For Opinion See 79 F.3d 1086

United States Court of Appeals,
Eleventh Circuit.
K MART CORPORATION, Defendant-Appellant-Cross-Appellee,
v.
Mercer David GRAYSON, Ronald L. Braley, Tony M. Arrington, Ricky D. Sallee, James L. Steadman, and John D. Thompson, Plaintiffs-Appellees-Cross-Appellants,
K MART CORPORATION, Defendant-Appellant-Cross-Appellee,
v.
Carl HELTON, Charles W. Kempton, Nick Payne, James E. Taylor, and Bob Williams, Plaintiffs-Appellees.
Nos. 94-9257, 94-9293.
February 14, 1995.

Appeal from a Final Order of Dismissal and an Interlocutory Order of the United States District Court for the Northern District of Georgia Case Nos. 1:92-CV-141-JEC and 1:94-CV-2564-MHS

Brief of Defendant/Appellant/Cross-Appellee

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***I** *STATEMENT REGARDING ORAL ARGUMENT*

Defendant-Appellant-Cross-Appellee K Mart Corporation requests oral argument in these cases. The facts and legal arguments presented are complex and raise several issues of first impression in this Circuit. K Mart also notes that this Court's November 18, 1994 order granting permission to appeal the *Helton* case also directed that the appeal be expedited for oral argument.

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***1** *STATEMENT OF JURISDICTION*

This Court has jurisdiction in the *Grayson* cases because this is an appeal of a final order of a United States District Court. 28 U.S.C. § 1291 (1988). This Court has jurisdiction in *Helton* because, by Order entered November 18, 1994, it accepted review of an interlocutory order entered by the United States District Court for the Northern District of Georgia and certified for review pursuant to 28 U.S.C. § 1292(b) (1988).

STATEMENT OF THE ISSUES

K Mart Corporation v. Grayson, et al., Appeal No. 94-9257

1. Whether dismissal of these cases to allow plaintiffs to "rejoin" their individual age discrimination claims with other age discrimination claims pending in *Helton, et al. v. K Mart Corporation,* Civil Action File No. 1:92-CV-2564-MHS (N.D. Ga.), was improper in light of a prior order entered after discovery closed that severed plaintiffs' claims for final disposition in separate proceedings.

2. Whether the post-discovery dismissal and reconsolidation of the former *Grayson* plaintiffs' individual claims into the *Helton* case is inherently prejudicial and would deprive defendant K Mart Corporation of its due process right to a fair trial where the District Court has already ruled that a joint trial of these plaintiffs' claims would hopelessly confuse and mislead the jury, and that plaintiffs' claims should be resolved separately.

3. Whether the dismissal of these cases was improper without an order directing plaintiffs to pay appropriate costs.

K Mart Corporation v. Helton, et al, Appeal No. 94-9293

The July 29, 1994 Order of the Honorable Marvin H. Shoob presents the essential question of whether, after completion of all discovery, a federal judge may convert an individual, five plaintiff lawsuit into a class action case and permit opt-in joinder of geographically diverse plaintiffs who complain of distinct, individual acts of alleged age discrimination, where a coordinate judge in ***2** the same district has previously ruled that such claims could not be joined in one lawsuit. The following issues are presented for review on interlocutory appeal from Judge Shoob's Orders:

1. Whether, on the eve of trial, a federal judge may appropriately apply the "similarly situated" requirement of 29 U.S.C. § 216(b) to allow opt-in joinder of multiple, individual claims in one ADEA lawsuit where a coordinate judge in the same district previously ruled that consolidation of such claims for trial in one lawsuit was improper under Federal Rules of Civil Procedure 20, 21 and 42.

2. Whether an ADEA opt-in class action is appropriate absent proof of an identifiable policy, plan, or scheme of age discrimination by the defendant and where individual issues predominate over any common issues of law

and fact.

3. Whether the district court should have conducted an evidentiary hearing before determining whether the action should proceed as an ADEA "opt-in" class action.

4. Whether, in an ADEA case, unnamed parties who have not filed timely administrative charges of discrimination may opt-in as plaintiffs by relying on other EEOC charges filed by the original, named plaintiffs.

5. Whether the EEOC charges filed by the named plaintiffs in this action gave adequate notice of "class-wide" discrimination, for purposes of the "single filing" ("piggyback") concept, if that concept applies in an ADEA case.

6. Whether persons whose own claims are time-barred by the applicable statute of limitations and who were demoted long before any of the original named plaintiffs filed EEOC charges may "piggyback" on an EEOC charge filed by another opt-in claimant.

STATEMENT OF THE CASE

1. *Course of Proceedings and Disposition Below.*

On January 17, 1992, eleven plaintiffs filed suit in the United States District Court for the Northern District of Georgia. *Grayson. et al. v. K Mart Corp.,* Civil Action No. 1:92-CV-141-JEC (N.D. Ga.) (hereinafter "*Grayson* Complaint," GR1-1-1).[FN1] Each of the eleven plaintiffs alleged that he had been demoted within a few months after the end of K Mart's 1990 fiscal year in violation of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §§ 621, *et seq.* ("ADEA"). *Grayson* Complaint, GR1-1-19. Each plaintiff also alleged a separate state law claim (under the laws of Alabama, Florida, Georgia and North Carolina) for the intentional infliction of emotional distress. *Id.* at ¶¶ 97-101, GR1-1-20-21. Approximately ten months later, on or about October 29, 1992, another group of five plaintiffs, three of whom had been demoted after the end of K Mart's 1991 fiscal year, filed a second lawsuit in Atlanta, styled as *Helton. et al. v. K Mart Corp.,* Civil Action No. 1:92-CV-2564-MHS (N.D. Ga.). The plaintiffs in *Helton* are represented by the same counsel as the *Grayson* plaintiffs. HR1-1-15.

> FN1. References to the record of the cases consolidated in this appeal will begin with the first letter of the lead plaintiff's last name, such as "G" for the *Grayson* case, "H" for the *Helton* case and "B" for the *Braley* case.

Many of the "boilerplate" allegations in the *Grayson* and *Helton* Complaints are quite similar. For instance, in paragraph I of the Complaint, HR1-1-1-2, the five *Helton* plaintiffs alleged that K Mart "set about" to replace older managers with younger managers "by a preconceived course of conduct" designed to "discredit" their performance, and to demote them "for pretextual reasons. " They also alleged that they had been victimized by a purported "20-40-60 " scheme that targeted senior, higher-paid managers for demotion or termination. *Id.* at ¶ 18, HR1-1-5. These allegations are essentially the same as unproven allegations in the *Grayson* Complaint filed almost one year earlier.[FN2] Despite these similarities, plaintiffs' counsel did not designate the *Helton* case as being related to *Grayson* on the civil intake questionnaire.[FN3] Moreover, *unlike* the *Grayson* plaintiffs, the plaintiffs in *Helton* did not purport to file that action on behalf of "other employees or former employees who may be similarly situated ....", GR1-1-20 (¶ 96), or allege that *Helton* was appropriate for class action treatment pursuant to the provisions of 29 U.S.C. § 216(b) (1988). Similarly, the Joint Preliminary Statement and Scheduling Order in *Helton,* entered on February 12, 1993, did not contain any statement that the five plaintiffs intended

to pursue claims on behalf of "similarly situated" persons, that plaintiffs intended to join any other persons as plaintiffs, or that plaintiffs intended to file any amendments after the deadline for amending the complaint specified in the Local Court Rules. *See* id., ¶ 6, HR2-26-3-4.[FN4]

FN2. This factually unsupported "20-40-60" allegation is contradicted by statistics showing that during the period of this claimed "purge," the average age of K Mart store managers and the percentage of store managers age 40 or older actually increased. Affidavit of Dr. David Peterson, filed in the *Helton* case on April 1, 1994. *See* HR15-97-Tab A in the Confidential Appendix Supporting K Mart's Motions for Partial Summary Judgment. *See also* p. 14 n. 12, *infra.*

FN3. *See* Civil Cover Sheet submitted by plaintiffs in *Helton,* HR22-151-Exhibit C in Appendix in Support of Reply Brief in Support of Motion for Reconsideration or Clarification of August 23, 1994 Order. If they had, the case would have been assigned to the Honorable Julie E. Carnes, the presiding judge in *Grayson.*

FN4. According to the formal Scheduling Order, amendments submitted more than 100 days after the date of the Complaint, "will not be accepted for filing unless otherwise permitted by law." Consistent with this limitation, Local Court Rule 300-2 also provides that absent a showing of "good cause, " plaintiffs seeking class-wide relief pursuant to Fed. R. Civ. P. Rule 23 must move for class certification within 90 days after the complaint is filed.

The five plaintiffs in *Helton* clearly could have sought to intervene as plaintiffs in *Grayson,* but chose not to do so, either out of a desire to have a different judge assigned to their case or out of concern that the discovery period in *Grayson* was about to end.[FN5] In any event, instead of being assigned to the Honorable Julie E. Carnes, the presiding judge in *Grayson,* the *Helton* lawsuit was assigned to the Honorable Marvin H. Shoob.

FN5. Under Local Court Rules, the period for discovery in *Grayson* was scheduled to expire on July 18, 1992, but was extended by consent until November 18, 1992. *See Grayson* Docket Sheet, Record Excerpts, Docket Entry 20. Discovery was extended again by agreement, and the scheduled discovery period expired on March 1, 1993. *Id.* at Docket Entry 26.

The *Grayson* plaintiffs were aware that K Mart contended that their separate claims were not properly joined in one lawsuit. K Mart had asserted that position in its Answer and in other preliminary pleadings. *See, e.g.,* Answer of K Mart, GR1-6-2. On March 17, 1993, after the end of the scheduled discovery period in *Grayson,* K Mart filed Motions for Summary Judgment with respect to the claims of each of the eleven plaintiffs. *Grayson* Docket Sheet, filed in the accompanying Record Excerpts, pp. 11-12, Docket Entries 54-64. At the same time K Mart filed a Motion for Severance and for Change of Venue. *Id.* at Docket Entry 65. K Mart argued, *inter alia,* that the claims of the eleven plaintiffs were not properly joined in one case under Fed. R. Civ. P. 20, that plaintiffs' individual claims should be severed for separate trials pursuant to Fed. R. Civ. P. 42(b), and that the claims of five plaintiffs who lived and worked in Florida and North Carolina should be transferred to the district courts that were more appropriate and convenient forums for their claims. *See* 28 U.S.C. § 1404(a); GR15-65.

Although K Mart's position on the propriety of joinder has been consistently and clearly asserted, during the more than two years between the filing of their Complaint and the end of all discovery in *Grayson,*[FN6] the plaintiffs in that case never sought to consolidate or join their claims with the claims asserted by plaintiffs in *Helton;* they did not seek to add any additional parties as plaintiffs; and they did not move for issuance of notice to any members of a purported ADEA class. *See Grayson v. K-Mart Corp.,* 849 F. Supp. 785, 787 (N.D. Ga. 1994); *Grayson* Docket Sheet, Record Excerpts. Similarly, the plaintiffs in *Helton* did not seek to modify or

amend the Complaint in that case at any time during the course of discovery to include alleged "class-wide" claims.

> FN6. As noted above, the scheduled discovery period ended on March 1, 1993, but in an order entered September 28, 1993, Judge Carnes granted in part plaintiffs' motion to compel additional discovery. *Grayson* Docket Sheet, Record Excerpts, p. 17, Docket Entry 113. Discovery ended with the completion of the deposition of K Mart's Chairman, Joseph Antonini, on January 25, 1994. The discovery period in the *Helton* case expired shortly thereafter, on February 14, 1994. *Helton* Docket Sheet, Record Excerpts, p. 10, Docket Entry 57.

Although the *Grayson* and *Helton* cases remained separate, the parties engaged in parallel discovery. For instance, shortly before the original expiration of discovery in *Grayson,* the parties entered into a discovery conciliation agreement that reserved certain disputed issues to be resolved by the court, but that generally limited the scope of statistical discovery to data about store managers employed in the three "subregions" (the Bontekoe, Clifton and Lynch regions) in which the *Grayson* plaintiffs had been employed. *See* discovery conciliation letter dated November 25, 1992, HR21-138-Exhibit "A" to the Appendix in Support of K Mart's Motion for Reconsideration or Clarification of the July 29, 1994 Order. The agreement also limited the scope of financial data discovery to operational results of other stores in the same districts in which the named plaintiffs had been employed. *Id.* at ¶ 2. The same range of statistical and financial data has been provided in the *Helton* case, *see* pp. 2-3 of Supplemental Response of K Mart Corporation to Plaintiffs' First Interrogatories and First Request for Production of Documents, HR21-138-Exhibit "B" to the Appendix in Support of K Mart's Motion for Reconsideration or Clarification of July 29, 1994 Order; the same expert witnesses have been used in both cases; and on January 25, 1994 the parties completed the deposition of Mr. Joseph Antonini, K Mart's Chairman, allowed pursuant to court orders in both cases. As noted above, discovery ended in both cases shortly after Mr. Antonini's deposition. *See* note 6, *supra.*

During more than two years of discovery, K Mart produced over 5,600 pages of documents in *Helton* and 12,100 pages of documents in *Grayson.* Affidavit of Edmund M. Kneisel, HR21-138-Exhibit "C" to the Appendix in Support of K Mart's Motion for Reconsideration or Clarification of July 29, 1994 Order. K Mart also expended considerable time and effort preparing specialized listings about personnel decisions and actions affecting store managers employed within the Bontekoe, Clifton and Lynch subregions. *Id.* This data has been the subject of computer assisted analyses prepared by plaintiffs' expert, Dr. Leonard Cupingood, and rebuttal analyses prepared by defendant's expert, Dr. David Peterson. Dr. Cupingood has been deposed twice by counsel for defendant. *Id.* In addition, the parties have completed depositions of each of the original named plaintiffs in both cases, of K Mart's Vice President, of Regional Managers responsible for the geographic areas where the named plaintiffs were employed, and of several other witnesses who reside within the three subregions at issue. All pretrial discovery regarding the claims of the original named plaintiffs in both cases is complete.[FN7]

> FN7. While thousands of documents have been produced, K Mart has not compiled or reviewed store files or operational results for any stores located outside of the districts in which the named plaintiffs were employed. *See* Affidavit of Shavan Giffen, HR21-138-Exhibit "E" to the Appendix Supporting K Mart's Motion for Reconsideration or Clarification of July 29, 1994 Order. If the *Helton* case is expanded and discovery reopened, it will be necessary to locate and compile thousands of additional documents responsive to the new claims of individual opt-in plaintiffs from Puerto Rico, the Virgin Islands and eight new states. *See* Affidavit of John Valenti, HR21-138-Exhibit "D" to the Appendix in Support of K Mart's Motion for Reconsideration or Clarification of July 29, 1994 Order. Even assuming that all these documents can be located, reopening and expanding the scope of discovery at this stage will cause

K Mart significant, additional expense and will significantly delay final disposition of these cases.

On February 22, 1994, after completion of all court-ordered discovery in *Grayson,* the Honorable Julie E. Carnes granted K Mart's Severance Motion, ruling that the claims of the eleven plaintiffs were not properly joined under Fed. R. Civ. P. 20 and that those claims should be severed into eleven separate cases in accordance with Fed. R. Civ. P. 42(b). *Grayson v. K-Mart Corp.,* 849 F. Supp. 785 (N.D. Ga. 1994). After reviewing the substance of Judge Carnes's ruling, several of the *Grayson* plaintiffs apparently decided that it would be in their interest to have their claims adjudicated by another federal judge; for on March 1, 1994, counsel for the plaintiffs advised the Court that they no longer opposed K Mart's motion to transfer venue of five claims to courts in Florida and North Carolina. *See* letter from Daniel M. Klein to Honorable Julie E. Carnes, dated March 1, 1994, GR25-169-Exhibit "A" to the Appendix in Support of K Mart's Motion for Reconsideration or Clarification of August 23, 1994 Order. This letter apparently crossed in the mail with the Court's February 25, 1994 transfer order. *Bell v. K Mart Corporation,* 848 F. Supp. 996 (N.D. Ga. 1994).

Consistent with their March 1, 1994 letter withdrawing their objections to the transfer of their claims, none of the *Grayson* plaintiffs sought appellate review or filed any motion for reconsideration of Judge Carnes' rulings. Instead, on February 28, 1994, counsel for plaintiffs filed a series of motions in *Helton* that in effect asked a different judge in the same district to overrule the *Grayson* decision. In those motions, the five *Helton* plaintiffs sought leave to amend their complaint to allege for the first time an ADEA "class action"; they sought leave to join several additional persons as named plaintiffs; and they sought permission from the court to send notice of the case to other "unnamed" potential class members to advise them that they could "opt-in" as plaintiffs in the case pursuant to 29 U.S.C. § 216(b).[FN8] The Order granting plaintiffs' motions was entered in *Helton* on July 29, 1994. HR20-133.

FN8. While the *Helton* "class action" motions were pending, and to comply with the orders in *Grayson* and *Bell,* K Mart spent considerable time and resources in coordinating the copying of the entire files of the out-of-state cases and "refiling" its motions for summary judgment in the severed cases. *Grayson,* 849 F. Supp. at 791, 793.

Plaintiffs did not seek any extension of the discovery period or file any motion to expand the scope of discovery before discovery ended in *Helton. See* Local Court Rule 225-1(b) (N.D. Ga.) (motions to extend discovery "must be made prior to expiration of the existing discovery period and will be granted only in exceptional cases...."). However, the order granting plaintiffs' post-discovery motions will require significantly expanded discovery, not only about the claims of unnamed potential class members in the Bontekoe, Clifton and Lynch subregions, but also about the claims of potential class members demoted from stores located in widely dispersed locations that have never been considered to be part of the *Helton* case or the *Grayson* cases. Similarly, without regard to ADEA charge-filing requirements, the statute of limitations governing ADEA claims, or the parties' previous agreements concerning the limited geographic scope of these cases, the July 29, 1994 order will allow joinder of persons from outside the geographic bounds of the named plaintiffs' claims and persons whose individual causes of action are time-barred by the longest period of limitations that might govern their claims.[FN9]

FN9. Pursuant to 29 U.S.C. § 255, which applies to ADEA claims that arose before the ADEA was amended effective November 21, 1991 by the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1079, *amending* 29 U.S.C. § 626(e)(1) (1988 & Supp. V 1993), the period of limitations for non-willful claims under the ADEA is two years and can be extended to three years only in the case of "willful" violations. As explained at pp. 47-52 below, pursuant to 29 U.S.C. § 256(b), an action filed by a potential opt-in plaintiff is not deemed to have been "commenced" until that plaintiff files a "consent" to join the case. Thus, the claims of persons who were demoted more than two or at most three years ago are time

barred, and those persons should not be included within the scope of any purported class.

In granting plaintiffs' motions, K Mart submits that the court in *Helton* overlooked the substantial prejudice that will result from essentially starting the *Helton* case over after all discovery has ended, after the time for amendments has long since expired under Local Court Rules, and after the case is ripe for final disposition. Similarly, while the *Helton* court noted that *Grayson* was a "similar case," the July 29, 1994 Order improperly distinguishes and directly contradicts Judge Carnes's well reasoned, thorough severance ruling in that case.

It is impossible to reconcile the severance order entered in *Grayson* in February 1994 with the subsequent "class action" order entered in *Helton.* Rather than effectively overrule Judge Carnes, K Mart respectfully submits that Judge Shoob should have followed her well-reasoned severance ruling by denying the *Helton* plaintiffs' untimely motions. As a result, K Mart filed a motion for reconsideration and alternative motion for interlocutory appeal, which has been allowed. In the meantime, the *Grayson* court compounded the *Helton* court's error by issuing, *sua sponte,* a conditional order dismissing without prejudice each of the six severed actions remaining in that court. Order of August 23, 1994, GR25-168. Without considering the considerable prejudice to K Mart caused by this dismissal ruling, Judge Carnes reasoned, *inter alia,* that in view of

plaintiffs' obvious preference to pursue their claims collectively and the commonality of plaintiffs' counsel ... [and] in the interest of fairness to all the parties involved and in the interest of judicial economy, the Court concludes that it should discontinue any further consideration of the above-styled cases to give the plaintiffs in each of these cases an opportunity to join the *Helton* class.

GR25-168-6.[FN10]

FN10. On August 22, 1994, in the third ADEA case filed by the same counsel, *Sands v. K Mart Corp.,* Civil Action No. 1-93-CV-2023-JEC (N.D. Ga.), Judge Carnes followed her earlier *Grayson* and *Bell* orders by severing the claims of plaintiff Sands, who alleged he had been constructively discharged when he resigned from a store manager position in early 1993, from the claims of a coplaintiff, Charles Wester, who had been demoted from a Loss Prevention District Manager job in Florida, and transferring Mr. Wester's case to the Southern District of Florida.

K Mart immediately moved for reconsideration of this ruling, pointing out that the *sua sponte* dismissal caused significant prejudice to K Mart, was inconsistent with law of the case principles, and was improper under Fed. R. Civ. P. 41(a). During a hearing on K Mart's motion, Judge Carnes recognized that her conditional dismissal order, which failed to provide for costs, infringed K Mart's rights; but nevertheless concluded that an immediate appeal of the *Grayson* cases, in conjunction with an interlocutory appeal in *Helton,* would advance the interests of justice. As a result, the District Court revised its conditional dismissal order to make it a final order, thereby allowing K Mart to appeal of right. Order of October 27, 1994 and Judgment of October 28, 1994, GR26-173-11; GR26-174. *See* Transcript of October 25, 1994 Proceedings before Hon. Julie E. Carnes, GR27.

The extent to which the July 29, 1994 order in *Helton* "overrules" *Grayson* is further evidenced by the subsequent actions of the former *Grayson* plaintiffs whose claims had been severed and transferred to United States District Courts in North Carolina and Florida (plaintiffs Bell, Mixon, Navickas, Kondrad, and Taper). *Bell v. K Mart Corp.,* 848 F. Supp. 996 (N.D. Ga. 1994). In a clear violation of "law of the case" concepts, five of those former *Grayson* plaintiffs filed opt-in notices in *Helton,* and two of the plaintiffs (plaintiffs Bell and Mixon) were allowed to "re-transfer" their previously transferred cases back to Atlanta. The three other transferred cases have been stayed pending disposition of the opt-in claims in *Helton.*

Although several persons, including all the *Grayson* plaintiffs, have purported to opt-in as plaintiffs in *Helton, see* Consent Forms. HR22-147; HR22-148, the *Helton* court did not give final approval to issue notice to other alleged class members because Judge Shoob decided instead to certify the "class action" ruling for interlocutory appeal. *See Helton* Order entered October 12, 1994, HR22-157-3-4. Following entry of Judge Shoob's Order certifying the July 29, 1994 Order for interlocutory appeal, K Mart filed a Petition for Permission to Appeal, which was granted by this Court on November 18, 1994. HR22-163.

2. *Statement Of Facts.*

a. *General Background.*

The demotions at issue in these cases occurred over a three year period beginning in 1990 in K Mart's Southern Region, which consists of approximately 700 stores located in eighteen states. Puerto Rico and the Virgin Islands. The Southern Region was in turn subdivided into five geographic "subregions," each headed by a different Region Manager. Groups of 12-16 stores in each subregion were assigned to distinct, geographic districts. *See* Affidavit of John Valenti, ¶¶ 2-3, Appendix in Support of K Mart's Petition for Review of the *Helton* case, Exh. "O." At the time of their demotions, the eleven named plaintiffs who filed the *Grayson* action lived and worked in three different subregions in four separate states: Alabama, Georgia, Florida and North Carolina. Three of the five named plaintiffs in the *Helton* case lived in Florida, two in Georgia, and each plaintiff worked at different stores located in different districts within the two states.[FN11] *See e.g.,* Affidavit of Wayne Clifton, HR5-92-Exhibit C in Appendix.

> FN11. When they were demoted, Messrs. Helton, Kempton, and Taylor were employed in the subregion assigned to Wayne Clifton, who had his office in Winter Park, Florida; Messrs. Payne and Williams were in the subregion assigned to Mike Lynch, who had his office in Atlanta, Georgia. Of the eleven *Grayson* plaintiffs, Messrs. Arrington, Braley, Grayson, Sallee, Steadman, and Thompson were in the subregion assigned to Mike Lynch. Messrs. Bell, Mixon, and Navickas were in the subregion assigned to Wayne Clifton. Messrs. Kondrad and Taper were in the subregion assigned to Mike Bontekoe, who had his office in Charlotte, North Carolina. *See* Affidavits of Wayne Clifton and Mike Lynch, HR5-92-Exhibits C and D in Appendix.

Each plaintiff alleges that he was demoted from his former position as Store Manager because of his age, but any similarity between plaintiffs' claims ends there. Indeed, when demoted, the plaintiffs ranged in age from barely being protected by the ADEA (age 40) to age 53. Similarly. as explained in detail in the factual sections of K Mart's summary judgment briefs, the facts pertinent to each plaintiff's work history and background are very different. *See* GR4-54-10-22; GR5-55-10-20; GR6-56-10-19; GR11-61-10-16; GR12-62-10-15; GR14-64-10-20; HR6-93-9-24; HR7-94-9-19; HR9-95-9-16; HR10-96-9-28; HR14-97-9-16. With only a few exceptions, each plaintiff worked in different districts throughout his career, reported to different District Managers at the time of his demotion, and in the case of the Florida and North Carolina plaintiffs, reported to different Region Managers. *See* note 11, *supra.* Each decision to demote was initiated by a different District Manager or Region Manager for reasons specific to that plaintiff's individual record of poor performance.

Plaintiffs have not and cannot offer any evidence showing that any entry on any store visit, audit or other report about the operations of their stores was false or untrue or prepared for agebiased reasons. *See, e.g.,* Sallee Dep., pp. 104-105, GR11-61-Exhibit H in Appendix; Taper Dep., pp. 187, 201-202, GR13-63-Exhibit H in Appendix; Kondrad Dep., pp. 199, 201, 232, 234-35, GR8-58-Exhibit H in Appendix; Helton Dep., pp. 76, 78, 104, 115, 121, 134, HR6-93-Exhibit E in Appendix. Plaintiffs have no evidence that they were singled out for criticism be-

cause of their age. Similarly. plaintiffs have no evidence that similarly-situated, younger managers with significant operational discrepancies, poor financial results and other, similar records of poor performance were treated more favorably.

Instead, plaintiffs seek to rely on "intuitive feelings" and their "collective " belief, founded on rumor, speculation and innuendo, that older workers were being demoted for improper reasons.[FN12] For example, former *Grayson* plaintiff Taper, who has filed an "opt-in" consent form in *Helton,* testified that he has no personal knowledge of any evidence showing that the evaluators who judged his performance used age as a negative factor:

> FN12. Among other speculative claims, plaintiffs allege that a "20-40-60 " club existed at K Mart, consisting of store managers "targeted" for demotion who had been employed for 20 years, who were at least 40 years old, and who were paid $60,000 per year or more. As Judge Carnes recognized:
> Plaintiffs' only evidence of the existence of this "club" is testimony by various employees, many of whom have claimed that K Mart discriminated against them because of their age and that they believed that employees who satisfied the three criteria were at an enhanced risk of suffering some adverse employment action. Without more, the Court cannot conclude that such a "club" existed, much less that some corporate policy or plan was responsible for its existence.
> *Grayson,* 849 F.Supp. at 788 n.2. *See also Lee v. K Mart Corp.,* Civil Action No. 1-93-CV-0124 (E.D. Tenn. Sept. 7, 1994) (holding, in granting summary judgment to K Mart, that "[t]he evidence about a 20-40-60 plan to force older employees to retire is admittedly rumor-based and therefore too speculative to consider").

To summarize, I have nothing concrete. I have a lot of intuitive feelings, but taken in the collective, everything that has happened to us since renewal, leads up to this strategy and these personnel decisions based on that strategy.

Taper Dep., p. 276, GR13-63-Exhibit H in Appendix.

Plaintiffs' conclusory assertions are not probative evidence that K Mart executives orchestrated a "class-wide purge" of older store managers. To the contrary, basic workforce data refutes this assertion because the average age of store managers in the three regions where plaintiffs were employed actually increased slightly, from age 40.7 in late 1988, before plaintiffs were demoted, to age 41 after the end of the alleged "purge." Similarly, the percentage of store managers age 40 or older also increased during this same period. Affidavit of David Peterson, Ph.D., ¶ 7, GR18-98-Exhibit D to the Joint Confidential Appendix Supporting K Mart's Reply Brief in Support of its Motions for Partial Summary Judgment. Obviously, as reflected by this data, many younger employees also left the store manager workforce during this period. Similarly, plaintiffs' unsupported contention that K Mart set out to reduce the number of older, higher-paid store managers is contradicted by evidence showing that the average earnings of older store managers actually increased during this period. At the same time the average earnings of younger store managers under age 40 decreased. *Id.* at ¶ 5, Ex. 2. As testified Dr. Peterson, when pertinent statistics are properly analyzed, the comparison between the ages of store managers removed and the ages of store managers remaining employed is "so close that the age differences can reasonably be attributed to chance and do not raise any inference that age may have been a factor in the selection of store managers removed." *Id.* at 1 16.

Plaintiffs obviously hope to distract the court and the jury from the lack of merit of their individual claims by tendering cumulative testimony during joint, collective proceedings. Each plaintiff will argue that he was vic-

timized by a pattern and practice of age bias because other, older store managers also were demoted. Judge Carnes carefully reviewed plaintiffs' evidence, and rejected the argument that their allegedly "collective" demotions should be tried together in one lawsuit:

Plaintiffs have directed this Court's attention to no authority for the proposition that the number of plaintiffs joined in a lawsuit affects the admissibility of pattern and practice evidence in an employment discrimination context. Such evidence is controlled by the Federal Rules of Evidence regardless of whether each plaintiff's case is tried separately or tried together in one consolidated trial....

While the fact of similar demotions within the same time frame ... may be relevant to ... plaintiff's case under Rule 401, the "prejudice resulting from permitting each witness, who is the plaintiff in his own lawsuit, to testify about the circumstances of his [demotion, would] substantially outweigh the probative value of the testimony," .... *The prejudice to defendant and confusion to the jury from the presentation of such testimony is the overriding reason plaintiffs' cases must be severed at this juncture.*

Grayson, 849 F.Supp. at 791 (emphasis added).

b. *Evaluation Of Store Manager Performance.*

Ultimately, each store manager's performance is judged by store operating results. These results are measured periodically by tracking sales, expenses, and projected profitability. Actual operating results are determined annually, following completion of the Company's fiscal year, which ends on the last Wednesday of January. After the fiscal year ends, "settlement sheets" are prepared to summarize the amount of performance bonus earned by the manager based on the manager's annual compensation contract for that year, which includes base salary plus incentive compensation. The largest component of a manager's incentive compensation is payable based on how well the store performs against an operating profit goal.[FN13] Affidavit of Wayne Clifton, ¶ 7, HR6-93-Exhibit B in Appendix.

> FN13. Periodically, Store Managers, in conjunction with District Managers, propose a set of goals for store sales, total gross, salaries, expenses, and operating profit. Operating goals are reviewed and adjusted by higher level management and eventually finalized early in each fiscal year as the store's "plan." The operating profit component of the plan is included in the store manager's annual contract. The largest percentage (60%) of a store manager's potential bonus is paid based on attaining the targeted operating profit goal. Affidavit of Wayne Clifton, ¶¶ 8-9, HR6-93-Exhibit B in Appendix.

In addition to performance measures that focus upon objective store performance, K Mart also conducts periodic audits to measure compliance with specified operating standards. In addition. Buyers, Region Managers, District Managers, Loss Prevention District Managers, and other corporate officials, make both scheduled and unscheduled visits to examine a store's operations, general appearance, and compliance with Company policies. Affidavit of John Valenti. ¶ 8, HR6-93-Exhibit A in Appendix. The manager who tours the facility usually prepares a store visit report, which rates the store in various categories as good, fair, or poor. District Managers, who have responsibility for 12-16 stores in a distinct geographic area, follow up on poor or fair ratings to make sure that any identified problems have been corrected. Affidavit of Wayne Clifton, ¶ 11, HR6-93Exhibit B in Appendix. Auditors, District Managers and Loss Prevention District Managers also conduct more lengthy, one or two day store visits, which are documented on multi-page forms and related correspondence that describe the overall condition of the store. *See, e.g.,* Helton Dep., Exhs. 23, 26, HR6-93-Exhibit E in Appendix.

Within the Southern Region, store managers who continually received poor audits, who were criticized for the

physical condition of their stores, and who failed to satisfy store operating goals are almost invariably rated poorly on their annual appraisals. If efforts to encourage these poorly rated managers to improve did not succeed, they were removed from their positions, usually by demotion to lower-level management positions. Affidavit of John Valenti, ¶¶ 11, 14, HR6-93-Exhibit A in Appendix. The various documents that summarize store operations, such as annual operating statements, store visit reports, periodic audits, and similar materials all play some role in this process. Thus, a determination that a manager was performing poorly and should be demoted is not based solely on the subjective opinion of the manager's direct superior, but actually is based on a variety of input received from many different sources. As illustrated by the following history leading to the decisions to demote plaintiffs Braley and Williams, each demotion at issue was based on a separate and discrete analysis of each store manager's individual performance record.

c. *Demotion of Ronald L. Braley* (former *Grayson* plaintiff).

Mr. Braley served as manager of K Mart store no. 3145 in Forest Park, Georgia, for approximately seven years, from 1984 until his demotion in 1991. Mr. Braley's tenure as Manager of this store was spectacularly unsuccessful, as illustrated by the charts attached to the Memorandum in Support of K Mart's Motion for Partial Summary Judgment Re: Plaintiff Ronald Braley as Exhibits “A “ and “B,“ GR5-55. He would not or could not follow directives from his superiors, including two former Southern Region Vice Presidents, to manage his store successfully. *See* Deposition of Ronald Braley (“Braley Dep.“), Exh. 4, p. 2; Exh. 6; Exh. 7, p. 1; Exh. 10, p. 1; Exh. 15, p. 2; Exh. 17; Exh. 21, GR5-55-Exhibit J in Appendix. For example, on September 16, 1987, former Region Vice President Robert McAllister wrote the following:

Your personal file is full of threatening letters and memos to the file that indicate that one more bad visit will result in your being dismissed or demoted from this store. Most recently, we have tried to be encouraging and optimistic, but you continue to give us the signals of “no success“ and are inviting us to remove you as Manager of this store.

Id. at Exh. 21, p. 2.

Unfortunately, Mr. Braley's problems continued under the supervision of District Manager Willie Sands.[FN14] who was assigned responsibility for Mr. Braley's store in 1988. Braley Dep., Exh. 25, GR5-55-Exhibit J in Appendix. Consistent with Mr. Sands' negative report of his first store visit, other managers who visited the store also reported continuing operational problems regarding matters such as refunds of merchandise without receipts, Braley Dep., pp. 133-34, GR5-55-Exhibit H in Appendix; poor follow-up on collecting “bad “ checks, Braley Dep., Exh. 25, p. 5, GR5-55-Exhibit J in Appendix; poor cash security, id.; and untimely invoice processing, such that Mr. Braley's store was the worst in the Region with 440 invoices over 45 days old. Braley Dep., Exh. 27, GR5-55-Exhibit J in Appendix.

> FN14. Willie Sands, who is represented by the same attorneys as Mr. Braley in a separate ADEA lawsuit pending against K Mart, *see* p. 11 n. 10, *supra,* unequivocally testified during his deposition that his critical evaluations of Mr. Braley were accurate; that no one told him to do anything but report the facts; that he falsified no store reports; and that he attempted to be fair and objective in evaluating Mr. Braley's performance without regard to his age. Deposition of Willie Sands (“Sands Dep.“), pp. 76-77, 80-90, 100-106, BR30-147-Exhibit J to the Appendix Supporting K Mart's Motion to Strike.

Not surprisingly, these continued problems led to a financial “disaster“ for store operating results in 1988. Operating profit dropped precipitously, from $1,003,838 in 1987 to $229.308 in 1988. Braley Dep., pp. 138-39,

GR5-55-Exhibit H in Appendix, Exh. 30, p. 2, line 5D, GR5-55-Exhibit J in Appendix. Invisible waste, which is K Mart's terminology for unexplained discrepancies between the book value of inventory and the annual, "cycle inventory" count of merchandise actually on hand, jumped from $233,262 in 1987 to $379,360 in 1988. *Id.* at line 25Q.

On June 9, 1989. Mr. McAllister met with Mr. Braley and District Manager Sands and proposed, given the financial "disaster" in 1988. that Mr. Braley should set a revised operating profit goal for the store.[FN15] Braley Dep., Exh. 34, GR5-55-Exhibit J in Appendix. Working with Mr. Sands, Mr. Braley proposed a $650,000 operating profit goal for 1989, but Mr. McAllister lowered that goal by $150,000, thereby making it easier for Mr. Braley to receive an increased incentive bonus by meeting this reduced goal. Mr. McAllister noted that he had considered demoting Mr. Braley, but that instead he had "'bet"' on him by giving him opportunity after opportunity for improvement. *Id.* at p. 2. Mr. McAllister concluded that nothing less than $500,000 in operating profit would be accepted, but that he believed Mr. Braley would achieve the $650,000 goal he had set for himself. *Id.* Unfortunately, Mr. McAllister was wrong. Store results for 1989 reflect that actual operating profit was less than one-half ($288,553) of Mr. Braley's own goal, and more than $200,000 under Mr. McAllister's reduced goal for the store. Braley Dep., Exh. 37, GR5-55-Exhibit J in Appendix.

> FN15. Operating profit and other store results are tracked throughout the year and are totalled annually on financial statements prepared at the end of K Mart's fiscal year in January. The fiscal year 1988 results were reviewed and used to establish annual operating goals for the 1989 fiscal year. Ability to achieve established goals is accorded significant weight on annual appraisals and is a principal component of a manager's annual incentive bonus. *See* p. 16 n. 13, *supra.*

Mike Lynch, who had assumed responsibility for the "subregion" that included Mr. Braley's store, toured it on July 10, 1990. Braley Dep., Exh. 41, GR5-55-Exhibit J in Appendix. Like his predecessors, Mr. Lynch accurately attributed the store's lack of sales and operating profit to Mr. Braley's "inability to implement [new] corporate programs." *Id.* Like his predecessors, Mr. Lynch also accurately reported that since Mr. Braley had assumed the management of the Forest Park store, the Company had consistently (and drastically) reduced the profit goal for the store. In 1990, the operating profit goal, which had been over $1,000,000 only a few years earlier, had been reduced to an unrealistically low $460,000. Mr. Lynch advised Mr. Braley that he was not trying to be overly critical, but that the items he brought to Mr. Braley's attention were the same ones that Mr. McAllister and other members of management had noted previously. *Id.* at pp. 1-2. On November 8, 1990, after his own visit to the store, Southern Region Vice President J. S. Valenti advised Mr. Braley that he had not followed up on the directions received from his Region Manager and District Manager, noting that

if immediate improvement is not seen in bringing your store to our standards, along with having an acceptable inventory at year end, then you will no longer remain as a Store Manager in our region.

Braley Dep., Exh. 43, GR5-55-Exhibit J in Appendix.

Despite ample warnings from several different region and district mangers regarding poor operations in the store, operating results for fiscal year 1990 worsened, waste increased, and operating profit dropped even lower than in 1989, to a paltry $163,411. Braley Dep., Exh. 47, GR5-55-Exhibit J in Appendix. Consistent with these poor results and this history of declining operations, Mr. Braley's 1990 performance was rated "unsatisfactory," and he was demoted in February 1991 for the well-documented reasons outlined above. Mr. Braley's age was not a consideration in this decision. Affidavit of John Valenti, ¶ 15, GR5-55-Exhibit A in Appendix.

d. *Demotion of Bob Williams (Helton* plaintiff).

Plaintiff Robert Williams, who was 12 years younger than Mr. Braley, also had a consistently poor record as store manager. Unlike Mr. Braley, however, Mr. Williams' poor results occurred at a brand new store, which opened in Smyrna, Georgia in March 1988. Williams Dep., p. 94, Exh. 7, HR15-97-Exhibit E in Appendix. From the beginning, Mr. Williams had problems operating the new store in accordance with K Mart standards. Thus, in August of 1988, following a complete store review, District Manager Dowling rated the store as "poor" in the following areas: pricing discrepancies in scanning merchandise, marking the most current prices on display counters and in the stockroom, and the stockroom's cleanliness and organization. Williams Dep., p. 88, Exh. 48, HR15-97-Exhibit E in Appendix.

In March 1990, Mr. Lynch wrote Mr. Williams regarding a weekly ad review conducted from February 11 to 17, 1990. Williams Dep., pp. 49-50, Exh. 14, HR15-97-Exhibit E in Appendix. Of the items publicized as being on sale, 29 were not even in stock. Obviously, such poor follow up on featured items was "totally unacceptable." Williams Dep., Exh. 14, HR15-97Exhibit E in Appendix. Other persons who visited the store reported similar problems, such as an 8% discrepancy between the "scanned" cash register price and the "shelf edge " price listed for customers on the merchandise counter, Williams Dep., pp. 50-51, Exh. 15, HR15-97-Exhibit E in Appendix; significant discrepancies in a merchandise purchase audit, Williams Dep., p. 52, Exh. 16, HR15-97-Exhibit E in Appendix; and a weak merchandise assortment, poor employee training, and deficiencies in handling old merchandise. Williams Dep., Exh. 17, HR15-97-Exhibit E in Appendix. Despite these objective, constructive criticisms, pricing discrepancies continued throughout the summer of 1990, as detailed by follow-up reports. Williams Dep., p. 60, Exh. 20, HR15-97-Exhibit E in Appendix. Loss Prevention District Manager Bruce Nilsson conducted a waste survey at the store in July 1990. He reported that "all or most of our systems were not running properly last year." Williams Dep., Exh. 20, HR15-97-Exhibit E in Appendix. Mr. Nilsson rated the store as "poor" in general loss prevention. Williams Dep., p. 62, Exh. 21, HR15-97-Exhibit E in Appendix. Not surprisingly, in July 1990 Mr. Williams's store "was in the poorest 10% of the stores in the K Mart Corporation in regards to the number of customer complaints." Williams Dep., Exh. 24, HR15-97-Exhibit E in Appendix.

Kirk Lupcho audited the store on August 6, 1990. Williams Dep., p. 66, Exh. 25, HR15-97-Exhibit E in Appendix. He found deficiencies in eleven areas, noting that many were repeat deficiencies that had been highlighted in a previous audit. Williams Dep., Exh. 25, HR15-97-Exhibit E in Appendix. In commenting on this consistent series of negative reports from virtually everyone who inspected the store, Region Manager Lynch advised Mr. Williams that "[i]t is certainly discouraging to note reports such as these after all our efforts to help you be successful," noting that "communications from [District Manager] Dave Dowling indicate you are struggling and your progress is inconsistent at best." Williams Dep., p. 66, Exh. 26, HR15-97-Exhibit E in Appendix.

Mr. Williams did not manage his store in accordance with K Mart standards, as reflected by many poor store visit reports beginning virtually as soon as the store opened and continuing through fiscal year 1990, Mr. Williams's last year as Store Manager. Consistent with this poor record, the store never made a profit; and during 1990, the store's net operating loss increased to $616,641. Williams Dep., pp. 93, 95-97, Exhs. 49, 50, HR15-97-Exhibit E in Appendix. As a result of his poor management,[FN16] Mr. Williams was rated "unsatisfactory " on his annual appraisal. Williams Dep., p. 97, Exh. 13, HR15-97-Exhibit E in Appendix. Consistent with the unsatisfactory appraisal, which is dated as having been prepared "12/90," Mr. Dowling warned Mr. Williams in late December 1990 that he would be demoted; and the demotion decision was confirmed during a conference between Mr. Lynch and Mr. Williams in January 1991. Williams Dep., pp. 98, 99, 103, HR15-97-Exhibit E in Appendix. The demotion decision was based on Mr. Williams's consistently poor man-

agement of areas critical to operational performance of his store, including problems with point of sale scanning and related shelf-edge pricing, high invisible waste, and problems with merchandise basic assortment (the items needed for sale in the store). His comparatively young age was not a factor in his demotion. Affidavit of John Valenti, ¶ 16. HR15-97-Exhibit A in Appendix.

> FN16. K Mart maintains records of periodic store visits, such as audits, loss prevention inspections and weekend visit reports for only two years. Affidavit of Michael Lynch, ¶ 16, HR15-97-Exhibit B, p. 7 in Appendix. As a result, detailed records summarizing prior management history normally are not available. However, during his deposition, Mr. Williams produced and testified about numerous, previous reviews and reports that he had retained in his personal files. *See* Williams Dep., Exhs. 28-47, HR15-97-Exhibit E in Appendix. These reports were prepared when Mr. Williams was under age 40, but he was just as critical of their contents as he was of the more recent reports reviewing his performance. Williams Dep., pp. 70-87, HR15-97-Exhibit E in Appendix.

As summarized above, consideration of Mr. Braley's claims will involve review of reports and appraisals prepared over a six to seven year period by at least three Region Vice Presidents, two different District Managers and Region Manager Lynch, as well as multiple store visit reports, audits and surveys prepared by other K Mart employees. *Helton* plaintiff Williams was employed as manager of the Smyrna store for a shorter period of time, but adjudication of his case will require a review of detailed evidence about numerous separate reports prepared by the many different managers who visited that store and criticized its operations. Many of these different managers may be called to testify about the problems they encountered in these stores. The need to review multiple reports and records compiled by numerous different personnel is not unique to the claims of plaintiffs Braley and Williams, as shown by the records compiled and relied upon in connection with the motions for summary judgment K Mart filed with respect to the other *Grayson* and *Helton* plaintiffs.

For instance, consideration of plaintiff Arrington's case will entail, at a minimum, review of performance appraisals, loss prevention reviews, district manager merchandise reviews, waste surveys, marketing/operations reviews, short visit reports, and an annual audit of his Athens, Georgia store. These records were prepared by many different K Mart managers, including two Region Vice Presidents, one Region Manager, three District Managers, a Loss Prevention District Manager, an Auditor, and a Food Service District Manager. Memorandum in Support of K Mart's Motion for Partial Summary Judgment re: Plaintiff Arrington, GR6-56-10-19. Consideration of plaintiff Bell's case will require review of at least 32 different written reports about his Florida store prepared or reviewed by at least three Region Vice Presidents, one Region Manager, and two District Managers. Memorandum in Support of K Mart's Motion for Partial Summary Judgment re: Plaintiff Bell, GR7-57-10-22. Consideration of plaintiff Grayson's case will require review of written reports of his performance at two different Atlanta area stores, including reports on “communication days“ held after employees complained about plaintiff Grayson, as well as letters and memoranda critical of plaintiff Grayson's abusive, uncooperative, and unprofessional attitude toward superiors, subordinates, vendors, and suppliers. Testimony about these complaints, as well as testimony from many different K Mart managers about their concerns regarding plaintiff Grayson's management, will be necessary. Memorandum in Support of K Mart's Motion for Partial Summary Judgment re: Plaintiff Grayson, GR4-54-10-19.

Testimony about plaintiff Kondrad's claims will describe 28 different written reports regarding his North Carolina store; letters prepared by plaintiff in response to those criticisms; and possible testimony from three Region Vice Presidents, two Region Managers, two District Managers, a Loss Prevention District Manager, an Internal Auditor, and a POS auditor. Memorandum in Support of K Mart's Motion for Partial Summary Judgment re: Plaintiff Kondrad, GR8-58-10-20. Review of plaintiff Mixon's claims will include testimony about at least 40

different reports prepared by numerous different Region and District Managers, as well as other K Mart personnel who visited his Tampa. Florida store. Memorandum in Support of K Mart's Motion for Partial Summary Judgment re: Plaintiff Mixon, GR9-59-9-26.

The case records of the four remaining former *Grayson* plaintiffs, Messrs. Navickas, Sallee, Steadman and Thompson, show that litigation of their claims also will require review of multiple reports and records, each unique to the operational characteristics and history of the particular plaintiff's store, and each prepared by many different managers. GR10-60, GR11-61, GR12-62, GR13-63, GR14-64. In the case of these four plaintiffs, records of the operations of the four stores they managed also will take into consideration the fact that each plaintiff worked in a separate state: Alabama (Thompson), Florida (Navickas), Georgia (Steadman) and North Carolina (Taper). The unique factual records that must be reviewed to adjudicate the claims of the *Helton* plaintiffs are similar. *See* HR6-93, HR7-94, HR9-95, HR10-96, HR14-97.

Plaintiffs in these cases contend that they are entitled to present a combined, class action case to a single jury because they were all allegedly demoted because of age. Judge Carnes properly rejected that contention in *Grayson,* noting that plaintiffs have no evidence that their demotions resulted from their supervisors' "blind" adherence to an identifiable, centralized policy of discrimination:

Plaintiffs point to centralized policy-making and review and claim that such control indicates that each plaintiff's local managers did nothing more than blindly implement company policy without exercising any independent judgment. *Plaintiffs' assertions are not supported by the record.* While the decisions to demote the plaintiffs could not have been implemented without approval by the Southern Regional Vice President, John Valenti, the *undisputed evidence establishes that the* ?? *individual employee's district and regional managers.*

Grayson, 849 F. Supp. at 789 (emphasis added). Similarly, as illustrated by the records summarized above, each demotion at issue was based on reasons that are fact-specific to the unique management circumstances of a particular plaintiff's store. After reviewing the evidence about these individual claims, Judge Carnes concluded that each plaintiff had a distinct employment history with K Mart, and that each individual demotion decision was a discrete, separate act:

Each plaintiff worked in a different store, geographically remote from the other plaintiffs. The decision to demote each plaintiff originated with his district manager and was derived within the context of the business circumstances of each plaintiff's store.... [T]he demotion decisions] hardly constitute a single act on the part of the defendant.

* * *

[E]ach demotion decision affecting the plaintiffs in these cases was a discrete act by the defendant.

Grayson, 849 F.Supp. at 788-89. Accordingly, these cases do not arise out of a common transaction or occurrence for purposes of joinder under Rules 20 and 21, and they lack sufficient "commonality" to be tried together as an "opt-in" class action under the ADEA.

Judge Carnes recognized that it would be impossible for K Mart to obtain a fair trial before a single jury if that jury were asked to distinguish between each plaintiff's individual circumstances in one, multi-plaintiff trial. As counsel for plaintiffs conceded in argument before Judge Carnes, that is exactly what will happen if these actions are tried collectively in one consolidated trial: "[T]here would be one verdict form that would apply to

each [, separate] plaintiff in the case," and the form would address K Mart's liability, if any, to each plaintiff individually. This form could list as many as 90 different plaintiffs. GR27-17, 18. Under these circumstances Judge Carnes correctly ruled that any joint trial of these multiple, disparate treatment claims would "hopelessly" confuse a jury and cause "intolerable" prejudice to K Mart's right to a fair trial:

Each plaintiff must prove liability on the part of the defendant with respect to the adverse action defendant took with respect to him. It is precisely this need to focus the jury's attention on the merits of each individual plaintiff's case that counsels against proceeding with these cases in one consolidated trial. There is a tremendous danger that one or two plaintiff's unique circumstances could bias the jury against defendant generally, thus. prejudicing defendant with respect to the other plaintiffs' claims.

* * *

In these cases, there are eleven factual situations and eleven sets of witnesses with testimony pertinent to those situations. Moreover, plaintiffs' state law claims arise under the laws of four different states. *The resulting confusion and prejudice from the scenario presented by a common trial of all plaintiffs' claims against the defendant would be intolerable.*

Grayson, 849 F. Supp. at 790-91 (emphasis added).

K Mart respectfully submits that Judge Carnes' obviously thorough review of the record in *Grayson* and her careful analysis of the legal standards for joinder and severance is correct, should constitute the "law of the case " with respect to the eleven *Grayson* plaintiffs, and should have been followed by Judge Shoob in *Helton*. By contrast, the *Helton* ruling, based solely on cases addressing the propriety of issuing class-wide notice at an *early* stage of an ADEA case, is demonstrably incorrect and overlooks substantial authority holding that "across-the-board" class actions are not an appropriate means of resolving individual, ADEA claims. Accordingly. K Mart respectfully submits that the initial severance ruling in *Grayson* should be affirmed and that the eleventh hour, class action ruling in *Helton* should be reversed.

SUMMARY OF THE ARGUMENT

(1) In February 1994, the *Grayson* court properly concluded that the individual demotion claims of the eleven named plaintiffs did not arise out of a "common transaction or occurrence" for purposes of joinder under Fed. R. Civ. P. 20 and 21, and that those claims should be severed under Fed. R. Civ. P. 42 because a joint trial of the individual, fact specific circumstances of each plaintiff's demotion would hopelessly confuse and mislead the jury and would cause "intolerable" prejudice to K Mart's rights. Five months later, the *Helton* court improperly failed to follow this ruling, but instead erroneously allowed plaintiffs to convert their individual case to an across-the-board class action involving distinct demotion decisions over a three year period affecting persons employed in eighteen different states, Puerto Rico and the Virgin Islands. Absent evidence of an identifiable, discrete policy of bias and where individual, fact-specific performance issues obviously predominate over any common questions of law and fact, an ADEA class action is not appropriate. Accordingly, the *Helton* court's eleventh hour class action ruling should be reversed.

(2) Even if the class action amendment were proper, the *Helton* court also erred by misapplying the "single filing" rule to permit persons to join this case based upon the filing of an EEOC charge by another, potential opt-in party who was not an original plaintiff in the case. Because the named plaintiffs did not file charges advising the EEOC (or K Mart) that they intended to pursue class action claims, joinder of additional opt-in plaintiffs in this

case is not proper.

(3) Moreover, additional persons should not be allowed to opt-in as plaintiffs in *Helton* if:

(a) They did not file individual, timely charges of age bias with the EEOC;

(b) They were not demoted within three (3) years of the filing of their opt-in consents to appear as plaintiffs in that case;

(c) They were not demoted within 180 days (or 300 days, if applicable) of the earliest timely charge filed by one of the original *Helton* plaintiffs.

(4) Because the *Helton* class action ruling should be vacated and reversed, the dismissal without prejudice of the severed *Grayson* cases also should be reversed. Moreover, the dismissal order is plainly inconsistent with law of the case principles that should bind the persons who were originally named plaintiffs. That order should be reversed because it significantly prejudices K Mart's rights to a prompt and fair disposition of those plaintiffs' claims in violation of Fed. R. Civ. P. 41(a).

(5) At a minimum, the dismissal order should be reversed and made conditional on the *Grayson* plaintiffs' being ordered to reimburse K Mart for the attorneys' fees and costs it needlessly incurred in litigating plaintiffs' claims for more than two years before the severed cases were dismissed.

***30** *ARGUMENT AND CITATION OF AUTHORITY*

I. *THE JULY 29, 1994 ORDER IN HELTON SHOULD BE REVERSED.*

There is no authority in the Eleventh Circuit, no Supreme Court decision, and no other Circuit Court ruling that supports Judge Shoob's unprecedented Order granting the *Helton* plaintiffs' post-discovery motion to convert their case from an individual, five-plaintiff lawsuit into an opt-in class action, particularly where, as outlined above, another federal judge in the same district previously held that such claims could not be joined in one lawsuit without inherently prejudicing K Mart's right to a fair trial. Instead of effectively overruling Judge Carnes' severance ruling in *Grayson,* Judge Shoob should have followed it.[FN17]

> FN17. As noted above, the *Grayson* lawsuit, which initially included "class action" allegations in the complaint, was filed ten months before the *Helton* litigation. Widespread precedent in the federal courts recognizes that "the first action filed, in which the Court acquires jurisdiction, is ordinarily given precedence." *In re Asbestos Sch. Litig.,* 594 F. Supp. 178, 179 (E.D. Pa. 1984). *See, e.g., O'Hare Int'l Bank v. Lambert,* 459 F.2d 328, 331 (10th Cir. 1972). As a matter of comity and sound judicial policy, numerous courts have refused to allow coordinate judges within the same district to overrule one another by issuing conflicting rulings unless the prior decision is "clearly wrong." *See, e.g., Feller v. Brock,* 802 F.2d 722, 727-78 (4th Cir. 1986); *Stevenson v. Four Winds Travel. Inc.,* 462 F.2d 899, 904-05 (5th Cir. 1972). *See also* discussion at Section II A, *infra.*

Judge Shoob apparently concluded that he was not bound by the dictates of comity to follow the ruling in *Grayson* because he determined that the standards for "opt-in" joinder under Section 216(b) of the FLSA differ from the standards for "permissive" joinder of claims under the Federal Rules of Civil Procedure. While he attempted to distinguish *Grayson* on those grounds, the July 29, 1994 ruling in the *Helton* case plainly "overrules" the outcome of the *Grayson* decision. Thus, each of the eleven *Grayson* plaintiffs whose individual claims were

severed and then transferred ***31** to district courts in other states, have filed "opt-in consents" to participate as plaintiffs in *Helton. See* HR22-148, 152. The six, former *Grayson* plaintiffs filed their opt-in consent forms in *Helton* even before Judge Carnes dismissed their separate cases. *See* HR22-147, 148. Allowing "re-joinder" of the separate *Grayson* claims in *Helton* plainly contradicts the rulings in *Grayson* and *Bell* that these cases must be tried separately.

A. *One Federal Judge Should Not Allow Eleventh Hour Opt-In Joinder Of Disparate ADEA Claims Where Only A Few Months Earlier, Another Coordinate Judge Ruled That Such Individual Claims Should Not Be Joined In One Lawsuit.*

1. *The opt-in "spurious" class action under the FLSA is essentially the same as multi-party joinder under Fed. R. Civ. P. 20 and 24(b).*

Judge Shoob refused to follow Judge Carnes' ruling in *Grayson* because he concluded that the ruling was based on the absence of proof of a "discrete " policy[FN18] and because he concluded ***32** that opt-in joinder standards under Section 216(b) of the FLSA differ from joinder standards under Rules 20 and 24(b). *See* HR20-133-3-4. As discussed in the next subpart of this brief, under the weight of judicial authority, an ADEA case should not be allowed to proceed as a class action where there is no identifiable, discriminatory policy and where individual, fact specific issues predominate over any common issues of law and fact.

> FN18. July 29, 1994 Order at p. 3, HR20-133-3. Contrary to Judge Shoob's ruling, K Mart respectfully submits that plaintiffs' failure to prove that a "discrete policy" had been applied on a class-wide basis should be fatal to their class action claims. As properly ruled by Judge Carnes in *Grayson,* ADEA class actions are not appropriate vehicles for resolving individual, disparate treatment claims. Judge Carnes carefully reviewed the *Grayson* record in light of the permissive joinder provisions of Rule 20, not only with respect to the "transaction or occurrence" language of that rule, but also with respect to the "commonality" issues central to that case, to *Helton* and to any other joint, class-type action. The *Grayson* court carefully reviewed plaintiffs' purported evidence of "motive to discriminate," plaintiffs' "anecdotal evidence of age bias" and plaintiffs' "statistical evidence" of alleged age bias. *Grayson,* 849 F. Supp. at 788-89. In particular, the court rejected plaintiffs' conclusory assertions that their demotions were a byproduct of upper level, centralized policymaking and ruled instead that "*the undisputed evidence establishes that the recommendation to make such a demotion originated with the individual employee's district and regional managers.*" *Id.* at 789 (emphasis added). No contrary evidence exists in the record of the *Helton* case.

In disregarding the procedural standards applied by Judge Carnes, Judge Shoob erroneously failed to recognize that ADEA "class actions" are not true "representative" actions. Rather, the "opt-in" provisions of the FLSA provide only a mechanism for the permissive joinder of parties.[FN19] *See La Chapelle v. Owens-Illinois. Inc.,* 513 F.2d 286, 289 (5th Cir. 1975); *Lusardi v. Xerox Corp.,* 99 F.R.D. 89, 92 (D.N.J. 1983), *appeal dismissed,* 747 F.2d 174 (3d Cir. 1984). *See also* 3B James W. Moore and John E. Kennedy, *Moore's Federal Practice* ¶ 23.02(1), at 23-35 (2d ed. 1987) ("while the class action was originally devised for cases of compulsory joinder it was expanded to include cases of permissive joinder -- situations where there are only common questions of law or fact"). *Cf. McKenna v. Champion Int'l Corp.,* 747 F.2d 1211, 1214 (8th Cir. 1984) (contrasting opt-in class actions under ADEA and Section 216(b) with Rule 23 "pure" class actions); ***33** *Fink v. Oliver Iron Mining Co.,* 65 F. Supp. 316 (D. Minn. 1941) (early case characterizing class actions under 29 U.S.C. § 216(b) (1988) as action in nature of permissive joinder).

FN19. Indeed, the Supreme Court has characterized an ADEA class action under 29 U.S.C. § 216(b) as a "process for joining multiple parties .... " *Hoffmann-La Roche, Inc. v. Sperling,* 493 U.S. 65, 70, 110 S.Ct. 482 (1989). As noted by the District Court in *Sperling.* "each individual [opt-in] plaintiff must bear his or her burden of proof as to each element of [his] ADEA claim." *Sperling v. Hoffman-La Roche. Inc.,* 118 F.R.D. 392, 407 (D.N.J.), *aff'd in part and appeal dismissed in part,* 862 F.2d 439 (3d Cir. 1988).

Numerous, early cases construing the opt-in concept have ruled that a class action under Section 216(b) of the FLSA is analogous to the "spurious" class action created by former Rule 23(a)(3) of the Federal Rules of Civil Procedure. *See, e.g., McNichols v. Lennox Furnace Co.,* 7 F.R.D. 40, 42 (N.D.N.Y. 1947) (analogizing Section 216(b), Rule 23 spurious class action, and permissive joinder); *Schempf v. Armour & Co.,* 5 F.R.D. 294, 296-97 (D. Minn. 1946) (recognizing Section 216(b) case is a "spurious class suit"). As ruled in *Lipsett v. United States,* 359 F.2d 956, 959 (2d Cir. 1966), a spurious class action differs from a true "representative" case under Rule 23(a); and participation in a spurious class should be governed by the permissive intervention standards of Rule 24(b). *See Zahn v. International Paper Co.,* 414 U.S. 291, 298 n. 6, 94 S. Ct. 505, 509 n. 6 (1973) (recognizing that spurious class action "'was merely an invitation to joinder"'); *Kainz v. Anheuser-Busch, Inc.,* 194 F.2d 737, 743 (7th Cir. 1952) ("[I]nasmuch as Rule 23(a)(3) is, in its essence, a permissive joinder rule rather than a rule defining a recognizable class, it is obvious that the two rules [Rule 23(a)(3) and Rule 20(a)] are, as to the intents and purposes involved here, equivalents. "), *cert. denied,* 344 U.S. 820 (1952); *Schatte v. International Alliance of Theatrical Stage Employees,* 183 F.2d 685, 687 (9th Cir. 1950) ("spurious class suit" is "merely a permissive joinder device in which the right and liability of each individual plaintiff is distinct "); *Hess v. Anderson, Clayton & Co.,* 20 F.R.D. 466, 482-83 (S.D. Cal. 1957) ("the 'spurious' class action ... is *nothing more than permissive joinder*) (emphasis in original). *Cf. Saxton v. W.S. Askew Co.,* 35 F. Supp. 519, 521 (N.D. Ga. 1940) (Section 216(b) action "comes more properly under Rule 24(b), Rules of Civil Procedure"). It is appropriate to deny permissive intervention (and certification of a "spurious" class) "where there is a lively probability of trial confusion ... even though there is a well defined issue common to all the claims." *Lipsett,* 359 F.2d at 959-60. Under these authorities, ***34** Judge Shoob should have applied the same standards as in *Grayson* instead of disregarding the outcome of that case.

2. *The District Court's ruling is inconsistent with class action limitations previously recognized by the United States Supreme Court.*

In granting plaintiffs' untimely motion to amend to allow unnamed class members to opt-in as plaintiffs, the *Helton* District Court relied principally upon the Supreme Court's decision in *Hoffmann-La Roche. Inc. v. Sperling,* 493 U.S. 165, 110 S.Ct. 482 (1989). *Sperling,* however, does not support the July 29, 1994 Order. To the contrary, the only issue resolved on interlocutory appeal (and later on *certiorari*) in *Sperling* was "the narrow question whether, in an ADEA action, district courts may play any role in prescribing the terms and conditions of communication from the named plaintiffs to the potential members of the class on whose behalf the collective action [is] brought." *Id.* at 169. Moreover, unlike *Helton, Sperling* was filed initially as a class action arising out of a force reduction that resulted in the discharge or demotion of 1,200 employees, more than 400 of whom had already signed consents to join the action *when it was initially filed. Id.* at 168. As noted by the appellate court, the adverse action at issue was taken on one day, February 14, 1985, "primarily" at two plant locations in New Jersey. *Sperling v. Hoffmann-La Roche, Inc.,* 862 F.2d 439, 440 (3d Cir. 1988) *aff'd,* 493 U.S. 165 (1989). The "narrow" issue resolved by the Supreme Court arose in the context of a discovery dispute, during the preliminary stages of that case and not after all discovery was complete. 493 U.S. at 168-69.

Given the "narrow" issue presented, *Sperling* did not address the circumstances under which federal courts should allow an ADEA case to proceed as a class action. However, the Supreme Court specifically noted that ADEA class actions should be managed "in a manner that is ... not otherwise contrary to ... the provisions of the Federal Rules of Civil Procedure." 493 U.S. at 170. There is no hint in *Sperling* that courts considering ADEA class action issues may disregard the ***35** Supreme Court's previous, seminal opinion in *General Tel. Co. of Southwest v. Falcon,* 457 U.S. 147, 102 S.Ct. 2364 (1982). *Falcon* conclusively rejected the concept that all claims of discrimination in employment are by definition susceptible to "across-the-board," class action treatment:

Conceptually, there is a wide gap between (a) an individual's claim that he has been ... [discriminated against], 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.

Id. at 157. As ruled in *Falcon,* if individual issues predominate, class action treatment is not appropriate. *See, e.g., Wheeler v. Columbus,* 703 F.2d 853, 855 (5th Cir. 1983) (where "[d]iscrimination in its broadest sense is the only [common] question alleged ..." class action treatment is not appropriate); *Dickerson v. United States Steel Corp.,* 582 F.2d 827, 834 (3d Cir. 1978) (finding issues unsuitable for class-wide joinder where "litigation of ... [a] purported general policy of defendant, as it might affect each plaintiff here, would inevitably focus in detail on the separate work histories of each plaintiff"). There is no policy reason for applying different standards in an ADEA class action case. *See Gorence v. Eagle Food Centers, Inc.,* No. 93-C-4862, 1994 W.L. 445149 at *10 (N.D. Ill. Aug. 16, 1994) (denying class certification of sex and age discrimination claims where the claims involved "the adjudication of individual fact-specific claims" so that plaintiffs could not establish commonality or typicality).

As Judge Carnes effectively recognized in *Grayson,* in an ADEA case, as in other types of employment discrimination cases, when individual, fact-specific issues predominate over class-wide issues, the lawsuit should not be allowed to proceed as a class action. *See, e.g., Pines v. State Farm Gen. Ins. Co.,* 58 Fair Empl. Prac. Cas. (BNA) 387, 394 (C.D. Cal. 1992) ("[a] preliminary determination of 'similar situations' may be reversed or modified later on in action, as ***36** new facts emerge"); *Walker v. Mountain States Tel. & Tel. Co.,* No. 87-M-790, 1988 U.S. Dist. LEXIS 17553 at *4 (D. Colo. Sept. 26, 1988) (reconsidering prior decision to certify class holding that the plaintiffs were so diverse as to require "an individualized inquiry not suitable for class action litigation"). Indeed, at least one federal judge has ruled that a joint trial of multiple, individual ADEA claims might deprive the defendant of its constitutional right to a fair trial. *Lusardi v. Xerox Corp.,* 118 F.R.D. 351, 370-73 (D.N.J. 1987) ("serious questions arise concerning the fairness, manageability and meaningfulness of [numerous] separate jury trials under the guise of a class action before a single jury"), *rev'd in part on other grounds sub. nom. Lusardi v. Lechner.* 855 F.2d 1062 (3d Cir. 1988), *adhered to on remand,* 122 F.R.D. 463 (D.N.J.), *app. dismissed,* 975 F.2d 964 (3d Cir. 1992).

The *Sperling* Court did not rule that claims arising out of a series of individual employment decisions, such as the decisions at issue here, should be tried together in a class action case simply because the ADEA allows trial courts to supervise issuance of opt-in notice to potential class members at a preliminary stage of the litigation. As ruled by Judge Carnes in *Grayson,* the fact that several persons have alleged complaints about individual employment decisions made by numerous different managers based on separate, fact-specific circumstances does not make the complainants "similarly situated " for purposes of joinder or class action treatment. *See, e.g, General Tel. Co. of Southwest v. Falcon,* 457 U.S. 147, 102 S.Ct. 2364 (1982); *Bradford v. Sears. Roebuck & Co.,*

673 F.2d 792 (5th Cir. 1982); *Dickerson v. United States Steel Corp.,* 582 F.2d 827 (3d Cir. 1978); *Equal Employment Opportunity Comm'n v. MCI Int'l, Inc.,* 829 F. Supp 1438, 1446 (D.N.J. 1993) (denying class action treatment of "thirty-four separate disparate treatment cases" arising out of layoffs conducted on a "employee by employee basis" where the "only common thread ... is that the persons involved were forty years old or older...."). *Accord Lusardi,* 122 F.R.D. at 466 ("[i]n the absence of one corporate wide reduction in force, about all that the members of the proposed class ***37** have in common is their termination and age within the protected range."). *See Ulvin v. Northwestern Nat'l Life Ins. Co.,* 141 F.R.D. 130, 131 (D. Minn. 1991), *cert. denied,* 112 S.Ct. 970 (1992) (significant variations in age, year of demotion, location in which they worked, supervisors, store results, and salaries led court to reject class action treatment).

In *Mooney v. Arabian American Oil Co.,* 1993 W.L. 739661 (S.D. Tex. 1993), the court noted that the Supreme Court's ruling in *Sperling,* was limited to the "narrow" procedural issue about notice and "did not address the 'similarly situated' issue," noting also that the underlying district "court's 'similarly situated' determination was preliminary in nature, based upon the record in its nascent form ...." *Id.* at *8 n. 9. After review of the full factual record following substantial discovery, the *Mooney* court ruled as follows: "Although Plaintiffs have broadly asserted a common theory of recovery, it is evident in this case, just as it was in *Lusardi,* that 'such a commonality ends when the defenses and the unique circumstances of each plaintiff are considered.'" *Id.* at *11 (citing *Lusardi,* 118 F.R.D. at 379). In dismissing the claims of more than 130 opt-in plaintiffs who had joined the case, the *Mooney* court concluded that an ADEA class action was not appropriate when adjudication of the "diverse" circumstances of each plaintiff would require an "individualized" factual inquiry and where the claims at issue were the product of "bottom up" decisionmaking, initiated "on a decentralized level by local management." *Id.* at *6, 11 (citing *Walker, supra,* and *Ulvin,* supra). As ruled in *Mooney,* as ruled by Judge Carnes in *Grayson, supra,* and as ruled by the other cases cited above, when individual, disparate treatment issues will be the focus of any trial, joint, classwide actions are simply not appropriate.

3. *The standards for allowing class-wide, opt-in joinder under the ADEA should be applied consistently with procedural protections of the Federal Rules.*

Sperling does not sanction a district court's "unbridled discretion, " 493 U.S. at 174, to allow class notice in a case such as *Helton,* which was not filed initially as a class action and in ***38** which plaintiffs did not seek leave to amend their complaint to allege a class action until discovery had been completed and Judge Carnes had issued a severance and transfer orders in the *Grayson* litigation.[FN20] Indeed, the *Sperling* Court was careful to point out that a district court must "manage the process of joining multiple parties in a manner that is orderly, sensible, and not otherwise contrary to statutory commands *or the provisions of the Federal Rules of Civil Procedure.* " *Id.* at 170 (emphasis added). There is not any hint in *Sperling* that the interests of eliminating a possible multiplicity of litigation would outweigh the procedural protections against untimely amendments and improper joinder incorporated in Rules 15, 20, 24, and 42 of the Federal Rules of Civil Procedure. Nothing in *Sperling* would eliminate the prohibitions against litigation of stale claims incorporated in those rules or in the statute of limitations and EEOC charge filing requirements governing ADEA claims. Indeed, the Court relied specifically on a decision dismissing claims for failure to prosecute, *Link v. Wabash R. Co.,* 370 U.S. 626, 82 S. Ct. 1386 (1962). and noted also that the authority to supervise notice should be managed "in an orderly fashion ... reinforced by Rule 16(b), requiring entry of a scheduling order *limiting time for various pretrial steps such as joinder of additional parties." Sperling,* 496 U.S. at 173 (emphasis added).

FN20. In contrast to the massive force reduction at issue in *Sperling,* plaintiffs' purported "class" case is based on a series of unrelated demotion decisions that occurred in widely dispersed geographic areas

during a three year period. Even without any expansion of the geographic scope of these cases, evidence shows that the decisions regarding the named plaintiffs in *Helton* and *Grayson* were initiated by numerous different district managers, three different region managers and affected persons in different stores located in four different states (Alabama, Florida, Georgia and North Carolina). Affidavit of John Valenti, ¶ 5, HR21-138-Exhibit "D" to the Appendix supporting K Mart's Motion for Reconsideration or Clarification of July 29, 1994 Order.

***39** These remarks in the *Sperling* decision are fully consistent with the Supreme Court's recognition that adherence to procedural protections in federal employment discrimination laws that are designed to prohibit the litigation of stale claims is one of the hallmarks of the "evenhanded" administration of justice:
Procedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by courts out of a vague sympathy for particular litigants. As we stated in *Mohasco Corp. v. Silver,* 447 U.S. 807, 826, 100 S.Ct. 2486, 2497, 65 L.Ed.2d 532 (1980), "[i]n the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law."

Baldwin County Welcome Ctr. v. Brown, 466 U.S. 147, 152, 104 S.Ct. 1723, 1726 (1984). In *Brown,* the Court reversed an underlying decision allowing a plaintiff to resurrect a time-barred EEOC claim.

Under Local Court Rules governing this case and in accordance with the Scheduling Order entered on February 12, 1993, the time for amendment of the *Helton* complaint to add classwide claims expired not later than February 6, 1993, *more than one year before* plaintiffs filed their belated motion to amend.[FN21] *See* pp. 4-7, nn. 4-6, *supra.* Even if the February 12, 1993 Scheduling Order should not be considered binding under Fed. R. Civ. P. 16(b),[FN22] and even if plaintiffs were ***40** not subject independently to the Local Rules of the District Court, under *Sperling,* plaintiffs' motion must be subject to the other pertinent provisions of the Federal Rules of Civil Procedure.

FN21. As pointed out above, plaintiffs' post-discovery motions will require significantly expanded discovery, not just about the claims of unnamed, potential class members in the Bontekoe, Clifton and Lynch subregions, but also about the claims of potential class members demoted from stores located in Puerto Rico, the Virgin Islands and in eight states that have never been considered to be within the agreed upon scope of discovery in *Helton* or in *Grayson.*

FN22. According to Rule 16(b), deadlines established in a scheduling order can be extended only upon a showing of "good cause." Fed. R. Civ. P. 16(b). Addressing the importance of this requirement, the court in *Harrison Beverage Co. v. Dribeck Importers. Inc.,* 133 F.R.D. 463, 469 (D.N.J. 1990), stated: "The careful scheme of reasonable framing and enforcement of scheduling orders for case management would ... be nullified if a party could inject amended pleadings upon a showing of less than good cause after scheduling deadlines have expired." Courts have routinely denied motions to amend that were filed after the deadline established by a Scheduling Order. *Baxter v. Fulton-Dekalb Hosp. Auth.,* 764 F. Supp. 1510, 1524-26 (N.D. Ga. 1991) (motion for leave to amend denied as untimely under Local Rules' Scheduling Order because filed more than 100 days after complaint filed); *Scoggins v. Moore,* 579 F. Supp. 1320, 1322 (N.D. Ga.) (motion for leave to amend denied as untimely under Local Court Rule because it came one year after complaint filed), *aff'd without op.,* 747 F.2d 1466 (11th Cir. 1984). *Accord, Hester v. International Union of Operating Eng'rs.,* 742 F. Supp. 1517, 1521 (N.D. Ala. 1990) (motion for leave to amend denied as untimely under scheduling order), *aff'd in part. rev'd in part on*

other grounds, 941 F.2d 1574, 1578-79 (11th Cir. 1991). Plaintiffs failed completely to show any good cause for their delay in seeking to amend the complaint.

The Federal Rules of Civil Procedure require the movants to make "timely application" for permissive intervention and provide that the intervenors' claims must arise out of the same "transaction or occurrence" as the claims of the named plaintiffs and present common issues of law or fact. Fed. R. Civ. P., Rules 20(a) and 24(b). These concepts are effectively incorporated in the "commonality" and "typicality" requirements of Rule 23 class actions. There is not the slightest hint in *Sperling* or any other case that these issues may be disregarded in considering permissive joinder and opt-in questions under the ADEA.

The proposition that motions for joinder and class action treatment must be timely is consistent with many rulings prohibiting eleventh hour amendments that would reformulate the ***41** essential nature of the case when the facts allegedly underlying the new theory have been known to the plaintiff from the beginning of the litigation:
Plaintiff has offered no explanation for his failure to move for leave to amend until after the discovery period in this case had closed, the case was scheduled for ... trial ... and defendant's meritorious motion for summary judgement was about to be granted. In this context, this Court finds the motion to amend comes too late and must be denied. *See, Hall v. Aetna Casualty and Surety Co.,* 617 F.2d 1108, 1110-11 (5th Cir. 1980); *In re Beef Industry Antitrust Litigation,* 600 F.2d 1148, 1162 (5th Cir. 1979); *Dunn v. Koehring Co.,* 546 F.2d 1193, 1198 (5th Cir. 1977); *Freeman v. Continental Gin Co.,* 381 F.2d 459 (5th Cir. 1967).
Lawyers of experience owe a duty to their clients, to the Court and to opposing counsel to prepare cases properly, to give the issues full consideration before preparing the pleadings and, in general, to exercise diligence in their practice. Code of Professional Responsibility DR6-101.... It would be inappropriate, in the view of this Court under the circumstance of this case, to permit plaintiff the right, after submitting the case under one theory and learning this was not enough. to attempt to inject new issues in the hope of achieving a different result.

Gray v. Frito-Lay, Inc., 35 Fair Empl. Prac. Cas. (BNA) 598, 604 (S.D. Miss. 1982). *See also Foman v. Davis,* 371 U.S. 178, 182, 83 S.Ct. 227 (1962) (undue delay in moving for leave to amend supports denial of motion). *Accord, Daves v. Payless Cashways, Inc.,* 661 F.2d 1022, 1025 (5th Cir. 1981).

As ruled in *Daves,* a "former" Fifth Circuit case that applies equally here, Rule 15(a) provides that leave to amend a pleading should be "freely given," but this language is modified by the clause "when justice so requires. " "Justice" does not require a motion for leave to amend to be granted in circumstances involving undue delay, bad faith, dilatory motive or undue prejudice to the party opposing the amendment. *See Foman v. Davis, supra.* The foregoing authorities recognize that courts have far more than mere "limited discretion" to deny untimely motions to amend. *See* Order of July 29, 1994, HR21-138-8. To the contrary, as ruled in *Gray v. Frito-Lay, Inc., supra,* the interests protected by the Federal Rules should require a court to consider carefully whether the ***42** proposed amendment would result in justice being served for all parties to the lawsuit, not just the moving party. *Id.* at 604. *Cf. Baldwin County Welcome Ctr. v. Brown,* 466 U.S. at 153.

The July 29, 1994 Order found that K Mart had not presented "countervailing reasons" warranting denial of plaintiffs' untimely motions. K Mart respectfully submits that the District Court did not properly examine the substantive and procedural issues addressed above. The District Court obviously overlooked the substantial prejudice to K Mart caused by allowing this eleventh hour amendment. Thus, if the class action ruling is not reversed, the scope of the case will be expanded to require extensive and expensive, additional discovery about individual agediscrimination allegations that were never raised at the administrative level, thereby substantially delaying the final disposition of the case. On the other hand, reversal of the class action ruling will not impair

the named plaintiffs' ability to litigate their individual claims against defendant, but would merely deny a number of would-be plaintiffs who failed to take the steps necessary to assert age-discrimination claims before the EEOC or the courts the opportunity at the eleventh hour to assert previously unexplored, untimely demotion claims.

During the more than two years that *Grayson* and *Helton* have been pending, defendant undertook a laborious effort to obtain information responsive to detailed discovery requests from the plaintiffs. K Mart produced approximately 18,000 pages of documents pertinent to the claims of the sixteen plaintiffs who filed these two cases; and K Mart and its counsel have expended substantial time and effort to compile statistical data regarding personnel actions in the Bontekoe, Clifton and Lynch regions. Affidavit of Edmund M. Kneisel, HR21-138-Exh. C in Appendix in Support of K Mart's Motion for Reconsideration or Clarification of July 29, 1994 Order. Allowing potential new plaintiffs spread over a much broader geographical area to opt-in to the *Helton* lawsuit at this stage will require defendant to recompile this data on an even more massive scale. *Id.* The amount of time, effort, and money that would have to be expended on this additional discovery is ***43** potentially staggering. If imposing such massive expense and manpower demands on defendant at this late stage of the proceedings does not constitute undue prejudice,[FN23] it is difficult to conceive of a situation that would satisfy this standard. *See Dow Corning Corp. v. General Elec. Co.,* 461 F. Supp. 519 (N.D.N.Y. 1978) (denying motion to amend complaint submitted after a year of discovery in which depositions were completed and defendant produced more than 2,000 documents and reviewed more than 15,000 documents received from plaintiff). *See also H.L. Hayden Co. v. Siemens Medical Sys., Inc.,* 112 F.R.D. 417 (S.D.N.Y. 1986) (court denied plaintiff's post-discovery motion to add a new defendant where the parties' history of extensive discovery indicated that the addition of a new party would result in a similarly protracted discovery process).

> FN23. Clearly, in view of costs incurred to date, K Mart has a legitimate interest in the expeditious resolution of this action. *See H.L. Hayden Co. v. Siemens Medical Sys., Inc.,* 112 F.R.D. 417 (S.D.N.Y. 1986); *A. Cherney Disposal Co. v. Chicago & Suburban Refuse Disposal Corp.,* 68 F.R.D. 383 (N.D. Ill. 1975). With each delay in the trial, the back pay claims of the plaintiffs continue to mount. *See O'Rourke v. Continental Casualty Co.,* 983 F.2d 94, 98 (7th Cir. 1993) (denying eleventh-hour amendment to add new claim to ADEA action, the court commented, “When back pay is mounting, claims should be resolved with dispatch.“).

Under the “piggybacking“ concept applied in the July 29, 1994 Order, defendant will be put on notice of new individual ADEA claims for the first time when the potential class members opt-in to this lawsuit. Obviously, it will be necessary to conduct additional depositions of each opt-in plaintiff to discover the facts unique to that new plaintiff's claim for relief. It will be necessary, at this late date, to commence a search of Company records and interview witnesses to investigate events that occurred years ago. Given the passage of time. the failure of would-be opt-in plaintiffs to assert ***44** their claims in a timely fashion,[FN24] and the as-yet undetermined identity of the members of the purported class, defendant currently has no way of knowing whether crucial witnesses and documentation are still available.[FN25] *See* Affidavit of John Valenti; Affidavit of Shavan Giffen, HR21-138-Exhibits D and E in the Appendix in Support of K Mart's Motion for Reconsideration or Clarification of July 29, 1994 Order.

> FN24. The need to conduct a prompt investigation and conciliation of claims when documents are available and memories are fresh is one reason courts have strictly enforced the ADEA's charge filing rules. *Edwards v. Kaiser Alum. & Chem. Sales, Inc.,* 515 F.2d 1195, 1198 (5th Cir. 1975).

FN25. The lengthy delay of the trial precipitated by the plaintiffs' class action amendment will increase the likelihood that crucial witnesses may not be available and that the memories of witnesses who are available may have faded. *See Data Digests, Inc. v. Standard & Poor's Corp.,* 57 F.R.D. 42, 45 (S.D.N.Y. 1972) (denying motion to amend complaint to add 17 new parties).

Courts have frequently identified the need for substantial, additional discovery as an element of prejudice that would justify denying a motion to amend submitted after or near the end of the discovery period. *See, e.g., Bryson v. Waycross,* 888 F.2d 1562 (11th Cir. 1989) (upholding district court's denial of plaintiff's motion to amend complaint to add new claims during the last week of the discovery period because the defendant would be unduly prejudiced); *Quaker State Oil Refining Corp. v. Garrity Oil Co.,* 884 F.2d 1510 (1st Cir. 1989) (affirming district court's denial of motion to amend submitted near the end of discovery period because non-moving party would be prejudiced by need for additional discovery); *Addington v. Farmer's Elevator Mut. Ins. Co.,* 650 F.2d 663 (5th Cir.) (plaintiff's post-discovery motion to amend complaint to add new factual and legal claims was properly denied because of likelihood of prejudice to defendant), *cert. denied,* 454 U.S. 1098 (1981); *McCann v. Frank B. Hall & Co.,* 109 F.R.D. 363 (N.D. Ill. 1986) (post-discovery motion to amend complaint denied because it would unduly prejudice defendant by necessitating additional discovery); ***45** *Minor v. Northville Pub. Sch.,* 605 F. Supp. 1185 (E.D. Mich. 1985) (motion to amend complaint submitted near the end of discovery denied because amendment would add new causes of action that would prejudice defendant by imposing the expense of additional discovery); *Drexel Burnahm Lambert, Inc. v. Edwards,* 100 F.R.D. 422 (N.D. Ga. 1983) (motion to amend counterclaim after close of discovery denied because the additional expense and trouble associated with the further discovery that would be necessitated by the amendment, coupled with the delay it would impose on the resolution of the case, would unduly prejudice the nonmoving party).

Reversal of the order granting plaintiffs' eleventh hour motions will ameliorate substantial prejudice to K Mart, will expedite disposition of the named plaintiffs' claims and will not prejudice their interests in any way. The class of potential plaintiffs will be prejudiced only to the extent those individuals sat on their rights and failed to pursue timely administrative and judicial claims. In light of the massive additional costs to defendant and substantial delays that would be precipitated by the addition of these individuals to the lawsuit, the fact that some of them may be foreclosed by their own inaction from pursuing individual claims against the defendant is not a sufficient reason to allow an opt-in class action to commence at this stage in the case. Thus, "[t]here is a point in the proceedings ... when the benefit derived from such a joinder is outweighed by the effect of a postponement of a final decision in the matter at the eleventh hour." *Benger Lab. Ltd. v. R.K. Laros Co.,* 24 F.R.D. 450, 452 n.2 (E.D. Pa. 1959). That point has been reached in this case. *See H.L. Hayden Co. v. Siemens Medical Svs., Inc.,* 112 F.R.D. 417 (S.D.N.Y. 1986) (denying post-discovery motion to amend complaint to add a new party). Because neither *Sperling* nor any other case justifies the eleventh hour amendment allowed by Judge Shoob, the July 29, 1994 Order in *Helton* should be reversed.

***46** B. *The District Court Misapplied Eleventh Circuit Authority In Failing To Limit The Scope L. The Potential Opt-In Class.*

1. *The "Single-Filing" Rule Should Not Apply In An ADEA Case.*

The *Helton* Court's July 29, 1994 order, as clarified on reconsideration by the order entered October 12, 1994. applied the single filing, "piggyback" concept to expand the scope of the potential class. Moreover, the court extended this concept by allowing potential class members who had not filed timely, administrative claims with the EEOC to rely upon a "class-wide" charge filed by another opt-in class member, Mr. David Grayson.[FN26]

As noted at p. 5 n. 2 of the July 29, 1994 Order, there is no Eleventh Circuit or United States Supreme Court authority supporting application of the "piggyback" concept in an ADEA case. HR20-133-5. According to case authority controlling in this Circuit, *only* those former store managers who filed timely ADEA charges with the EEOC should be allowed to "opt-in" to this case. *Price v. Maryland Casualty Co.,* 561 F.2d 609 (5th Cir. 1977). Under *Bonner v. Prichard.* 661 F.2d 1206 (11th Cir. 1981), this Fifth Circuit case controls until overruled by an en *banc* Eleventh Circuit decision, and that has not occurred.

> FN26. Mr. Grayson is the lead plaintiff in *Grayson.* As discussed at pp. 61-64 below, allowing him to join *Helton* as an opt-in plaintiff would violate principles of comity and the law of the case that should govern his claim.

The District Court's July 29, 1994 Order is based on *Calloway v. Partners Nat'l Health Plans,* 986 F.2d 446 (11th Cir. 1993), which is not an ADEA case and which did not cite or overrule *Price, supra.* Because the District Court's Orders are apparently in direct conflict with controlling authority that has not been overruled, potential members of the *Helton* class who have not filed timely charges of discrimination should not be permitted to "piggyback " onto another plaintiff's timely administrative charge.

***47** 2. *The Named Plaintiffs Did Not File Proper Class-Wide Charges.*

Even assuming that the single-filing rule should apply to opt-in class actions under the ADEA, the charge upon which the opt-in plaintiffs rely must provide sufficient notice of class-wide discrimination. Although the Eleventh Circuit has not addressed this issue in an ADEA case, the Fifth Circuit has ruled that to be the foundation for a class action, a charge must allege class-wide discrimination or that it was filed on behalf of a class. *Anson v. University of Tex. Health Science Center,* 962 F.2d 539, 541-543 (5th Cir. 1992); *accord, Kloos v. Carter-Day Co.,* 799 F.2d 397, 402 (8th Cir. 1986). Similarly, the Ninth Circuit has held that a lawsuit filed by a plaintiff whose administrative charge "expressed no intention to sue on behalf of anyone other than himself" could not form the basis for an "opt in" class action. *Naton v. Bank of California,* 649 F.2d 691, 697 (9th Cir. 1981). In the July 29, 1994 Order, the District Court found that three of the named plaintiffs' charges were sufficient to provide notice of class-wide discrimination. HR20-133-7. Although these three charges do allege, sometimes by name, that other managers have been discriminated against, none of these claimants gave notice that they sought to represent a class; and the EEOC did not conduct any class-wide investigation of the charging parties' claims. Affidavit of Shavan Giffen, Appendix in Support of K Mart's Petition for Review of the *Helton* case, Ex. "KK." The Court should not permit a class action to proceed where, as here, the defendant and the EEOC were not notified that the plaintiffs intended to pursue class-wide claims.

3. *Persons Whose Individual Claims Are Time Barred Should Not Be Allowed To Opt-in.*

Courts that have allowed "piggybacking" have ruled that the "relied upon charge [must be] valid ... [and] arise out of the same time frame" as the claim of the would-be plaintiff. *Calloway,* 986 F.2d at 450. Thus, a non-charge filing claimant cannot piggyback on a meritless, untimely charge. The earliest charge cited by Judge Shoob as a basis for piggybacking was filed by Bob Williams. but that charge is both meritless (the EEOC issued a "no cause " determination on July ***48** 31, 1992, Williams Dep., p. 23, Exh. 5, HR15-97-Exhibit E in Appendix) *and* untimely.[FN27] The earliest timely charge that could arguably be a basis for piggybacking was filed by plaintiff Kempton on April 15, 1992. *See* Affidavit of Shavan Giffen, Exhibit B, HR21-138-Exhibit E in Appendix Supporting K Mart's Motion for Reconsideration or Clarification of July 29, 1994 Order and Alternate Motion for Interlocutory Appeal. As a result, persons demoted in non-deferral states before October 18, 1991

(180 days before April 15, 1992) and persons demoted before June 20, 1991 (300 days before April 15, 1992) in deferral states[FN28] cannot be included within the alleged class and should not receive notice under 29 U.S.C. § 216(b) (1988).

FN27. As noted above, plaintiff Bob Williams was warned that he would be demoted in December, 1990; his annual appraisal, which rated him "unsatisfactory," was prepared in December; and he was advised of the demotion in January 1991 by his Regional Manager, Mike Lynch. *See* discussion, pp. 22-23, *supra.* Plaintiff Williams did not file an EEOC charge until August 1, 1991, more than 180 days after he was advised of his demotion. Williams Dep., pp. 12-13, Exh. 2, HR15-97-Exhibit E in Appendix. Because Georgia is a non-deferral state, Mr. Williams' charge was not timely. *See* Memorandum in Support of K Mart's Motion for Partial Summary Judgment re: Bob Williams, HR14-97-17-20. Thus, the Williams charge cannot form a basis for "piggybacking" by opt-in plaintiffs who did not file EEOC charges. *See Calloway,* 986 F.2d at 450.

FN28. Plaintiff Kempton filed his charge in Florida, which is a deferral state. *See* 29 U.S.C. §§ 626(d)(2), 633(b) (1988).

Even if Bob Williams' charge were timely, that charge should not be used as the measure for membership in the *Helton* "class" because it was filed before November 21, 1991, the effective date of the Civil Rights Act of 1991. Pub. L. No. 102-166, 105 Stat. 1079, *amending* 29 U.S.C. § 626(e)(1) (1988 & Supp. V 1993). Before this amendment, 29 U.S.C. § 255 (1988) provided a two year period of limitations for non-willful claims under the ADEA and a three year ***49** limitations period in the case of "willful" violations. Effective November 21, 1991, the Civil Rights Act of 1991 deleted the statute of limitations periods in 29 U.S.C. § 255 from the ADEA and substituted a 90 day right to sue letter requirement. *See* 29 U.S.C. § 626(e) (Supp. V 1993). This requirement and the charge filing requirement are the only limitations provisions applicable to ADEA claims arising on or after November 21, 1991. However, this change cannot apply to pre-amendment conduct because the Civil Rights Act of 1991 is not retroactive. *See Landgraf v. USI Film Prods.,* 114 S.Ct. 1483 (U.S. 1994); *Mulhall v. Advance Sec. Inc.,* 19 F.3d 586, 589 n.9 (11th Cir.), *cert. denied,* 115 S.Ct. 298 (U.S. 1994); *Goldsmith v. City of Atmore,* 996 F.2d 1155, 1159 (11th Cir. 1993). As a result, the claim of any class member who would purport to "piggyback" on Bob Williams' 1991 charge already would be time-barred by the maximum, three year statute of limitations in 29 U.S.C. § 255.

The Kempton charge is the earliest charge that could serve as the basis for any opt-in claims. However, instead of relying on the Kempton charge, Judge Shoob ruled on reconsideration that the backward reach of the class could be measured by a charge filed on June 14, 1991 by opt-in claimant Grayson. HR22-157-2. This ruling disregards "piggyback" concepts previously applied by other courts and is not supported by any precedent. Persons demoted in late 1990 or early 1991 are not "similarly situated" with the named *Helton* plaintiffs who filed timely charges in 1992. *See Calloway, supra.* Moreover, because an opt-in action is not "commenced" until the opt-in plaintiff files a "consent" to join the case, 29 U.S.C. § 256(b) (1988), claims based on demotions in 1990 and early 1991 clearly are time-barred by the longest statute of limitations (three years) that might apply in this case. Thus, persons demoted before November 21, 1991 should not be allowed to opt-in as additional plaintiffs in the *Helton* action.[FN29]

FN29. The November 21, 1994 amendment, which adopted a dual limitations period measured from commencement of EEOC proceedings and receipt of a right to sue notice from the EEOC is consistent with the important "conciliation" role of the EEOC and with the ruling in *Price, supra,* that persons

who do not file their own EEOC charges should not be allowed to join an ADEA class.

***50** The question of when an action is commenced by an opt-in plaintiff in an ADEA representative action has not been addressed by the Eleventh Circuit. However, other courts have relied upon 29 U.S.C. § 256(b) (1988) to bar untimely, opt-in claims:

Section 7(e) of the ADEA, 29 U.S.C. § 626(e), incorporates the limitations period set out in the Portal-to-Portal Act of 1947, 29 U.S.C. § 255, which is two years unless the allegedly illegal conduct was "willful," in which case the period is three years. The period runs from the time the defendant takes the allegedly discriminatory actions and the plaintiff learns of them. *See Delaware State College v. Ricks.* 449 U.S. 250, 258, 101 S.Ct. 498, 504, 66 L.Ed.2d 431 (1980). The period ends when the plaintiff "commences" his action. 29 U.S.C. § 255. An action may be commenced in either of two ways. If the plaintiff brings an individual action, commencement occurs when he files a complaint. 29 U.S.C. § 256(a). *If the plaintiff joins a pending class action, his action commences when he opts into the action by filing written consent with the court in which the action is pending.* 29 U.S.C. § 256(b).

O'Connell v. Champion Int'l Corp., 812 F.2d 393, 394 (8th Cir. 1987) (emphasis added). The *O'Connell* court expressly rejected the plaintiffs' argument that the initial filing of the class action they sought to join saved them from the time bar. *Id. Accord, Libront v. Columbus McKinnon Corp.,* 832 F. Supp. 597, 623-25 (W.D.N.Y. 1993) (applying 29 U.S.C. §§ 255, 256(b) to bar claims for "non-willful" violations that occurred more than two years before the plaintiffs filed written consents to "opt into" the case).

In yet another interlocutory appeal in *Sperling, supra,* the Third Circuit refused to follow the Eighth Circuit's *O'Connell* decision and ruled instead that the filing of an ADEA class action tolled the limitation periods in 29 U.S.C. § 255 (1988). *See Sperling v. Hoffmann-La Roche. Inc.,* 24 F.3d 463 (3d Cir. 1994). The Third Circuit attached special significance to the fact that the ADEA does not specifically cite Section 7 of the Portal-to-Portal Act, 29 U.S.C. § 256(b) (1988). ***51**24 F.3d at 465. However, Section 7(b) of the ADEA does specifically incorporate "the powers, remedies, *and procedures* ... in sections 211(b), 216 ... and 217 of [the Fair Labor Standards Act of 1938, *as amended* (29 U.S.C. § 211(b), 216, 217)]. " 29 U.S.C. § 626(b) (1988) (emphasis added). Section 7 of the Portal-to-Portal Act specifically *amended* the procedures of Section 16 of the FLSA to define the time of commencement of an opt-in action. Pub. L. No. 8049, 61 Stat. 88, *codified as* 29 U.S.C. § 256(b) (1947). K Mart submits that the Third Circuit erroneously overlooked the plain language of the ADEA, the fact that 29 U.S.C. § 256(b) defines terms and procedures that were specifically cited as incorporated into the ADEA, and the Supreme Court's express reference to Section 7 in its opinion in the same case. *See Hoffmann-LaRoche, Inc. v. Sperling,* 493 U.S. at 173.

Moreover, the ruling in *O'Connell* is supported by the Sixth Circuit's affirmance of *Equal Employment Opportunity Comm'n v. Chrysler Corp.,* 546 F. Supp. 54 (E.D. Mich. 1982), *aff'd,* 733 F.2d 1183 (6th Cir. 1984). In that case, the EEOC filed a "pattern and practice" action under Sections 16 and 17 of the FLSA, 29 U.S.C. §§ 216(c), 217 (1988), to recover back pay and liquidated damages on behalf of individual claimants and for equitable relief. 546 F. Supp. at 61. In response to the defendant's argument that some of the back pay claims were time barred, the district court held that "an individual who has not filed a consent to be a party plaintiff to EEOC's suit before the applicable period has run, will be barred from recovering back pay and liquidated damages under § 216(c)." 546 F. Supp. at 61. The same rule should apply to individual actions seeking class-wide joinder under § 216(b).

If an opt-in plaintiff in an individual action under 29 U.S.C. § 216(b) did not have to file a consent within the

applicable limitations period, then an alleged "representative" lawsuit brought by individual plaintiffs could include a much broader scope of claims than a pattern and practice case brought by the EEOC. Surely, Congress did not intend for individual claimants to have broader litigation authority than the very agency charged with enforcing the ADEA. Moreover, application of ***52** different limitations periods to cases brought under § 216(b) and § 216(c) would be internally inconsistent, because under § 216(c), the right of an individual to file suit terminates when the EEOC files an action. A claimant who never filed a timely consent (or any charge) with the EEOC should not be entitled to opt-in to an individual, ADEA lawsuit and obtain broader relief than could be awarded if the EEOC filed a representative action.

Even if *O'Connell, supra,* were wrong, the tolling rule applied in *Sperling, supra,* cannot be used to expand the class to include persons demoted or who resigned in lieu of demotion from store manager positions more than three years before February 28, 1994, which is the first date on which plaintiffs sought to amend the *Helton* complaint to assert a class action claim. *Sperling v. Hoffmann-La Roche. Inc.,* 24 F.3d 463, 468 (3d Cir. 1994) (the statute of limitations for an opt-in plaintiff may be tolled by the filing of another action only "as long as the representative nature of the action is clear on the complaint's face.") *See Slack v. Stiner,* 358 F. 2d 65, 69-70 (5th Cir. 1966) (in spurious class action under securities law, limitations period was not tolled before entry of a pretrial order providing that class relief was being sought). *See also Owens v. Bethlehem Mines Corp.,* 630 F. Supp. 309 (S.D. W.Va. 1986) (applying 29 U.S.C. § 256(b) (1988), but concluding that equitable tolling should also apply during the period between the filing of plaintiffs' motion for class notice and the order granting the motion). The *Helton* plaintiffs' original Complaint made no mention of class or representative claims, which were asserted for the first time when plaintiffs filed their February 28, 1994 motion to amend. Thus, February 28, 1991 would be the *earliest* date that could possibly be used for measuring the temporal scope of any class of potential, opt-in plaintiffs.

4. *Persons Demoted Long Before the Named Plaintiffs Filed EEOC Charges May Not "Piggyback" on a Charge Filled By Another Opt-in Claimant.*

Under *O'Connell, supra,* Mr. Grayson's opt-in claim should be time barred because he was demoted more than three years before his "opt-in" consent was filed. HR22-147. However, even if the *Sperling* tolling rule were applied, Mr. Grayson's status as a potential opt-in claimant ***53** should not allow him to join this case because his demotion occurred in a non-deferral state (Georgia), more than 180 days before the earliest timely charge (Kempton's April 15, 1992 charge filed by a person who is actually a named plaintiff in the *Helton* case. Thus, even though Mr. Grayson filed his own charge, he is not "similarly situated" with other potential class members for purposes of opt-in joinder under the ADEA. *See Calloway,* 986 F.2d at 450. *Calloway* does not support the proposition that an opt-in plaintiff who did not file a charge may join his otherwise timebarred claim in the lawsuit by relying on a charge filed by another plaintiff in a different case. Rather, the *Calloway* court carefully limited its ruling to the unique factual circumstances presented[FN30] by holding that "a plaintiff, such as Calloway, who unsuccessfully moves to intervene in the lawsuit of a plaintiff who has filed an EEOC charge may invoke the single filing rule." *Id.* at 450. Moreover, *Calloway* involved a wage discrimination claim that was determined by the Court to be a "continuing violation." *Id.* at 448-49. As ruled by the Eighth Circuit, even if the piggyback concept should apply in an ADEA case, that concept should be limited to cases involving continuing violation claims and not to cases involving discrete demotion decisions.[FN31] *See* ***54***Thomure v. Phillips Furniture Co.,* 30 F.3d 1020, 1027 (8th Cir. 1994), *petition for cert. filed,* 63 U.S.L.W. 3540 (Jan. 9, 1995) (No. 94-1193-CFX).

FN30. In *Calloway, supra,* the non-charge filing plaintiff had attempted to intervene in a Title VII ac-

tion brought by another plaintiff in the same court. 986 F.2d at 447-48. The trial judge initially denied intervention on the ground that the claims at issue were too "dissimilar" and because of the "advanced stage" of the original lawsuit. *Id.* at 447. Later, however, the same judge concluded that the intervenor's claim was in fact "very similar" to the original claim; and on appeal, the defendant "did not dispute" that the intervenor's claim arose "out of similar discriminatory treatment in the same time frame," thus satisfying the requirements of the "single filing" rule. *Id.* at 448-49.

FN31. Unlike a wage claim, a demotion claim is based on a discrete, completed act and "remaining demoted" does not constitute a "continuing " violation. *Phillips v. Southern Bell Tel. & Tel. Co.,* 650 F.2d 655, 657-58 (5th Cir. 1981).

The unprecedented theory adopted by the District Court would allow the scope of a putative class to be extended rearward indefinitely. Thus, whenever an "opt-in" plaintiff had filed a charge that pre-dated the earliest charge otherwise forming the basis for the opt-in class, the scope of the class would in turn be extended to include this earlier charge. Such a result would virtually eliminate any period of limitations for the opt-in claims and would be inconsistent with the proposition that "no plaintiff [should] be permitted to bring suit until the EEOC has been given the opportunity to address the grievance." *Calloway,* 986 F.2d at 450. *See also Forehand v. Florida State Hosp.,* 839 F. Supp. 807, 818 (N.D. Fla. 1993) ("the purpose of the [charge]-filing requirement -- to permit the EEOC to first attempt settlement of grievances through conference, conciliation, and persuasion -- was, and is, to be preserved and not usurped by the district courts.").

Where, as here, there is no evidence of an unsuccessful attempt to intervene, the *Calloway* court did not purport to change the pre-existing law that in a Rule 23 class action, the "unnamed plaintiffs" must rely upon a charge filed by the "named plaintiff;" and that in a permissive intervention case, prospective "intervenors who had not filed EEOC charges ... [must] rely on the charge of one of the original plaintiffs." *Calloway,* 986 F.2d at 450 (*citing Wheeler v. American Home Prods, Corp.,* 582 F.2d 891, 897-98 (5th Cir. 1977) and *Oatis v. Crown Zellerbach Corp.,* 398 F.2d 496, 498-99 (5th Cir. 1968)). *See Walker v. Jim Dandy Co.,* 747 F.2d 1360, 1366 (11th Cir. 1984). Under this authority, persons who did not file EEOC charges should not be allowed to opt-in unless they were demoted within 180 (or 300, if applicable) days of a valid, timely charge filed by one of the persons originally, named as a plaintiff *in the Helton case.* As ruled in *Calloway,* the single-filing rule may not be invoked "where the relied upon charge is invalid, or where the claimed discriminatory treatment is not similar or *does not arise out of the same time frame.*" ***55**986 F.2d at 450 (emphasis added). The trial court's ruling reconsidering the temporal scope of the class improperly disregards this rule.

C. *Class Notice Should Not Have Been Authorized Without A Hearing.*

In *Sperline,* the Supreme Court authorized the issuance of class notice at a preliminary stage of the case before substantial discovery had been completed. As a result, the Court did not have a record that would have allowed it to address the serious questions of manageability of a class action in a circumstance in which there is no identifiable, discrete policy of bias and where another federal judge has ruled that individual issues predominate over any common issues of law and fact. The thorough ruling in *Grayson* should not have been disregarded and overruled by the *Helton* court without at least conducting an evidentiary hearing. Indeed, in applying the analogous standards of Fed. R. Civ. P. 23, the courts have recognized that "when a serious question of commonality, or any other essential element [of a class action], is raised, a hearing usually is necessary." *Bradford v. Sears Roebuck & Co.,* 673 F.2d 792, 795-796 (5th Cir. 1982). In *Bradford,* the trial court had certified a "state-wide" class based on class-wide allegations of racial discrimination. On interlocutory appeal, the Fifth Circuit noted that the

record contains a "serious question" as to whether or not a "uniform policy or practice for hiring, firing, and promotion is utilized at Sears' 46 units in Mississippi." *Id.* at 796. The appellate court concluded that given that the lower court's class action ruling was "based only on the conclusionary allegations in the pleadings, the finding of commonality was premature; the district court erred in certifying the statewide class." *Id.* at 796.

In *Dickerson v. United States Steel Corp.,* 582 F.2d 827, 831 (3d Cir. 1978), the court cited cases applying Rules 24(b), 20 and 23 in holding on interlocutory appeal that classmember/intervenors cannot satisfy common question of law or fact standards when their individual claims are based upon "discrete sporadic incidents concerning different types of work occurring in different years, at different plants, and with different supervisors." As recognized in *Dickerson,* ***56** when "litigation of ... [a] purported general policy of defendant, as it might affect each plaintiff here, would inevitably focus in detail on the separate work histories of each plaintiff ... ", the claims at issue are not suitable for class-wide joinder in one proceeding. *Id.* at 834 (quoting *Smith v. North Am. Rockwell Corp.,* 50 F.R.D. 515, 522 (N.D. Okla. 1970)).

At page 4 of the July 29, 1994 Order, in *Helton,* the court noted that "plaintiffs are alleging an upper management policy of age discrimination that affected plaintiffs and the 'opt-in class' of plaintiffs. These allegations described the circumstances giving rise to the alleged upper management policy and the manner in which that policy allegedly resulted in age discrimination against a class of plaintiffs." HR20-133-4. While the Order states that these allegations are supported factually, there is not any discussion of what that evidence is. In *Grayson,* Judge Carnes ruled that it is "undisputed" that the demotions at issue were not the product of "blind adherence" to any centralized policy. 849 F. Supp. at 789. K Mart respectfully submits that the federal rules require a much sounder evidentiary basis for concluding that Judge Carnes was "clearly wrong" and that the persons whose claims were several in *Grayson* may now opt-in plaintiffs consolidated case. *See Bradford v. Sears. Roebuck & Co., supra.*

II. *THE DISMISSAL ORDER IN GRAYSON SHOULD BE REVERSED*

A. *The Dismissal Order Is Inherently Prejudicial In Violation of Fed. R. Civ. P. 41.*

Judge Carnes ruled that the previous severance and transfer rulings in *Grayson, supra,* and *Bell. supra,* were correct; but to accommodate Judge Shoob's ruling, she conditionally dismissed the six, severed cases remaining in her court to permit those plaintiffs to opt-in as plaintiffs in *Helton.* K Mart submits that this dismissal, as clarified and made final on rehearing, was procedurally and substantively erroneous. The *Grayson* plaintiffs and *Helton* plaintiffs chose to file their actions separately in the District Court. Discovery has been completed in both cases, including the production of thousand of documents, and the taking of numerous depositions; the parties have ***57** expended substantial time and effort to compile statistical data; and each, separate case is ripe for final disposition. Unless reversed, the dismissal order will interminably delay the final disposition of these plaintiffs' claims.

During a hearing convened by Judge Carnes to consider K Mart's motion for reconsideration of her initial, *sua sponte* dismissal ruling, the parties and the Court discussed the procedural "quagmire" caused by the eleventh hour class action ruling in *Helton. See* Transcript of October 25, 1994, Status Conference Before the Honorable Julie Carnes, GR27. Among other matters, the parties discussed the question of how a prospective, 90-plaintiff case might be tried. *See id.* at 8-9, 18-24. During this discussion, Judge Carnes noted that a joint trial of each prospective opt-in plaintiff's claim would be a "really long trial" and that if each plaintiff had the "right to present every story, every anecdote, or vignette about every other person who was [demoted] in this age group ...

then the Defendant will have the right to prove the converse anecdote about every other person in this age group who wasn't [demoted].“ *Id.* at 21, 24. This is precisely why, as ruled in the *Grayson* severance order, a joint trial of these multiple, individual claims would “hopelessly“ confuse the jury and cause “intolerable“ prejudice to K Mart.

Judge Carnes also noted during the hearing that plaintiffs did not move promptly for class-wide relief, but waited until after an adverse ruling on the severance motion and then asked Judge Shoob effectively to reach a different result:
[Y]ou all didn't file for this *Helton* class back when we were litigating [K Mart's severance motion], ... the defendant[ ] expended a great deal of money, and the Court expended a great deal of time in handling the severance motion. And if you had wanted the *Helton* [class], you should have done it back earlier, instead of waiting for an adverse ruling from this Court and going to Judge Shoob, a different judge, and getting a [different] ruling ...

Id. at 30-31. Despite these concerns, Judge Carnes apparently decided to dismiss these cases based on the proposition that “trying 90 [claims] is not much worse than trying 83, and that you would be ***58** just as happy to get it all over in one fell swoop then to have seven, or however many you have got left, severed separate trials with me.“ *Id.* at 14. To the contrary, as stated during the hearing before Judge Carnes, id. at 15-16, K Mart respectfully submits that it is simply impossible to have a fair, manageable trial of multiple, disparate treatment claims, whether the trial involves 90, 83, or fewer than 20, separate claimants. *Id.* at 15-16. Adding the *Grayson* plaintiffs to the “pot“ will only increase the prejudice caused by the *Helton* order.

Dismissal of the severed *Grayson* cases is inconsistent with the settled proposition that “the essential question“ presented under Rule 41 is to determine “whether the dismissal of the action will be unduly prejudicial to the defendants.“ *Nance v. Jackson,* 56 F.R.D. 463, 471 (M.D. Ala. 1972). *See Spencer v Moore Business Forms, Inc.,* 87 F.R.D. 118, 119 (N.D. Ga. 1980) (“it is defendants' interests, not plaintiff's, which must be considered“). As ruled in *Pace v. Southern Express Co.,* 409 F.2d 331 (7th Cir. 1969),
[s]ome of the factors justifying denial [of a motion to dismiss without prejudice] are the defendant's effort and expense of preparation for trial, excessive delay and lack of diligence on the part of the plaintiff in prosecuting the action, insufficient explanation for the need to take a dismissal, and the fact that a motion for summary judgment has been filed by the defendant.

Id. at 334. *See Thomas v. Amerada Hess Corp.,* 393 F. Supp. 58, 70 (M.D. Pa. 1975) (adding factor of the excessive and duplicitous expense of defending a second action). None of these factors was addressed in either the original or the modified dismissal order.

Plaintiffs' claims have been pending against K Mart for 37 months. As previously discussed, all discovery is complete and K Mart has filed well supported motions for summary judgment and “refiled“ those motions again pursuant to the *Grayson* Court's February 22, 1994 severance order. The parties have also incurred thousands of dollars of copying costs in complying with the severance and transfer orders, and five cases have been docketed and litigated for several months in separate jurisdictions. Perhaps most importantly, each of these separate cases is ripe for ***59** final disposition, either on summary judgment or by trial. Strict adherence to procedural requirements for the speedy disposition of claims is an essential hallmark of the “evenhanded administration“ of justice. *See Baldwin County Welcome Ctr. v. Brown,* 466 U.S. 147, 153. 104 S.Ct. 1723, 1726 (1984).

Where, as here, the parties have conducted extensive and costly discovery, and the defendant has filed detailed

summary judgment motions in each case, the cases cannot be dismissed without causing substantial prejudice to K Mart. In these circumstances, a "dismissal without prejudice" is a contradiction in terms that should not be allowed. *See Thomas,* 393 F. Supp. at 70 (refusing to dismiss after discovery completed and motions for summary judgment with voluminous supporting affidavits and memoranda filed); *Local 2677, American Federation of Government Employees v. Phillips,* 358 F. Supp. 60, 65 (D.C. Cir. 1973) (denying dismissal where summary judgment motion filed). "A great deal of time, money and energy has been expended by all parties to this litigation, and plaintiff's attempt to wipe the slate clean and start over after having suffered legal reverses is unfair to defendants." *Spencer,* 87 F.R.D. at 122. As the *Thomas* court noted,

Were this Court to allow plaintiffs' motion [for dismissal], it could in good conscience only do so and specify *with* prejudice or require the payment of defendants' costs, expenses, and counsel fees which to date are beyond plaintiffs' ability to pay.

Thomas. 393 F. Supp at 70.

As noted above, K Mart expended a "great deal of money" and the trial court "expended a great deal of time," GR27-30, litigating and deciding the severance motion *before* plaintiffs made any attempt whatsoever to convert the *Helton* case to an ADEA class action. Clearly, K Mart should be entitled to recover the costs it needlessly expended in litigating these issues in *Grayson,* as recognized by numerous courts and as effectively determined by Judge Carnes during the October 25, 1994 hearing. *See* GR27-31, 40-41. *See generally Spencer,* 87 F.R.D, at 124 (prejudice may be alleviated by dismissing some claims with prejudice, taxing court costs and awarding ***60** attorneys' fees to the defendant); *accord, Nance,* 56 F.R.D. at 472. However, because Judge Carnes decided that appellate resolution of the merits of the severance and joinder issues presented should not await disposition of a dispute regarding fees and costs, GR27-46, 48, 55-58, she denied K Mart's alternative motion to condition the dismissal order on plaintiffs' reimbursing K Mart's reasonable costs and attorneys' fees. *Id.* at 81-84.[FN32]

> FN32. As implicitly ruled by Judge Carnes, an award of fees and expenses cannot alleviate the substantial prejudice to K Mart caused by the dismissal of these claims in derogation of the previous ruling holding that these plaintiffs' claims must be resolved in separate proceedings. As discussed in the next subsection of this brief, the dismissal ruling plainly violates law of the case principles. Nevertheless, if the dismissal is sustained, K Mart respectfully submits that the ruling should be vacated in part and remanded with directions that the dismissal must be conditioned upon K Mart's recovering from plaintiffs the needless costs and expenses incurred in litigating the severance and transfer issues in *Grayson.*

The eleven-plaintiff *Grayson* case had been pending for more than three years; the five-plaintiff *Helton* case had been pending for more than 20 months; and discovery had closed in both cases without either set of plaintiffs having made any effort to convert these cases into an "optin" class action. Plaintiffs filed the eleventh hour motion to amend in *Helton* in an obvious effort to circumvent the *Grayson* court's February 22, 1994 order. Allowing the "prejudicial" dismissal order to stand would be inconsistent with Fed. R. Civ. P. 41 and with the law of the case established in February, 1994.

B. *The Dismissal Order Is Inconsistent With Law Of The Case Principles.*

Discovery ended in *Grayson* in March 1993. Thereafter, K Mart filed motions for summary judgment and motions for severance and transfer. *See* GR4-54; GR5-55; GR6-56; GR7-57; GR8-58; GR9-59; GR10-60; GR11-61; GR12-62; GR13-63; GR14-64; GR15-65. On February 22, ***61** 1994, Judge Carnes granted the severance motion; and in accordance with the instructions of the Court, the parties expended thousands of dollars in

copying the pleadings of the *Grayson, et al* case to create duplicate files that were re-docketed as separate cases. *See* Letter from Edmund M. Kneisel to James L. Ford dated April 4, 1994, and Invoice, GR25-169-Exhibit "F" in the Appendix in Support of K Mart's Motion for Reconsideration or Clarification of August 23, 1994 Order. Immediately thereafter, pursuant to a companion order entered in *Bell, supra,* on February 25, 1994, the Clerk of Court mailed the files of the five transferred cases to five different courts in Florida and North Carolina.

The October 27, 1994 dismissal order effectively "undoes" all of these prior actions and severely prejudices K Mart's interest in the prompt, final disposition of these cases. Indeed, the October 27, 1994 dismissal order has caused the five severed and transferred plaintiffs to ask for "retransfer" of their claims. Any such retransfer is improper because the "law of the case " doctrine prohibits a transferee court from reversing a transferor court's decision by sending a transferred case back. *See Hayman Cash Register Co. v. Sarokin,* 669 F.2d 162, 169 (3rd Cir. 1982) ("[a] disappointed litigant should not be given a second opportunity to litigate a matter that has been fully considered by a court of coordinate jurisdiction, absent unusual circumstances "); *see also Christianson v. Colt Indus. Operating Corp.,* 486 U.S. 800, 816, 108 S.Ct. 2166 (1988) ("Indeed, the policies supporting the doctrine [of law of the case] apply with even greater force to transfer decisions than to decisions of substantive law; transferee courts that feel entirely free to revisit transfer decisions of a coordinate court threaten to send litigants into a vicious circle of litigation").

As Judge Carnes acknowledged, her dismissal ruling was based on "practical " considerations (litigating 90 joint cases is not much different than litigating 83) without regard to law of the case principles. *See* GR27-27 ("I didn't consider the law of the case at all ...."). K Mart ***62** respectfully submits, however, that absent "extraordinary circumstances," law of the case principles should prevent a District Court from effectively overruling its *own,* prior orders:

"As most commonly defined, the doctrine [of the law of the case] posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California,* 460 U.S. 605, 618, 103 S. Ct. 1382, 1391, 75 L.Ed.2d 318 (1983) (dictum). This rule of practice promotes the finality and efficiency of the judicial process by 'protecting against the agitation of settled issues.' I B J. Moore, J. Lucas, & T. Currier, Moore's Federal Practice ¶ 0.404[1], p. 118 (1984) ....

Christianson, 486 U.S. at 815-816. *See Luckey v. Miller,* 929 F.2d 618, 622 (11th Cir. 1991) ("[t]he purpose of the law of the case doctrine 'is to establish efficiency, finality, and obedience within the judicial system "'); *Bradford v. Harding,* 180 F. Supp. 855, 855-56 (E.D.N.Y. 1959) (refusing to allow remand of case under law of the case doctrine where similar motion was denied previously in same action), *aff'd,* 284 F.2d 307 (2d Cir. 1960) .

There is no reason for the *Grayson* Court, which addressed joinder and severance issues in February 1994, to defer to the July 1994 decision of Judge Shoob, which is demonstrably incorrect for the reasons discussed above. Normally, the first filed action should control; and the *second* judge of a coordinate court to rule on an issue should defer to the *first* judge who ruled, not vice versa. *See, e.g., Feller v. Brock,* 802 F.2d 722, 727-28 (4th Cir. 1986) (recognizing the longstanding judicial policy that "coordinate courts should avoid issuing conflicting orders"). The opinion of the court in *E.W. Bliss Co. v. Cold Metal Process Co.,* 174 F. Supp. 99 (N.D. Ohio 1959), *aff'd,* 285 F.2d 244 (6th Cir. 1960), also is instructive:

In this District, we have five District Judges but only one United States District Court. When the Court speaks through one of the Judges, the decision should be followed by his colleagues unless it is clearly wrong. It would not be conducive to the orderly administration of justice to do otherwise.

Id. at 121. *See Stevenson v. Four Winds Travel. Inc.,* 462 F.2d 899, 904-05 (5th Cir. 1972) (holding that one judge of a United States District Court should "respect and not overrule [the] ***63** decision and order" of a prior judge of the same court); *ACF Indus., Inc. v. Guinn,* 384 F.2d 15 (5th Cir. 1967) (finding abuse of discretion where judge vacated prior order of another judge in the same court), *cert. denied,* 390 U.S. 949 (1968). *See also Prack v. Weissinger,* 276 F.2d 446, 450 (4th Cir. 1960) ("in federal practice, judges of coordinate jurisdiction, sitting in cases involving identical legal questions under the same facts and circumstances, should not reconsider the decisions of each other"); *County of Oakland v. City of Detroit,* 610 F. Supp. 364, 367 (E.D. Mich. 1984) (federal judge in same district presiding over civil antitrust and racketeering trial against same defendants arising out of same circumstances would not rule on same issues but would defer to first determination in criminal case), *appeal denied,* 762 F.2d 1010 (6th Cir. 1985).

In the first dismissal order of August 23, 1994, the District Court specifically reiterated "the correctness of its severance rulings in *Grayson* and *Sands.*" Nevertheless, the dismissal order completely overruled the February, 1994 severance order by allowing plaintiffs to do exactly what that order prohibited: Litigate their separate claims in one consolidated case. *See Christianson,* 486 U.S. at 817 (one court should not "revisit" decisions of its own or of a coordinate court ... [absent] extraordinary circumstances such as where the initial decision was 'clearly erroneous and would work a manifest injustice."'). K Mart respectfully submits that this Court should not allow the trial court to disregard sound law of the case principles and dismiss the severed *Grayson* actions merely because Judge Shoob erroneously refused to follow the well-reasoned, prior ruling in that case severing plaintiffs' claims for separate trials. To do so would work a "manifest injustice" to K Mart's legitimate interest in a fair and speedy resolution of these claims.[FN33] Plaintiff ***64** Grayson and his former co-plaintiffs should not be rewarded for their inactivity and delay by being allowed now to dismiss their individual claims with impunity and effectively start over again as "optin" class members in *Helton.*

> FN33. K Mart's right to defend the plaintiffs' individual claims promptly, while memories are comparatively fresh and witnesses available to testify, will be severely prejudiced by the potential lengthy delay necessary to determine??e "timeliness" issue regarding each plaintiff's membership in the class. On the other hand, no individual plaintiff's claim will be prejudiced by or have any res judicata effect on the outcome of the *Helton* litigation. *See, e.g., Smith v. Stark Trucking, Inc.,* 53 F. Supp. 826, 828 (N.D. Ohio 1943) ("An employee not party to the suit, who does not himself intervene in due time in the action, or designate someone else to represent him, cannot be bound by the judgment or have his claim rendered res judicata."); *Fink v. Oliver Iron Mining Co.,* 65 F. Supp. 316, 318 (D. Minn. 1941) ("Certainly, such judgment [adverse to class action plaintiffs] would not be res adjudicata to an employee who did not intervene or authorize the plaintiffs to act in a representative capacity. "). Thus, the eventual outcome in the *Grayson* case will not bind the *Helton* plaintiffs in any way.

CONCLUSION

In sum, for the reasons stated hereinabove, K Mart respectfully requests this Court to reverse and vacate the *Helton* court's class action ruling and remand that case with instructions to proceed with the litigation as an individual, non-class action lawsuit. Alternatively, the *Helton* ruling should be vacated and remanded with instructions to limit the scope of any class notice that is issued to include only those persons who filed timely charges of age bias with the EEOC; who were demoted no more than three years before the filing of their opt-in "consents" to appear as plaintiffs in the litigation; and who were demoted within 180 days (or 300 days, if applicable) before plaintiff Kempton filed his EEOC charge. K Mart also respectfully requests this Court to vacate the dismissal order entered in the *Grayson* cases and remand those lawsuits with instructions that they be resolved in accordance with the *Grayson* court's severance order entered on February 24, 1994. At a minimum, the

dismissal with prejudice should be vacated and made conditional on plaintiffs' ***65** reimbursing K Mart for the court costs and attorneys' fees it needlessly incurred in litigating the *Grayson* plaintiffs' claims.

K MART CORPORATION, Defendant-Appellant-Cross-Appellee, v. Mercer David GRAYSON, Ronald L. Braley, Tony M. Arrington, Ricky D. Sallee, James L. Steadman, and John D. Thompson, Plaintiffs-Appellees-Cross-Appellants, K MART CORPORATION, Defendant-Appellant-Cross-Appellee, v. Carl HELTON, Charles W. Kempton, Nick Payne, James E. Taylor, and Bob Williams, Plaintiffs-Appellees.
1995 WL 17019968 (C.A.11) (Appellate Brief)

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