



CIRCUIT COURT OF THE STATE OF OREGON

FOURTH JUDICIAL DISTRICT
MULTNOMAH COUNTY COURTHOUSE
1021 S.W. FOURTH AVENUE
PORTLAND, OR 97204-1123

RICHARD C. BALDWIN
JUDGE

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Re: Jennifer Adams v. Western Culinary Institute, et al.
Case No. 0803-03530
Opinion Letter Re Plaintiffs Motion For Class Certification

Dear Counsel,

The Court has now had an opportunity to carefully consider Plaintiff's Motion for Class Certification. Based on applicable Oregon law, and after assessing all factors set forth in ORCP 32, the Court allows the motion, in part, and denies the motion, in part.

BACKGROUND

Jennifer Adams, a former culinary student at Defendant Western Culinary Institute, LTD, a subsidiary of Defendant Career Education Corporation, seeks to prosecute a class action for damages and equitable relief individually and on behalf of all other similarly situated persons. In her Fourth Amended Complaint And Demand For Jury Trial, plaintiff alleges as follows:

"The classes consist of current and former WCI-School students, . . .
The contract/unjust enrichment class consists of all students . . . who attended WCI-School, made tuition payments, incurred financial obligations, or otherwise suffered ascertainable loss within the six years prior to the date of commencement of this action. The Unlawful Trade Practices Act subclass consists of all students . . . who attended WCI-School, . . . within one year of the date of commencement of this action. The fraud subclass consists of all students . . . who attended WCI-School, . . . within two years of the date of commencement of this action. As alleged below, defendants' fraudulent concealment has tolled these limitations periods."
(para. 6)

“Based on information and belief, plaintiff estimates that the contract/unjust enrichment class size numbers between 5,000 and 6,000 people, and the UTPA subclass size to number approximately 750 people. Plaintiff estimates that the fraud subclass numbers approximately 2,000 people. Regardless of the exact number, the classes are so numerous that joinder is impracticable because of the large size and geographic dispersion of the class.” (para. 7)

Plaintiff’s allegations of underlying facts pertinent to her Motion for Class Certification are as follows:

“Defendants made misleading representations and omissions to plaintiff and the class regarding the value of the WCI-School education, benefit of the degree, exclusivity of the degree, nature of ongoing career placement, job placement rates, post-graduate salaries, and its operation under the regulations of Oregon’s Office of Degree Authorization, including:

“ . . . ”

B. Affirmatively representing in the WCI-School catalog that the Le Cordon Bleu curricula gives students greater opportunities to acquire the knowledge and skills necessary to excel in the culinary/hospitality world, when in fact Le Cordon Bleu training does not provide those benefits for the entry level jobs for which the school’s catalog says it trains its students;

C. Affirmatively representing in the WCI-School catalog that the school trains students for entry level jobs, but failing to disclose that those entry level jobs do not require that training;

D. Knowing, but failing to disclose, that WCI-School’s training would qualify graduates for mostly low paying, poverty-wage jobs;

“ . . . ”

G. Knowing, but failing to disclose, that defendants were so concerned about loan defaults given the imbalance between WCI-School tuition and expected wages that CEC paid to Sallie Mae 25 percent or more of sub-prime loans that Sallie Mae made to WCI students;

H. Knowing, but failing to disclose, that students who attend WCI-School will not obtain material benefit from the course of study;

I. Calculating job placement rates in a manner inconsistent with that required by the State of Oregon’s governing regulations;

J. Providing each student with graduate job placement rates that affirmatively represented that it places over 90 percent of its students in jobs, but failing to disclose that those rates were composed mostly of jobs that do not require culinary training like prep cook and line cook;

“ . . . ”

M. Defendants affirmatively represented that they provide post-graduation career placement assistance, but by inflating job placement figures to include jobs for which a culinary degree is unnecessary, they misrepresented the nature of career services that they would provide;

“ . . . ” (Para. 14)

Plaintiff has also alleged that “(a)s a result of the misrepresentation and omissions described above, defendants violated the following regulations:

1. OAR 583-030-0035(8)(d) by failing to clearly explain the true relationship between the curriculum and subsequent student qualification for occupational practice;
2. OAR 583-030-0035(9) by offering admission without evidence that the applying student can reasonably expect to benefit from the education obtained;
3. OAR 583-030-0035(11)(e) by not clearly describing placement services;
4. OAR 583-030-0035(12) by communicating information that is inaccurate and misleading;
5. OAR 583-030-0035(12)(a) by misrepresenting and/or omitting in the school catalog material information about the relationship of the curriculum to occupational qualification, career planning, placement services, financial aid, and job opportunities for current students;
6. OAR 583-030-0035(20) by engaging in practices that are fraudulent, dishonest, unethical, exploitive, irresponsible, deceptive, and inequitable and thus harmful to plaintiff and the class.” (para 14, sub.O)

It is undisputed that these regulatory standards apply to defendants as a school offering academic degrees in Oregon. See OAR 583-030-0035.

In support of her contention that defendants have engaged in deceptive practices, plaintiff relies on statements in a catalog routinely provided by defendants to all students attending the Institute. The catalog includes the following statements:

“LE CORDON BLEU – AN INTERNATIONAL PASSPORT SINCE 1895
Few institutions of any kind possess the prestigious reputation of Le Cordon Bleu. This internationally renowned school for the culinary arts has become synonymous with expertise, innovation, tradition, and refinement – qualities which are meticulously nurtured by the school.”

“Le Cordon Bleu’s partnership with Le Cordon Bleu Schools North America further expands this influence. Le Cordon Bleu’s arrival in the United States is significant beyond mere expansion. It ushers in a new educational era in culinary arts that combines classical European techniques with modern American technology and training. As a result, students will be afforded even greater opportunities to acquire the knowledge and skills necessary to excel in the culinary world”

“With this comprehensive training, WCI graduates should be able to function in a variety of food service organizations that focus on cuisine, baking and pastry, or management. Specifically, graduates from the Associate of Occupational Studies (AOS) LCCB Culinary Arts Program will have received training for entry-level positions such as Garde Manger, Line Cook, Baker, Roundsman, Catering Cook, Banquet Cook, and Prep Cook. Students graduating from the LCB Hospitality and Restaurant Management program will have received training for entry-level positions such as Assistant Manager, Maitre D’, Bartender, Wine Steward, Assistant Catering Manager, Manager Trainee, and Wait Person. . . .” See Plaintiff’s Declarations.

Students were also provided a “WCI Graduate Success Rates Form” (dated Mar. 31, 2007) indicating a total employment rate for students graduating between 10/1/05 and 9/30/06 of 94.49%. The employment rate for graduates of each program offered was in excess of 88%. The employment rates do not indicate the nature of the employment position or salaries obtained by the graduates. Plaintiff contends the Rates Form is misleading because many of the entry level restaurant jobs included in the placement statistics do not require any culinary training or specialized education. See Plaintiff’s Declarations. Plaintiff contends defendants misrepresented job placement figures to students as well as the value and significance of defendants’ programs in violation of Oregon Administrative Rules previously cited.

Plaintiff's declarations indicate that defendants tracked the positions its graduates obtained and salaries following graduation but did not disclose this information to students. The data shows that approximately 70% of its 2007-2008 graduates earn less than \$22,500 and 87% less than \$25,000 per year. The charges for defendants' programs range from \$41,050 for a 60 week program down to \$18,050 for a 30 week diploma, depending on the length and type of program. Plaintiff contends defendants engaged in deceptive practices because students were unable to assess the value of the program in relationship to cost as a result of defendant's catalog statements and the nondisclosure of salary and job information known to defendants.

Defendants contend it provides quality education and training in the culinary field, and is nationally accredited by and in good standing with the Accrediting Commission of Career Schools & Colleges of Technology. Defendants' Declarations indicate that its educational programs are also accredited by the American Culinary Foundation Accrediting Commission and in good standing, after regular reviews, with the Oregon Department of Degree Authorization. Defendants point to the following statements from the catalog and Student Disclosure Form about what students can expect from defendants' programs:

"The success or satisfaction of an individual student is not guaranteed and is dependent upon abilities and the application of personal efforts . . . [c]areer advancement assistance for a specific industry position may be enhanced by the education received but will depend on an individual's abilities, attitude, and prior relevant experience."

"The purpose of WCI is to provide basic training . . . [its] programs offer students the opportunity to [a]cquire the attributes of a professional, entry-level cook or hospitality management trainee." Topaz Dec., Ex. C.

Defendant's Enrollment Agreement provides:

5. Success of Students. The Student's individual success or satisfaction is not guaranteed, and is dependent upon the Student's individual efforts, abilities and application of himself/herself to the requirements of the school.

8. Employment. WCI does not guarantee employment following graduation but does offer career planning assistance to students and graduates . . . Employment and externship decisions are outside the control of the school. Some programs may require additional education, licensure and/or certifications for employment in some positions. Topaz Dec. Ex. D.

Defendants Student Disclosure Form provided to students includes the following statements:

“2. Employment & Salaries

Western Culinary Institute has served the community since 1983 and is proud of its graduate employment record. The School will offer job search assistance; however it cannot guarantee employment, a specific job title, salary or salary range. I have not been guaranteed employment, a specific job title, salary or salary range by any employee of Western Culinary Institute.

3. Externship

The school provides guidance and assistance in securing an externship; however it cannot guarantee an externship at a specific property or position, with a particular chef or manager, with a salary, or in foreign country. Furthermore, I understand that I must be an active participant in securing my externship. I have not been guaranteed a specific externship by any employee of Western Culinary Institute.” See Topaz Decl.

Defendants also submitted several declarations regarding the value of its education and training and the benefits of a culinary education.

UTPA AND FRAUD CLAIMS

As indicated above, plaintiff’s Unlawful Trade Practices Act (UTPA) and Fraud claims are based on allegations of affirmative misrepresentations and failure to disclose certain information known to defendants relating to the value and benefits of the educational services provided by defendants. Defendants argue that class certification of these claims is not “superior to other available methods for the fair and efficient adjudication” of such claims because individual determinations of whether students relied on the alleged misrepresentations would overwhelm common issues. Defendants also argue, for similar reasons, that other factors militate against class certification under ORCP 32 (A) (B). Defendants emphasize that “education is an inherently individual experience” and rely on submissions relating to the value of the educational services defendants provide to students. See Defendants Opposition Memo at pages 12-15.

A core issue for the Court is whether individual determinations of reliance on misrepresentations by students would be required in this class action with respect to the UTPA and Fraud Claims. Generally, a UTPA or Fraud claim based on express misrepresentations does require proof that the plaintiff relied in fact on those representations to his or her detriment. See *Newman v. Tualatin Development Co.*, 287 Or 47 (1979) (Class action could not be brought against builder where reliance by purchasers on express warranty would have to be individually

determined); see also *Feitler v. Animation Celection*, 170 Or. App. 702 (2000). However, this element of proof is a requirement only in fraud claims alleging affirmative misrepresentations of fact. Here, plaintiff's UTPA and Fraud Claims include allegations of express statements and allegations of nondisclosure of information.

In *Sanders v. Francis*, 277 Or 593, (1977) an automobile dealer allegedly sold a car to a consumer at a price substantially higher than the advertised price. The Court held that whether a claim under the UTPA requires proof of reliance by the consumer "as an element of causation necessarily depends on the particular practice alleged. The Court's rationale was as follows:

"In many cases plaintiff's reliance may indeed be a requisite cause of any loss, i.e. when plaintiff claims to have acted upon a seller's express representations. But an examination of the possible forms of unlawful practices shows that this cannot invariably be the case. Especially when the representation takes the form of a 'failure to disclose' under sub section (2), as in this case, it would be artificial to require a pleading that plaintiff had 'relied' on that non-disclosure. Similarly, if the particular violation of paragraph (i) is a sale made in wilful disregard of the advertised price, and intended at the time of the advertisement, then plaintiff's damage results precisely from defendants' reliance on her ignorance, not from plaintiff's reliance on defendants' advertisement." 277 Or. at 599.

In *Tri-West Construction Co. v. Hernandez*, 43 Or App 961 (1979), a contractor made false and misleading statements about a homeowner's right to rescind a contract for home improvements. The contractor argued that because the homeowner "had actual written notice of their "right to rescind, they could not justifiably rely upon any contrary representation made by [the contractor]. 43 Or App at 971. Citing *Sanders v. Francis*, supra, the Court rejected this argument:

"In this case, the unlawful practice alleged by defendants was a representation by plaintiff that defendants had no right to rescind a contract which both federal law (15 USC § 1635) and state law (ORS 83.710 *et seq*) required plaintiff to inform defendants they did have a right to rescind. The representation was therefore not a mere statement of opinion, it was an affirmative misstatement by one party of a fact which that party was required to accurately state to the other. Similarly, proof that a party justifiably relied on a representation is not necessary when the representation involves a matter about which the party making it is legally required to inform the other." 43 Or App at 972-73.

See also *Strawn v. Farmers Ins. Co.*, 228 OR App 454 (2009) (fraud class certification affirmed where fact finder could reasonably infer detrimental reliance from continued payment of premiums for coverage insurance company never intended to provide) and *Handy v. Beck*, 282 Or 653 (1978) (fraud actionable without misrepresentation where defendant concealed and failed to disclose information he had a duty to report).

This Court concludes that under *Sanders & Triwest*, class members here may assert their nondisclosure allegations as actionable under the UTPA and at common-law without proof of reliance. Those allegations are set forth in paragraph 14 (C),(D), (H) and (J), supra. UTPA or Fraud Claims arising from express written representations made to all students in defendants' catalog contrary to the nondisclosed information may not be maintained as a class action because reliance must be determined on an individualized basis. See *Newman v. Tualatin Development Co.* supra. However, these representations may be relevant to prove whether the nondisclosure of information by defendants constituted a deceptive practice.

Plaintiff has also alleged defendants failed to disclose that defendants "paid to Sallie Mae 25 percent or more of sub-prime loans that Sallie Mae made to WCI students [because defendants were] concerned about loan defaults given the imbalance between WCI-School tuition and expected wages . . .". Para 14 (G), supra. The Court expresses no opinion on whether this alleged nondisclosure provides a basis for plaintiff's UTPA or Fraud claims without further pretrial briefing by the parties.

Defendants have cited *Diallo v. American Intercontinental University, Inc.*, 2009 WL 4021178 (Ga App; 11/23/09) in support of their position that this action should not be certified as a class action. In *Diallo*, former students of American Intercontinental University, Inc. sought class certification for Fraud claims alleging that the University "had induced them and others to enroll in the school by making false representations relating to accreditation and placement rates. Class certification was denied, in part, because "individual assessments would be needed to ascertain, for example, any reliance each putative class member had placed upon the school's SACS-accredited status in electing to enroll; which SACS accreditation requirements were pertinent to that class member; and whether AIU's alleged failure to meet one or more such requirements had resulted in injury to that individual." *Diallo* is distinguishable from this case because the Court was not faced either with Unlawful Trade Practices claims or with substantial allegations of nondisclosure of information sufficient to support UTPA or Fraud claims. Compare also *Newman v. Tualatin Development Co.*, supra, where allegations were based on express warranty only, with no allegations of nondisclosure.

The Court anticipates in this case that issues of liability and damages will likely be bifurcated at time of trial. Based on the pleadings and submissions, class members may have sustained different damages. This potential difference in damages by class members does not necessarily present a valid basis for declining to certify this class action. See, e.g., *Alsea Veneer, Inc. v. State of Oregon*, 117 Or App 42 (1992). Here, the Court would likely move forward to individual determinations of damages sustained by class members in the event plaintiffs meet their burden of proof on liability. See also *Shea v. Chicago Pneumatic Tool Company*, 164 Or App 198 (1999).

The Court certifies these claims only as to students who entered into contracts for services with defendants after defendants allegedly knew and failed to disclose that the outcomes for students were materially different than represented in defendants' catalog. The size of this class would appear to be sufficiently large to support certification. See *Newman v. Tualatin Development Co.*, supra. The Court limits plaintiff's proposed class as indicated because determinations of whether individual students relied on express misrepresentations prior to defendants' failure to disclose information would overwhelm common issues and not frame a manageable class. Any such claims would more appropriately be prosecuted as individual claims. See ORCP 32 (B).

CONTRACT AND UNJUST ENRICHMENT CLAIMS

Plaintiff has not demonstrated an adequate basis to proceed on her claims for breach of contract. Nor has plaintiff demonstrated a basis for certification of her claims for unjust enrichment. Questions of fact as to the value of the educational services provided to students and varying amounts of tuition paid are not common to the proposed class. See ORCP 32 (A) (2). Therefore, those claims are not certified as part of this class action.

DEFENDANTS MOTIONS TO STRIKE

Defendants have filed Motions To Strike The Declarations of Ray Lindley and Richard Ross Filed In Support of Plaintiffs Motion To Certify Class Action. Defendants contend that the declarations constitute expert testimony and fail to comply with OEC 702. Defendants also argue that expert opinion that laws or rules were violated by defendants should be disregarded. However, the Court has only considered the content of the declarations as relevant to the requirements and factors set forth in ORCP 32 and has not considered the declarants' opinions as expert testimony. Defendants' motions are therefore allowed, in part, and denied in part.

Accordingly, plaintiff's counsel may submit an appropriate form of Order certifying that the specific prerequisites of ORCP 32 (A) are satisfied and that this action may be maintained as a class action. Pursuant to ORCP 32 (C), the Order will be conditional and may be altered or amended before a decision on the merits.

Sincerely,



RICHARD C. BALDWIN
Circuit Court Judge