

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

SHARON HAMILTON, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.)	C.A. No. 00-635 GMS
)	
CITY OF WILMINGTON, a political)	
subdivision of the State of Delaware, <i>et al.</i> ,)	
)	
Defendants.)	

MEMORANDUM AND ORDER

I. INTRODUCTION

On July 7, 2000, the plaintiffs, temporary employees with the City of Wilmington, filed their complaint against the above named defendants. The civil rights complaint charged the defendants with violating the constitutional rights of the plaintiffs by refusing to provide them with health care and paid leave. The named plaintiffs purported to represent the entire class of City of Wilmington temporary employees. The court entered a schedule for the case on December 21, 2000 which set the deadline for motions on the class certification issue at April 16, 2001 and the dispositive motion deadline at July 16, 2001. Both motions were timely filed with the court. However, in August 2001, after the parties had briefed all issues but before the court could decide the motions, the parties informed the court that a tentative settlement had been reached.

After holding a hearing on the matter, the court certified a class of plaintiffs for settlement purposes only on March 26, 2002. The court then ordered the defendants to notify the potential class members. The court also notified the parties that it would conduct a fairness hearing regarding the settlement on July 18, 2002.

The fairness hearing was held as scheduled on July 18, 2002, with counsel for both sides and an adjuster from the City of Wilmington present. After hearing counsels' representations and the proffered testimony, the court indicated that it felt the settlement was fair and reasonable under current law. However, the court also advised the parties that it would issue an opinion which more fully explained its findings. This is that opinion. The court will now outline the facts of this case as they pertain to this settlement and will explain why this settlement is fair and reasonable.

II. ADDITIONAL BACKGROUND

The plaintiffs allege that upon his election as the mayor of Wilmington, the defendant Sills began an initiative to reduce the number of permanent city employees. According to the plaintiffs, this was to be accomplished through the hiring of temporary employees. The plaintiffs contend that this was a money saving measure for the City since temporary employees, unlike permanent employees, are hired outside of the City's merit system and are therefore excluded from employee benefits such as health care, pension benefits, life insurance, paid holidays, paid vacations, paid sick days and other benefits extended to merit system employees.

The plaintiffs were employees of the City of Wilmington during the relevant time period. According to Wilmington City Code section 40-27, all employees who are in the elective, exempt, or limited service are excluded from the merit system. The City Code defined the limited service to include part-time, seasonal, and temporary employees. Despite these clear directives, the plaintiffs claim that although they were classified as temporary employees, many of them worked full time hours for a year or more with no vacation and no benefits. The plaintiffs further assert that section 40-27 violated the Wilmington City Charter, and in particular Article VII of the charter.

Article VII states that, with very few exceptions, all city employees must be included in the merit system. The plaintiffs contended that their job classifications did not meet any of the outlined exceptions in Article VII. Thus, the plaintiffs claim that they should have been included in the merit system and provided with its benefits.

The plaintiffs filed their original complaint on July 7, 2000, and amended complaint on November 17, 2000. The complaint alleged violations of 42 U.S.C. § 1981, 42 U.S.C. § 1983, and the Wilmington City Charter. The complaint sought monetary relief for the missed benefits, as well as injunctive relief which would prevent the City from engaging in further acts of alleged discrimination.

The case proceeded and the court entered a schedule on December 21, 2000. The defendants timely filed their motion for summary judgment. In their motion, the defendants argued that the plaintiffs failed to state a viable claim under section 1981 because there were absolutely no allegations that the defendants acted with racial animus, or that the plaintiffs belonged to a protected class. The defendants further argued that the section 1983 claim, which was predicated upon an equal protection violation, was not viable because the employee classification system used by the City would ultimately pass rational basis review. In their response, the plaintiffs admitted the futility of the section 1981 claims. However, they continued to assert that the defendants' classification of temporary employees violated the Constitution because the only rational basis the defendants provided for the classification was saving money, and saving money. According to the plaintiffs, this justification cannot survive rational basis scrutiny.

In August 2001, as the court was preparing to rule on the defendants' summary judgment motion, the parties notified the court that they had reached a tentative settlement agreement. The parties then filed a joint motion for the certification of a class for settlement purposes only. The court held a hearing on this motion on March 26, 2002. After deciding that the representations of the attorneys were sufficient to meet the standards for preliminary class certification as outlined by the Third Circuit in *In re General Motors Corp. Pick-up Truck Fuel Tank Litigation*, 55 F.3d 768 (3d Cir. 1995), the court granted the motion on that date. At the conclusion of the March 26, 2002 hearing, the court instructed the parties to provide notice to the purported class of plaintiffs. The court further instructed the parties that a hearing regarding the fairness of the settlement would be held on July 18, 2002.

Between March and June of 2002, the parties circulated notice of the proposed settlement through certified mail and other means. The potential claimants were notified of their ability to opt-out of the settlement as well as their ability object to the settlement. In an affidavit dated June 17, 2002, counsel for the defendants, Kathleen McDonough, noted that only three potential plaintiffs requested to be excluded from the settlement. (D.I. 62 at 2.)

The court held the scheduled fairness hearing on July 18, 2002. Present at the hearing were counsel for the plaintiffs, Victor Battaglia and Phillip Bartoshesky, and Ms. McDonough. Also present with Ms. McDonough was Ms. Monica Gonzalez-Gillespie, Director of Personnel for the City of Wilmington. No other persons appeared at the hearing. No class members were present. Additionally, none of the persons who asked to be excluded appeared to object.

The court began the hearing by asking the parties various questions about the settlement. The court will now outline the applicable legal standard in the Third Circuit for determining whether a proposed settlement in a class action is fair, adequate, and reasonable. The court will then discuss how the testimony and statements adduced at the hearing establishes the fairness and reasonableness of the settlement at issue.

III. STANDARD OF REVIEW

The Third Circuit has stated that any proposed settlement of a class action lawsuit must be fair, reasonable, and adequate. *See General Motors*, 55 F.3d at 805. The Third Circuit has also provided its district courts with clear guidance on what constitutes a fair, reasonable, and adequate settlement. In *Girsh v. Jepsen*, 521 F.2d 153 (3d Cir. 1975), the Circuit announced nine factors which district courts should use to evaluate a proposed settlement. The *Girsh* court directed the lower courts to consider:

(1) the complexity, expense and likely duration of the litigation . . . ; (2) the reaction of the class to the settlement . . . ; (3) the stage of the proceedings and the amount of discovery completed . . . ; (4) the risks of establishing liability . . . ; (5) the risks of establishing damages . . . ; (6) the risks of maintaining the class action through the trial . . . ; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery . . . ; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation . . .¹

Id. at 157. The *Girsh* court also stated that the finding of fairness and reasonableness is “left to the sound discretion of the district court.” *Id.* The court will now consider whether the proposed settlement is fair, adequate, and reasonable in light of the nine *Girsh* factors.

¹ These nine factors were reaffirmed by the Third Circuit in the *General Motors* case. *See General Motors*, 55 F.3d at 805.

IV. DISCUSSION

A. The Stage of the Proceedings

The first *Girsh* factor requires the court to inquire into the stage of the proceedings. The purpose of this inquiry is to determine whether counsel had an adequate appreciation of the merits of the case before settlement negotiations began. *See General Motors*, 55 F.3d at 813. This factor might be satisfied where there has been sufficient time for discovery and legal research. During the hearing, Mr. Battaglia indicated that the case was filed on July 7, 2000. (Hearing Tr. at 10.) Thus, counsel have had slightly over two years to fully immerse themselves in this matter. Mr. Battaglia further indicated that there was an adequate opportunity for discovery, as he had received “[employee] records from the City that were . . . three feet high.” (*Id.*) Ms. McDonough verified that the defendants “produced voluminous documentation.” (*Id.* at 27.) Finally, Mr. Battaglia indicated that after the complaint was filed, he began to research the legal issues involved. (*Id.* at 11.) He indicated that his research revealed that there were several questions of first impression involved. (*Id.*)

Based on these representations at the hearing, the court finds that there was adequate opportunity for discovery and legal research. Thus, the court finds that this factor weighs in favor of finding that the settlement is fair and reasonable.

B. The Complexity and Duration of the Litigation

The second *Girsh* factor asks the court to determine the complexity and the duration of the litigation. This factor is intended to “capture the probable costs, in both time and money, of continued litigation.” *See General Motors*, 55 F.3d at 812.

The representations regarding financial cost made at the hearing established that as of July 2002, the plaintiffs' expenses in prosecuting the case had "far exceeded \$150,000." (Tr. at 15.) Mr. Battaglia further estimated that trying the case would have cost "somewhere between \$225,000 and \$300,000" exclusive of the "substantial" expert witness fees which could have ranged from \$20,000 to \$25,000. (*Id.*) Mr. Battaglia further estimated that an appeal of the case, which both parties agreed was likely, would cost an additional \$50,000. (*Id.* at 18.) Thus, the estimated cost to the plaintiffs to fully litigate this action are somewhere between \$445,000 and \$525,000.² Additionally, Mr. Battaglia represented that if the plaintiffs survived summary judgment, the litigation would have continued for another nine months.

Based upon the representations made at the hearing, the court finds that the potential duration and complexity of this case is such that settling the case at this juncture will save the parties both time and money. Therefore, the second *Girsh* factor weighs in favor of finding that the settlement is fair and reasonable.

C. The Reaction of the Class to the Settlement

The third *Girsh* factor requires the court to determine the reaction of the class to the proposed settlement. The Third Circuit has stated that to determine the reaction of the class, "courts look to the number and vociferousness of the objectors." *General Motors*, 55 F.3d at 812. The court may also consider the silence of the class and the number of persons who opted out of the class. *See id.* at 813.

² The hearing did not elicit a similar estimation of costs for the City. Nevertheless, the court presumes that the City's costs would have been similar to those presented by the plaintiffs.

The court first notes that Mr. Battaglia represented that there were approximately 93 claimants. (Tr. at 31.) Of this number, Mr. Battaglia stated that he believed there were two people that decided to opt out of the settlement. (Id.) Ms. McDonough indicated in her affidavit that there were three potential exclusions. (D.I. 62 at 2.) Thus, although there were 93 potential claimants, at most, only three of them elected not to participate in the settlement. Furthermore, with regard to objections, none were received, and no objectors appeared in court to contest the settlement (Tr. at 13, 31.)

Furthermore, although the parties initially believed that there could be over one thousand potential plaintiffs, the numbers were later reduced and the City eventually sent out approximately 500 notices to potential claimants. (*Id.* at 14, 29.) Mr. Battaglia stated that although he would have expected 35 of those contacted to apply for benefits, over 93 people eventually responded. (*Id.* at 29.)

The court finds that the putative plaintiffs were adequately advised of their right to object to or opt out of the settlement, and that despite this advice, the overwhelming majority of plaintiffs decided to participate in the settlement. The court further finds that the larger than expected number of claimants indicates that the members of the class responded positively toward the settlement. Therefore, the court concludes that the reaction of the class thus far has been favorable. This factor then also weighs in favor of finding that the settlement is fair and reasonable.

D. The Risks of Establishing Liability

The court must next inquire into the risks of establishing liability. “By evaluating the risks of establishing liability, the district court can examine what the potential rewards (or downsides) of litigation might have been had class counsel elected to litigate the claims rather than settle them.” *General Motors*, 55 F.3d at 814. In other words, the court must evaluate the strengths and weaknesses of each case to determine whether settlement is actually a fair method of resolving the claims.

During the hearing, Mr. Battaglia represented that he believed this case “was fraught with difficult legal issues” and presented a “close question.” (*Id.* at 12.) He indicated that after conducting “major research,” he and his associates concluded that there was a fifty-five percent chance that the plaintiffs would prevail on summary judgment, with a corresponding forty-five percent chance that the court would rule in the City’s favor. (*Id.* at 11.) Mr. Battaglia’s statements lead to the inference that there were persuasive arguments to be made on both sides. For instance, Mr. Battaglia stated that although he believed that he could make some sound arguments regarding medical care for temporary employees, the City had stated that under no circumstances would those employees have been entitled to medical insurance under the City charter. (*Id.* at 13.) Mr. Battaglia stated that given these close legal questions, the case “present[ed] the situation where it could be desirable for our people to take half a loaf.” (*Id.*)

For her part, Ms. McDonough stated that she believed the City had a fifty-five percent chance of prevailing on summary judgment. (*Id.* at 20.) Although Ms. McDonough gave the plaintiffs a forty-five percent chance of success, she indicated that, in the City’s opinion, there was absolutely no binding case law in support of the plaintiffs claim. Indeed, she maintained that there

was persuasive precedent from the First Circuit in opposition to the claims. (*Id.* at 21.) She indicated that on similar facts, the First Circuit had found that the employees were not entitled to benefits. (*Id.*) She also acknowledged, however, that the plaintiffs believed that the First Circuit case was distinguishable from the present case. (*Id.*) She also indicated that the City believed that the plaintiffs, or at least some of them, faced a considerable statute of limitations problem. (*Id.*) Despite the statute of limitations problem, Ms. McDonough conceded that even if some claims were time-barred, the remaining plaintiffs had a strong argument that the defendants' alleged acts violated the City charter. (*Id.* at 21-22.)

The representations of counsel during the hearing, coupled with the court's own review of the legal issues presented in the summary judgment briefs, establish that each side had some considerable strengths and weaknesses to its case. The court finds that just as the plaintiffs would have had difficulty establishing liability, the City would have encountered difficulties in defending against liability. The court thus finds that the parties' representations demonstrate that the risks of trying this case were roughly equal for each party. Therefore, this factor weighs in favor of finding that the settlement is fair and reasonable.

E. The Risks of Establishing Damages

The court must next examine the risk of establishing damages. In considering this factor, the *General Motors* court stated, "Like the previous factor, this inquiry attempts to measure the expected value of litigating the action rather than settling it at the current time." *General Motors*, 55 F. 3d at 816. The court is encouraged to consider the difficulty in establishing that the plaintiffs have actually suffered damages. *See id.*

Although Mr. Battaglia indicated that there were “very large” risks with respect to both liability and damages, he indicated that he believed damages might be slightly easier to establish. (Tr. at 29.) Despite this optimistic view, Mr. Battaglia conceded that damages might be difficult to establish because some employees were “high end” employees (i.e. upper level employees) and earned more than the average class member. (*Id.*) Ms. McDonough commented that different employees presented different situations not only because of their varying job positions, but also because of the number of hours worked, unemployment issues, and residency requirements. (*Id.* at 32-33; 42-43.)

The court finds that similar to the risks inherent in establishing liability, each party would have encountered some difficulty in establishing or defending against damages. The court further notes that given the diverse array of plaintiffs, settlement is probably better able to account for the differences among plaintiffs than a jury verdict. The court therefore finds that the settlement enables the parties to better resolve the damages issues presented in this case. Thus, this factor weighs in favor of approving the proposed settlement.

F. The Risks of Maintaining a Class Action

The sixth factor to consider is the risk inherent in maintaining a class action. This factor is designed to consider the putative plaintiffs’ prospects for class certification. *General Motors*, 55 F.3d at 817. In this case, however, the court has already certified the putative class in accordance with Federal Rule of Civil Procedure 23 as directed by the Third Circuit in *General Motors*. *See id.* at 799. Since the class has been pre-certified, the court adopts its findings from the previous hearing on this point and finds that this factor weighs in favor of finding that the settlement is fair and reasonable.

G. The Ability of the Defendants to Withstand a Greater Judgment

The next factor to consider is the ability of the defendant to withstand a greater judgment. *See id.* at 818. During the hearing, Ms. Monica Gonzalez-Gillespie, the Director of Personnel for the City of Wilmington, testified under oath that the City of Wilmington has agreed to pay the plaintiffs \$210,000 to settle this case. The court then engaged Gonzalez-Gillespie in a series of questions regarding the financial condition of the City of Wilmington. The questioning proceeded as follows:

The Court: You're a cabinet level official in the City government; is that correct?

A: That's correct.

Q: And you've been so [for] how long now?

A: Two years

Q: Given that fact, you have a general understanding of the City's current financial position?

A: Yes, I do.

Q: Are you able to offer an opinion as to whether the City could withstand a greater judgment than that which is contemplated by this proposed settlement?

A: I don't think we could. I don't think the City could.

Q: This amount that is contemplated by the settlement is the extent of what you feel the City could reasonably absorb?

A: Absolutely.

(Tr. at 47-48.) When asked why the City could not afford to pay a more substantial sum, Gonzalez-Gillespie testified that at present, due to the results of other litigation, the City of Wilmington is operating at a financial deficit. (*Id.* at 50.)

Based on the uncontroverted testimony of Gonzalez-Gillespie, the court finds that the defendant could not withstand a greater judgment. Since there was, of course, the possibility that a jury could have awarded a greater judgment, the court concludes that this factor weighs in favor of finding that the settlement is fair and reasonable.

H. The Range of Reasonableness of the Settlement in Light of the Best Possible Recovery

The *Girsh* court next directed the district courts to consider the range of reasonableness of the settlement in light of the best possible recovery. The goal of this factor is to determine whether the settlement gives good value based on the strength of the case, or is a “‘sell-out’ of an otherwise strong case.” *See General Motors*, 55 F. 3d at 806. There are numerous factors that may be used to help a court determine the reasonableness of the settlement, including the value of the settlement, the utility of the settlement to the plaintiffs, and the impact that attorneys’ fees might have on any settlement. *See id.* at 806-07. The court will now consider each of these factors.

1. Valuation

The court may consider the present value of the damages the plaintiffs would likely recover if successful at trial, appropriately discounted for the risk of not prevailing, and then compare this number with the amount of the settlement. *See id.* at 806.

When the court asked Mr. Battaglia about the possible financial outcomes of this case, Mr. Battaglia stated that in the best of circumstances, if the plaintiffs prevailed at summary judgment and at trial, the high end of any recovery could be as high as \$700,000. (Tr. at 39.) Although not conceding the plaintiffs’ success, Ms. McDonough agreed that \$700,000 was not an unreasonable projection for this case.

At the opposite end of the spectrum, when asked about the low end of recovery, Mr. Battaglia testified that at worst, the plaintiffs could have walked away with nothing. (*Id.*) However, he also stated that if the plaintiffs prevailed at summary judgment or at trial, a recovery of \$400,000 would not be unreasonable. (*Id.*) Defense counsel did not dispute these representations.

In light of the statements made during the hearing, the court finds that given the fact that the plaintiffs might have received nothing, the proposed settlement of \$210,000 is imminently reasonable in light of the range of possible monetary recoveries.

2. Utility

There is some authority in the Third Circuit that a settlement that is not useful to the plaintiffs may not be fair and reasonable. *See General Motors*, 55 F. 3d at 807. For instance, in the *General Motors* case, the court rejected the proposed settlement because the vouchers that General Motors proposed to send to potential plaintiffs would be useful to some, but not all, class members. *See id.* at 808.

The court finds that the proposed settlement has utility to all of the plaintiffs. First, unlike *General Motors*, where vouchers were involved, the cash money payments to be given here will be equally usable by any claimant. Second, the Gonzalez-Gillespie testimony establishes that the settlement has utility to each plaintiff. Gonzalez-Gillespie testified that the City used an intricate formula to determine the amount due to each plaintiff. (Tr. at 42.) According to Gonzalez-Gillespie, that formula was based primarily upon the amount of hours worked by each claimant. (*Id.*) She then testified that based on this formula, the recovery for individual claimants ranged from \$300 to \$8000, with most plaintiffs receiving at least \$1,000. (*Id.* at 44-45.) Although there was some disparity in the amounts awarded to individuals, Gonzalez-Gillespie testified that these differences were based primarily on the amount of hours an individual worked and the length of time they served as a City employee. (*Id.* at 45.) Thus, those who had worked more hours received more under the terms of the proposed settlement. (*Id.*)

In light of the Gonzalez-Gillespie testimony and other facts adduced at the July hearing, the court finds that the City's formula was imminently fair. Common sense dictates that those who served longer - and therefore lost more benefits - should be compensated at a higher rate. Thus, the court finds that utility considerations support a finding of fairness and reasonableness.

3. Attorney's Fees

In *General Motors*, the Third Circuit also indicated that a district court may consider how attorney's fees may impact the proposed settlement. *See General Motors*, 55 F.3d at 807. When questioned about attorney's fees, Mr. Battaglia testified that if the case had been taken to trial, the plaintiffs' attorneys' fees would have approached or exceeded \$250,000. (Tr. at 34-35.) He further testified that if the plaintiffs had prevailed and received the low end of their recovery (\$400,000 - \$500,000), the projected attorneys' fees, once deducted, would reduce their recovery to the amount awarded in the proposed settlement. (*Id.* at 35.) However, the terms of the proposed settlement require that the City will pay the plaintiffs' attorneys' fees without reducing the plaintiffs' recovery.

The court finds that since the projected attorneys' fees would have reduced any jury award by nearly fifty percent, settling the case is obviously beneficial to the class members. Thus, this consideration also supports a finding that the proposed settlement is fair and reasonable.

After considering value, utility, and attorneys fees, the court concludes that the parties' valuation of this case is reasonable. The proposed settlement is reasonable in light of that valuation. The court further finds that the settlement will be useful to each plaintiff and that attorneys' fees will not disproportionately diminish the settlement fund. Therefore, the court finds that the settlement is within the reasonable range of the best possible recovery. Thus, this factor weighs in favor of finding that the settlement is fair and reasonable.

I. The Range of Reasonableness of the Settlement in light of all of the Attendant Risks of Litigation

Finally, *Girsh* instructs district courts to consider the reasonableness of the settlement in light of all of the attendant risks of litigation. Although this is closely related to the previous factor, this ninth factor encourages the court to consider the reasonableness of the settlement in light of the relief sought in the complaint. *See General Motors*, 55 F.3d at 810.

The plaintiffs requested both monetary and injunctive relief in their complaint. Based on the representations at the hearing, the court is satisfied that the monetary relief granted is adequate. However, the court was concerned that the plaintiffs would receive no injunctive relief as a result of the settlement. (Tr. at 33.) When asked about injunctive relief, Mr. Battaglia responded that after the plaintiffs instituted their lawsuit, the City went to the General Assembly to have the City Charter changed to permit the kind of conduct the plaintiffs wished to prevent. (*Id.* at 12, 33.) In Mr. Battaglia's opinion, the amendment to the charter effectively mooted any claim for injunctive relief. (*Id.* at 34.)

The court agrees with Mr. Battaglia that although injunctive relief was initially sought, at present, it is unavailable to the plaintiffs. Consequently, the plaintiffs are limited to monetary recovery. The court is satisfied that the settlement provides adequate monetary recovery. The court thus finds that the relief proposed by the settlement is reasonable in light of the relief sought in the plaintiffs' complaint. Therefore, the court finds that this factor militates in favor of finding that the settlement is fair and reasonable.

V. CONCLUSION

After fully considering each of the nine *Girsh* factors, the court finds that each of the nine factors weigh substantially in favor of concluding that the proposed settlement is fair, reasonable, and adequate. The court will therefore approve the settlement. The court will sign the parties' suggested form of order concurrent with this memorandum and order.

NOW, THEREFORE, IT IS HEREBY ORDERED that:

1. The court finds that the parties' proposed settlement is fair, reasonable, and adequate.
2. The court orders the settlement funds be distributed in the manner suggested in the parties' form of order submitted to the Court on July 18, 2002, and signed this day simultaneously with this memorandum and order.

Dated: August 26, 2002

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE