

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

RUTHELLE FRANK, *et al.*,

Plaintiffs,

v.

Case No. 11-CV-1128

SCOTT WALKER, *et al.*,

Defendants.

**Defendants' Civil Local Rule 7(h) Expedited Non-dispositive
Motion to Bifurcate Class Certification and Suspend Other Briefing**

Pursuant to Civil Local Rule 7(h), Defendants respectfully move the Court for an order: (1) bifurcating the issue of class certification from the merits of Plaintiffs' injunction motion, Dkt. 222; (2) establishing a briefing schedule on class certification; and (3) suspending all briefing on the merits of Plaintiffs' injunction motion until after class certification is decided by this Court's written order.

Following the Seventh Circuit's mandate, Dkt. 221, Plaintiffs filed their permanent injunction and class certification motion to pursue as-applied claims that they believe were not a part of the Seventh Circuit's judgment. (Dkt. 222.) Setting aside whether Plaintiffs *can* pursue their as-applied claims, class

certification should be the first thing that the Court addresses on remand and it might be the only salient issue that the Court needs to address.¹

“It is important that the question whether the case is to proceed as a class action be resolved sooner rather than later.” *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 486 (7th Cir. 2012). Federal Rule of Civil Procedure 23(c)(1)(A) states: “At an early practicable time . . . the court must determine by order whether to certify the action as a class action.” Bifurcation of the class issue makes sense because the relief that Plaintiffs are requesting requires that classes *first* be certified to pursue as-applied constitutional claims and class-wide relief. (See Dkt. 222:1-2; Dkt. 223:9-19.)

Here, the trial evidence demonstrates that there are no representative Plaintiffs for putative classes 3, 4, and 6. (Dkt. 176:90-91 (chart illustrating the putative class representative Plaintiffs who either presented no trial evidence or already have qualifying ID).) Plaintiffs rely *solely* upon the trial record and have submitted no additional evidence with their motion. For putative classes 3, 4, and 6, there is no evidence in the trial record for the Court to conclude that there are Plaintiffs to be representatives. This is fatal to class certification. Fed. R. Civ. P. 23(a)(3) (claims or defenses of “the representative parties” must be “typical of the claims or defenses of the class.”).

¹Plaintiffs may have forfeited their right to class certification when they did not timely appeal or move for reconsideration of this Court’s April 29, 2014, order denying class certification. The Court ordered: “**IT IS FURTHER ORDERED** that the Frank plaintiffs’ motion for class certification is **DENIED** as **MOOT**.” (Dkt. 195:70.) Federal Rule of Civil Procedure 23(f) provides only 14 days to appeal the denial of class certification.

Additionally, certain Plaintiffs may have acquired qualifying ID after trial or passed away, including class representatives for putative classes 1, 3, 4, and 6. Plaintiffs did not inform the Court of these basic facts. Deceased Plaintiffs or Plaintiffs with qualifying ID cannot be class representatives. They do not have claims “typical of the claims or defenses of the class.” Fed. R. Civ. P. 23(a)(3).

In addition to the dearth of class representative Plaintiffs, there are other class certification issues that deserve to be addressed before the Court reaches the merits of Plaintiffs’ as-applied claims. Defendants explained why the classes cannot be certified under Rule 23 in their briefs filed pre- and post-trial in opposition to class certification. (*See* Dkt. 83; Dkt. 176:82-104.) Most importantly, putative class 1 is vague, would prove utterly unmanageable, and cannot be certified under Rule 23. Issues of class certification should be disposed of *first* to avoid wasting judicial and party resources if class certification is a dead end.

This Court should address class certification prior to proceeding to the merits of Plaintiffs’ as-applied claims. Because the relief requested is class-specific, the Court should order: (1) bifurcation of class certification from the merits of Plaintiffs’ permanent injunction motion on as-applied claims; (2) a briefing schedule regarding class certification; and (3) suspension of all briefing regarding the merits of Plaintiffs’ permanent injunction motion to address as-applied claims until after the Court enters a written order disposing of the class certification motion. If the class certification motion is ultimately granted, the Court should order a telephone status conference to schedule time for further briefing on the merits.

WHEREFORE, Defendants respectfully request that the Court grant their instant motion, bifurcate the class certification issue, schedule briefing on that issue, and suspend all further pending briefing on Plaintiffs' motion, Dkt. 222.

Dated this 31st day of March, 2015.

Respectfully submitted,

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