

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS –
CORPUS CHRISTI DIVISION

NIKOLAI GRUSHEVSKI and others §
similarly situated, §

Plaintiffs, §

v. §

C.A. NO. 09-cv-00002

TEXAS WINGS, INC., CORPUS §
CHRISTI WINGS, LTD., TWI XXII, §
INC., and HOOTERS OF AMERICA, §
INC., §

Defendants. §

JURY TRIAL DEMANDED

**PLAINTIFF’S BRIEF ON THE ISSUE OF CONDUCTING
LIMITED DISCOVERY ON A POTENTIAL DEFENDANT CLASS**

I.
BACKGROUND

At the Scheduling Conference held on February 23, 2009, the Court discussed with all counsel Grushevski’s intent to seek certification of a plaintiff and defendant class. As the Court is well aware, the underlying case involves a claim that Hooters refuses to hire men as waiters. It is undisputed that this is a national policy. Indeed, the policy emanates from Defendant Hooters of America, Inc. (“HOA”), which is the franchisor and owner of the Hooters restaurant concept. It is expected that discovery will reveal that, among other things, refusing to hire men to be waiters is a condition of receiving a Hooters franchise.

As stated at the Scheduling Conference, Grushevski intends to conduct discovery on the underlying discrimination claim and Hooters', et al., BFOQ defense. The Court further ruled that class-based discovery should proceed simultaneously. Accordingly, Grushevski asks the Court to permit him to conduct limited discovery on the propriety of a defendant class.¹ The case law supports using defendant classes in a variety of circumstances, and Grushevski believes that the benefit of permitting discovery on certain issues. Among them: 1) the scope, breadth, and effect of HOA's policies of not hiring men to be waiters; 2) whether Texas Wings and HOA as the 2 largest Hooters store operators are qualified to serve as class representatives²; and 3) any defenses thereto.

II. LEGAL ANALYSIS

Class suits may be maintained under proper circumstances whether brought by plaintiffs or against defendants as a class. *Battles v. Braniff Airways*, 146 F.2d 336 (5th Cir.1944), certiorari denied 65 S.Ct. 1411, 325 U.S. 871, 89 L.Ed. 1990; see also Fed. R. Civ. P. 23. If general and specific requirements of this rule relating to class actions can be met, fact that class is defendant class is not independent ground for opposing maintenance of class

¹It is important to note that Grushevski's EEOC Charge of Discrimination notified HOA and Texas Wings that he believed the violations to be national in scope. A copy of the Charge is attached hereto as Exhibit "A".

²These 2 groups alone are believed to own and operate approximately 35-40% of the Hooters stores in the United States.

action. *Research Corp. v. Pfister Associated Growers, Inc.*, 301 F.Supp. 497 (N.D.Ill.1969).

To the extent tensions arise among members of a defendant class, or various objections to the size or scope of a defendant class are properly raised, a district court has within its power the ability to replace class representatives with other class members or to increase the number of class representatives. *Robinson v. Sheriff of Cook County*, 167 F.3d 1155, 1157 (7th Cir.1999). Indeed, it is not necessary for named defendants to “voluntarily come forward or make a showing that they have the ability or desire to adequately and fairly protect all [defendant] class members.” *In re Braniff Airways, Inc.*, 22 B.R. 1005, 1009 Bankr.N.D.Tex.1982.

III. CONCLUSION

Plaintiff is not at this juncture moving the Court to certify a defendant class. However, rather than joining hundreds of corporate entities comprising all Hooters franchisees, it makes sense to permit Grushevski the opportunity to determine whether a defendant class is appropriate. Indeed, due to the anticipated numerosity of entities, commonality of the ultimate legal question on BFOQ, and typicality of the franchisees, a defendant class appears to be a prudent manner in which the Court can manage the dispute.

Finally, if the case proceeds against only the current 2 groups of restaurants, and Grushevski prevails, it seems that myriad other lawsuits will be filed by franchisees not a part of the lawsuit. Indeed, HOA will have to change its core concept. When it attempt to enforce a policy requiring the hiring of males as waiters, the non-party franchisees will claim breaches of the franchise agreements, arguing that they are not bound by the Court's ruling, resulting in potentially inconsistent rulings across the country. Certification of a defendant class will prevent these issues from arising.

For the foregoing reasons, Grushevski prays that the Court permit him the ability to conduct discovery on the propriety of a defendant class.³ A discovery Motion will be forthcoming after the Court has reviewed this brief.

Respectfully submitted,

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By: /s/ Martin A. Shellist

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³Undersigned counsel is cognizant of the Court's typical procedure for conducting teleconferences on discovery disputes, but submits this Motion in light of the Court's previous request to brief the issue.

CERTIFICATE OF CONFERENCE

Undersigned counsel hereby certifies that he has conferred with counsel for Defendants who are opposed to the relief sought in the foregoing Brief.

/s/ Martin A. Shellist
MARTIN A. SHELLIST

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been forwarded to all counsel of record via ECF (Electronic Court Filing), Hand Delivery and/or Facsimile and/or Certified Mail, Return Receipt Requested on March 5th, 2009.

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