff indicated that she is primarily interested in obtaining injunctive and declaratory relief.

Defendants also argue that plaintiff, and the proposed class, lack standing to seek any injunctive relief because they have "no specific present intention to seek future admission to the Law School." Here defendants rely on the line of cases, beginning with *Lyons*, which hold that a plaintiff may not seek an injunction to enjoin a practice which does not threaten plaintiff with immediate and irreparable injury. Defendants correctly note that plaintiff *Lyons* was not permitted to seek an injunction enjoining the Los Angeles police department from using choke holds, because there was no reasonable likelihood that plaintiff would be subjected to a choke hold a second time. The present case is different. Plaintiff has testified that she *will apply* to the law school if the admissions policy is changed. And the proposed class includes those who will apply in the future -- "until the time that judgment is entered herein."

The court concludes that this case is maintainable as a class action under Rule

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23(b)(1)(A) and 23(b)(2), but not under Rule 23(b)(1)(B). As all of the prerequisites of Rule 23(a) are also satisfied, the court shall grant plaintiff's motion for class certification.

#### Plaintiff's Motion for Bifurcation

Plaintiff also asks that the court bifurcate the trial into liability and damages phases. The first phase would determine whether the admissions policy is unconstitutional and whether injunctive and/or declaratory relief should be awarded. The second phase would determine the amount of any damages which should be awarded, if any, to individual class members.

Defendants agree that the trial should be bifurcated into liability and damages phases. However, defendants believe that the issue of "causation" should be decided in the liability phase. Defendants appear to be arguing that there is no need to address the matter of damages for those class members who were not "injured" by the admissions policy - that is, those members who would not have been admitted even under a race-neutral policy.

In reply, plaintiff correctly argues that defendants' use of the word "Causation" in this context is incorrect. Any applicant who was rejected under an unconstitutional admissions policy has a cause, of action, as least for nominal damages. In *Northeastern Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993), the Supreme Court stated.

When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge, the barrier need not allege that he would have obtained the benefit but for the barrier, in order to establish standing. The "injury in fact" in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability

to obtain the benefit.

Similarly, in *Jordan v. Dellway Villa of Tenn.* 661 F.2d 588, 594 (6th Cir. 1981), the Sixth Circuit held that all African Americans who applied for an apartment, and who were rejected because of their race, could sue for at least nominal damages "even if the ultimate decision would have been the same had constitutional procedures been followed." In *Smith v. University of Wash. Law School* 2 F. Supp. 2d 1324, (W.D. Wash. 1998), Judge Zilly cited the above-quoted passage from *City of Jacksonville* and stated: "Plaintiffs challenging state action on equal protection grounds are not required to demonstrate that they would have received a benefit absent application of a discriminatory policy."

These cases make clear that all members of the class will be entitled to at least nominal damages if the admissions policy is found to be unconstitutional. Even those members who would not have been admitted under a race-neutral policy have a cause of action. Whether particular applicants would or would not have been admitted is, therefore, not relevant to the issue of liability. If the case proceeds to the damage phase, defendants would at that point have the opportunity to show that particular applicants would not have been admitted. Such a showing would reduce the amount of damages awardable to any such applicants. But in any event, this is an issue which will be relevant at the damages phase of the trial, not at the liability phase.

#### Conclusion

For the reasons stated above,

IT IS ORDERED that plaintiff's motion for class certification is granted. The class

will be certified because the case satisfies all four prerequisites of Rule 23(a) and, in addition, the case is maintainable as a class action under Rule 23(b)(1)(A) and 23(b)(2).

IT IS FURTHER ORDERED that plaintiff's motion for bifurcation is granted. The liability phase will determine whether the admissions policy is constitutional and, if it is not, whether injunctive and/or declaratory relief should be granted for the class. If the policy is found to be unconstitutional, then the damages phase will determine whether the applicants are entitled to damages and whether any additional injunctive relief should be awarded in individual cases.

BERNARD A. FRIEDMAN

UNITED STATES DISTRICT JUDGE

Dated: Jan. 07 1999

Detroit, Michigan