No. 01-1555

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SCOTT CULVER,

Plaintiff-Appellant

v.

CITY OF MILWAUKEE, A MUNICIPAL CORPORATION,
BOARD OF MILWAUKEE FIRE AND POLICE COMMISSIONERS,
PHILLIP ARREOLA, ET AL.,

Defendants-Appellees

and

UNITED STATES OF AMERICA, LEAGUE OF MARTIN, AND
LATINO PEACE OFFICERS ASSOCIATION,

Defendants-Intervenors-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The appellant's jurisdictional statement is correct and complete.

STATEMENT OF THE ISSUES

1. Whether the district court abused its discretion in determining that Culver's suit cannot be properly maintained as a class action.

2. Whether the district court abused its discretion by not notifying absent

class members prior to the dismissal of the action.

3. Whether the district court judge was correct in refusing to recuse himself from the case.

4. Whether the district court abused its discretion by refusing to consolidate this case with *United States* v. *City of Milwaukee*, No. 74-C-480 (E.D. Wis.).

STATEMENT OF THE CASE

A. *Proceedings In United States v. City of Milwaukee*

This case emanates from an action brought by the United States against the City of Milwaukee in 1974, alleging that the City had discriminated against blacks and women with respect to recruitment, hiring, and promotion in the City's police force. See *United States* v. *City of Milwaukee*, Civ. Action No. 74-C-480 (E.D. Wis.) (hereinafter referred to as *United States* case). The district court subsequently entered three orders – dated July 25, 1975, October 9, 1975, and September 16, 1976 – setting forth hiring goals for minorities and women in the City of Milwaukee police department.

On September 27, 1996, the United States moved to modify the old hiring orders due to a significant change in the law and facts since the earlier orders had been entered (U.S. App. 2, R. 3, 4).[1/] In July 1997, pending the court's ruling on

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[1/] "U.S. App. __" refers to pages in the United States' supplemental appendix filed with this brief as appellee. "U.S. App. __, R. __" refers to record items listed in the district court's docket sheet in the *United States* case, which is contained in the United States' supplemental appendix. "App. __" refers to pages in the appendix attached to appellant Culver's opening brief. "Br. __" refers to

(continued...)

the motions for a new modified hiring order, and because of the City's immediate need to hire new police officers, the United States and the City jointly moved for a temporary order that would vacate the old hiring orders and permit the City to hire a number of new officers (U.S. App. 4, R. 27).

On October 11, 1996, appellant Scott Culver moved to intervene in the *United States* case (U.S. App. 3, R. 7). Culver asserted that as a white male who sought and will seek employment with the City police department, he had a direct and substantial interest in any modification of the old hiring orders. The district court denied the motion to intervene "without prejudice" on July 29, 1997 (U.S. App. 28).[2/] The court stated that Culver's motion failed to comply with Fed. R. Civ. P. 24(c), which requires such a motion to be accompanied by a pleading. The court invited Culver to refile his motion in compliance with the federal rules. On July 29, 1997, the district court also granted the parties' joint motion and entered a temporary hiring order that vacated the old hiring orders (U.S. App. 21).

Culver appealed the denial of his motion to intervene in the *United States* case. This Court dismissed the appeal, holding that the district court's order

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[1/](...continued)
page numbers in appellant Culver's opening brief. "City App. __" refers to pages in the City's supplemental appendix filed with its brief as appellee. "R. __ at __" refers to documents listed in the district court's docket sheet, and the page numbers within those documents.

[2/] By the same order the district court also denied the motion to intervene filed by the Latino Peace Officers Association (LPOA) (U.S. App. 28). LPOA refiled its motion to intervene (U.S. App. 5, R. 41), and it was granted by the district court on October 31, 1997 (U.S. App. 6, R. 45).

denying the motion to intervene was not a final appealable order. *United States* v. *City of Milwaukee*, 144 F.3d 524 (7th Cir. 1998) (U.S. App. 13). The Court observed that the district court "plainly expressed its intent not to reach the merits of the motion to intervene until it was properly presented." *Id.* at 528-529. This Court held that the district court's decision "did not resolve definitively whether Mr. Culver ought to be allowed to intervene in this litigation and is therefore not a final decision within the meaning of 28 U.S.C. § 1291." *Id.* at 529.[3/]

B. *Proceedings In The LEOCARD Suit*

The Law Enforcement Officers' Coalition Against Reverse Discrimination, Inc. (LEOCARD), and ten of its members, brought this action on February 25, 1993, alleging that the hiring orders in the *United States* case discriminated against white men. See *Law Enforcement Officer's Coalition Against Reverse Discrimination, Inc.* v. *City of Milwaukee*, No. 93-C-0189 (E.D. Wis.) (hereinafter referred to as *LEOCARD* case). On June 15, 1993, the district court granted Culver's motion to be added as a party to the *LEOCARD* case. See *Culver* v. *City of Milwaukee*, No. 98-2079 (7th Cir. Oct. 15, 1999) (U.S. App. 112). Culver's claim, however, was treated by the court as separate from the other plaintiff's claims, and Culver was represented by different counsel (U.S. App. 112). On March 22, 1994, the plaintiffs filed a joint amended complaint adding a hiring

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[3/] After this Court dismissed Culver's appeal, the district court's docket sheet in the *United States* case reflects that Culver never refiled a motion to intervene in that case. See U.S. App. 8-11.

claim and Gary Meyer as an additional named plaintiff (City App. 101).[4/]

1. *District Court's 1995 Order Certifying A Class Action*

Culver subsequently moved to certify a class action for the hiring claims (R. 36, 37). On January 31, 1995, the district court, presided by Chief Judge Evans, granted Culver's motion and certified Culver's suit as a class action (App. 1). The district court defined the class as:

> 1. All white male applicants for hire as sworn officers with the Milwaukee Police Department, from 1975 to the present, who were eliminated from contention, or whose hire date was delayed, by any and all conduct undertaken by defendant Milwaukee Board of Fire and Police Commissioners, because of their status as a white male.
>
> 2. In addition to satisfying the requirements set forth in paragraph one above, the putative class member must have possessed at the time they sought an application a valid driver's license, shall have attained a minimum age of 21 years of age, shall not have been convicted of any felony, and shall possess a high school diploma or its equivalent [App. 1-2].

While the order defined the composition of the class, it did not contain specific findings or other information concerning the class and its compliance with Rule 23, or the propriety of Culver's serving as class representative. *Culver*, No. 98-2079 (7th Cir.) (U.S. App. 112-113).

In September 1995, the case was reassigned to Judge Randa (R. 78). Two

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[4/] The hiring claim included Culver as a named plaintiff. In addition, original named plaintiffs Christopher Marshall and Anthony Lipek were included as named plaintiffs under the hiring claim, alleging that they were denied applications for employment in 1991. The amended complaint states that both Marshall and Lipek subsequently took the City's written entrance examinations in 1992, passed their examinations, and appear on the City's eligibility list. City App. 106.

months later, in November 1995, the case was again reassigned to another judge, Judge Curran (R. 84). On November 15, 1995, the district court issued an order that it would reconsider *sua sponte* the class certification issue (U.S. App. 31). The district court observed that the class certification order failed to address "issues such as exhaustion of administrative remedies, how the damages issues will be resolved, and notice and opt out provisions" (U.S. App. 32). Judge Curran ordered Culver to "file a brief and any papers supporting [the] motion for class certification" (U.S. App. 32).

2. *District Court's Hearing On Validity Of 1995 Order Certifying Class*

A hearing was held on January 17, 1996, in part to address the class certification issue (U.S. App. 34). At that hearing, counsel for Culver stated that he sought to certify a class of white males who requested an application from the City police department but did not get one (U.S. App. 39-44). The City did not keep records of individuals who inquired about applying for a position with the police department but who did not submit an application (U.S. App. 40, 54). During the hearing, Culver testified about his position and ability to represent the class (U.S. App. 63-83). At the time of the hearing Culver worked as deputy sheriff for the Cook County Sheriff's Department in Illinois (U.S. App. 64). Culver testified that in December 1992, he telephoned the Milwaukee Fire and Police Commission and asked to receive an application and information about applying for a position with the police department (U.S. App. 65, 75-76). Culver told the person on the telephone that he was a white male, and Culver testified that he was told that the

police department "won't be taking whites until 1994" (U.S. App. 65). Culver stated that he never received an application, nor did he make any further attempts to get an application (U.S. App. 65-66, 78). Culver did not keep a record of the telephone call to the City police department (U.S. App. 76). Culver further testified that he has had no contact with any potential members of the class, nor does he know any person who might be included in the class (U.S. App. 71). Culver also testified the he has had no discussion as to what his management responsibilities would be as class representative (U.S. App. 72).

3. *District Court's October 10, 1997, Order Invalidating The Culver Class*

A few weeks later, on February 6, 1996, the case was again reassigned to another judge, Judge Reynolds (R. 98). The court had not yet ruled on the class certification issue. On August 27, 1997, the district court ordered Culver to file a renewed motion for class certification with appropriate supporting documentation (U.S. App. 96). Culver instead moved to vacate the August 27 procedural order (R. 154), and for recusal of Judge Reynolds (R. 153).

Culver's motions were denied on October 10, 1997 (U.S. App. 100). With respect to the class certification issue, the district court held that there was no validly certified class, and "no findings in the record to justify class certification" (U.S. App. 103). The district court stated that to fulfill the requirements of Rule 23 the "court must make such findings, and fulfill its independent duty to determine that the interests of the unnamed class members will be adequately protected by a

class representative and class counsel" (U.S. App. 102). The court noted that the August 27, 1997, order permitted Culver to "renew[] [his] motion for class certification [and file] supporting documents," but instead Culver moved "for reconsideration of the August 27 order" (U.S. App. 103). The district court denied Culver's motion for reconsideration upon determining that there were "no findings * * * to justify class certification" (U.S. App. 103). The district court also denied Culver's motion for recusal because it failed to "reflect any facts that would justify recusal" (U.S. App. 103).

On December 1, 1997, Culver moved to withdraw his individual claim as moot, and requested that the court enter judgment on his claims pursuant to Fed. R. Civ. P. 54(b) (U.S. App. 105). Culver stated that his claim was moot because he had obtained employment as a Chicago police officer (U.S. App. 105). On December 12, 1997, the district court granted Culver's motion to withdraw his individual claim as moot, but refused to grant his request for a Rule 54(b) judgment (U.S. App. 107).

The case was once again reassigned on January 31, 1998, to Judge Adelman (R. 204). A status conference was held in the case in March 1998 (R. 205). On April 1, 1998, the district court granted LEOCARD's motion to intervene in the *United States* case and dismissed its claims in the *LEOCARD* case (U.S. App. 109).

4. *Appeal Of The District Court's October 10, 1997, Order Invalidating The Class Certification*

Culver appealed the district court's October 10, 1997, order invalidating the class certification. On appeal, this Court reversed the judgment of the district court and remanded for further proceedings. *Culver*, No. 98-2079 (7th Cir.) (U.S. App. 111).[5/] This Court held that even though Culver's personal claim had become moot, he retained the right to appeal the August 10, 1997, order that the class was improperly certified. Slip op. 6.

This Court held that the district court, in invalidating the class, erred by holding that Fed. R. Civ. P. 23(a) requires that specific findings be made at the time of certification. This Court stated that "specific findings on the record as to why a proposed class meets the requirements of Rule 23 are not an absolute prerequisite to a valid certification." *Id.* at 8. Instead the district court must determine whether "any of the Rule 23(a) prerequisites are lacking." *Id.* at 9. The Court stated that the district court "erred in determining that no class existed simply because of the absence of explicit findings by [the prior district court judge]." *Id.* at 9. Because the error resulted in the later exclusion of the class representative from a hearing that resulted in dismissal of the action, the Court remanded for additional proceedings to determine "whether there exists a viable class within the meaning of

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[5/] This Court held that despite the district court's refusal to grant the Rule 54(b) judgment, the Court had jurisdiction of the appeal because a recent addition to Rule 23 allowed the courts of appeals to accept interlocutory appeals of class certification issues, even without a district court's certification of the appeal. See *Culver*, slip op. 6, n.4; see also Fed. R. Civ. P. 23(f) (eff. Dec. 1, 1998).

Rule 23 and, if so, whether Mr. Culver can be said to 'fairly and adequately protect the interests of the class.'" *Id.* at 10.

C. *Proceedings On Remand*

1. *The Parties' Positions On Remand*

On remand, the district court ordered the parties to respond to the issues set out in the court of appeals' opinion (R. 213). Culver filed a response to the district court's order that essentially reiterated the procedural history of the case (R. 217). In addition, Culver discussed exhaustion of administrative remedies and damages in a supplemental response (R. 218). Culver moved to consolidate his case with the *United States* case (R. 216, 236), for recusal of the district court judge (R. 214, 238; see also U.S. App. 121), and to compel the City to produce records of white male applicants into the City police department whose entry was delayed or denied because of their race or sex (R. 215, 237). On December 17, 1999, Culver moved the district court to determine which parties remained in the case (R. 235). Culver asserted that he was the only plaintiff in the case, since LEOCARD agreed to dismiss its action upon the grant of its request to intervene in the *United States* case (R. 235 at 1). Culver also asserted that the City was the only defendant still in the case (R. 235 at 2).

The United States responded that the Culver class is not viable under Rule 23(a)(2) primarily because there are no questions of law common to the class (R. 220). The United States also argued that Culver was not an appropriate class representative because of statements he made at the January 1996 hearing that he

was no longer interested in pursuing the case or a job with the City police department, that he made only one phone call to inquire about getting an application to work at the police department, and never followed up on that call (R. 220 at 1, 7).[6/] The City moved to decertify the Culver class (R. 227). The City argued that Culver could not adequately represent the interests of the class because his individual claim is moot and that there is no identifiable class (R. 227 at 2-11).

The United States and the City opposed Culver's motion to recuse Judge Adelman (R. 219, 223), and the City opposed Culver's motion to consolidate this case with the *United States* case (R. 224). The City also opposed Culver's motion to compel the City to produce records of white male applicants (R. 225).

2. *District Court's May 15, 2000, Order On Recusal*

On May 15, 2000, Judge Adelman entered an order denying Culver's motion that he recuse himself from the case (App. 4). Judge Adelman stated that the fact that the case had been assigned from Judge Curran to Judge Reynolds (who was presiding over the *United States* case), had nothing to do with Judge Adelman's ability to oversee the case impartially (App. 6-7). Judge Adelman also stated that even though his former law partner, Kenneth Murray, represented the City of Milwaukee police union in past years, that was no basis for the judge to recuse himself from the case (App. 7). Judge Adelman observed that 28 U.S.C.

[6/] LEOCARD and League of Martin both responded that they supported the position taken by the United States that the class was not viable and that, even if it were, Culver was not an adequate representative of the class (R. 230, 233).

455(b)(2) would only require recusal had his former law partner represented the union in the present litigation (App. 7). Judge Adelman stated that the police union is not a party to the case, and that Murray never represented the union during their partnership or since Judge Adelman's appointment to the federal bench (App. 7). Finally, Judge Adelman determined that there was no misconduct in either failing to inform Culver's counsel of the March 31, 1998, status conference, or not including his counsel on the distribution list to receive the April 1, 1998, order dismissing the case (App. 7-8). Judge Adelman explained that at the time of the status conference Culver was not a party to any of the live claims remaining in the case: the court noted that Judge Reynolds determined that there was no viable class, and Culver had withdrawn his own claims (App. 7-8).

Judge Adelman also rejected Culver's motion for recusal because it did not satisfy the procedural requirements of 28 U.S.C. 144. Judge Adelman observed that under 28 U.S.C. 144, motions for recusal must be accompanied by an affidavit, and only one affidavit may be filed in any case (App. 9). Judge Adelman noted that Culver has filed two affidavits in the case, one to support a motion for recusal of Judge Reynolds, and now a second to support a motion to recuse Judge Adelman (App. 9-10). The court thus held that since the affidavit to recuse Judge Adelman is the second affidavit in the case filed under Section 144, the court could not consider the affidavit's allegations (App. 9-10). Judge Adelman also found that the affidavit was untimely because it was filed one and one-half years after the April 1,

1998, order dismissing the case (App. 10-11).[7/]

Judge Adelman also determined that Culver failed to demonstrate any basis for recusal under 28 U.S.C. 455 as well. Judge Adelman stated that the facts alleged by Culver would not cause a reasonable person to question his impartiality, and thus provided no basis for recusal (App. 12).

3. *District Court's September 30, 2000, Orders On Recusal, Clarifying The Remaining Parties In The Case, And Consolidation*

Culver moved the district court for reconsideration of the recusal order. On September 30, 2000, the district court denied Culver's motion for reconsideration of the prior recusal order, as well as Culver's motion to consolidate this case with the *United States* case, and clarified the parties that remained in the case (App. 14, 27).

The district court again rejected all of Culver's asserted grounds for recusal. Judge Adelman first observed that in the motion to reconsider recusal, Culver conceded that Judge Curran's decision to assign the case to Judge Reynolds is no reason for Judge Adelman to recuse himself from the case (App. 17). Culver argued that Judge Adelman should recuse himself because his former law partner represented the union in the *United States* case, and the union was a party when the

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[7/] Culver also claimed that Judge Adelman's law clerk told Culver's counsel that she was purposefully left off of the distribution list for receiving the April 1, 1998, dismissal order (App. 11). Judge Adelman found further basis for deciding that the motion was untimely because the law clerk that Culver claimed to have spoken with had completed her clerkship on October 1, 1999, seven and one-half weeks before Culver filed the motion, and thus Culver did not bring the motion at the earliest moment after becoming aware of the facts supporting it (App. 11).

case was filed in 1974. Judge Adelman explained, however, that his former law partner did not represent the union in the *United States* case (App. 17). Judge Adelman stated that the union's motion to intervene in the 1974 case was signed by a different counsel at a law firm called Whyte & Hirschboeck S.C., and that Judge Adelman was never affiliated with that firm (App. 17-18 n.1). Third, Judge Adelman again rejected Culver's claim that the court's failure to add Culver's counsel's name to the distribution list to receive the April 1, 1998, order is a basis for recusal (App. 18). Judge Adelman noted that Culver did not challenge his findings regarding the court's usual practice for notifying parties of orders, or his finding that Culver had no live claims (App. 18). Culver instead argued that his counsel should have been on the distribution list because Culver had not withdrawn as a party to the proceeding (App. 18). Judge Adelman stated that even if the court erred, "then it is this district's usual practice that Culver challenges, and not my impartiality" (App. 19).

Judge Adelman also rejected Culver's unsubstantiated contentions that the court delayed ruling on Culver's motion to consolidate and the City's motion to decertify the class, and that any such delay "displays bias and unfair treatment toward Culver and the class" (App. 20). Judge Adelman stated that he seeks to address all motions promptly, and that Culver "cite[d] no authority to support the proposition that a delayed ruling constitutes bias against one or more parties (or the apparent corollary that a speedy ruling constitutes favoritism towards one or more parties)" (App. 20).

With respect to clarifying the parties in the case, the district court held that because the LEOCARD plaintiffs voluntarily dismissed their claims with prejudice, "neither LEOCARD nor the individual LEOCARD plaintiffs may re-assert their claims" (App. 22). The district court ruled that the intervening defendants – the United States, the League of Martin, and the Latino Peace Officer's Association – continue as parties to the case (App. 25). The court determined that LEOCARD's voluntarily dismissal of its own claims "has nothing to do with [intervening defendants'] right to defend against the claims pressed by the class" (App. 25).

The district court entered a separate decision and order denying Culver's motion to consolidate the *LEOCARD* case with the *United States* case (App. 27). The district court found that Culver failed to show that there are common issues of fact or law that would compel consolidating the cases (App. 30). The court also found that the two cases are in different procedural postures, and that while Culver had been a party to the *LEOCARD* case since its origin in 1993, he did not move to consolidate that case with the *United States* case until 1999 (App. 30). Finally, the district court held that even if, as asserted by Culver, white male interests are unrepresented in the *United States* case, the court is not authorized to consolidate the cases under Fed. R. Civ. P. 42 because there are no common issues of law or fact (App. 31-32).

4. *District Court's January 24, 2001, Order Decertifying The Culver Class*

On January 24, 2001, the district court entered its decision and order decertifying the Culver class (App. 35). The district court determined that the Culver class did not meet the requirements of Fed. R. Civ. P. 23, and that Culver is not an adequate class representative.

The district court noted that Culver withdrew his individual claims in 1997, and the district court dismissed those claims (App. 38-39). The district court held that even though Culver's individual claims are moot, the class action may not be dismissed unless the court determines that the class does not meet the requirements of Rule 23 (App. 39).

Applying the elements of Rule 23, the court first assessed whether Culver's claims are interrelated with the interests of the class of plaintiffs he seeks to represent. The district court pointed out that

> [t]he amended complaint challenges as discriminatory a City recruiting practice and several City hiring practices. The challenged recruiting practice is the City's denying application forms to white men who requested them * * *. The challenged hiring practices are the City's using race and sex to alter applicants' entrance exam scores, and using the altered scores to prepare eligibility lists for new hires. The class thus includes a group of attempted applicants who were denied application forms, and a group of actual applicants who took the entrance exam but who were not hired, or whose hiring was delayed, due to scoring and eligibility list practices [App. 41].

"To determine whether the commonality and typicality requirements are met," the court considered whether Culver's recruiting claim is a "separate practice" from the purported class members' claims challenging the City's exam scoring and

eligibility list formation practices (App. 42). Noting decisions by other courts, including *Castro* v. *Beecher*, 459 F.2d 725, 732 (1st Cir. 1972), the district court determined that "Culver's representing his personal interests, regarding the recruitment claim, would not guarantee that the interests of actual applicants, regarding hiring practices, would be fairly and adequately protected" (App. 45). The court thus concluded that a "class composed of a group of attempted applicants [such as Culver] and a group of actual applicants * * * cannot satisfy the commonality and typicality requirements of" Rule 23 (App. 44-45).

Next, the district court found that Culver could not fairly and adequately represent the class because he had conflicting and antagonistic interests with some purported class members that he sought to represent. The district court stated that "protecting current employees' seniority and other benefits from the interests of attempted applicants and non-hired actual applicants seeking retroactive seniority benefits would require, at a minimum, creating separate subclasses represented by separate counsel" (App. 46).

The district court next considered whether a subclass of attempted applicants could form a viable class under Rule 23 (App. 47, citing Rule 23(c)(4)(B)). The district court held that a subclass of attempted applicants could not be formed because the numerosity requirement of Rule 23(a) was not met (App. 53-54). The court observed that Culver did not do anything to determine the number of attempted applicants that would comprise the class, and that his only proof of the number of attempted applicants are "conclusory" statements by Culver that

"provide the court with no basis to assess whether numerosity is in fact established" (App. 50). The court noted that other than Culver, two of the original plaintiffs in the action [Christopher Marshall and Anthony Lipek] alleged that they were denied application forms, but "all of the original plaintiffs voluntarily dismissed their claims with prejudice in 1998" (App. 53); see also p. 5, n.4, *supra*. The district court found, "based [on a] review of the record and of the transcript of the January 1996 evidentiary hearing before Judge Curran," that Culver "has never demonstrated that the numerosity requirement of Rule 23(a)(1) is satisfied" (App. 53-54).

The district court also considered the adequacy of Culver's representation of attempted applicants (App. 54). The district court expressed concern over Culver's ability to adequately represent a class of attempted applicants since he voluntarily withdrew his individual claim, and "failed for six years" to "take the simple step of placing newspaper or police magazine advertisements to identify members of the subclass of attempted applicants he purported to represent" (App. 54). Based on these facts, the district court concluded that Culver is not an adequate representative for the subclass of attempted applicants (App. 54-55). The district court concluded that "the January 1995 order granting certification was improvidently granted" (App. 56).

The district court next observed that under Fed. R. Civ. P. 23(c)(3), the judgment in a class action must identify the members of the class and specify or describe the persons to whom notice of the judgment was directed (App. 57). The

district court observed that Rule 23 was "designed to prevent representative plaintiffs from settling or dismissing cases to the detriment of the absent members of the class" (App. 57). The district court stated that "absent class members in this case are not bound by the case's dismissal, because the class was never properly certified and the judgment is therefore not a class judgment" (App. 58). The court held that the "notice requirements of Rule 23(e) do not apply when a case is dismissed because of a determination that it is not maintainable as a class action, so long as absent class members are not harmed by the dismissal" (App. 58). Finally, the district court held that there is little harm that putative class members will miss the statute of limitations period for filing their own individual claims as a result of the dismissal of this action (App. 58-59). The court stated that the Culver class claims "received no publicity, and no notice [had] been sent to putative class members" and therefore it is not likely that purported class members relied on Culver to represent their interests in this case (App. 59).

5. *District Court's February 9, 2001, Order Denying Culver's Motion To Vacate The Order Invalidating The Class*

Culver moved to vacate the district court's order invalidating the class (R. 253). The district court denied the motion on February 8, 2001 (App. 61). Because Culver failed to state the authority for his motion, the district court assumed that Culver's motion sought to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e) (App. 63), which requires the movant to assert the discovery of new evidence, an intervening change in law, or manifest error of fact or law. The court

held that Culver's motion did not assert newly discovered evidence or an intervening change in controlling law (App. 63 & n.2). The district court thus interpreted Culver's motion as asserting that the decision finding the class invalid under Rule 23 contained manifest errors of law (App. 63).

First, Culver challenged descriptive words used by the court in distinguishing between "attempted applicants" asserting recruiting claims and "actual applicants" asserting hiring claims. The district court held that this presented no manifest error of fact or law, noting that while Culver criticizes the court's descriptive words, he did not challenge the finding that the practices challenged by the two groups of applicants lack the commonality and typicality required for class actions under Rule 23 (App. 63-64).

Next, Culver challenged the district court's finding that class members who were hired, and those not hired, had antagonistic interests regarding seniority benefits (App. 64). Culver argued that applicants hired despite the "race [or] sex preferences" would not be in the class (App. 64). The district court found no manifest error of fact or law because the original certification order includes applicants whose hire date was delayed, and thus includes applicants hired despite the "preferences" (App. 64). Culver argued that the court erred by acting on the motion to decertify without giving him time to do the research to determine the class size (App. 64-65). The district court rejected this argument for various reasons. First, the court stated that nothing prevented Culver from communicating with absent purported class members, and that such communications did not

require leave of court (App. 65-66). The court next ruled that there is no basis for the court to extend the time for Culver to satisfy Rule 23 (App. 66-67), and that the court was not required to provide Culver with a new opportunity to research the size of the class (App. 68-69).

The court also did not find manifest error in its decision as to the adequacy of Culver's representation of the class (App. 69). The court observed that Culver "allow[ed] six years to lapse without taking basic measures to determine the size of the class that he sought to represent," and otherwise bore "important misconceptions about his rights and responsibilities as a named class representative" (App. 69). The court noted, as well, that Culver's motion demonstrates his "patterns of asserting legal propositions that are no longer good law and of ignoring the court's local rules" (App. 69-70). The court stated that these facts confirm the court's concern as to Culver's ability to adequately represent the class (App. 70).

Finally, the court held that there was no manifest error with respect to its ruling that absent purported class members need not be notified of the case's dismissal (App. 70). The court reiterated its finding that there were no facts showing that class claims were so well publicized that absent purported class members may have relied upon the Culver class to vindicate their rights rather than filing suits of their own, and Culver presented no evidence to the contrary (App. 70).

STANDARDS OF REVIEW

The district court's ruling that Culver's suit could not be maintained as a class action should be reviewed for abuse of discretion. *Patterson* v. *General Motors Corp.*, 631 F.2d 476, 480 (7th Cir. 1980), cert. denied, 451 U.S. 914 (1981). The district court's ruling that notice need not be given to absent purported class members in a class action that was never properly certified should be reviewed for abuse of discretion. See *Simer* v. *Rios*, 661 F.2d 655, 666 (7th Cir. 1981), cert. denied, 456 U.S. 917 (1982). The district court's denial of Culver's motion for recusal should be reviewed *de novo*. *O'Regan* v. *Arbitration Forums, Inc.*, 246 F.3d 975, 987-988 (7th Cir. 2001). The district court's order refusing to consolidate this case with the *United States* case should be reviewed for abuse of discretion. *King* v. *General Elec. Co.*, 960 F.2d 617, 626 (7th Cir. 1992). The district court's factual findings should be reviewed for clear error. *Stone* v. *Farley*, 86 F.3d 712, 716 (7th Cir.1996). The district court's legal conclusions should be reviewed *de novo*. *Mace* v. *Van Ru Credit Corp.*, 109 F.3d 338, 340 (7th Cir. 1997).

SUMMARY OF THE ARGUMENT

1. It is the law of this case that Culver's personal claim is moot. In the last appeal in this litigation, this Court remanded for further proceedings to determine whether a viable class exists and whether Culver could represent the class. After conducting further proceedings on the viability of Culver's asserted class action, the district court correctly determined that Culver failed to satisfy the Rule 23

requirements for class certification of either the full class of plaintiffs, or a subclass of attempted applicants such as himself. No viable class action can be maintained on the facts of this case. Because Culver has failed to satisfy the elements for class certification, and there is no other purportedly qualified class representative to take his place, the district court did not abuse its discretion in dismissing the action.

The district court correctly ruled that Culver is not qualified to represent the full purported class of plaintiffs – attempted applicants and actual applicants – because his interest as an attempted applicant is not common or typical to that of actual applicants. The district court also correctly ruled that Culver could not represent a subclass of attempted applicants. Culver never undertook any efforts to determine the number of members in this subclass, and thus failed to satisfy the numerosity requirement of Rule 23. Furthermore, the district court determined that Culver could not fairly and adequately represent a subclass of attempted applicants because his personal claim is moot, and he never undertook any affirmative efforts to notify potential class members of the suit.

2. The district court acted well within its discretion in deciding against notifying absent purported class members of the dismissal of the suit. The notice requirements of Fed. R. Civ. P. 23(e) are not absolute, and in this case the district court reasonably determined that any putative class members would not be adversely affected since the dismissal order was not entered as a class judgment and would thus not bind persons who have not been named as a party to the action. Moreover, there was no concern of collusion and, in view of the absence of

publicity of the class action, it was unlikely that absent purported class members relied on Culver to litigate their claims. Nor is it likely that any purported class members would miss the statute of limitations for filing individual claims because of the dismissal of this suit.

3. This Court should not disturb the district court's orders denying Culver's motion for recusal under 28 U.S.C. 144 and 455. The motion and affidavit filed by Culver pursuant to 28 U.S.C. 144 are procedurally invalid because the affidavit is signed by counsel, and not Culver himself, and is the second affidavit that Culver's counsel has filed in this case, in violation of Section 144. The affidavit is also untimely because it was filed over a year after Culver knew of the asserted basis for recusal. In any event, even if Culver met the procedural requirements of Section 144, his factual allegations do not support recusal of the judge because they would not cause a reasonable person to believe that Judge Adelman has a personal bias or prejudice against Culver or his counsel. In addition, this Court cannot entertain an appeal of Culver's denial of recusal under 28 U.S.C. 455. When a district court denies a motion for recusal under Section 455, the moving party must immediately petition the court of appeals for a writ of mandamus. Culver's failure to request a writ constitutes a waiver of his recusal argument. But, again, even if Culver had satisfied the requirements of Section 455 and properly petitioned for a writ of mandamus, recusal would not be appropriate under that statute either because there is no compelling evidence that Judge Adelman bears any personal bias or prejudice towards Culver or his counsel.

4. Finally, the district court acted well within its discretion in refusing to consolidate this case with the *United States* case. Fed. R. Civ. P. 42 permits consolidation only where the district court finds there to be common questions of law or fact, and that consolidation furthers the economy and convenience of the court and the parties. The district court reasonably determined that there were no common questions of law or fact that made consolidation desirable.

ARGUMENT

I

CULVER FAILED TO SATISFY THE RULE 23 REQUIREMENTS FOR CLASS CERTIFICATION

In the last appeal in this litigation, this Court held that "[e]ven though [Culver's] personal claim has become moot, [] Culver retained the right to appeal Judge Reynolds' determination that the class had been improperly certified" (U.S. App. 116, citing *United States Parole Comm'n* v. *Geraghty*, 445 U.S. 388, 404-407 (1980); see also *Whitlock* v. *Johnson*, 153 F.3d 380, 384 (7th Cir. 1998) ("A properly certified class has a legal status separate from and independent of the interest asserted by the named plaintiff.")). As in the last appeal to this Court, Culver has a right to seek reversal of the district court's denial of class certification even though his individual claim is moot. *Geraghty*, 445 U.S. at 404-405.

In its prior decision, this Court reversed the district court's prior order invalidating the class, holding that the order was improper because it was based solely on the court's determination that there were no initial findings to support the

certification of a class action. This Court remanded for further proceedings so that the district court could make a determination as to "whether there exists a viable class within the meaning of Rule 23" and, if so, whether Culver can fairly and adequately represent the class (U.S. App. 120). The Court stated that "[r]esolution of these issues may well terminate this litigation" (U.S. App. 120). See *Geraghty*, 445 U.S. at 404 ("A named plaintiff whose claim expires may not continue to press the appeal on the merits until a class has been properly certified."). Because Culver's individual claim is moot, the class claims may proceed only if it is shown that the class satisfies the criteria set out in Fed. R. Civ. P. 23.

Determining whether a case "should be allowed to proceed as a class action involves intensely practical considerations, most of which are purely factual or fact-intensive." *Reed* v. *Bowen*, 849 F.2d 1307, 1309 (10th Cir. 1988) (citing *Geraghty*, 445 U.S. at 402-403). "Each case must be decided on its own facts, on the basis of 'practicalities and prudential considerations.'" *Ibid.* (quoting *Geraghty*, 445 U.S. at 406 n.11). After conducting further proceedings, the district court determined that the purported class did not satisfy Rule 23, and that Culver could not fairly and adequately represent the interests of the class (see pp. 16-21, *infra*). The district court acted well within its discretion in dismissing the action, since there was no viable class and no other purportedly qualified class member available to substitute for Culver as class representative.

Federal Rule of Civil Procedure 23(a) sets out the prerequisites to a class action. Rule 23(a) states:

> One or more members of a class may sue or be sued as representative parties on behalf of all only 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.

The plaintiff has the burden of proving that a case is appropriately a class action and meets all the requirements of Rule 23. *Valentino* v. *Howlett*, 528 F.2d 975, 978 (7th Cir. 1976). These requirements effectively "limit the class claims to those fairly encompassed by the named plaintiff's claims." *General Tel. Co. of the Northwest* v. *EEOC*, 446 U.S. 318, 330 (1980); see also *General Tel. Co.* v. *Falcon*, 457 U.S. 147, 156 (1982). "Failure to meet any one of the requirements of Rule 23 precludes certification of a class." *Valentino*, 528 F.2d at 978.[8/]

Culver moved to certify a class of plaintiffs in this case. The district court was correct in ruling that Culver failed to prove that he has the same interests or

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[8/] Culver initially argues (Br. 15) that because his case involves an allegation of discrimination based on race, his case is a class action by its very nature. However, this Court has made clear that "[a]llegations of discrimination do not constitute a by-pass around Rule 23." *Eggleston* v. *Chicago Journeymen Plumbers' Local Union No. 130*, 657 F.2d 890, 895 (7th Cir. 1981), cert. denied, 455 U.S. 1017 (1982); see also *Patterson* v. *General Motors Corp.*, 631 F.2d 476, 480 (7th Cir. 1980), cert. denied, 451 U.S. 914 (1981). Quoting the Supreme Court's decision in *East Texas Motor Freight System, Inc.* v. *Rodriguez*, 431 U.S. 395, 405-406 (1977), this Court stated that while suits alleging racial or ethnic discrimination are "often by their very nature class suits * * * careful attention to the requirements of Fed. Rule Civ. Proc. 23 remains nonetheless indispensable." *Eggleston*, 657 F.2d at 895. "The mere fact that a complaint alleges racial or ethnic discrimination does not in itself ensure that the party who has brought the lawsuit will be an adequate representative of those who may have been the real victims of that discrimination." *Ibid.* (quoting *East Texas Motor*, 431 U.S. at 405-406). Thus, even though Culver asserts racial discrimination, his case cannot proceed as a class action unless he can show that the class satisfies the requirements of Rule 23.

suffered the same injury as his purported class members, or that Culver's claims have the same essential characteristics as the claims of the class at large. The district court correctly characterized Culver's interests as that of a "would-be" or attempted applicant since he never applied for a position with the police department. The district court determined that as an attempted applicant Culver's interests and claims were not the same as the interests and claims of actual applicants.

Moreover, the district court correctly determined that Culver could not represent a subclass of plaintiffs (*i.e.*, a subclass of attempted applicants as himself), because he failed to satisfy Rule 23's numerosity requirement, and in any event had failed to demonstrate that he could fairly and adequately represent the purported class. The district court thus acted well within his discretion in decertifying the Culver class and dismissing the action.

A. *The District Court Correctly Determined That Culver's Interests And Claims Lack Commonality And Typicality With Those Of The Purported Class Members*

1. Rule 23 requires that "questions of law or fact common to the class" be present in order to maintain a class action, and that the claims of the class representative be "typical" of that of the class members. Fed. R. Civ. P. 23(a)(2) and (3). The commonality criterion of Rule 23(a)(2) requires that the named class representative be part of the class and "possess the same interest and suffer the same injury as the class members." *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 625-626 (1997); see also *Falcon*, 457 U.S. at 156 (quoting *Rodriguez*, 431

U.S. at 403). The typicality requirement of Rule 23(a)(3) can be satisfied "by a showing of a sufficient interrelationship between the claims of the representative and those of the class, so that an adjudication of the individual claims will necessarily involve the decision of common questions affecting the class." *Griffin* v. *Dugger*, 823 F.2d 1476, 1487 n.24 (11th Cir. 1987) (quoting 1 H. Newberg, *Newberg on Class Actions* § 3.17 (2d ed. 1985)), cert. denied, 486 U.S. 1005 (1988); see also *Patterson*, 631 F.2d at 481 (assessing typicality "requires a comparison of the claims or defenses of the representative with the claims or defenses of the class") (quoting *Taylor* v. *Safeway Stores, Inc.*, 524 F.2d 263, 270 (10th Cir. 1975)). In *Falcon*, the Supreme Court noted that the "commonality and typicality requirements of Rule 23(a) tend to merge," and that these sub-elements of Rule 23(a) "serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." 457 U.S. at 157 n.13; see also *Keele* v. *Wexler*, 149 F.3d 589, 594 (7th Cir. 1998); *Rosario* v. *Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992) ("The question of typicality in Rule 23(a)(3) is closely related to the * * * question of commonality."), cert. denied, 506 U.S. 1051 (1993).

Culver asserts that the City discriminated against him because it refused to give him an employment application for a position with the police department (see pp. 6-7, *supra*). Culver asserts that he was denied an application because he is a

white male (see pp. 6-7, *supra*). Culver's interests in the case are that of an attempted applicant, *i.e.*, an individual who *attempted* to apply for a position with the police department but who *never actually submitted* an application for employment. The 1995 order certified a class of "white male applicants" (white males who applied for positions with the police department) "who were eliminated from contention, or whose hire date was delayed * * * because of their status as a white male" (App. 1). The district court noted, and Culver does not dispute, that Culver "is only a member of the group of attempted applicants" (App. 42).

In resolving this issue, the district court correctly examined whether Culver's interests and claims as an attempted applicant are "sufficiently interrelated" with the interests and claims of actual applicants (see pp. 16-17, *supra*). The district court correctly determined that Culver's recruiting claim does not fairly encompass the claims challenging the City's exam scoring and eligibility list formation practices (App. 44). For example, in *Rodriguez*, a Title VII action brought by three Mexican-American truck drivers, the court of appeals certified a class composed of the trucking company's black and Mexican-American city drivers allegedly denied, on racial or ethnic grounds, promotions to more coveted "line-driver" positions. On review, the Supreme Court held that the court of appeals "plainly erred" in certifying a class action. *Rodriguez*, 431 U.S. at 403. The Supreme Court based its holding on the fact that the named plaintiffs were not qualified for "line-driver" positions when the class was certified, and therefore could have suffered no injury from the alleged discriminatory practices. The Supreme Court thus determined that

the named plaintiffs were not eligible to represent a class of persons who did allegedly suffer the injury. *Id.* at 403-404; see also *Walker* v. *Jim Dandy Co.*, 747 F.2d 1360, 1364 (11th Cir. 1984).

Courts of appeals that have considered whether different kinds of employment claims can proceed as a class action closely analyze the individual facts of the case to determine whether the interests and claims of the plaintiffs in these actions are sufficiently interrelated. For example, in *Griffin*, 823 F.2d at 1483-1484, the court of appeals vacated an order certifying a class because the named class representative, an incumbent employee, asserted claims of race discrimination in discipline and promotion, but did not have common interests or claims typical of other plaintiff class members who asserted race discrimination in the employer's use of written entry-level examinations. In *Castro* v. *Beecher*, 459 F.2d 725, 732 (1st Cir. 1972), the court of appeals held that the interests and claims of class members challenging allegedly discriminatory written police entrance examinations were not common or typical of the interests and claims of class members challenging discriminatory recruitment practices. See also *Williams* v. *Wallace Silversmiths, Inc.*, 75 F.R.D. 633, 635 (D. Conn. 1976) (where named plaintiffs include individuals who are currently employed by company, those who voluntarily left company, and the widow of a deceased employee, the district court denied motion for class certification because the "claims of the named plaintiffs do not have the requisite commonality or typicality with the claims of the subclasses of persons denied employment and deterred from seeking employment").

The facts in this case show that there is no commonality between Culver's allegations of race discrimination in recruitment and the purported class of plaintiffs who assert injury on the basis of the City's alleged discriminatory hiring practices. Culver never applied for a position with the City police department, and therefore the City never considered him for hiring. Culver's injury based on alleged discrimination in recruitment is not "sufficiently interrelated" to the injuries alleged by individuals who completed an employment application and satisfied other criteria for employment. For instance, Culver did not have to meet any qualifying prerequisites to merely request an application for employment with the City police department. The 1995 certification order, however, encompassed as class members those individuals who, at the time of application, possessed a valid driver's license, reached the age of 21, had not been convicted of a felony, and possessed a high school diploma or its equivalent (App. 2). The certification order gave the City authority to "disqualify[] a putative class member if the member was unable to meet the minimum requirements for application at the time they sought to apply for the position of Police Officer for the City of Milwaukee * * *" (App. 2). There is nothing in the record to show that Culver met the prerequisites for inclusion in the class as defined by the 1995 certification order. As an attempted applicant, Culver failed to show that he possessed the same interests and suffered the same injury as the purported class of actual applicants. Thus the district court was correct in determining that the class did not satisfy the commonality and typicality requirements of Rule 23.

2. Culver asserts (Br. 20-21) that the district court was wrong to separate the purported class into attempted (or would-be) applicants and actual applicants. Culver argues (Br. 20) that his interests are common and typical of the class because his and the class's alleged injuries derive from the City's alleged general policy of "exclud[ing] white males from hire."

This argument parallels the "across-the-board rule" that was severely restricted by the Supreme Court in *Falcon*. The Court in *Falcon* stated that while it "cannot disagree with the proposition underlying the across-the-board rule – that racial discrimination is by definition class discrimination * * * – the allegation that such discrimination has occurred neither determines whether a class action may be maintained in accordance with Rule 23 nor defines the class that may be certified." 457 U.S. at 157. The Court, for instance, stated:

> Conceptually, there is a wide gap between (a) an individual's claim that he has been denied a promotion on discriminatory grounds, and his otherwise unsupported allegation that the company has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class claims will share common questions of law or fact and that the individual's claim will be typical of the class claims.

Falcon, 457 U.S. at 157. Thus Culver's "presumption that general class claims are fairly encompassed within the personal claims of a named plaintiff can, at best, be characterized as tenuous." *Griffin*, 823 F.2d at 1486 (citing *Falcon*, 457 U.S. at 158). The *Falcon* Court made clear that "actual, not presumed, conformance with Rule 23(a) [is] indispensable." 457 U.S. at 160. The district court was correct in ruling that Culver's interests and claims as an attempted applicant were not similar

to the interests and claims of actual applicants, and thus did not abuse its discretion in decertifying the class on this ground alone.

B. *Culver Also Cannot Represent A Subclass Of Attempted Applicants Because He Has Failed To Provide Any Substantiated Estimate Of The Number Of Members In The Subclass, And Has Not Demonstrated That He Could Fairly And Adequately Represent the Subclass*

Upon determining that Culver could not represent the full class of persons that he sought to represent in his motion for class certification, the district court next considered *sua sponte* whether Culver satisfied the Rule 23(a) requirements to represent a subclass of attempted applicants. The district court correctly determined that Culver could not represent a subclass of attempted applicants in this case because he failed to provide any indication as to the number of members in the subclass, and the facts demonstrated that Culver could not fairly and adequately represent the purported subclass.

1. *Culver Failed To Satisfy The Numerosity Requirement Of Rule 23(a)*

Rule 23(a)(1) permits certification if the class is "so numerous that joinder of all members is impracticable." Plaintiffs seeking class certification are not required to specify the exact number of persons in the class, *Vergara* v. *Hampton*, 581 F.2d 1281, 1284 (7th Cir. 1978), cert. denied, 441 U.S. 905 (1979), but must provide some facts to substantiate the claim that the number of persons is too numerous to be joined to the action, *Valentino*, 528 F.2d at 978. Plaintiffs cannot "rely on conclusory allegations that joinder is impracticable or on speculation as to the size of the class in order to prove numerosity." *Marcial* v. *Coronet Ins. Co.*,

880 F.2d 954, 957 (7th Cir. 1989); *Valentino*, 528 F.2d at 978.

a. When Culver initially sought to certify a class, he stated that the "proposed class consists of hundreds and perhaps thousands of white male applicants" (R. 37 at 3). He intended the class to include not only actual applicants, but attempted applicants as well (U.S. App. 43). Culver, however, has not presented any substantiated proof as to the number of persons who would constitute a class of attempted applicants. At the January 17, 1996, hearing, counsel for Culver testified that she had no records as to the number of individuals to whom the City refused to give employment applications for positions with the police department (U.S. App. 39-40). In addition, counsel for the City testified that the City kept only records of persons who *submitted* applications for employment with the police department (U.S. App. 54; see also R. 226 (affidavit of Melanie R. Swank)). Furthermore, Culver never sought to assess the number of potential attempted applicants. The district court noted that Culver proposed, in 1993, to advertise in local newspapers to seek out persons who may have attempted to receive an application for employment with the City police department but whose request was refused because of race and/or gender (App. 50). Culver, however, never took any measures to determine the size of the class that he sought to represent and let six years elapse before requesting that the district court grant him approval to do so (App. 50).

b. Culver argues (Br. 27) that he had no duty to identify absent class members prior to a finding of liability. However, the district court's duty to assess

whether a class is properly certified did not end with the improper 1995 certification. "[A]s long as the [district] court retains jurisdiction over the case 'it must continue carefully to scrutinize the adequacy of representation and withdraw certification if such representation is not furnished.'" *Barney* v. *Holzer Clinic, Ltd.*, 110 F.3d 1207, 1214 (6th Cir. 1997) (quoting *Grigsby* v. *North Mississippi Med. Ctr., Inc.*, 586 F.2d 457, 462 (5th Cir. 1978)). As the purported class representative, Culver had a continuing responsibility to ensure that the numerosity requirement, and in fact all of the Rule 23 prerequisites, are met. Culver, however, has not shown that any other class member even exists, and failed to take even basic measures, such as placing ads in local newspapers and police magazines, to determine the size of the class that he purports to represent. Culver thus failed to demonstrate that even a subclass can be certified, because he failed to satisfy Rule 23's numerosity requirement.

2. *Culver Failed To Show That He Can Fairly And Adequately Represent The Subclass*

Even if Culver had satisfied Rule 23's numerosity requirement for certification of a subclass, the district court determined that Culver failed to show that he could fairly and adequately represent that subclass. Ample facts support the court's determination.

First, the fact that the district court granted Culver's motion to dismiss his individual claim as moot provides strong support for the district court's determination that Culver is unable to fairly and adequately serve as class

representative. A named plaintiff must have a personal stake in the outcome of the case at the time the district court rules on class certification. See *Geraghty*, 445 U.S. at 399. As this Court recognized in the prior appeal in this action, Culver's claim became moot in December 1997, two years after the initial 1995 certification order and about three years prior to the district court's January 2001 and February 2001 orders decertifying the class. Because Culver's claims are moot, he cannot fairly and adequately represent the class in this suit since he no longer has any common and ongoing interests and claims in the action. See, *e.g.*, *Harris* v. *Peabody*, 611 F.2d 543 (5th Cir.) (court of appeals refuses to reverse district court's determination that named plaintiff with mooted claim was not an appropriate class representative for certification purposes), cert. denied, 449 U.S. 958 (1980); see also *Ball* v. *Wagers*, 795 F.2d 579, 582 (6th Cir. 1986) (court of appeals remands to district court to determine whether mootness of named plaintiff's claim required substituted class representative or dismissal).

Second, as already discussed at p. 7, *supra*, Culver never made any attempts to contact potential class members and notify them of the class suit. Culver testified at the January 1996 hearing (p. 7, *supra*), that he had made no attempt to contact other similarly situated persons, and knew of no other person who had been denied an application by the City police department because of race. As a result the only purported class member that Culver knows of is himself, and consequently there is no other individual to assume the role of class representative. Compare *Whitlock*, 153 F.3d at 384 (when class representative's claim became moot, district

court "acted properly" in allowing the class claims to continue with the substitution of appropriate class representatives).

Indeed, Culver's failure to seek out other purported class members is indicative of his lack of involvement in the case and failure in fulfilling his fiduciary duties to individuals that he seeks to represent in this litigation. When seeking to prosecute a class action, the class representative and class counsel "assume[] certain fiduciary responsibilities to the [c]lass." *Sondel* v. *Northwest Airlines, Inc.*, 56 F.3d 934, 938 (8th Cir. 1995); *Jefferson* v. *Ingersoll Int'l, Inc.*, 195 F.3d 894, 897 (7th Cir. 1999); see also *Baffa* v. *Donaldson, Lufkin & Jenrette Sec., Corp.*, 222 F.3d 52, 61 (2d Cir. 2000) (class status may properly be denied where class representative has "so little knowledge or an involvement in the class action"). As the district court noted, the fiduciary relationship between the class representative and class members necessitates that the "class representative * * * properly communicate freely with absent class members, so long as he or she avoids false and misleading information" (App. 65 (citing 3 Newberg & Conte, *Newberg on Class Actions* § 15.16 at 15-48 (3d ed. 1992))). Culver's failure to contact other putative class members has thus resulted in the absence of any other individual to substitute as class representative in the case.

Culver argues (Br. 27-28) that he was precluded from seeking out potential class members for two reasons. First, he seems to argue (Br. 28) that Fed. R. Civ. P. 23(d)(2) requires that the district court approve in advance any communications with potential class members. Rule 23(d)(2) states (emphasis added):

> In the conduct of actions to which this rule applies, the court *may* make appropriate orders: * * * (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action * * *.

Contrary to Culver's apparent assertions, this Rule would not require that Culver get approval from the court prior to seeking out potential class members. Rather, any notice contemplated under Rule 23(d)(2) is "discretionary." See Advisory Committee's Notes to 1966 Amendment; see also *Navarro-Ayala* v. *Hernandez-Colon*, 951 F.2d 1325, 1336 (1st Cir. 1991); *Cox* v. *American Cast Iron Pipe Co.*, 784 F.2d 1546, 1554 (11th Cir.), cert. denied, 479 U.S. 883 (1986). Rule 23(d)(2) authorizes the district court, at its *discretion*, to issue orders related to administering the class during the pendency of a class action proceeding and does not preclude Culver from notifying potential class members of his proposed class action.

Culver argues further (Br. 28) that his counsel is licensed in the State of Illinois and that state supreme court bar rules prohibit her from soliciting potential class members. However, the Illinois bar rules do not prohibit Culver's counsel from notifying potential class members of a class action. Rule 7.2 of Article VIII in the Illinois Rules of Professional Conduct states that a lawyer may advertise services subject to certain provisions. Ill. S. Ct. Rules of Prof'l Conduct R. 7.2. Rule 7.2 of the Illinois rules practically mirrors that of Rule 7.2 of the American

Bar Association's Model Rules of Professional Conduct. Rule 7.3 of the Illinois rules of professional conduct sets out the restrictions to attorneys in directly contacting prospective clients and prohibits attorney solicitation "directed to a specific recipient." Ill. S. Ct. Rules of Prof'l Conduct R. 7.3. The language that prohibits attorney solicitation to a "specific recipient" does not appear on its face to prohibit counsel from taking measures to assess the existence of potential class members for a class action suit, since the solicitation would not be directed at specific, named individuals. Indeed, like Rule 7.2, Rule 7.3 of the Illinois professional conduct rules contains restrictions on attorney solicitation of specific prospective clients similar to those stated in ABA Model Rule 7.3. Comment 4 of Rule 7.2 of the ABA Model Rules states, however, that "[n]either [Rule 7.2] nor Rule 7.3 prohibits communications authorized by law, such as notice to *members of a class in class action litigation*." Model Rules of Prof'l Conduct R. 7.2, cmt. 4 (emphasis added).

The fact that Culver "labored under the misconception that he was forbidden to communicate with the class members that he represented" over a six-year period reinforced the court's "concerns about Culver's ability to provide adequate class representation" (App. 66).

II

THE DISTRICT COURT ACTED WELL WITHIN ITS DISCRETION IN DECIDING AGAINST GIVING NOTICE OF THE DISMISSAL TO PUTATIVE CLASS MEMBERS

Culver argues (Br. 29) that the district court was obligated to notify absent class members of the dismissal of the case. Fed. R. Civ. P. 23(e) provides:

> Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

The notice requirement of Rule 23(e) applies where "a class has been *certified* and the case is settled or dismissed," because the settlement or dismissal "will be res judicata as to the claims of the individual class members." *Simer* v. *Rios*, 661 F.2d 655, 664 (7th Cir. 1981) (emphasis added), cert. denied, 456 U.S. 917 (1982); see also *Hansberry* v. *Lee*, 311 U.S. 32, 42-43 (1940). "[W]here the claims are settled, important rights and remedies may be bargained away in the settlement process." *Simer*, 661 F.2d at 664 (citing *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313-314 (1950)). "[N]otice of the settlement is [thus] necessary as a matter of constitutional due process, [as] an individual's claim cannot be extinguished without notice and an opportunity to be heard." *Ibid.*

However, this Court held in *Simer* that the notice requirement of Rule 23(e) is not absolute. 661 F.2d at 666. This Court stated that requiring Rule 23(e) notice even where a class has not been properly certified would essentially "convert[] every *potential* class claim into a class action requiring Rule 23(e) notice as well as

other full class treatment [that would be] time consuming and costly." *Simer*, 661 F.2d at 665. The Court stated that "rather than setting down an absolute rule we choose to place discretion in the district court to assess the prejudice to absent class members * * * , the institutional costs of notice and a certification hearing, as well as other factors relevant to this determination." *Id.* at 666.

The district court in this case recognized that final judgments in class action cases must identify the class "to facilitate later courts' res judicata assessments" (App. 57). The district court, however, did not enter the final judgment as a class judgment, and therefore the judgment does not bind persons who have not been named parties to the dispute (App. 57). The district court stated that the final judgment dismissing the action would not prejudice absent class members for two reasons. First, since the dismissal is involuntary and not due to a settlement, there is no fear of improper collusion. Second, the statute of limitations for absent class members to file individual claims will once again begin to run,[9/] but because the class claims received no publicity and no notice was ever sent to putative class members, the "risk is extremely minimal of a putative class member missing the statute of limitations period for his own individual action [because] of the dismissal of this case" (App. 58-59). The district court thus reasonably concluded that notice

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[9/] This Court observed in *Glidden* v. *Chromalloy American Corp.*, 808 F.2d 621, 627 (7th Cir. 1986), that the "filing of a suit with a class allegation tolls the running of the statue of limitations with respect to the absent class members." The time begins to run again where the district court "refuses to certify the case as a class action." *Ibid.* Indeed, the district court's decertification of the class in this case causes the statute of limitations to run again as well (App. 58-59).

to purported class members was not necessary in this case, since the judgment dismissing the action would not have precluded any purported class members from bringing individual claims.

III

THIS COURT SHOULD NOT DISTURB THE DISTRICT COURT'S RULING DENYING CULVER'S MOTION FOR RECUSAL

Culver moved to recuse Judge Adelman pursuant to 28 U.S.C. 144 and 455(a) and (b)(2) (R. 214, 238). There are no facts to support recusal of the judge, and thus no basis for this Court to overturn the lower court's judgment.

A. *The Motion And Affidavit Filed Under 28 U.S.C. 144 Are Procedurally Invalid, And Otherwise Do Not Support The Recusal Of Judge Adelman*

1. The motion for recusal and accompanying affidavit filed by Culver pursuant to 28 U.S.C. 144 were invalid because Culver failed to meet the procedural requirements for filing the motion. Pursuant to 28 U.S.C. 144, a party may move for recusal of a judge where the party files a timely and sufficient affidavit that the judge has a "personal bias or prejudice" against him. "Section 144 expressly requires the 'party' to execute the [affidavit]," which must also be accompanied by a "certificate of counsel of record stating that it is made in good faith." *Roberts* v. *Bailar*, 625 F.2d 125, 128 (6th Cir. 1980). Failure of a party to sign the affidavit renders the motion for recusal "invalid" "from the time that it is filed." *Ibid*. (Section 144 motion for recusal invalid where plaintiff's counsel, not plaintiff, signs the affidavit); see also *United States ex rel. Wilson* v. *Coughlin*, 472 F.2d 100, 104 (7th Cir. 1973); *Pomeroy* v. *Merritt Plaza Nursing Home, Inc.*, 760

F.2d 654, 658-659 (5th Cir. 1985); see also *Paschall* v. *Mayone*, 454 F. Supp. 1289, 1299-1301 (S.D.N.Y. 1978) (affirming denial of Section 144 disqualification motions accompanied only by affidavit of counsel).

In this case, Culver's motion is defective because he did not sign the affidavit accompanying his Section 144 motion for recusal. The affidavit was instead signed by Culver's counsel (U.S. App. 124-125). In a supplemental filing, Culver's counsel explained that the affidavit "required under section 144 is signed by plaintiff's counsel since she has personal knowledge of the facts contained therein, and the plaintiff Scott Culver does not" (R. 238). However, the fact that Culver's counsel became aware of the facts before Culver himself does not waive the statutory requirement that Culver himself must sign the affidavit in order for the recusal motion to be valid.

Next, Culver's counsel's affidavit supporting the motion for recusal is invalid because Section 144 permits the filing of "only one such affidavit in any case." 28 U.S.C. 144. As the district court pointed out, and Culver does not dispute, this is the second motion and affidavit for recusal filed by Culver in this litigation. The first Section 144 affidavit was filed by Culver in this case against Judge Reynolds in 1997 (see p. 7, *supra*). In *United States* v. *Balistrieri*, 779 F.2d 1191, 1200 n.6 (7th Cir. 1985), cert. denied, 475 U.S. 1095 (1986), this Court "construe[d] the statute strictly" and noted that the "plain language permits a party only one affidavit in a case." See also *Roberts*, 625 F.2d at 128. Pursuant to *Balistreiri*, Section 144 limits a party to the filing of one motion and affidavit for

recusal; thus, the district court was correct in determining that under Section 144, it could not consider the allegations set out in Culver's second affidavit (App. 10).

Finally, the motion for recusal is invalid because it is untimely. An affidavit supporting a recusal motion under Section 144 must be filed "at the earliest moment after [the movant acquires] knowledge of the facts demonstrating the basis for such disqualification." *United States* v. *Sykes*, 7 F.3d 1331, 1339 (7th Cir. 1993) (internal quotations omitted). The facts alleging personal bias or prejudice "must be stated with particularity," and must be "definite as to times, places, persons, and circumstances." *Balistrieri*, 779 F.2d at 1199. The district court correctly concluded that Culver's motion and affidavit were not timely because they were not filed at the earliest moment after Culver knew of the basis allegedly supporting Judge Adelman's disqualification.

Culver's counsel's affidavit states that Judge Adelman should be disqualified because he did not notify her of the status conference which preceded the April 1, 1998, order dismissing the case, or of a November 1998 order which clarified the April 1998 dismissal order (U.S. App. 124-125). These facts are plainly untimely and cannot serve as bases for disqualifying Judge Adelman, as the proceedings that Culver refers to occurred one to one and one-half years prior to the filing of his motion and affidavit for recusal.

2. Even if Culver met the procedural requirements, his factual assertions are patently insufficient to warrant recusal. *Balistrieri*, 779 F.2d at 1199 (in "passing on the legal sufficiency of the affidavit, the judge must assume that the factual

averments it contains are true, even if he knows them to be false"). Section 144 requires recusal where there are sufficient facts that would "convince a reasonable person that bias exists." *Id.* at 1199. "The negative bias or prejudice from which the law of recusal protects a party must be grounded in some personal animus or malice that the judge harbors against him, of a kind that a fair-minded person could not entirely set aside when judging certain persons or causes." *Id.* at 1201. "Satisfactory evidence of bias or prejudice must show this element of personal animus or malice." *Ibid.*

With respect to Culver's counsel's allegation (U.S. App. 124-125) that she was not notified of the status conference preceding the issuance of the April 1998 dismissal order, the district court explained that this was pursuant to standard administrative court procedures and not purposeful exclusion of her (see App. 7-8). As the district court explained, at the time that the court notified counsel of the March 31 status conference (which preceded the April 1, 1998, order dismissing the case), "Culver was not a party to any live claims remaining in the case" (App. 7; see also App. 18-19). Since Culver was not a party to the action at that point, and therefore was not on the court's distribution list, she accordingly did not receive the April 1998 order, or the November 25, 1998, order clarifying the dismissal order (App. 8). Culver must make factual averments which show that the bias is "personal" rather than "judicial." *United States* v. *Patrick*, 542 F.2d 381, 390 (7th Cir. 1976), cert. denied, 430 U.S. 931 (1977). Culver's counsel's exclusion from the distribution list was not a result of personal bias or prejudice,

but was instead a function of the court's normal administrative procedures.

Culver's counsel's affidavit also asserted that Judge Adelman had a personal bias or prejudice because his former law firm represented the City's police union (U.S. App. 125). However, Judge Adelman's response to this allegation wholly dispelled any assertion by Culver that recusal was warranted. Judge Adelman explained that he never represented the police union while in private practice; that his partner, Kenneth Murray, never represented the police union during their partnership; that the police union is not a party to this case; and finally that Murray is not an attorney to any party in this case (App. 17-18; see also App. 7).

Thus Culver's counsel's affidavit presents no allegation that would cause a reasonable person to believe that Judge Adelman has any personal bias or prejudice against Culver or his counsel.

B. *Culver Waived His Challenge To Judge Adelman's Refusal To Recuse Himself Under 28 U.S.C. 455, And In Any Event Culver's Challenge Is Without Merit*

Section 455 of Title 28 is "the comprehensive federal recusal statute." *Balistrieri*, 779 F.2d at 1202. Under 28 U.S.C. 455(a), a party may seek recusal of a judge in a proceeding where the judge's "impartiality might reasonably be questioned." Section 455(b) details several specific circumstances that would warrant recusal, such as where the judge has a "personal bias or prejudice concerning a party" or where "in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter." 28 U.S.C. 455(b)(1) and (2).

Unlike 28 U.S.C. 144, Section 455 does not require the filing of an affidavit by a party to the proceeding. See *Balistrieri*, 779 F.2d at 1200 n.6.

1. Culver in this case failed to properly challenge the denial of the motion for recusal under Section 455. When a district court denies a motion for recusal under Section 455, the "moving party's sole recourse is to apply to [the court of appeals] immediately for a writ of mandamus." *Balistrieri*, 779 F.2d at 1205; *United States* v. *Franklin*, 197 F.3d 266, 269 (7th Cir. 1999); *United States* v. *Smith*, 210 F.3d 760, 764 (7th Cir. 2000). "A failure to request the writ constitutes a waiver of the recusal argument." *Franklin*, 197 F.3d at 269; *Smith*, 210 F.3d at 764. Since Culver failed to petition for a writ of mandamus upon issuance of the district court's May 15 and September 30, 2000, orders denying his motion for recusal under Section 455, Culver has waived his right to challenge the denial.

2. Even if Culver had petitioned for a writ of mandamus of the denial of the recusal order, there are no facts to show that Judge Adelman was partial, or bore a personal bias or prejudice against Culver. "[T]he phrase 'personal bias or prejudice' found in Section 144 mirrors the language of Section 455(b)." *Brokaw* v. *Mercer County*, 235 F.3d 1000, 1025 (7th Cir. 2000) (citing *Balistrieri*, 779 F.2d at 1202 ("[W]e shall view judicial interpretations of 'personal bias or prejudice' under § 144 as equally applicable to § 455(b)(1).")). Therefore, for the same reasons that recusal was not required under Section 144 (pp. 45-47, *supra*), it is also not required under Section 455.

Section 455 requires recusal only where "actual bias or prejudice is 'proved

by compelling evidence.'" *O'Regan* v. *Arbitration Forms, Inc.*, 246 F.3d 975, 988 (7th Cir. 2001) (citing *Hook* v. *McDade*, 89 F.3d 350, 355 (7th Cir. 1996), cert. denied, 579 U.S. 1071 (1997)). There is no evidence demonstrating that Judge Adelman had a personal bias or prejudice against Culver. As explained, pp. 46-47, *supra*, Culver's absence of notice regarding the status conference that preceded the April 1, 1998, dismissal order, and notice of subsequent orders, was due to administrative procedures adhered to by all of the judges in Judge Adelman's district. Culver's counsel was removed from the distribution list because Culver was no longer a party in the case, not because of any personal bias or prejudice against counsel or her client. As also explained, p. 47, *supra*, neither Judge Adelman nor his former law partner ever represented any party in this proceeding. Since Culver has failed to demonstrate that a reasonable person would question Judge Adelman's impartiality, there is no basis for recusal under 28 U.S.C. 455.

IV

THE DISTRICT COURT ACTED WELL WITHIN ITS DISCRETION IN REFUSING TO CONSOLIDATE THIS CASE WITH THE *UNITED STATES* CASE

Rule 42(a) of the Federal Rules of Civil Procedure permits actions involving "common questions of law or fact" to be consolidated for the economy and convenience of the court and of the parties. See *Johnson* v. *Manhattan Ry. Co.*, 289 U.S. 479, 497 (1933); see also *Lewis* v. *ACB Bus. Servs., Inc.*, 135 F.3d 389, 412 (6th Cir. 1998); *Ikerd* v. *Lapworth*, 435 F.2d 197, 204 (7th Cir. 1970). The district court did not abuse its discretion by refusing to consolidate this case with

the *United States* case.

First, because the district court decertified the Culver class, and properly dismissed the action, there is essentially no other case to consolidate with the *United States* case. Second, as the United States argued below (R. 219), the broad class action relief sought in this case by Culver principally concerns injunctive relief from the 1975 and 1976 hiring orders (which are no longer in effect), the legality of those old orders, back pay, and damages. The relief sought in the *United States* case, however, is more prospective in that it concerns developing fair hiring procedures for future police applicants. Consolidation of the two cases would significantly broaden the scope of the *United States* case and take it in a direction adverse to the interests of the parties to these actions. Based on these facts, the district court reasonably determined that there were no common issues of law or fact that would make consolidation "desirable" (see App. 30; see also p. 15, *supra*).

CONCLUSION

For the forgoing reasons, the district court's judgments should be affirmed.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation set out in Fed. R. App. P. 32(a)(7)(B). The brief was prepared using WordPerfect 7.0, and contains 13,798 words.

_____
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CERTIFICATE OF SERVICE

I hereby certify that on June 18, 2001, two copies of the Brief For The United States As Appellee, one 3-1/2 inch computer disk containing the Brief's text, and one copy of the United States' Supplemental Appendix were served by first-class mail, postage prepaid, on each of the following persons:

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