United States District Court, N.D. Florida.
Josephine HAYNES, et al., Plaintiffs,
v.
SHONEY'S, INC., et al., Defendants.
No. 89-30093-RV.

June 22, 1992.

ORDER

VINSON, District Judge.

***1** This civil rights action is presently before the Court on the plaintiffs' motion to certify classes. (doc. 82). A two-day evidentiary hearing was held in this matter, and the parties have subsequently inundated the Court with evidentiary submissions and legal memoranda.

I. *Discussion.*

The plaintiffs are black and white former employees and applicants of Shoney's, Inc. ("Shoney's") and its franchisee, Robertson Investment Company ("RIC"). They complain that the defendants have discriminatorily failed to hire, failed to promote, harassed, discharged, constructively discharged, and retaliated against the plaintiffs. The plaintiffs contend that all such discriminatory actions resulted from a discriminatory policy initiated and maintained by defendant Raymond L. Danner, the founder and former CEO of Shoney's.[FN1]

FN1. Defendant Danner served as Chairman of the Board until March 1989. After his retirement in 1989, he remained on the board and took the title "Senior Chairman of the Board."

A. *Classes Sought to be Certified.* The plaintiffs seek to certify two classes, for the lengthy period from the date of the enactment of Title VII, forward. The first class would consist of all black applicants, employees, and former employees. The second class would consist of all white applicants, employees, and former employees. Plaintiffs Nelson, Haynes, Riley, Thomas, Williams, Cobb, Forte, Jones, Cochran, Miles, Manigo, Dean, and Whittico represent the first putative class. They allege that the defendants intentionally discriminated against them on the basis of race. Mongoven, Bonsall, and the Elliotts represent the second putative class. They claim that the defendants retaliated against them because of their refusal to implement discriminatory employment practices.

Regarding the first class, plaintiffs allege that Haynes and Cochran were not hired because of their race, that Riley, Nelson, Thomas, Williams, Cobb, Forte, Jones, Miles, Manigo, Dean and Whittico were demoted or denied promotions because of their race, that Riley was harassed because of race, and that Riley, Nelson, Thomas, Williams, Forte, Miles, Manigo, Dean, and Whittico were illegally terminated. Regarding the second class, plaintiffs allege that Bonsall was harassed, and that the remaining class representatives were terminated, in retaliation for opposing the unlawful practices. Except for the applicant-plaintiffs, all plaintiffs allege that the defendants subjected them to a racially hostile work environment.

The jobs to which these classes apply include any job at any facility owned by Shoney's or RIC, including restaurants, company inns, manufacturing and distribution centers, as well as certain non-restaurant related occupations (white collar positions, including marketing, advertising, accounting, personnel, real estate, construction, data processing, etc.).[FN2] The Third Amended Complaint includes claims against Shoney's in Pensacola, Florida; Tallahassee, Florida; Charleston, South Carolina; Kansas City, Kansas; Louisville, Kentucky; Columbus, Georgia; Phenix City, Alabama; Savannah, Georgia; Nashville, Tennessee; and against RIC in Marianna, Florida, and Panama City, Florida. However, all of the named plaintiffs either worked or sought employment only in the Shoney's or Captain D's restaurants, either in lower level or management positions.

FN2. The plaintiffs' amended motion for class certification reduced the scope of the putative classes by eliminating claims at or involving over 200 franchisees, operating over 900 restaurants.

***2** Plaintiffs seek certification of two classes encompassing five separate operating divisions of Shoney's. These are Shoney's restaurants, Captain D's restaurants, Lee's Famous Fried Chicken restaurants, and its Fifth Quarter and Pargo's restaurants, as well as Shoney's' corporate administrative operations, and three separately incorporated enterprises: Shoney's Lodging, Inc., Mike Rose Foods, Inc.[FN3], and the Commissary Operations, Inc. The requested certification would thus

encompass nine separate enterprises in nineteen states, with over 700 employing locations and almost 30,000 incumbent employees. (As noted, the amended motion has eliminated approximately 900 restaurants operated by about 200 franchisees.)

> FN3. Mike Rose Foods, Inc. is a wholly-owned subsidiary which is a private label manufacturer of salad dressings, dry batter, biscuit mixes, and condiments for Shoney's, Inc. and others in the food service industry.

The plaintiffs argue that allegations of an overt policy of blatant racial discrimination and retaliation justify class certification. They claim that the illegal policies were developed and directed by defendant Danner and by top Shoney's management, and implemented by all-white supervisory and management personnel.

B. *Individual Plaintiffs.* Josephine Haynes is a black female who resides in Pensacola, Florida. She contends that Shoney's discriminatorily failed to hire her in two Shoney's restaurants in Pensacola, Florida, on October 28, 1988. She contends that when she left her application for the Mobile Highway restaurant, she was told by an unidentified male that there were no positions available. She also alleges that she left her application at the Davis Highway restaurant with an unidentified female who indicated that there might be an opening for a salad bar position and to check back in a week. However, when she called the Davis Highway restaurant she was told that there were no positions available. She filed an EEOC charge in December 1988 and an amended charge in August 1989 and her right to sue letter was issued on April 18, 1990.

Denise Riley is a black female who resides in Pensacola, Florida. She was twice employed as a salad bar attendant at Shoney's restaurants in Pensacola for a total of approximately five months, from February to June of 1986 and for one month in the summer of 1987. She has not been employed by defendant Shoney's since June 1987. She claims that defendant Shoney's discriminated against her by reducing her work hours, by twice denying her promotions to salad bar supervisor, subjecting her to on-the-job harassment and a racially hostile work environment, which resulted in her constructive discharge. As a result of the foregoing, Riley was allegedly deterred from reapplying. Riley contends that the second time she was denied the promotion, it was filled by a less qualified white female. She filed an EEOC charge in December 1988 and a second amended charge in August 1989 and her right to sue letter was issued on April 18, 1990.

Dewitt Michael Nelson is a black male who resides in Tallahassee, Florida. He worked for two Shoney's restaurants in Tallahassee, Florida, between May 1985 and January 1989. Nelson, who was hired initially as a cook, was promoted to kitchen manager in July 1986. He subsequently transferred to another store and then transferred back to his original store. Nelson received and signed a disciplinary notice dated November 23, 1988, for "not acting in a professional manner." The notice warned him that if "such conduct occurs again you will be terminated immediately." Nelson was fired on January 9, 1989. Nelson contends that defendant Shoney's demoted him and denied him a number of promotions, which included positions such as kitchen manager, relief manager, and assistant manager. He further contends that defendant Shoney's subjected him to a racially hostile work environment and discharged him, based on racial and retaliatory motives. He filed an EEOC charge on December 13, 1988, a second charge alleging retaliation in February 1989, and a second amended charge in August 1989. His right to sue letter was issued on April 18, 1990.

***3** Buddy Bonsall is a white male who resides in Tallahassee, Florida. He was employed by Shoney's and Captain D's restaurants in West Virginia and Florida at various times from 1975 to August 1988. He contends that he was harassed, subjected to a hostile work environment, and terminated from his manager position at the North Monroe Street Shoney's in Tallahassee, Florida, because he refused to follow his supervisors' instructions to discriminate against blacks. He filed an EEOC charge in February 1989 and an amended charge in August 1989, and his right to sue letter was issued on April 18, 1990.

Carolyn Cobb is a black female who resides in South Carolina. She is currently employed as a server at a Shoney's on Savannah Highway in Charleston, South Carolina. Cobb contends that during previous employment as a server at the Savannah Highway Shoney's in Charleston, from 1970 to 1982, she was denied promotions and was later constructively discharged. She resumed her employment as a server at the Savannah Highway restaurant in 1986. Cobb worked four-hour shifts in 1987 and 1988 and then full-time in 1989. Cobb contends that defendant Shoney's illegally denied her promotions to positions including dining room supervisor and kitchen manager, and subjected her to a racially hostile work environment. She filed an EEOC charge in May 1989 and her right to sue letter was issued on

February 1, 1991.

Terrell Forte is a black male who resides in Kansas. From approximately February 1988 to August 1988, he was employed at the 7th Street Shoney's restaurant in Kansas City, Kansas, as a prep person and cook. Forte contends that he heard area supervisor Ray Smith "on a regular basis" refer to blacks as "niggers." He claims that he was illegally denied promotions to positions such as manager trainee, breakfast bar manager, and assistant kitchen manager, that he was subjected to a racially hostile environment and that he was constructively discharged. He filed an EEOC charge and an amended charge in April 1989 and his right to sue letter was issued on January 31, 1991.

Helen Jones is a black female who resides in Kentucky. She is employed as a kitchen manager at the Fern Valley Road Shoney's restaurant in Louisville, Kentucky. She worked as a cook at the Eastern Parkway and the Preston Highway Shoney's restaurants after her initial hire in 1984 and before she transferred to the Fern Valley Road restaurant. Jones contends that she was illegally denied a number of promotions to positions including kitchen manager, salad bar supervisor, night kitchen manager, relief manager, and assistant manager and that she was subjected to a racially hostile work environment. She filed an EEOC charge and an amended charge in May 1989 and her right to sue letter was issued on January 31, 1991.

Melkannah Cochran is a black female who resides in South Carolina. In the early 1970's, she was employed at a Shoney's restaurant on Savannah Highway in Charleston, South Carolina. She has not been employed by Shoney's since the late 1970's, but applied for employment with Shoney's in the late 1980's. She contends that she applied twice for a night-time server position at the Savannah Highway restaurant in Charleston, but was offered a cook's position instead, at a salary which was about one-half of the salary she had received in previous employment as a cook at Cafe 99. She is currently employed as a cook at California Dreaming restaurant. She filed an EEOC charge on June 6, 1990, and her right to sue letter was issued on February 6, 1991.

***4** Elaine Miles is a black female who resides in Georgia. She has been employed as a server in Shoney's restaurants in Columbus, Georgia, from 1982 to 1985 and in Phenix City, Alabama, from 1985 to August 1989. In 1988, she worked as night dining room supervisor for approximately two months. However, at her request, she returned to her server position in December 1988 because of the time it required her to spend away from her child. Miles contends that in August 1989, she and three other servers refused to serve a group of Wal-Mart employees who were notoriously low tippers. She complains that she and the other black server were fired, but the white servers were not. Miles claims that she was illegally denied promotions to the position of dining room supervisor, that she was subjected to a racially hostile work environment, and that she was discharged in retaliation for filing an EEOC charge. She filed an EEOC charge in June 1989 and an amended charge in July 1989 and her right to sue letters were issued in February 1991.

Arthur Manigo is a black male who resides in Georgia. He was employed as an Assistant Manager at the Victory Plaza Captain D's in Savannah, Georgia, from 1985 to 1988. He was rehired as a cook in November 1987 and subsequently promoted to Assistant Manager in February 1988. As Assistant Manager, he was responsible for filling out the daily deposit slips for cash receipts and depositing the funds in a local bank in the night depository after his shift ended. According to Manigo, one of his cash receipts deposits was temporarily misplaced by a bank employee in May 1988 and he was discharged. He contends that the discharge was racially motivated. Manigo also contends that, prior to his illegal discharge, he was denied promotions to store manager and that he was subjected to a racially hostile work environment. He filed an EEOC charge in July 1988 and his right to sue letter was issued in March 1989.

Paula Dean is a black female who resides in Florida. She was employed as a breakfast bar attendant at the Davis Highway Shoney's in Pensacola, Florida, from June 1987 to July 1988. She contends that she was discriminatorily denied the jobs for which she initially applied, as well as promotions to positions such as salad bar supervisor, hostess, cashier, server, dining room supervisor, and salad bar supervisor, which led to her constructive discharge. She also claims that defendant Shoney's subjected her to a racially hostile work environment. She filed an EEOC charge in April 1989 and her right to sue letter was issued on February 6, 1991.

Andrew Whittico is a black male who resides in Tennessee. He has recently been re-employed as a manager trainee at a Shoney's restaurant in Smyrna, Tennessee. From 1986 to July 1989, Whittico worked at various Shoney's restaurants in Nashville, Tennessee, as a cook, night kitchen manager, and production manager. He contends that he was illegally denied promotions to

positions such as kitchen manager, relief manager, assistant manager, and store manager, that he was subjected to a racially hostile work environment, and that he was constructively discharged.

***5** Henry Elliott is a white male who was resides in Marianna, Florida. He was employed by defendant RIC from 1978 to 1988, and as store manager at the Marianna Captain D's from May 1986 through April 11, 1988. He contends that he was fired by area supervisor Paul Suggs on April 11, 1988, because of his refusal to implement the discriminatory policies. Elliott also contends that defendant RIC subjected him to a hostile work environment. He filed an EEOC charge on May 26, 1988, and an amended charge in December 1988 and his right to sue letter was issued on April 14, 1989.

Billie Elliott is a white female who resides in Marianna, Florida. She was employed by defendant RIC at the Marianna Captain D's from 1985 to April 14, 1988, as a dining room supervisor.[FN4] Elliott contends that she was instructed to discriminate against blacks and refused to do so, and that defendant RIC subjected her to a hostile work environment. On April 12, 1988, she called Barry Abbott, the director of franchise field services in Nashville. She contends that area supervisor Paul Suggs fired her because he thought she had threatened to file a lawsuit against Captain D's. She filed an EEOC charge in April 1988 and an amended charge in December 1988 and her right to sue letter was issued on April 14, 1989.

> FN4. According to the defendant, she was previously employed at this store from September 19, 1982, until she was fired on June 8, 1983. She was then rehired on July 3, 1985.

Lester Thomas is a black male who resides in Marianna, Florida. He was employed by defendant RIC at the Marianna Captain D's from January 26, 1986, to May 10, 1988.[FN5] He contends that he was demoted from assistant manager to relief manager in late April or early May 1988 and was replaced by a white person. He further contends that he was subjected to a racially hostile work environment and that he was discriminatorily discharged on May 8, 1988. He filed an EEOC charge on May 24, 1988, and an amended charge in August 1989 and his right to sue letter was issued on April 14, 1989.

> FN5. According to the defendant, Thomas was initially hired as a cook and then promoted to relief manager in April 1986. He was promoted to assistant manager on January 12, 1988.

Donna Mongoven is a white female who resides in Chipley, Florida. She was employed by RIC on two separate occasions from 1982 to 1985. In 1985, she was employed as assistant dining room supervisor under Kim Gilmour until she was terminated by area supervisor Paul Suggs on July 2, 1985. Mongoven contends that defendant RIC subjected her to a racially hostile work environment and ultimately discharged her because she refused to discriminate against blacks. She filed a EEOC charge in May 1988, an amended charge in December 1988, and a second amended charge in August 1989, and her right to sue letter was issued on April 14, 1989.[FN6]

> FN6. Defendant RIC contends that plaintiffs Mongoven and Williams have not alleged the occurrence of any discriminatory act within 300 days of filing their respective charges of discrimination.

Leonard Charles Williams is a black male who resides in Panama City, Florida. He was employed at the Captain D's on 15th Street, Panama City, Florida, from approximately June 1983 to January 26, 1986. Williams was initially hired as a cook, then promoted to relief manager, then promoted to assistant manager, after which he was fired by area supervisor Jan Suggs. He contends that he was subjected to a racially hostile work environment, that he was illegally denied a promotion to the position of store manager, and that his termination was racially motivated. He filed an EEOC charge on June 15, 1988, and an amended charge in December 1988. His right to sue letter was issued on April 14, 1989.

***6** Other named putative class members include Patricia Spires, Julia Hunter, Stephanie Cooper, Gwendolyn Smith, Deborah Bell, Madeline Herring, Hampshire Peterson, Maxine White, and John Corley.[FN7] These individuals have filed charges pertaining to RIC.

> FN7. Defendant RIC contends that Spires, Hunter and Bell have each failed to allege the occurrence of a discriminatory act against them within 300 days prior to their respective filings of charges of discrimination.

II. *Class Certification-Generally.*

Questions concerning the certification of a class are left to the broad discretion of the district court. *See, e.g., Washington v. Brown & Williamson Tobacco Corp.,* 959 F.2d 1566, 1569 (11th Cir.1992); *Ross v. Bank S., N.A.,* 837 F.2d 980, 991, *reh'g granted and opinion vacated,* 848 F.2d 1132 (1988), *on reh'g,* 885 F.2d 723 (11th Cir.1989), *cert. denied,* 495 U.S. 905, 110 S.Ct. 1924, 109 L.Ed.2d 287 (1990); *Cox v. American Cast Iron Pipe Co.,* 784 F.2d 1546, 1553 (11th Cir.), *cert. denied,* 479 U.S. 883, 107 S.Ct. 274, 93 L.Ed.2d 250 (1986); *Ezell v. Mobile Hous. Bd.,* 709 F.2d 1376, 1379 (11th Cir.1983). A district court's denial of class certification will not be disturbed on appeal absent an abuse of discretion. *See, e.g., Walker v. Jim Dandy Co.,* 747 F.2d 1360, 1363 (11th Cir.1984); *Giles v. Ireland,* 742 F.2d 1366, 1372 (11th Cir.1984); *Gilchrist v. Bolger,* 733 F.2d 1551, 1555 (11th Cir.1984). Even after entering a certification order, the district court judge is free to modify it in light of subsequent developments in the litigation. *Cox, supra,* 784 F.2d at 1553.

The legitimacy of a Title VII class action depends on the satisfaction of two distinct prerequisites. First, there must be an individual plaintiff with a cognizable claim; that is, an individual who has constitutional standing to raise the claim or claims and who has satisfied the procedural prerequisites of Title VII. *See, e.g., Griffin v. Dugger,* 823 F.2d 1476, 1482 (11th Cir.1987), *cert. denied,* 486 U.S. 1005, 108 S.Ct. 1729, 100 L.Ed.2d 193 (1988). Second, Title VII contains no special authorization for class action suits maintained by private individuals. Therefore, although actions involving allegations of racial discrimination are by their very nature class actions, an individual litigant who seeks to maintain a class action under Title VII must, nevertheless, satisfy the prerequisites of numerosity, commonality, typicality, and adequacy of representation set forth in Rule 23(a), *Federal Rules of Civil Procedure. See, e.g., General Tel. Co. of the Southwest v. Falcon,* 457 U.S. 147, 156, 102 S.Ct. 2364, 2369-70, 72 L.Ed.2d 740, 749 (1982); *East Texas Motor Freight Sys., Inc. v. Rodriguez,* 431 U.S. 395, 405-06, 97 S.Ct. 1891, 1898, 52 L.Ed.2d 453, 463 (1977); *Griffin, supra,* 823 F.2d at 1482.

Once the requirements of Rule 23(a) are met, the court must also find that the party opposing the class has acted or refused to act on grounds, generally applicable to the class, thereby making final injunctive relief or corresponding declaratory relief possible with respect to the class as a whole. Rule 23(b)(2), *Fed.R.Civ.P.*

***7** A. *Rule 23(a) Analysis.* A Title VII class action, like any class action, should not certified unless and until the trial court is satisfied, after a "rigorous analysis" that the requirements of Rule 23(a) have been fulfilled. *See, e.g., Coon v. Georgia Pac. Corp.,* 829 F.2d 1563, 1566 (11th Cir.1987); *Walker, supra,* 747 F.2d at 1363; *Gilchrist, supra,* 733 F.2d at 1555; *Ezell, supra,* 709 F.2d at 1379. Although the court should not conduct a preliminary inquiry into the merits of the suit in order to determine whether it may be maintained as a class action, since the parties are not required to prove the merits of their case at this stage [*see Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 177-78, 94 S.Ct. 2140, 2152, 40 L.Ed.2d 732, 748-49 (1974)], the plaintiffs must provide more than bare allegations that they satisfy the requirements of Rule 23 for class certification. *See, e.g., Morrison v. Booth,* 763 F.2d 1366, 1371 (11th Cir.1985); *Shelton v. Pargo, Inc.,* 582 F.2d 1298, 1312 (4th Cir.1978) (plaintiffs must present facts which show existence of a class).[FN8]

FN8. Rule 23(a) provides:

> 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 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.

> [A] district court holding a pretrial certification hearing has no "authority to conduct a preliminary inquiry into the merits of the suit," ... [but] evidence relevant to the commonality requirement is often intertwined with the merits.
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> *Washington v. Brown & Williamson Tobacco Corp., supra,* 959 F.2d at 1570 n. 11 (quoting *Nelson v. United States Steel Corp.,* 709 F.2d 675, 679-80 (11th Cir.1983)).

See also Kirkpatrick v. J.C. Bradford & Co., 827 F.2d 718, 722-23 (11th Cir.1987), *cert. denied,* 485 U.S. 959, 108 S.Ct. 1221, 99 L.Ed.2d 421 (1988); *Stastny v. Southern Bell Tel. & Tel. Co.,* 628 F.2d 267, 275-76 (4th Cir.1980). The requirements of numerosity, typicality, commonality, and adequacy of representation

serve to limit the class claims to those fairly encompassed by the named plaintiffs' claims. *Walker, supra,* 747 F.2d at 1363.

(1) *Numerosity.* As to numerosity, the Eleventh Circuit has noted that while there is no fixed numerosity rule, "generally less than twenty-one is inadequate, more than forty adequate, with numbers between varying according to other factors." *Cox v. American Cast Iron Pipe Co., supra,* 784 F.2d at 1553 (citing 3b *Moore's Federal Practice* ¶ 23.05[1] at n. 7 (1978)). However, "[t]he requirement of numerosity is fact-based. Judicial economy and impracticability of joinder are the key." *Johnson v. Montgomery County Sheriff's Dep't,* 99 F.R.D. 562, 564 (M.D.Ala.1983) (citing *Phillips v. Joint Legislative Committee,* 637 F.2d 1014, 1022 (5th Cir.1981), *cert. denied,* 456 U.S. 960, 102 S.Ct. 2035, 72 L.Ed.2d 483 (1982)). *See also Holland v. Steele,* 92 F.R.D. 58, 63 (N.D.Ga.1981) ("the proper focus is not on numbers alone, but on whether joinder of all members is practicable in view of the numerosity of the class and all other factors"). "Practicability of joinder depends on size of the class, ease of identifying its members and determining their addresses, facility of making service on them if joined and their geographic dispersion." *Garcia v. Gloor,* 618 F.2d 264, 267 (5th Cir.1980), *cert. denied,* 449 U.S. 1113, 101 S.Ct. 923, 66 L.Ed.2d 842 (1981) (citing 3B *Moore's Federal Practice* ¶ 23.05, at 23-149 (2d ed. 1979)). *See also Kilgo v. Bowman Transp., Inc.,* 789 F.2d 859, 878 (11th Cir.1986).

***8** Mere allegations of numerosity are insufficient to meet this prerequisite; however, the plaintiff need not show the precise number of members in the class. *See, e.g., Evans v. U.S. Pipe & Foundry Co.,* 696 F.2d 925, 930 (11th Cir.1983); *McNeill v. New York City Hous. Auth.,* 719 F.Supp. 233, 252 (S.D.N.Y.1989); *Lynch v. Rank,* 604 F.Supp. 30, 36 (N.D.Cal.), *aff'd,* 747 F.2d 528 (9th Cir.1984). Moreover, the numerosity requirement may be less important when class-wide discrimination is alleged and when the numerosity question is close, the balance should be struck in favor of a finding of numerosity, since the court may later decertify the class under Rule 23(c)(1). *See Evans, supra,* 696 F.2d at 930.

Plaintiffs allege in this case that the class is distributed over thirty states, involving over 1,500 restaurants and potentially thousands of affected employees. Because I conclude, *infra,* that the typicality and commonality requirements are not met as to defendant RIC, I evaluate the Shoney's plaintiffs and the RIC plaintiffs separately to determine whether the numerosity requirement is satisfied.

I find that the numerosity requirement is satisfied by the putative black class against Shoney's, Inc. The plaintiffs have alleged a policy or practice of racial discrimination which comprises hundreds or perhaps thousands of employees from all of the non-franchised Shoney's restaurants.

On the other hand, with regard to the putative white retaliation class, plaintiff Bonsall is the sole Shoney's plaintiff with claims of illegal retaliation. I do not find that the plaintiffs have identified a sufficient number of potential class members to satisfy the numerosity requirement of Rule 23(a). Therefore, no class of former or current white employees who claim injury due to retaliation will be certified. Accordingly, the claims of plaintiff Bonsall will not be included in the class certified; however, he is free to pursue his individual claim of retaliatory discharge against defendant Shoney's in an independent action, assuming that all procedural prerequisites have been satisfied.

I do not find that the numerosity requirement of Rule 23(a) is satisfied as to RIC, in light of the small number of identified potential RIC class representatives and the extremely finite source from which a total class could be drawn. The limited number of potential class members which may have claims against RIC convinces me that such actions could best be litigated on an individual basis. Therefore, no separate white or black class will be certified against defendant RIC.[FN9]

FN9. Because I do not find that class certification is proper with respect to plaintiff Mongoven, it is clear that her independent Title VII claims must likewise fail due to her failure to exhaust administrative remedies. *See, e.g., Thomas v. Florida Power & Light Co.,* 764 F.2d 768, 769-70 (11th Cir.1985) (timely filing of administrative charge is condition precedent to maintenance of Title VII lawsuit in federal court); *Griffin v. Carlin,* 755 F.2d 1516, 1529-30 (11th Cir.1985).

(2) *Commonality and Typicality.* As a preliminary matter, I note that the Eleventh Circuit has stated that the fact that plaintiffs raise disparate treatment claims, while not dispositive, weighs against finding the commonality and typicality requirements satisfied.

"Disparate impact cases typically involve readily

identified, objectively applied employment practices such as testing procedures. The common reach of such practices is likely to be clearer and easier to establish than a general policy of race discrimination alleged to united otherwise factually dissimilar disparate treatment claims."

***9** *Washington, supra,* 959 F.2d at 1570 n. 10 (quoting *Nelson, supra,* 709 F.2d at 679 n. 9).

The Eleventh Circuit has commented that the commonality requirement does not require that all questions of fact and law raised in the action be common. "The claims actually litigated in the suit must simply be those fairly represented by the named plaintiffs." *Cox, supra,* 784 F.2d at 1557.

The Supreme Court of the United States clarified the requirements of Rule 23(a) in the context of employment discrimination class actions in *Falcon, supra*. The Supreme Court phrased the issue as "whether respondent Falcon, who complained that petitioner did not *promote* him because he is a Mexican-American, was properly permitted to maintain a class action on behalf of Mexican-American applicants for employment whom petitioner *did not hire.* " 457 U.S. at 149, 102 S.Ct. at 2366, 72 L.Ed.2d at 745 (emphasis added). The Court rejected the "across-the-board" theory which had been accepted by a number of courts.[FN10] The Court emphasized that merely alleging racial or ethnic discrimination does not ensure that the party who brought the lawsuit will adequately represent those who have been the real victims of that discrimination. *Falcon, supra,* 457 U.S. at 157, 102 S.Ct. at 2370, 72 L.Ed.2d at 750.

FN10. Under this now-defunct theory, a plaintiff who alleges discrimination in one aspect of employment, such as hiring, may represent a class including which includes plaintiffs who have allegedly been discriminated against in other aspects of employment, such as termination and promotion. *Nelson, supra,* 709 F.2d at 678 n. 7. According to Schlei and Grossman, across-the-board suits refer to those "in which the 'courts permit ... the named plaintiff acting as a "private attorney general" to raise "across-the-board charges of employment discrimination throughout an employer's force, and to represent persons who ha[ve] materially different employment situations from the named plaintiff" '." *Cox, supra,* 784 F.2d at 1558 (quoting Schlei & Grossman, *Employment Discrimination Law* at 1217 (1983)). This approach " 'presumes that a plaintiff who has suffered an alleged act of discrimination is qualified to represent all persons of the same basis (i.e., race, sex, etc.) in terms of any and all alleged discriminatory practices and issues'." *Id.*

Although the *Falcon* Court acknowledged that racial discrimination is by definition class discrimination, it cautioned litigants that "the allegation that such discrimination occurred neither determines whether a class action may be maintained in accordance with Rule 23 nor defines the class that may be certified." *Id.* The Court observed that there is a distinction 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, supra, 457 U.S. at 157, 102 S.Ct. at 2370, 72 L.Ed.2d at 750 (footnote omitted).

Thus, the Court concluded that the plaintiff had failed to demonstrate typicality or commonality.[FN11]

FN11. Although the requirement of typicality is similar in some respect to the commonality requirement, the focus is on the claim of the representative party, not the entire class. *See, e.g., Holland, supra,* 92 F.R.D. at 63. "Typicality" is met when a "class representative [is] part of the class and 'possess[es] the same interest and suffer[s] the same injury' as the class members." *East Texas Motor Freight Sys., Inc., supra,* 431 U.S. at 403, 97 S.Ct. at 1896, 52 L.Ed. at 462 (1977).

Without any specific presentation identifying the questions of law or fact that were common to the claims of respondent and of the members of the class he sought to represent, it was error for the District Court to presume that respondent's claim was typical of other claims against petitioner by Mexican-American

employees and applicants. If one allegation of specific discriminatory treatment were sufficient to support an across-the-board attack, every Title VII case would be a potential companywide class action.

Id. at 158-59, 102 S.Ct. at 2371, 72 L.Ed.2d at 751 (footnote omitted).

So, *Falcon* made it clear that merely reciting the language of Rule 23(a) will not suffice. Rather, in order to satisfy the commonality and typicality requirements of Rule 23(a), a putative class representative must *specifically identify* the questions of law or fact that are common to his claims and those of the members of the putative class. *Coon v. Georgia Pac. Corp.,* 829 F.2d 1563, 1566-67 (11th Cir.1987). However, the Court restricted its holding somewhat in the often-cited footnote 15:

***10** Significant proof that an employer operated under a general policy of discrimination *conceivably* could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes.

Falcon, supra, 457 U.S. at 158 n. 15, 102 S.Ct. at 2371 n. 15, 72 L.Ed.2d at 751 n. 15. (emphasis added).

The Court in *Falcon* also discussed the interrelationship between the Rule 23 requirements of commonality, typicality, and adequacy of representation:

The commonality and typicality requirements of Rule 23(a) tend to merge. Both 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. Those requirements therefore also tend to merge with the adequacy-of-representation requirement, although the latter requirement also raises concerns about the competency of class counsel and conflicts of interest.

Falcon, supra, 457 U.S. at 157 n. 13, 102 S.Ct. at 2371 n. 13, 72 L.Ed.2d at 750 n. 13.[FN12]

FN12. *Falcon* precludes the maintenance of a class action by an incumbent correctional officer complaining of subjective decisionmaking process, who seeks to represent a class including those who may have been victims of a discriminatory *objective* decisionmaking process. *See Griffin, supra,* 823 F.2d at 1490-91. "In our view, applicants who were subjectively denied clerical positions cannot sufficiently identify with other applicants who failed an objective written examination and, on that basis, were not hired for the higher-ranking position of correctional officer." *Id.* at 1492. Moreover, "general statistical evidence of underrepresentation in the workforce will undoubtedly not suffice to justify a single class covering different types of discrimination such as in hiring, promotion, and discharge." *Griffin, supra,* 823 F.2d at 1490 n. 32 (quoting A. Larson & L. Larson, *Employment Discrimination* § 49.52(c)(2) (1986)).

In this case, there are named plaintiffs from Shoney's restaurants and Captain D's restaurants. Shoney's restaurants are the responsibility of a President, under whom is a Vice President of Operations. These restaurants operate in five separate geographical regions encompassing nineteen states, with over seven hundred employing locations and thirty thousand incumbent employees. Regional Vice Presidents or Directors are responsible for the Regions and report to the Vice President of Operations. Within each region, Division Directors are responsible for a number of Shoney's restaurants in a given geographic area. The Division Directors are assisted by Area Supervisors and Area Training Supervisors. Each restaurant is operated by a Manager, who oversees in-restaurant supervisory staff.

Entry level hourly positions include: servers, hosts and hostesses, bus personnel, dishwashers, cook/prep, and salad bar attendants. These individual are hired by the local manager. In-store first-level supervisory positions include: Breakfast Bar Supervisor, Dining Room Manager, Night Dining Room Manager, Relief Manager, Kitchen Manager, and Night Kitchen Manager. These individuals are also hired by the Manager after consultation with division supervisors. The next level of in-store supervisory positions include: Manager Trainee, Assistant Manager, and Store Manager. These individuals are hired by Store Manager, Division Supervisors, the Division Director, and occasionally, the Regional Vice President. Defendant Shoney's policy is to promote from within where possible.

Defendant Shoney's contends that each of Shoney's restaurant concepts (Shoney's, Captain D's, Pargo's, Lee's Famous Fried Chicken, and Fifth Quarter), as well as each corporate entity (other than Shoney's Lodging), has established and maintained its own personnel functions. Although defendant Shoney's maintains a corporate personnel department, its primary responsibilities at all relevant times (apart from the corporate offices themselves), were to be available for consultation on employment matters, to provide periodic information through circulars and seminars regarding the laws affecting employees, and, upon request, to investigate claimed violations of state and federal law involving personnel matters.

***11** Defendant Shoney's has presented evidence that the day-to-day operations and personnel problems of the various enterprises remain within the province of the individual enterprise. There was evidence that each restaurant maintains its own marketing, administrative, operative, and personnel functions. Each concept hires, fires, and promotes its own employees, and personnel practices are not centrally determined or controlled. Each enterprise is functionally and operationally separate, with distinct lines of responsibility. According to defendant Shoney's, management personnel above the regional vice president level of any concept, or personnel in other regions of the same concept, become involved in day-to-day personnel decisions at the restaurant level only in isolated and unusual circumstances.

Defendants argue that the plaintiffs should not be permitted to expand the scope of class by referring to the so-called "Danner policy" of discrimination. [FN13] There is no evidence that any of the plaintiffs had contact with the other functional operations in Shoney's. All were employed or sought employment at several of the Shoney's and Captain D's restaurants. There is no evidence that any of the named plaintiffs had any contact with Danner. The defendants argue that the Supreme Court in *Falcon* never suggested that a class based on a general policy of discrimination could properly cover numerous functionally distinct operations. Rather, class claims must be narrowly tailored to reflect the claims of the purported class representatives and *Falcon* found commonality lacking because the individual facilities made their own employment decisions.

> FN13. Plaintiffs claim that under this policy, blacks were not hired or utilized in dining room positions, were reduced in dining room positions, were not utilized as servers or hostesses, were reduced as servers or hostesses, were terminated and replaced by white employees, and were not hired to supervisory or managerial positions. Defendants contend that the statistics show otherwise, and that the evidence clearly demonstrates the absence of a company-wide policy of limiting or excluding blacks in any position.

Nevertheless, plaintiffs allege that commonality is established by evidence of the so-called "Danner policy" and a common policy of retaliation involving all aspects of employment. Plaintiffs claim that the common policy as to the first class included discrimination in hires, promotion, and terminations, harassment, and discriminatory pay treatment, directed by top officials and carried out by managers and supervisors. As to the second class, plaintiffs allege that the illegal pattern and practice of retaliation adversely affected all white employees/applicants who oppose unlawful employment practices.

Insofar as typicality is concerned, the plaintiffs allege that all injuries resulted from the same policy of discrimination/retaliation designed and directed by defendant Danner and other officials, and implemented by supervisory and management personnel. Plaintiffs contend that the elements of the named representatives' claims are substantially the same for all class members and that the illegal policy was centralized and that similar equitable relief is sought on behalf of all class members.

As it relates to the certification of a class against defendant Shoney's, I find that the plaintiffs have established sufficient prima facie evidence that a policy emanating from defendant Raymond L. Danner had a significant impact on the everyday employment practices of the individual Shoney's restaurants. This evidence gains in significance because of the very contractual relationship between defendant Shoney's and its concept restaurants which was lacking in the case of defendant RIC and its few isolated operations.

***12** However, I find the typicality and commonality requirements satisfied only with respect to the representative claims, i.e., those plaintiffs who were employed at the store level by Shoney's concept restaurants and Captain D's concept restaurants (excluding franchises). Both before and after the Supreme Court's decision in *East Texas Motor Freight Systems, Inc., supra,* [FN14] courts have often held that a plaintiff employed

in one organizational unit, such as a division, department, or geographical facility, lacks the required nexus to represent a class of employees in other units or facilities. *See, e.g., Giles v. Ireland,* 742 F.2d 1366, 1372-73 (11th Cir.1984); *Bradford v. Sears, Roebuck & Co.,* 673 F.2d 792, 797 (5th Cir.1982); *Taylor v. Safeway Stores, Inc.,* 524 F.2d 263, 268-71 (10th Cir.1975). *See also* B. Schlei & P. Grossman, *Employment Discrimination Law,* 1236 n. 51 (2d ed. 1983) (citing authority). As Schlei and Grossman have pointed out:

> FN14. In *East Texas Motor Freight Systems, Inc., supra,* the Supreme Court of the United States considered for the first time the application of Rule 23 to Title VII and unanimously held that, although such actions are by their very nature class suits, careful attention to the requirements of Rule 23 remained indispensable. 431 U.S. at 405-06, 97 S.Ct. at 1898, 52 L.Ed.2d at 463.

> Class action plaintiffs seeking to aggregate multiple facilities have been most successful under the adverse impact theory. If an identifiable policy or practice in effect in all facilities is challenged under an adverse impact theory, courts often find sufficient nexus between employees in different facilities with respect to that challenged policy or practice.
>
> If a claim involves an alleged pattern of *disparate treatment,* however, the nexus between employees in different units or facilities may not be sufficient to allow a multifacility class. The critical issue in such cases is the allocation of decision-making authority over those employment decisions challenged by the plaintiff.
>
> Schlei & Grossman, *supra,* at 1237 (footnotes omitted) (emphasis added).

This impacts on the scope of the class in two ways. First, I agree with the defendants that these functionally distinct operations should not be grouped together for class certification purposes, merely because there are representative plaintiffs from other restaurant concepts under the Shoney's, Inc. umbrella. No plaintiffs had contact with other functional groups besides Shoney's concepts and Captain D's concepts, yet they seek certification with regard to seven additional enterprises, which are both functionally and geographically distinct, for a total of nine distinct enterprises, including over 700 employing locations in nineteen states. Therefore, only those concepts which are represented by named plaintiffs, i.e., Shoney's and Captain D's (excluding franchises) are properly within the scope of the class certified.

Second, I have determined that the class should be composed only of those individuals who worked at the store level, up to and including the store manager. None of the named plaintiffs was employed, or sought employment, above the in-store management level. *Falcon* involved an individual who claimed that he was discriminatorily denied a promotion. The Supreme Court held that he was not entitled to maintain a class action on behalf of those who claimed that they were not hired due to race. I do not read *Falcon* as suggesting that once a policy of discrimination is alleged at one level of employment, putative class members from that lower level can represent individuals who were employed in a totally different level of employment. Such a reading would seem especially incongruous here, where the named plaintiffs consist solely of in-store employees and supervisorial staff, but the plaintiffs seek to bring in upper level management employees, who also allegedly carried out the discriminatory policies of Raymond L. Danner. Even if I found that the commonality and typicality requirements could be satisfied under this tenuous reading of *Falcon,* plaintiffs could not demonstrate that the named plaintiffs could adequately protect the interests of those upper level managers. The upper level managerial individuals have interests which are at best diverse from, and probably conflict greatly with, those of the named plaintiffs. Accordingly, insofar as the plaintiffs seek to certify a class consisting of employees other than those who worked at the store level, I find that the typicality and commonality requirements have not been met.

***13** Defendant RIC is a franchisee of defendant Shoney's. RIC operates three Captain D's restaurants in Panama City, Florida, and one in Marianna, Florida. Defendant Charles Robertson, a resident of the State of Florida, is a principal co-owner and has been President and a director since 1977. His duties have included overseeing the day-to-day operation and management of RIC. Roger Danner, the other principal co-owner and Vice President of RIC, is a resident of Tennessee and has been a RIC director since 1982.[FN15] He is the son of defendant Raymond L. Danner. However, he has never been an officer, director, or executive of Shoney's.

> FN15. Defendants Roger Danner and Robertson each have a 49.75% ownership interest in RIC. The remaining .50% interest is held by Earl

Hamilton, not a defendant in this case.

Each Captain D's restaurant owned by defendant RIC employs approximately twenty (20) people at any particular time. Defendant RIC pays defendant Shoney's a fee to prepare and maintain RIC's payroll records. Defendant Shoney's also issues defendant RIC's weekly payroll checks and maintains computerized records of defendant RIC's personnel employment data. Field representatives from Shoney's periodically visit the RIC Captain D's restaurants in order to monitor RIC's adherence to defendant Shoney's standards of operations. Some managers and supervisors have been asked by RIC supervisors or stockholders to be present during visits by defendant Raymond L. Danner. Defendant Raymond L. Danner has visited the RIC Captain D's restaurants in both Marianna and Panama City while he was Chairman of the Board and CEO of Shoney's. However, there is no evidence that defendant Raymond L. Danner exercises any control over the day-to-day personnel functions and actions of RIC. He is not a stockholder, officer, director, or employee of RIC. *See* doc. 976, exh. 17, ¶¶ 12-13.

Although the amended motion for class certification eliminates over 200 franchisees, defendant RIC remains. As a franchisee, defendant RIC operates independently of defendant Shoney's. There is no evidence of a controlling contractual relationship (except for an *unexecuted* franchise agreement). [FN16] Indeed, the unexecuted franchise agreement provides that employment-related activities such as hiring, firing, promotion, etc., are solely and exclusively the responsibility and prerogative of the franchisee, thus supporting defendants' position that RIC operated completely independent from Shoney's. The record is simply devoid of evidence that defendant Shoney's exercised control over the personnel policies and actions of defendant RIC.[FN17]

FN16. Evidence that Shoney's participates in the preparation of payroll records and checks for RIC, maintains computerized personnel data for RIC, and provides *advisory* and counseling services to RIC, including consultation and advice regarding employee selection and training does not support plaintiffs' position that RIC is under the control of defendants Shoney's or Raymond Danner.

FN17. I do observe that defendant RIC was admittedly influenced by Shoney's policies, both as to employment as well as to general operations. Any franchisee probably should be, if the franchise has any value. However, for purposes of class certification, I find that the commonality and typicality requirements demand a showing of control before two separate and independently operated entities may be linked together by an allegedly discriminatory policy emanating from a single corporate officer.

Accordingly, I find that defendant RIC is not a proper party defendant to this motion for class certification, in light of the absence of some evidence of a contractual relationship between defendants Shoney's and RIC. Insofar as it relates to the inclusion of RIC plaintiffs into the overall class, I do not find the anecdotal evidence concerning defendant Raymond L. Danner sufficient to justify including this small corporation as a party defendant to a class action of such mammoth proportions. The difficulties of keeping the defendants separate and of proceeding with RIC class plaintiffs also present problems of unfair prejudice and confusion. There are no good reasons for proceeding with RIC in this class action. Plaintiffs Henry and Billie Elliott, Thomas, and Williams may independently pursue their individual civil rights actions against RIC, assuming that all procedural prerequisites have been satisfied.[FN18] However, these claims will not be included in the class certified and, therefore, RIC is not a party defendant to the class action.

FN18. As I have already observed, the claims of plaintiff Mongoven cannot stand independently of the class action because of her failure to exhaust administrative remedies. Accordingly, her claims will be dismissed. *See supra* note 10.

***14** (3) *Adequacy of Representation.* The remaining putative class representatives for consideration are Haynes, Riley, Nelson, Cobb, Forte, Jones, Cochran, Miles, Manigo and Dean.

For purposes of class certification, the adequacy of representation depends on the qualifications of counsel for the representatives, the absence of antagonism or conflict between the interest of proposed plaintiffs, sharing interests between representatives and absentees, and the unlikelihood that the suit is collusive. *See, e.g., In re Northern Dist. of California, Dalkon Shield IUD Prods. Liab. Litig.,* 693 F.2d 847, 855 (9th Cir.1982), *cert. denied,* 459 U.S. 1171, 103 S.Ct. 817, 74 L.Ed.2d 2015 (1983); *Barkman v. Wabash, Inc.,* 674 F.Supp. 623, 633 (N.D.Ill.1987). The purpose of the adequacy requirement

is to "protect the legal rights of absent class members." *Kirkpatrick v. J.C. Bradford & Co.,* 827 F.2d 718, 726 (11th Cir.1987), *cert. denied,* 485 U.S. 959, 108 S.Ct. 1221, 99 L.Ed.2d 421 (1988).

The class representatives must be part of the class and possess the same interest and suffer the same injury as the class members. *Bishop v. Committee on Professional Ethics & Conduct of Iowa State Bar Ass'n,* 686 F.2d 1278, 1289 (8th Cir.1982). The mere fact that a putative representative is of the same race or national origin of the persons he seeks to represent does not support a finding that his representation will be adequate or that his claims are typical. *Bradford, supra,* 673 F.2d at 797. The primary purpose of the adequacy of representation requirement is to ensure that representative parties will fairly and adequately protect the interests of the class. *Hill v. Western Elec. Co.,* 672 F.2d 381, 388 (4th Cir.), *cert. denied,* 459 U.S. 981, 103 S.Ct. 318, 74 L.Ed.2d 294 (1982). Adequacy of representation will be found if the named representatives have an interest in common with the proposed class members and their attorneys will properly prosecute the class action. *See, e.g., Gonzales v. Cassidy,* 474 F.2d 67, 72 (5th Cir.1973); *Pottinger v. City of Miami,* 720 F.Supp. 955, 959 (S.D.Fla.1989). The court must consider both the competency and experience of counsel and the potential conflicts of interest or antagonism between plaintiffs' claims and those of the putative class. *See, e.g., Weinberger v. Thornton,* 114 F.R.D. 599, 604-05 (S.D.Cal.1986); *Penk v. Oregon State Bd. of Higher Educ.,* 93 F.R.D. 45, 50 (D.Or.1981). Thus, courts have outlined two factors as critical in determining adequacy of representation:

> (1) [T]he representative must have common interests with the unnamed members of the class; and (2) it must appear that the representative will vigorously prosecute the interests of the class through qualified counsel.
>
> *Holland v. Steele,* 92 F.R.D. 58, 64 (N.D.Ga.1981) (quoting *Gonzales, supra,* 474 F.2d at 72).

Because a judgment in a class action is binding on all class members who receive notice and do not request exclusion, *see, e.g., Fowler v. Birmingham News Co.,* 608 F.2d 1055, 1058 (5th Cir.1979), due process requires the courts to insure that representation is adequate. *See, e.g., In re Mid-Atl. Toyota Antitrust Litig.,* 93 F.R.D. 485, 487 (D.Md.1982). However, it is not necessary to determine whether a named plaintiff has a meritorious claim before they can be certified as class representatives. *See, e.g., Sirota v. Solitron Devices, Inc.,* 673 F.2d 566, 571 (2d Cir.), *cert. denied,* 459 U.S. 838, 103 S.Ct. 86, 74 L.Ed.2d 80 (1982).

***15** I find that, at least as a preliminary matter, without yet addressing the factual merit of the named plaintiffs' individual claims, the named plaintiffs appear capable of adequately representing the interests of the class. Having eliminated from the scope of the class various non-representative claims, I believe that the claims of these named plaintiffs are fairly representative of the remaining issues in this case. Furthermore, I am convinced that counsel for the plaintiffs will vigorously prosecute the interests of the class and that they are qualified to do so.

It is entirely proper for the trial court to consider the ethical conduct of plaintiffs' counsel in deciding whether to grant class certification. *See, e.g., In re Fine Paper Antitrust Litig.,* 617 F.2d 22, 27 (3d Cir.1980); *Stavrides v. Mellon Nat'l Bank & Trust Co.,* 60 F.R.D. 634, 637 (W.D.Pa.1973). "Reference to counsel's unethical and improper actions is sufficient to find that he cannot adequately represent the putative class in accordance with his fiduciary duties." *Wagner v. Lehman Bros. Kuhn Loeb, Inc.,* 646 F.Supp. 643, 662 (N.D.Ill.1986).

However, as a preliminary matter, I decline to inject yet another highly controversial issue into this already prolonged and complicated action. However, I again stress the seriousness of defendants' allegations, and I assure the parties that these concerns will not go unaddressed prior to final judgment in this case. Furthermore, I strongly remind the plaintiffs that my decision to certify the class may be revisited at any time should additional allegations arise which threaten the adequacy of class representation. *See* Rule 23(c)(1). *See, e.g., Falcon, supra,* 457 U.S. at 160, 102 S.Ct. at 2372, 72 L.Ed.2d at 752 (trial court remains free to modify certification order in light of subsequent developments in litigation).

B. *Rule 23(b)(2) Requirements.* Plaintiffs seek to have their action certified as a class action pursuant to Rule 23(b)(2), which provides for a class action if "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." *Fed.R.Civ.P.* 23(b)(2). This section was intended to facilitate civil rights actions where the class representatives typically sought broad injunctive or declaratory relief against discriminatory practices. *See,*

e.g., Penson v. Terminal Transp. Co., 634 F.2d 989, 993 (5th Cir. Unit B 1981); *Holland, supra,* 92 F.R.D. at 64.

Rule 23(b)(2) requires that the challenged conduct or lack of conduct be premised on a ground that is applicable to the entire class. *See, e.g., Brown v. Orr,* 99 F.R.D. 524, 527 (S.D.Ohio 1983). This element is generally satisfied if the defendants' actions affected all persons similarly situated. *See, e.g., Christman v. American Cyanamid Co.,* 92 F.R.D. 441, 453 (N.D.W.Va.1981). However, the action or inaction of the defendant does not have to be effective or completed with reference to each member of the class, so long as it is based on grounds which have general application to the class. *Holland, supra,* 92 F.R.D. at 64 (citing 3B *Moore's Federal Practice* § 23.40[2], at 23-290). Where final injunctive relief in the form of reinstatement, and equitable relief consisting of back pay and benefits are sought, maintenance of a class action under Rule 23(b)(2) is proper, as long as the class is sufficiently cohesive so that the employer is answerable on grounds generally applicable to the class and the relief inures to the class as a whole. *See, e.g., Wetzel v. Liberty Mut. Ins. Co.,* 508 F.2d 239, 250-53 (3d Cir.), *cert. denied,* 421 U.S. 1011, 95 S.Ct. 2415, 44 L.Ed.2d 679 (1975); *Brotherhood Ry. Carmen of U.S. & Canada v. Delpro Co.,* 98 F.R.D. 471, 477 (D.Del.1983).

***16** A so-called "hybrid" Rule 23(b)(2) class action is one in which class members seek individual monetary relief, typically back pay, in addition to the class-wide injunctive declaratory relief. *See, e.g., Cox, supra,* 784 F.2d at 1552. Although Rule 23(b)(2) contemplates cases seeking injunctive or declaratory relief, both the former Fifth Circuit and the Eleventh Circuit have approved individual back pay awards in Rule 23(b)(2) class actions.[FN19] *See Holmes v. Continental Can Co.,* 706 F.2d 1144, 1152 (11th Cir.1983); *Pettway v. American Cast Iron Pipe Co.,* 494 F.2d 211, 256-57 (5th Cir.1974); *Johnson v. General Motors Corp.,* 598 F.2d 432, 437 (5th Cir.1979).

FN19. The Eleventh Circuit has indicated that "the demand for back pay is not in the nature of a claim for damages, but rather is an integral part of the statutory equitable remedy, to be determined through the exercise of the court's discretion." *Holmes, supra,* 706 F.2d at 1152. However, this statement presents analytical difficulties. For example, if back pay is considered "equitable relief," rather than compensatory damages, then there would be no need to certify a class as a special "hybrid" Rule 23(b)(2) action. A class seeking statutory back pay would fall under the Rule 23(b)(2) without the need for a separate analysis into its "hybrid" status.

Although this case generally appears to satisfy the requirements of Rule 23(b)(2), in that the challenged conduct is generally premised on a ground applicable to the class as a whole, it appears from the record that all, or substantially all, of the equitable relief initially sought by the plaintiffs has been, or is being, currently implemented by defendant Shoney's in accordance with an agreed-upon resolution of these matters. *See* doc. 701 at 251 (transcript of September 18, 1991, hearing). The parties are apparently now at the point where "money ... [is] really all that's left in the case." *Id.* Nevertheless, the record is not at all clear on this matter and I invite the parties to file written memoranda within ten (10) days of this date, informing the court whether there are any remaining unresolved equitable issues.[FN20]

FN20. It is clear that the notice requirements will be altered if this case is characterized as a "hybrid" class action. The former Fifth Circuit has held that where monetary relief is sought and accorded in a Rule 23(b)(2) action, notice is no longer discretionary, but is *required* at some stage of the proceedings. *Penson, supra,* 634 F.2d at 994. *See also In re Temple,* 851 F.2d 1269, 1272 n. 5 (11th Cir.1988); *Cox, supra,* 784 F.2d at 1554; *Holmes, supra,* 706 F.2d at 1154; *Johnson, supra,* 598 F.2d at 437. Although it is improper to require such a notice at the certification stage, *Cox, supra,* 784 F.2d at 1554-55 (trial court abused discretion in authorizing opt-out notice at certification stage), I will require such notice if and when liability is established. On the other hand, should it ultimately be certified as a Rule 23(b)(3) action, immediate notice will be mandatory to all class members.

C. *Temporal Restrictions on Class.* The defendants also argue that the class should be temporally limited. I agree that the class action must have a cut-off date. However, the plaintiffs contend that under the continuing violation theory, the class is unlimited in time and, therefore, dates back to the enactment date of Title VII. I disagree.

The effective filing of a timely charge with the EEOC is a condition precedent to the maintenance of an action in the district court. *See, e.g., Love v. Pullman Co.,* 404 U.S.

522, 524-25, 92 S.Ct. 616, 618, 30 L.Ed.2d 679, 683 (1972); *Chaffin v. Rheem Mfg. Co.,* 904 F.2d 1269, 1271 (8th Cir.1990); *Robinson v. Caulkins Indiantown Citrus Co.,* 701 F.Supp. 208, 210 (S.D.Fla.1988); *Montgomery v. Atlanta Family Restaurants, Inc.,* 752 F.Supp. 1575, 1578 (N.D.Ga.1990). Title VII requires that a charge of discrimination be filed within 180 days [FN21] (or 300 days in deferral states) [FN22] after the alleged unlawful employment practice occurred. *Chaffin, supra,* 904 F.2d at 1271; *Abrams v. Baylor College of Medicine,* 805 F.2d 528, 532 (5th Cir.1986); *Domingo v. New England Fish Co.,* 727 F.2d 1429, 1442, *modified,* 742 F.2d 520 (9th Cir.1984). Therefore, a claim may not be maintained under Title VII where the charging party fails to file a charge of employment discrimination within 180 days of either the alleged discriminatory act or the date on which the party becomes aware of the alleged discriminatory act. *See, e.g., Delaware State College v. Ricks,* 449 U.S. 250, 101 S.Ct. 498, 66 L.Ed.2d 431 (1980); *United Air Lines, Inc. v. Evans,* 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977); *Roberts v. North Am. Rockwell Corp.,* 650 F.2d 823, 826 (6th Cir.1981).

FN21. Section 706(e) of Title VII, Title 42, *United States Code,* Section 2000e-5(e), governs the filing of timely charges of discrimination with the EEOC. Subsection (e) states that:

> A charge under this Section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred ... except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a state or local agency with authority to grant or seek relief from such practice ... such charge shall be filed by or on behalf of the person within three hundred days after the alleged unlawful employment practice occurred.
>
> 42 U.S.C. § 2000e-5(e).

FN22. Under Section 706(e), where the charging party institutes state proceedings, a charge may be filed with the EEOC within 300 days of the discrimination, rather than the usual 180 days.

***17** In general, a discriminatory action which is not the basis for a charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. It may constitute relevant background evidence in a proceeding in which the status of the current practice is at issue, but separately considered, it is merely an unfortunate event in history which has no present legal consequences. *See, e.g., United Air Lines, supra,* 431 U.S. at 558, 97 S.Ct. at 1889, 52 L.Ed.2d at 578; *Domingo, supra,* 727 F.2d at 1443. The continuing violation theory is a way of introducing this type of background evidence. *See, e. g., Domingo, supra,* 727 F.2d at 1442.

The continuing violation doctrine has generally has been applied in the context of a continuing policy and practice of discrimination on a company-wide basis. *See, e.g., Green v. Los Angeles County Superintendent of Schools,* 883 F.2d 1472, 1480 (9th Cir.1989). Although the precise contours of the continuing violation rule are unclear, there is general agreement that it relieves a plaintiff of the burden of showing that all actionable occurred within 180 days prior to the charge, so long as the complaint is timely as to the last occurrence. *See, e.g., Coon v. Georgia Pac. Corp.,* 829 F.2d 1563, 1170 (11th Cir.1987); *Berry v. Board of Supervisors,* 715 F.2d 971, 981, *aff'd on remand,* 783 F.2d 1270 (5th Cir.1983), *cert. denied,* 479 U.S. 868, 107 S.Ct. 232, 93 L.Ed.2d 158 (1986).

Under the "continuing violation" doctrine, a cause of action is considered timely filed if a substantial nexus exists between a timely filed claim and an otherwise time-barred claim that they may be viewed as constituting a single violation which continues into the statutory period. *See, e.g., Montgomery, supra,* 752 F.Supp. at 1581; *Robinson, supra,* 701 F.Supp. at 211; *Domingo, supra,* 727 F.2d at 1443. To determine whether such a nexus exists, courts utilize a very fact-specific analysis which examines three factors which, while not exhaustive, are instructive: first, the subject matter of the discrimination; second, the frequency of the occurrences; and third, the degree of permanence of the violation (i.e., if the violation should trigger an employee's awareness of her rights under the statute). *See, e.g., Berry, supra,* 715 F.2d at 981; *Robinson, supra,* 701 F.Supp. at 211. [FN23]

FN23. A violation is not continuing merely because the effects of an allegedly discriminatory action continue to be felt over a period of time. *See, e.g., Chaffin, supra,* 904 F.2d at 1271-72; *Mack v. Great Atl. & Pac. Tea Co.,* 871 F.2d 179, 182 (1st Cir.1989); *Berry, supra,* 715 F.2d at 979; *Reed v. Lockheed Aircraft Corp.,* 613 F.2d 757, 760 (9th Cir.1980).

The core idea is that equitable considerations may require that the filing periods not begin to run until facts supportive of a Title VII charge or a civil rights action are or should be apparent to a reasonably prudent person similarly situated. *See, e.g., Glass v. Petro-Tex Chem. Corp.,* 757 F.2d 1554, 1560 (5th Cir.1985); *Abrams, supra,* 805 F.2d at 532. However, courts have cautioned that the continuing violation theory must be "guardedly employed because within it are the seeds of the destruction of statutes of limitation in Title VII cases." *Abrams, supra,* 805 F.2d at 533. [FN24]

> FN24. Courts have held that to establish a continuing violation, the plaintiff must show some application of the illegal policy (or his class) within the 180 days preceding the filing of his complaint. *Abrams, supra,* 805 F.2d at 533; *Hill v. AT & T Technologies, Inc.,* 731 F.2d 175, 180 (4th Cir.1984); *Berry, supra,* 715 F.2d at 979; *Domingo, supra,* 727 F.2d at 1443:
>
> > Just as there can be no negligence in the air, so the existence of a quiescent discriminatory policy is simply insufficient to toll the statute of limitations. To hold to the contrary would expose employers to a virtually open-ended period of liability and would, as we said, read the statute of limitations right out of existence.
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> > *Abrams, supra,* 805 F.2d at 533-34 (footnote omitted).

***18** The continuing violation theory does not exist to give a second chance to an employee who has allowed a legitimate Title VII claim to lapse. *See Roberts v. Gadsden Memorial Hosp.,* 835 F.2d 793, 800, *opinion amended on reh'g,* 850 F.2d 1549 (11th Cir.1988); *Robinson, supra,* 701 F.Supp. at 212. Nor does the mere allegation of a "continuing violation" constitute a talismanic or shibboleth term automatically relieving a claimant of any obligation to comply with the statutory term requirements for the filing of a charge with the EEOC. *See, e.g., Hill, supra,* 731 F.2d at 179-80.

There are two kinds of continuing violations, one of which is the so-called systemic violation. *See, e.g., Jensen v. Frank,* 912 F.2d 517, 522 (1st Cir.1990). A systemic violation need not involve an identifiable, discrete act of discrimination transpiring within the limitation period.[FN25] A systemic violation has its roots in a discriminatory policy or practice; so long as the policy or practice itself continues into the limitation period, a challenger may be deemed to have filed a timely complaint. *See, e.g., Jensen, supra,* 912 F.2d at 523; *Green, supra,* 883 F.2d at 1480; *Roberts, supra,* 650 F.2d at 826. Schlei & Grossman have observed that:

> FN25. In contrast, a serial violation is composed of a number of discriminatory acts emanating from the same discriminatory animus, each act constituting a separate wrong actionable under Title VII. *See, e.g., Jensen, supra,* 912 F.2d at 522. Thus, to demonstrate a continuing "serial" violation, a plaintiff must show a series of related acts, one or more of which fall within the limitations period, or the maintenance of a discriminatory system both before and during the limitations period. *Green, supra,* 883 F.2d at 1480. The interdicted act must constitute discrimination *as to that plaintiff. See, e.g., Jensen, supra,* 912 F.2d at 522.

> There is no question but that, if the employer has a formal rule or policy which discriminates in either the allocation of jobs or employment benefits, and the system is maintained into the charge-filing period, the system or practice can be attacked despite the fact that the plaintiff was not denied a particular job or benefit within the charge-filing period.
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> The real question is the extent to which less formal and structured practices will be deemed a "system" of discrimination sufficient to trigger the continuing violation theory and allow an attack on the "system" even in the absence of a specific incident of discrimination against the plaintiff within the charge-filing period. Plaintiffs normally allege that illegal acts of discrimination against them are part of the system; defendants normally contend that if discrimination occurred, the acts of discrimination were sporadic and unrelated.
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> Schlei & Grossman, *supra,* at 1050 (footnotes omitted).

A single act of favoritism, even if proved, falls considerably short of showing an ongoing pattern and practice dating back to the time of P's removal. *See, e.g., Jensen, supra,* 912 F.2d at 523. The plaintiff must prove more than the occurrence of isolated or sporadic acts of

intentional discrimination. The preponderance of the evidence must establish that some form of intentional discrimination against a class of which plaintiff was a member was the company's "standard operating procedure." *See, e.g., Jewett v. International Tel. & Tel. Corp.,* 653 F.2d 89, 91-92 (3d Cir.), *cert. denied,* 454 U.S. 969, 102 S.Ct. 515, 70 L.Ed.2d 386 (1981).[FN26]

FN26. A systemic policy of discrimination is actionable even if some or even all of the events evidencing its inception occurred prior to the limitations period. The reason is that the continuing system of discrimination operates against the employee and violates his or her rights up to a point in time that falls within the applicable limitations period. *See, e.g., Green, supra,* 883 F.2d at 1480.

Courts have found continuing violations in claims of discrimination in hiring, *see, e.g., Smith v. Kaldor,* 869 F.2d 999, 1007-08 (6th Cir.1989), in placements and promotions, *see, e.g., Green, supra,* 883 F.2d at 1480; *Trevino v. Celanese Corp.,* 701 F.2d 397, 402 (5th Cir.1983); *Quillen v. United States Postal Serv.,* 564 F.Supp. 314, 319 (E.D.Mich.1983), and in salary differentials. *See, e.g., Berry, supra,* 715 F.2d at 980. However, courts have consistently concluded that a discharge is a discrete act of discrimination which cannot form the basis of a continuing violation. *See, e.g., Hill, supra,* 731 F.2d at 179 n. 8 (noting trend without addressing issue); *Jensen, supra,* 912 F.2d at 523 n. 4; *Smith, supra,* 869 F.2d at 1007-08; *Quillen, supra,* 564 F.Supp. at 319. Some have also held that a claim of failure to hire may not form the basis of a continuing violation claim, thus limiting this equitable doctrine to claims relating to placement and promotion, i.e., existing employees. *See, e.g., Hill, supra,* 731 F.2d at 179 n. 8; *Trevino, supra,* 701 F.2d at 402.

***19** The earliest charge filed by a Shoney's plaintiff was filed no earlier than December 1, 1988. I do not interpret the continuing violation theory as expanding the scope of the class action as far back as the enactment of Title VII. There are valid and paramount reasons for the prompt filing requirements in employment matters. Records are purged or lost, memories fade, witnesses become unavailable, and, therefore, the limitations periods are an important part of the overall Title VII design. To allow a reach-back into the 1970s or earlier would read the limitations periods out of the statute, which I decline to do. *See, e. g., Domingo, supra,* 727 F.2d at 1442-43 (rejecting similar argument). Rather, the continuing violation theory provides the class with a remedy for those discriminatory acts which impacted named class members prior to the cut-off date. The cut-off date must still be established by reference to the earliest filed charge. Therefore, the 300-day limitations cut-off date is February 4, 1988.[FN27]

FN27. Defendants have also argued that the certification sought would be totally unmanageable and incapable of adequate delineation. Defendants argue that there is no proposed starting date and that the potential class numbers are staggering. While the inability to accurately identify, notify, or process the claims of large putative classes has led courts to decline certification, I am confident that, by narrowing the scope and breadth of the class, I have eliminated many concerns of manageability. Such concerns have already been reduced by my order bifurcating proceedings into two stages. *See* Schlei & Grossman, *supra,* at 1244.

Defendants contend that Riley's claims are time-barred and that her claims are not revived merely by joining class action. The fact that some individuals who have viable claims as of the cut-off date may be able to get relief dating back to December 1986 does not affect the timeliness of other individuals' claims.

Plaintiff Riley alleges that during her employment in 1986 and 1987, defendant Shoney's discriminated against her by reducing her work hours, by subjecting her to on-the-job harassment, by constructively discharging her as a result of the foregoing, which deterred her from reapplying, and by twice denying her a promotion to salad bar supervisor. She filed an EEOC charge in December 1988, well beyond the 300-day limitations period. Plaintiff Riley does not contend that defendant Shoney's discriminated against her again subsequent to the alleged acts in 1986 and 1987. Therefore, her invocation of the continuing violation theory must, by necessity, be based on the systemic violation analysis.[FN28]

FN28. As I note *infra,* in order to demonstrate a "serial" continuing violation, a plaintiff must show that at least one discriminatory act occurred during the limitations period. *See, e.g., Jensen, supra,* 912 F.2d at 522.

As discussed above, most courts have consistently held

that discharge is not a continuing violation. *See, e.g., Hill, supra,* 731 F.2d at 179 n. 8; *Jensen, supra,* 912 F.2d at 523 n. 4; *Smith, supra,* 869 F.2d at 1007-08; *Berry, supra,* 715 F.2d at 980. A principle justification underlying these discharge decisions stems from the fact that an employer is entitled to treat a past act as lawful after the employee fails to file a charge within the limitation period. If a former employee was permitted to challenge his or her dismissal on the basis of an allegedly ongoing discriminatory policy at any time, it goes without saying that the limitation period would be meaningless. Further, an employee who has been discharged would have little need for the continuing violation rule; by definition, such an individual has been the victim of a bounded, identifiable act putting him on unambiguous notice that he has been subject to adverse job action. The firing is final and cannot logically be followed by a series of other harmful acts. Because of the discharge's finality, the existence of a discriminatory "system" can no longer deter the complainant from seeking to exercise his full employment rights. *Jensen, supra,* 912 F.2d at 523 n. 4. The last allegedly discriminatory act complained of by plaintiff Riley was her discharge in 1987. Her charge was not timely filed. I do not find facts justifying departure from the aforementioned practice of denying availability of the continuing violation theory to those complaining of allegedly illegal discharges. Plaintiff Riley does not contend that she was not cognizant of either her rights under Title VII or the allegedly illegal conduct. *See Roberts v. Gadsden Memorial Hosp.,* 850 F.2d 1549, 1550 (11th Cir.1988) ("A claim arising out of an injury which is 'continuing' only because a putative plaintiff knowingly fails to seek relief is exactly the sort of claim that Congress intended to bar by the 180-day limitation period"). Nor do equitable considerations justify application of the continuing violation theory to her case. Plaintiff Riley does not contend that the defendant Shoney's prevented her from filing a timely charge with the EEOC; indeed, she testified that she declined to file a timely charge because of anticipated legal costs. Quite simply, plaintiff Riley failed to pursue whatever claim she had. As I noted, *supra,* "[t]he continuing violation theory does not exist to give a second chance to an employee who allowed a legitimate Title VII claim to lapse." *Roberts, supra,* 835 F.2d at 800. [FN29]

FN29. In *Elliott v. Sperry Rand Corp.,* 79 F.R.D. 580 (D.Minn.1978), the court observed:

> [I]f a policy or practice has remained in existence or a pattern of discriminatory events has occurred right to the date of discharge, the charge may be deemed timely. The former employee has standing to assert the claim because, within the charge-filing period, he was subject to the discriminatory policy or practice. This rationale appears to break down, however, if the filing occurs more than 180 days following termination. Whatever the nature of the charges, the suit would appear to be time-barred, for the last possible date upon which a policy or practice could have adversely affected the former employee was outside the statute of limitations.
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> *Id.* at 586.

III. *Conclusion.*

***20** In light of the foregoing, I conclude as follows on the plaintiffs' motion for class certification:

A class of black restaurant employees shall be, and is, certified to represent claims of failure to hire, harassment, failure to promote, discriminatory discharge, and retaliation. The designation of this class action as a Rule 23(b)(2) or a Rule 23(b)(3) action will be deferred while the parties are given the opportunity to address the matters raised herein regarding the extent to which unresolved equitable issues remain. This class will consist of employees from Shoney's restaurants and Captain D's restaurants only. [FN30] This class action will not proceed against Shoney's, Inc.'s franchisees, RIC, or the non-restaurant divisions, such as Mike Rose Foods, the Commissary or Shoney's Lodging. The class will be temporally limited with a beginning cut off date of February 4, 1988, and ending April 19, 1991. Only those plaintiffs who worked at the store level shall be joined as class action plaintiffs. Thus, clerical or upper-level managerial (above store level) employees are not included.[FN31]

FN30. I do not find that certification is also necessary on a disparate impact theory. As Schlei and Grossman have pointed out, disparate treatment "pattern and practice" cases are factually and analytically indistinguishable from "adverse impact" cases. In such cases, the typical methods and order of proof for disparate treatment and adverse impact cases do not apply.

> [I]n both the disparate treatment

> "pattern-or-practice" case and the adverse impact "excessive subjectivity" case, the battle is determined by an evaluation of the probative force of plaintiff's and defendant's statistical evidence and the evidence with respect to alleged specific instances of discrimination. The proof considerations are no different whether the case be styled a pattern or practice of disparate treatment, on the one hand, or adverse impact resulting from an excessively subjective system of selection for hire or promotion, on the other.
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> Schlei & Grossman, *supra,* at 1288-90 (footnotes omitted).
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> *See also Coe v. Yellow Freight Sys., Inc.,* 646 F.2d 444 (10th Cir.1981).

FN31. The plaintiffs have also raised claims under the Civil Rights Act of 1964, Title 42, *United States Code,* Section 1981. However, in *Patterson v. McLean Credit Union,* 491 U.S. 164, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989), the Supreme Court limited actions under Section 1981 to exclude racial harassment and discrimination claims arising after contracts have been formed. Thus, " '[p]roblems that may arise later from the conditions of continuing employment' are not actionable under § 1981." *Walker v. South Cent. Bell Tel. Co.,* 904 F.2d 275, 276 (5th Cir.1990) (quoting *Patterson, supra,* 491 U.S. at 176, 109 S.Ct. at 2372, 105 L.Ed.2d at 150). It appears that, as a practical matter, many of the plaintiffs' claims are barred by the *Patterson* decision. However, resolution of the Section 1981 issues are more appropriately reserved for the numerous pending motions for summary judgment.

Plaintiffs Bonsall, Henry and Billie Elliott, Williams, and Thomas are SEVERED from the class action and may independently pursue their respective individual claims, assuming that all necessary administrative prerequisites have been satisfied. Because plaintiffs Mongoven and Riley did not file a timely charge with the EEOC, their Title VII claims are DISMISSED.

DONE AND ORDERED.