1995 WL 17019967 (C.A.11) (Appellate
Brief) United States Court of Appeals,
Eleventh Circuit.

KMART 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,
KMART 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.
March 1, 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 Plaintiffs/Appellees/Cross-Appellants

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I *STATEMENT REGARDING ORAL ARGUMENT

This case has already been set for oral argument.

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Cases

1 *STATEMENT OF JURISDICTION

Jurisdiction in *Kmart Corporation v. Helton. et al.,* Case No. 94-9293 is based on the order of this Court granting Kmart's petition to allow an interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

Jurisdiction in *Kmart Corporation v. Grayson. et al.,* Case No. 94-9257 lies under 28 U.S.C. § 1331, assuming that the district court's order was a final order.

STATEMENT OF THE ISSUES

I. In *Kmart Corporation v. Helton. et al.,* Case No. 94-9293:

1. Whether the district court abused its discretion when it certified as "similarly situated" under 29 U.S.C. § 216(b), an opt-in class of ADEA plaintiffs who: - all worked for the same employer (Kmart);

- all held the same job title (Store Manager) and performed the same job responsibilities;

- all worked in the same region (Kmart's Southern Region);

- all worked under the same regional Vice President (John Valenti);

- all were subjected to the same employment decision (demotion[1]);

- all were eliminated during a purge following John Valenti's installation as Southern Region Vice President, in which one of every three Southern Region Store Managers either was demoted or resigned; and

***2** - all rely upon the same body of live testimony, documentary evidence, and statistical proof of a company plan to eliminate older managers in the Southern Region to establish that their individual demotions were motivated by age?

2. Whether the district court correctly determined the rearward temporal scope of the opt-in class (that is, the earliest date on which additional class members could have been demoted and still opt in as plaintiffs in this case)? This presents the following subsidiary issues:

a. What is the earliest date on which a Store Manager who never filed a charge of discrimination with the Equal Employment Opportunity Commission could have been demoted and still opt in to the class by relying ("piggybacking") on EEOC charges filed by others?

b. On what date was the ADEA's 2- or 3-year statute of limitations, which applies to the claims of additional plaintiffs who were demoted before the November 21, 1991 effective date of the Civil Rights Act of 1991, tolled?

II. In *Kmart Corporation v. Grayson. et al.,* Case No. 94-9257:

1. Whether the district court abused its discretion in dismissing the *Grayson* plaintiffs' cases without prejudice to permit them to opt in to the *Helton* class?
2. Whether the *Grayson* plaintiffs are barred from opting into the *Helton* class because of the severance order in *Grayson*, even though they fall within the *Helton* class definition?

3. In the cross-appeal: whether the district court's severance order was erroneous?

***3** *STATEMENT OF THE CASE*

1. *Course of Proceedings and Disposition Below*

Kmart Corporation v. Grayson. et al., Case No. 94-9257 (the "*Grayson* " case) and *Kmar Corporation v. Helton. et al.,* Case No. 94-9293 (the "*Helton*" case) are appeals from what were originally two multi-plaintiff actions brought under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 *et seq.* (the "ADEA").[2] The plaintiffs in both cases allege they were victims of an age-motivated purge of Store Managers in Kmart's Southern Region that began in 1990, following a company-wide reorganization and the installation of a new Vice President of Kmart's Southern Region. Between 1990 and 1992, Kmart demoted approximately 151 Southern Region Store Managers and approximately 76 more resigned. *See* Plaintiffs' Brief in Opposition to Defendant's Motion for Reconsideration of July 29, 1994 Order (hereinafter "Reconsideration Brief)(H-144[3]), Appendix. Exh. D. This purge eliminated approximately one third of all Store Managers in the Southern Region. *Id.* Each plaintiff was removed from his Store Manager job and assigned to a lower position. *E.g.,* Helton Complaint (H-I) ¶ 1.

The plaintiffs allege Kmart carried out its purge of older Store Managers using a technique known throughout Kmart as "building a case" or "building a file." Kmart would target older Store Managers for elimination and then "build a case" against them by subjecting them to months of intense scrutiny and unrelenting criticism. The company methodically filled the targets' personnel files with criticisms and threats. Those managers who did not resign under the pressure of this inquisition would be demoted based upon the so-called "record " that had been compiled. H-l. Each plaintiffs personnel file contains ***4** some 40 to 60 critical reports, the great majority of which were generated in the months immediately preceding his demotion. Every one of the plaintiffs had received "Satisfactory" or higher annual appraisals for at least four years prior to 1990.

The eleven original *Grayson* plaintiffs filed their complaint on January 17, 1992. G-1. The case was originally assigned to the Hon. G. Ernest Tidwell and was later reassigned to the Hon. Julie Carnes. Kmart filed its Answer on March 18, 1992. G-6.

The five original *Helton* plaintiffs filed their complaint on October 29, 1992. H-1. On December 18, 1992, Kmart filed separate answers responding to the claims of individual plaintiffs. H-6, H-7, H-8, H-9. The following month, Kmart filed what would prove to be the first of a series of severance motions in these cases. Contending that their claims were not properly joined under Rule 20, Fed. R.Civ.P., Kmart moved to sever the claims of the five *Helton* plaintiffs and transfer their cases to the districts in which the stores that they had managed were located. H-17. Kmart also unilaterally refused to provide substantive responses to the plaintiffs' written discovery requests until the severance motion was decided. Reconsideration Brief (H-144), Appendix Exh. D. This strategy effectively delayed prosecution of the *Helton* case until nearly a year after the complaint had been filed.

By April of 1993, discovery had closed in *Grason* and Kmart filed eleven separate summary judgment motions, one for each plaintiff. G-54 through G-64. Kmart also filed a motion to sever and transfer in *Grayson.* seeking exactly the same procedural ruling as requested in the still-pending *Helton* severance motion. G-65. In addition, Kmart moved for separate trials on each plaintiffs federal and state law claims. *Id.*

Judge Shoob denied Kmart's severance motion in *Helon* on September 30, 1993.[4] H-51. Judge ***5** Shoob addressed and rejected the central argument with which Kmart has always argued for severance and against collective treatment: that the existence of separate explanations for each plaintiffs demotion makes the cases "unrelated":

The Court disagrees with defendant's argument that plaintiffs would be unable to prove a pattern and practice case *because* plaintiffs worked in different stores at different regions. Indeed, that the plaintiffs worked in different stores but allegedly were demoted in a similar fashion and within a similar time frame could be evidence of a company-wide policy.

September 30, 1993 Order (H-15) at 4.

On November 22, 1993-more than a year after the complaint had been filed-Kmart served substantive responses to the plaintiffs' first discovery requests in *Helton.* Reconsideration Brief (H-144), Appendix Exh. G.

Following an unsuccessful attempt to settle the *Grayson* and *Helton* cases by mediation, the plaintiffs collectively deposed Kmart Chairman Joseph Antonini on January 25, 1994.

On February 22, 1994, Judge Carnes issued the severance order in *Grayson*, breaking up the case into eleven separate civil actions. G-135. In a separate order, Judge Carnes then transferred the five non-Georgia *Grayson* plaintiffs to other United States District Courts. Two of the plaintiffs were transferred to a single district, the Eastern District of North Carolina. The remaining three plaintiffs were transferred to the Jacksonville, Orlando, and Tampa divisions of the Middle District of Florida. *Bell v. K Mart Corporation,* 848 F. Supp. 996 (N.D. Ga. 1994).

On February 28, 1994, the *Heltn* plaintiffs moved, under 29 U.S.C. § 216(b), to allow additional plaintiffs to intervene if they fell within the following definition of "similarly situated" individuals:

***6** Each person who (1) was demoted from the position of General Store Manager of any store in Kmart's Southern Region at any time between January 1, 1990 and December 31, 1992, or who resigned from such a position during the same time period after being told that he or she would be demoted if he or she did not resign, and (2) was, at the time of the demotion or resignation, at least 40 years old.

Plaintiffs' Motion to Permit Joinder of Similarly Situated Additional Plaintiffs Pursuant to 29 U.S.C. § 216(b), for Leave to Amend the Complaint, and to Authorize Notice to Potential Additional Plaintiffs (H-85). Kmart opposed this motion vigorously, contending among other things that the district court should have followed the logic of Judge Carnes' severance ruling in *Grayson.*[5] Kmart conceded, however, that "the plaintiffs in *Grayson* would be members of any class 'certified' in this [the *Helton*] case. " Defendant's Brief in Opposition to Plaintiffs' Motion to Permit Joinder of Similarly Situated Additional Plaintiffs Pursuant to 29 U.S.C. § 216(b), for Leave to Amend the Complaint, and to Authorize Notice to Potential Additional Plaintiffs (H-98) at 3 n.3. Kmart also filed yet another motion to sever the claims of the five original five plaintiffs in *Helton.* H-92.

Judge Shoob granted the plaintiffs' § 216(b) motions on July 21, 1994. H-133. Judge Shoob observed:

In this action, plaintiffs are alleging an upper management policy of age discrimination that affected plaintiffs and the "opt-in class" of plaintiffs. These allegations describe 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. Furthermore, these allegations are supported by deposition and affidavit evidence.

July 21, 1994 Order (H-133) at 4. Judge Shoob also denied the second Kmart severance motion. *Id.* at 10.

***7** On October 17, 1994, the plaintiffs served a one-paragraph amendment to the *Helton* complaint, specifying that the complaint was brought on behalf of both the named plaintiffs and others "similarly situated" within the meaning of 29 U.S.C. § 216(b). H-160.

Kmart moved for reconsideration of the *Helton* class action ruling or, alternatively, to certify certain issues for interlocutory appeal. H-138. Judge Shoob denied reconsideration, except that he modified the temporal scope of the "opt-in class" to store managers who had been demoted on or after December 16, 1990, if they worked in "non-deferral" states, or on or after August 18, 1990, if they worked in "deferral" states. Judge Shoob also certified the July 21 order for interlocutory appeal. Order of October 6, 1994 (H-157). This Court subsequently granted leave to pursue the interlocutory appeal in *Helton.*

Shortly after learning of Judge Shoob's "class certification" order in *Helton,* Judge Carnes issued a *sua sponte* order permitting those *Grayson* plaintiffs whose cases had not been transferred out of the Northern District of Georgia to join in the *Helton* case. Order of August 23, 1994 in *Grayson,* G-168. Judge Carnes noted that all of the *Grayson* plaintiffs were members of the *Helton* class, and assumed that those plaintiffs would wish to opt in to the *Helton* case. Judge Carnes dismissed without prejudice the claims of the six Georgia *Grayson* plaintiffs, subject to the condition that they could re-open their cases if they were later excluded from the *Helton* class. *Id.*

All of the eleven original *Grayson* plaintiffs filed opt-in notices in *Helton.* H-147, H-148, H-152. In addition, those five former *Grayso* plaintiffs whose cases had been transferred out of the Northern District of Georgia (and who were therefore not subject to Judge Cares' August 23, 1994 dismissal order) filed motions in their respective courts to transfer their cases for consolidation with *Helton* or, alternatively, to stay or dismiss their actions without prejudice (the "Transfer Motions"). The purpose of these motions was to allow each such plaintiff to discontinue his individual suit and join in the *Helton* class proceeding.

***8** Kmart opposed all five Transfer Motions with the same argument: that permitting any of the former *Grayson* plaintiffs to litigate their claims as part of the *Helton* class would somehow violate the "law of the case " established in the *Grayson* severance order. Appendix Supporting Respondent's Brief in Opposition to the Petition for Permission to Appeal from an Interlocutory Order of the United States District Court for the Northern District of Georgia Case No. 1:94-CV-2623-MHS and Alternative Petition for the Writ of Mandamus, Eleventh Circuit Appeal No. 94-9207, Exhs. I-M. In addition, Kmart moved for reconsideration of Judge Carnes' dismissal order, also based on its "law of the case" argument.[6] *Id.* Exh. N.

Every one of the district judges presiding over former *Grayson* plaintiffs rejected Kmart's "law of the case" theory and allowed those plaintiffs, in one way or another, to discontinue prosecution of their individual suits and join in the *Helton* class action. Judge Schlesinger of the Middle District of Florida, Jacksonville Division, transferred former *Grayson* plaintiff Kenneth Bell's case for consolidation with *Helton. Id.* Exh. O. Judge G. Kendall Sharp of the United States District Court for the Northern District of Florida, Orlando Division, stayed the case of former *Grayson* plaintiff David Navickas. *Id.* Exh. P. Judge Elizabeth A. Kovachevich of the United States District Court for the Northern District of Florida, Tampa Division, transferred the case of former *Grayson* plaintiff James Mixon for consolidation with *Helton.*[7] *Id.* Exh. Q. Judge W. Earl Britt of the United States District Court for the ***9** Eastern District of North Carolina stayed the cases of former *Grayson* plaintiffs James Kondrad and Mitchell Taper. *Id.* Exh. R.

After Judge Schlesinger transferred plaintiff Bell's case for consolidation with *Helton,* Kmart asked Judge Shoob to re-transfer the case back to Judge Schlesinger, again based on its "law of the case" theory. *Id.* Exh. S. Judge Shoob denied Kmart's motion, expressly rejecting Kmart's "law of the case " argument.[8] Kmart petitioned for a writ of mandamus on the issue and this Court denied the petition. Order of November 18, 1994 in In Re: Kmart Corporation, No. 94-9207.

Judge Carnes also rejected Kmart's "law of the case" argument. Following an in-chambers hearing, she declined to reverse her decision to dismiss the six Georgia *Grayson* cases so that they could litigate collectively in *Helton.* Judge Carnes did, however, modify her previous ruling so that the dismissal without prejudice would be unconditional. G-173.

Judges Shoob, Carnes, Britt, Schlesinger, Sharp, and Kovachevich restored order to what had become an uncontrolled litigation binge. Kmart has been conducting a textbook demonstration of "hardball" litigation by a party with essentially unlimited resources facing an opponent with very limited resources. It has fought everything and conceded nothing. By the fall of 1994, Kmart had filed more than 105 motions in the combined *Grayson* and *Helton* cases. Plaintiffs Brief in
Opposition to Defendant's Motion for Reconsideration or Clarification of August 23, 1994 Order and Alternative Motion for Interlocutory Appeal in *Grayson* (G-170) at 1, n.1 & Exh. A.[9]

***10** The *Grayson* severance order played into Kmart's hand. The order itself immediately required the making of some 52,000 photocopies, at a cost of more than four thousand dollars. G-170, Exh. A. A case that Kmart was already litigating in a "scorched earth" manner essentially grew in burdensomeness by a factor of eleven. In each case, Kmart refiled its summary judgment motions, followed by the inevitable motions to strike virtually all of the evidence the plaintiffs offered in opposition to the summary judgment motions. The evidence Kmart sought to strike was, of course, identical in all eleven cases. *Compare,* e.g., G-151 *with* A-147.[10] The plaintiffs were forced to file new opposition papers in each of the eleven cases. The plaintiffs had to obtain local counsel and comply with the myriad of local rules governing motions, briefs, and other matters in each of the

district courts to which various plaintiffs had been exiled-even though the substance of the plaintiffs' positions had not changed at all.

Despite the unanimous rulings of six federal judges that the *Grayson* plaintiffs may properly join in the *Helton* class, Kmart's hunger for severance, and the endless litigation that severance brings, is undiminished. Kmart has filed three appeals,[11] two petitions for interlocutory review, and one petition for a writ of mandamus. Those appeals and petitions that have not already been dismissed have been consolidated in the present case.

2. *Statement of Facts*

We ask the Court to review the following fact statement with four considerations in mind. First, the record contains a dramatic and substantial body of evidence that Kmart had a plan to eliminate older ***11** Store Managers in Kmart's Southern region. Second, each plaintiff will rely on this body of evidence to argue that his demotion was part of the discriminatory plan and hence motivated by age. Third, the hundreds of factual and legal issues arising from this body of evidence are exactly the same in each plaintiffs case. Fourth, it would be logistically and financially impossible for the plaintiffs to present this evidence effectively in individual cases, if they were forced to do so.

These considerations go to the essential dispute in this appeal. They demonstrate why this case should be litigated collectively under 29 U.S.C. § 216(b), and why Kmart has fought to break the case into as many small pieces as possible.

A. *Formulation of the Discriminatory Policy: Chairman Joseph Antonini's "New Image" for Kmart Management*

In 1987, Joseph Antonini became President, Chief Executive Officer, and Chairman of Kmart. Deposition of Joseph Antonini at 6-7, Appendix to Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment in *Helton* (H-104), Exh. 4. These assignments gave Antonini the authority to "set the strategies" for Kmart. *Id.* at 13. Under Antonini's direction, Kmart began a program of store restructuring and modernization that Kmart termed the "Renewal Program." *Id.* at 11. The purpose of Kmart's Renewal Program has been to create a "new image" for Kmart. *Id.* at 14-16, 22.

Part of the "new image" Antonini wanted for its stores was youthful Store Managers. On September 12, 1990, Antonini spoke at the unveiling of the new Kmart logo at a newly-renovated store in Oak Park, Michigan. After unveiling the logo, Antonini began enumerating what he considered to be Kmart's various accomplishments. He listed the company's "quality merchandise"; "sharp everyday pricing"; "state-of-the-art shopping environment"; "bold displays"; and "color decor." To climax this list of company achievements, he proclaimed:

And ladies and gentlemen, in addition to all of this that you have heard, we are even more blessed with an officer group whose average age is slightly under 50 years; a ***12** middle management group, our middle management team, many of them are here today, whose average age is 40. All dedicated, and committed, to our strategies for the 90's.

Kmart broadcast Antonini's speech over the company's satellite video network. *Id.* at 30-31. Kmart uses that network for communicating directly to all of Kmart stores. *Id.* at 31.

On October 10, 1989, Antonini gave a public press briefing in which he listed the youth of Kmart's management "team" in a list of company strengths. Antonini said:

In addition, K Mart has one of the youngest and most aggressive management teams in retailing today. The average age of the 32-person corporate officer group is less than 50 years old with an average retail experience exceeding 22 years. Our store managers average 15 years service.

Id. at 35-36 & Exh. 7.

Discussing his Oak Park comments at his deposition, Antonini admitted (perhaps unwittingly) to his enthusiasm for younger managers. He claimed that he was not interested in their youthful image, but in their "longevity":

[T]he team that I was referring to that .... was under fifty-two years old, or whatever the age was, not only were they experienced but also *had a long time to go* from the standpoint of completing the job we had to do.... [W]hat I liked about, had a lot of experience and *had a lot of longevity left* ... meaning a long time of experience and *a long time to go as far as completing their time as far as working with Kmart's concerned* .... It had nothing to do with anything else and that's why I'm confused with what you're getting at.... You talk about longevity. Yes, *they had a long time left to help me finish the program* and that's the reason why I commented on it ....

Id. at 38-40 (emphasis added).[12]

***13** B. *Execution of the Policy: Statements and Actions at National Level*

Antonini's subordinates perceived his desire for younger managers and promptly began making plans to carry out his wishes. Among the first to discuss these plans with persons who would become witnesses for the plaintiffs was Don Keeble, Kmart's director of store operations nationwide. In 1988, Keeble had a series of meetings with witnesses David Marzano and Christopher Powers. In one meeting, Keeble told Powers that "Wal-Mart had a much younger image that was appealing and that Kmart was also pursuing this type of image." Affidavit of Christopher M. Powers, H-104, Exh. 3. Keeble added that Kmart's "*problem was that Kmart had these older managers who were accustomed to the old way of doing things. He said he didn't want to re-educate these people because they still wouldn't fit into the new image that he and Mr. Antonini wanted.*" *Id.*

In the spring of 1988, Keeble told Marzano that "Kmart was promoting a younger image in management, including store management." Keeble said, "Kmart's going to go with a younger image." Affidavit of David Marzano ¶ 4 (H-104, Exh. 1.). Later that year, Keeble told Marzano that "Kmart wanted to change its image by bringing in younger store managers." *Id.* ¶ 5. In another meeting, Keeble, discussing the company's long-term Store Managers, stated that "Kmart had a lot of 'old wood' that was really 'dead wood.'" *Id.* ¶ 6.

C. *Execution of the Policy in Kmart's Southern Region*

Kmart divides the United States into geographical areas that it calls "Regions." Prior to a reorganization that took place in 1990, Kmart divided the United States into five Regions. In the reorganization, Kmart consolidated its five Regions into three larger Regions. The company appointed John Valenti as Regional Vice President of the Southern Region. Valenti is known throughout Kmart as "Dr. Death." Valenti Deposition at 117-18 (H-104, Exh. 28). Valenti's Southern Region was divided into 6 subregions (officially also called "regions "), each of which was presided over by a Regional ***14** Manager. Each such "region" was in turn divided into districts, each of which had its own District Manager. A district contained some 10-12 stores.

A little more than a year before becoming Southern Region Vice President, Valenti had described Kmart's "older Store Managers" as "the trouble with Kmart " and confided that the company had a plan to eliminate them. In a meeting in late 1988 or early 1989, Valenti told David Marzano:

That's the trouble with Kmart. It's these older store managers, but we are planning to do something about it.

Supplemental Affidavit of David C. Marzano ¶ 6 (H-104, Exh. 2).

Valenti was asked to take over the enlarged Southern Region by Tom Watkins, Kmart's Senior Vice President of Store Operations. Valenti reported to Watkins for the next three years. Valenti Deposition at 27, 37 (H-104, Exh. 28).

In early 1990, Watkins instructed Robert McAllister (who preceded Valenti as Southern Regional Vice President and was then in his last few weeks in that position) to prepare a chart listing all managers in Kmart's Southern Region who had been rated "Needs Improvement" for 1989. Watkins directed McAllister to report the age and pay of each such manager, as well as what action the company had taken or was planning to take regarding the manager. At his deposition, McAllister could identify no

legitimate reason why Watkins would need to know these managers' ages as he monitored their treatment. Deposition of Robert McAllister at 61-63 & Exh. 2 (H-104, Exh. 26).

In March of 1990, McAllister sent Watkins a memorandum with the chart he had called for. In McAllister's chart, every "Below Expectations" manager under the age of 39 was, without any explanation, scheduled to be re-appraised in the near future. Managers around the age 40 were either to be demoted or, if an excuse was given, to be re-evaluated. Virtually all the managers over the age of 45 were "slated for demotion." *Id.* at 61-63 & Exh. 2.

Effective in fiscal year 1991 (the first following John Valenti's installation as Vice President of the Southern Region), Kmart began including in each Regional Manager's annual profit plan the pay of ***15** all the Store Managers in his area. Bontekoe Deposition at 60-65 (H-104, Exh. 22). Since senior Store Managers were paid higher salaries, this change penalized Regional Managers with older Store Managers in their areas, and gave the Regional Managers an incentive to eliminate the older Store Managers.

John Valenti's installation as Regional Vice President of the Southern Region was accompanied by an avalanche of Store Manager demotions and resignations. From 1990 through 1992, Kmart demoted 151 Southern Region Store Managers and approximately 76 additional Store Managers resigned. Reconsideration Brief (H-144), Exh. A. Expert statistical analysis[13] of the Valenti purge shows that Store Managers age 40 or older were dramatically more likely to be demoted than those under 40. The disparity between the actual and expected number of demoted older Store Managers, expressed in units of standard deviation, ranges from 3.06 to 3.48 standard deviations. Affidavit of Leonard Cupingood ¶¶ 8-11, (H-104, Exh. 5). Had these demotions and resignations not occurred, 74.2 percent of the Store Managers in the same region would have been 40 or older by the end of 1992. As a result of the demotions and resignations, that percentage was held to 57.1%. *Id.* ¶ 16.[14]

***16** The record contains much other evidence of the Valenti purge. One witness, for example, quotes a 1991 statement by a Southern Region District Manager that "Kmart is getting rid of all older, higher paid managers and district managers." Affidavit of Curtis Williams, identifying Plaintiff Curtis William's Response to Kmart First Interrogatory No. 1 in *Williams v. Kmart* (H-104, Exh. 7).

D. *Common Evidence of Pretext: Proof of Good Performance Before the Purge*

At the "pretext" stage of their proof, the plaintiffs will also rely largely on collective evidence. An overview of the plaintiffs' performance histories shows just how improbable Kmart's position is. Every one of the *Grayson* and *Helton* plaintiffs had been receiving "Commendable" or "Competent" annual evaluations for years up until the Valenti purge. According to Kmart, every plaintiff suddenly became incompetent. For its defense in any case to seem plausible, Kmart must isolate the factfinder from the facts of all the other cases:

	Before Valenti Purge				After Valenti Purge	
Name	1986	1987	1988	1989	1990	1991
Arrington	Commendable	Commendable	Competent	Competent	Needs Improvement	
BeLl	Competent	Competent	Competent	Competent	Needs Improvement	
Bralcy	Competent	Competent	Competent	Competent	Unsatisfactory	Needs Improvement

Grayson	Commendable	Commendable	Commendable	Commendable	Needs Improvement	
Helton	Commendable	Commendable	Commendable	Competent	Needs Improvement	Needs Improvement
Kempton	Competent	Competent	Competent	Competent	Needs Improvement	Needs Improvement
Kondrad	Competent	Competent	Competent	Competent	Below Expectations	
Mixon	Competent	Competent	Competent	Competent	Below Expectations	
Navickas	Commendable	Commendable	Commendable	Commendable	Needs Improvement	
Payne	Commendable	Commendable	Commendable	Competent	Needs Improvement	
Sallee	Competent	Competent	Competent	Competent	Needs Improvement	
Steadman	Competent	Competent	Competent	Competent	Needs Improvement	
Taper	Competent	Competent	Competent	Competent	Unsatisfactory	
Taylor	Competent	Competent	Commendable	Competent	Meets Expectations	Needs Improvement
Thompson	Competent	Competent	Competent	Competent	Needs Improvement	Unsatisfactory
Williams	Competent	Commendable	Commendable	Commendable	Unsatisfactory	

***18** E. *Common Evidence of Pretext: Kmart's Technigue of "Building a Case"*

Proof of Kmart's "case building" or "file building" technique is also central to this case: it shows that the criticisms amassed in each plaintiffs file shortly before his demotion could not have motivated the decision to demote him because they were generated *after* that decision had been made. It also suggests that demotions which appeared on paper to have been proposed

by the Store Managers' immediate superiors (the District Managers) were in fact instigated by Valenti, and that the demotion process was centrally planned, monitored, and coordinated. This critical evidence of case building is the same for every plaintiff.

John Valenti established a reputation for eliminating Store Managers by building cases against them. During the summer of 1988, witness David Marzano met with Valenti to discuss a program to centralize the hiring of cleaning crews in Kmart stores. Immediately before the meeting, one of Valenti's Regional Managers, Michael Bontekoe, told Marzano that Valenti was known as "Dr. Death" because he would "build a file" on any manager with whom he could not "get his way." During the meeting, Valenti promised to "start to build a file" on any manager who would not go along with the program. Marzano Affidavit ¶ 8, (H-104, Exh. 1).

Mr. Valenti built cases against targeted Store Managers by having his District Managers and Loss Prevention District Managers inspect and criticize their stores. In 1992, Valenti reprimanded witness Charles Wester, a Southern Region Loss Prevention District Manager, "for not having done enough to build cases against older managers." Deposition of Charles Wester at 264 & Exh. 11 (H-104, Exh. 49). Valenti told Wester to "go out there and be tougher on ... the older Store Managers ...." *Id.* at 264-65.

When Kmart wished to target an older Store Manager, it would relentlessly criticize him, complaining about matters that were routinely overlooked for younger managers. This is a pattern that occurred over and over again in the Southern Region. Wester Affidavit ¶ 5 (H-104, Exh. 15).

***19** Kmart would also build a case against a targeted manager by assigning the manager goals that could not be achieved. When the manager failed to meet them, Kmart would inundate him with criticism. Willie Sands Affidavit ¶ 4 (H-104, Exh. 42).

Regional Vice Presidents Valenti and McAllister, and Regional Managers Clifton, Lynch, and Bontekoe all testified under oath that Kmart had never had a practice known as "building a case," and that they had never given or heard of instructions to "build a case" against a manager. Valenti Deposition at 94-96; McAllister Deposition at 53-54; Clifton Deposition at 101-04; Lynch Deposition at 73-75; Bontekoe Deposition at 80-82 (H-104, Exhs. 28, 26, 24, 25, 22).

This testimony by all of Kmart's lead witnesses was demonstrably false: case building was established procedure at Kmart. Indeed, in 1985, McAllister and Clifton had jointly written a confidential memorandum to all of the District Managers in Kmart's Southern Region, stating, in pertinent part:

If not already you should begin *building a case to terminate* these [Resident Assistant Managers].

McAllister Deposition Exh. 5 (H-104, Exh. 26)(emphasis added).

Copies of the McAllister/Clifton "build a case" memorandum were distributed to top Kmart officials in the company's Troy, Michigan headquarters. The list of recipients included the Senior Vice President of Store Operations, the Vice President of Human Resources, and the Director of Employee Relations. Neither they, nor any of the 30 to 40 Southern Region District Managers who received the memorandum ever suggested to McAllister that the instruction to "begin building a case to terminate" certain targeted managers strayed from accepted company practice. McAllister Deposition at 115-16 (H-104, Exh. 26).

Other evidence shows case building to have been an established company technique for eliminating pre-selected victims. In the late 1980's, Kmart summoned thirty District Managers to a meeting at a motel near Kmart's Troy, Michigan headquarters. In the meeting, District Managers were ***20** handed small slips of paper containing the names of management personnel whom the company had already decided were to be terminated through the process of building a case. The District Managers were told to inspect the managers' stores and write up evaluations rating the managers "unsatisfactory"; put the managers on sixty-days' probation; return to the stores in thirty days and tell the managers that they "had failed to show satisfactory progress"; return in another thirty days and rate the managers "unsatisfactory" again; and terminate the managers. The managers were not to be told that the outcome of these inspections was already fixed. Sworn Statement of Earnest L. Stewart at 6-18 (H-104, Exh. 17).

Further evidence strongly suggests the company was pre-selecting its victims in the Valenti purge. In approximately April of 1990, Southern Region Loss Prevention District Managers Bruce Nilsson and Ralph Anderson found a typed list of Southern Region Store Managers slated for demotion. The list included the age of each Store Manager. Nilsson Deposition at 49-54 (H-104, Exh. 27).

F. *Additional Common Evidence of Pretext*

Because the criticisms that Kmart built up in each plaintiffs personnel file all tend to echo the same themes-allegedly insufficient profitability, excessive store inventory shrinkage, poor store "appearance," and vague "leadership" problems-the plaintiffs will also present a common core of evidence that these criticisms were pretextual. Every judge and jury that decides Store Manager demotion cases (be it one case or twenty) will have to weigh this same evidence and, in the process, become experts on Kmart accounting practices, inventory techniques, personnel policies, and most other aspects of store management.

"Invisible Waste" is a term meaning unexplained shrinkage in a store's inventory. A Kmart store's inventory is calculated as a dollar figure equal to the total of the selling prices of all the items in the store. Each store is inventoried by an outside service once a year, and a dollar value of the total inventory is computed. To calculate a store's invisible waste for a particular year, Kmart takes the ***21** dollar value of the store's inventory at the start of a year and adjusts that figure by: (a) adding the dollar value of all inventory that Kmart's records show were delivered to the store, (b) subtracting the store's sales during the year, and (c) factoring in any changes to the selling prices of the merchandise while it was in the store. This process produces an inventory figure that the company would expect to find when the store is inventoried at the end of the year. The amount by which the actual inventory total falls below the expected figure is invisible waste. In general, invisible waste has two sources. The first is theft, consisting principally of shoplifting and employee theft, the second is bookkeeping errors by store personnel. Lynch Deposition at 90. Although Kmart criticized the plaintiffs for invisible waste in their stores, invisible waste is in fact not controllable by a Store Manager. Nilsson Deposition at 5870; Clifton Deposition at 180 (H-104, Exh. 27, 24).

Kmart regularly blamed older Store Managers for invisible waste in their stores, even though it was simultaneously denying requests to supply these stores with equipment or additional personnel to reduce waste. Wester Affidavit ¶ 14 (H-104, Exh. 15).

Although Kmart used store profitability as an excuse to demote older Store Managers, store profitability is determined by factors outside of the individual store manager's control. These include the economy, demographics, store location, the physical layout of the store, and the store's nearby competition. Antonini Deposition at 24-26 (H-104, Exh. 4). According to Valenti, a Kmart store's layout can be more important to profitability than the quality of the merchandise. Valenti Deposition at 61-62 (H-104, Exh. 28).

There is a virtually unlimited number of problems for which Kmart can blame a Store Manager. Kmart can blame a Store Manager for the unsatisfactory performance of any of the managers or employees in the store; any aspect of the store's operation; any personnel problems; and any aspect of the store's financial results. Bontekoe Deposition at 29-42, 45; Clifton Deposition at 41-42; Lynch ***22** Deposition at 146, 163. (H-104, Exhs. 22, 24, 25). Every Kmart store has "some kind of security problem." Nilsson Deposition at 29-30 (H-104, Exh. 27).

Kmart did not base its decisions to demote the plaintiffs upon any objectively verifiable criteria. Valenti Deposition at 115. Although Kmart criticized Store Managers for failure to meet their store's sales and profit "goals," these goals were not based on any objective formula. McAllister Deposition at 44 (H-104, Exh. 26). Kmart's annual evaluations of the Store Managers were not controlled by objectively verifiable criteria. Clifton Deposition at 121-22; Lynch Deposition at 95; Bontekoe Deposition at 114. Kmart has no objectively verifiable manner for evaluating the appearance or condition of a Kmart store. Nilsson Deposition at 109; Lynch Deposition at 158-59; Bontekoe Deposition at 72-73 (H-104, Exhs. 24, 25, 22).

At his deposition, Valenti testified that any Store Manager whose store had invisible waste above one and one-half percent in 1990 was appraised "Needs Improvement." Valenti Deposition at 104 (H104, Exh. 28). This testimony was false. In the districts of the *Grason* plaintiffs, nine Store Managers under the age of 40 had invisible waste above one and one-half percent for 1990, but received evaluations higher than "Needs Improvement." Hart Affidavit ¶ 8 (H-104, Exh. 40).

Kmart did not demote numerous younger Store Managers in the Southern Region who had at least two consecutive years of store operating losses, high invisible waste, or both. *Id.* ¶¶ 5-7. Of the 22 Store Managers in the plaintiffs' districts who (1) were under the age of 40 and (2) received "Needs Improvement" or "Unsatisfactory" evaluations for 1990, *not a single one* was demoted in 1991. *Id.* ¶ 9.

3. *Standard of Review*

The principal rulings by Judges Shoob and Carnes at issue in this appeal were:

a. The "certification" of a opt-in "class" under 29 U.S.C. § 216(b) in *Helton;*

***23** b. The dismissal without prejudice, under Fed. R.Civ.P. 41 of the individual *Grayson* actions so that the plaintiffs could opt-in to the § 216(b) class; and

All of these issues should be reviewed under an "abuse of discretion " standard. Two issues should be reviewed *de novo.* These are:

a. Whether Judge Shoob correctly defined the temporal scope of the opt-in class by applying the proper limitations principles; and

b. Whether the *Grayson* plaintiffs were all barred from opting in to the *Helton* class under the "law of the case" doctrine.

The cross-appeal challenges the correctness of Judge Carnes' severance ruling in *Grayson.* Joinder determinations under Rule 20(a) are normally reviewed under an "abuse of discretion" standard. Two of Judge Carnes' determinations made in the course of that ruling, however, raise legal issues that should be reviewed de *novo.* These are:

a. Whether discrimination plaintiffs seeking joinder under Rule 20(a) must show they were all subject to a "discreet program or procedure" employed by the defendant?

b. Whether a Rule 20(a) joinder determination may be made without taking into account the "similarly situated" standard of 29 U.S.C. § 216(b)?

SUMMARY OF THE ARGUMENT

Kmart has defended these cases with a "divide and conquer" strategy. Kmart has battled to so magnify the measure of federal judicial resources committed to the case because that would advance Kmart's litigation strategy. Kmart wants numerous federal judges to conduct dozens of trials because that would help Kmart argue for exclusion of key pattern and practice evidence in each individual case, ***24** and because holding a large number of trials would cripple each plaintiffs ability to prosecute his claims.

In fact, these cases are highly suited for consolidation in a single action. Through the combined efforts of six United States District Judges, these cases now stand in their correct procedural posture: as a single "opt-in class action " under 29 U.S.C. § 216(b). The key rulings challenged in this appeal are both discretionary and correct, and they should not be disturbed.

Judge Shoob's decision to allow the *Helton* plaintiffs to proceed collectively under 29 U.S.C. § 216(b) lay fully within his discretion. No appellate court has ever reversed a district court for "certifying" a § 216 class of "similarly situated" ADEA plaintiffs. Federal policy strongly favors collective age discrimination litigation: "Congress has stated its policy that ADEA plaintiffs should have the opportunity to proceed collectively." ?? 493 U.S. 165, 170 (1989).

This case is ideally suited for collective litigation. All of the plaintiffs were demoted in a purge of store managers occurring within Kmart's Southern Region in a defined period of time. All of the plaintiffs will rely on the same common core of evidence

to establish that their demotions were based on age. The cases contain hundreds of identical legal and factual issues. If the plaintiffs were forced to proceed individually, it would be impossible for them to present their evidence of discriminatory motive or pretext effectively. Both logistically and financially, Kmart would gain an overwhelming and unfair advantage.

Judge Shoob also acted within his discretion in permitting the addition of an opt-in class at the time that he did. Kmart has been stalling this litigation for years, and has discovered an interest in "speedy" litigation solely as a pretext to challenge § 216(b) treatment. The plaintiffs filed their § 216(b) motion within a reasonable time after (1) obtaining critical additional evidence of a centralized plan of discrimination and (2) attempting to settle the individual claims (which necessarily required postponing ***25** the § 216(b) motion). Kmart was not prejudiced by the timing of the motion. Judge Shoob was not required to hold a full evidentiary hearing before allowing the § 216(b) class.

Judge Shoob correctly defined the temporal scope of the class. All of the existing *Helton* and *Grayson* plaintiffs are entitled to opt in to the *Helton* class free of any timeliness issues, since they filed timely charges and complaints. Judge Shoob correctly ruled that opt-in plaintiffs who had not filed their own EEOC charges could "piggyback" on the charge of Mercer David Grayson, filed June 14, 1991. Judge Shoob also correctly determined that the old 2- or 3- year statute of limitations eliminated by the 1991 Civil Rights Act either was (1) inapplicable to the *Helton* case because the complaint was filed in 1992, or (2) satisfied for all plaintiffs because the limitations period was tolled by the filing of the *Helton* complaint.

Judge Carnes acted within her discretion in dismissing without prejudice the cases of the individual *Grayson* plaintiffs so that they could continue their suits in the context of the *Helton* class. In substance, this was a transfer order. Both the decision to allow a Rule 41(a)(2) dismissal and the decision whether to attach conditions (such as the payment of costs upon refiling) lie within the district court's discretion. No circuit requires that defense costs be imposed as a condition of dismissal. The dismissal did not prejudice Kmart.

Judge Carnes' previous severance ruling in *Grayson* was not "law of the case " and did not bar the *Grayson* plaintiffs from subsequently opting into the *Helton* class. The six district judges who unanimously rejected Kmart's "law of the case" theory ruled correctly.

Judge Carnes' severance order in *Grayson* should be reversed. The reasoning in the severance order would outlaw virtually all collective discrimination litigation. Judge Cames failed to consider the policies underlying Rule 20, Fed. R.Civ.P., as well as § 216(b) and the *Sperling* decision.

***26** *ARGUMENT AND CITATIONS OF AUTHORITY*

I. *JUDGE SHOOB'S "OPT-IN CLASS CERTIFICATION" ORDER IN HELTON SHOULD NOT BE DISTURBED*

A. *Judge Shoob Acted Within His Discretion and Correctly Applied the Principles of 29 U.S.C. § 216(b).*

1. *This Case is Ideally Suited for Collective Litigation under 29 U.S.C. § 216(b).*

The ADEA incorporates the procedures of the Fair Labor Standards Act for combining claims of similarly situated plaintiffs. 29 U.S.C. § 216(b) allows for an "opt-in class action" of similarly situated plaintiffs:

> An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer ... in any Federal or State court of competent jurisdiction by any one or more employees for and on behalf of himself or themselves and other employees similarly situated.

In *Hoffman-La Roche. Inc. v. Sperling,* 493 U.S. 165 (1989), the Supreme Court emphasized Congress' intent to allow ADEA plaintiffs to proceed collectively to gain the advantage of lower individual costs to vindicate rights by the pooling of resources:

The ADEA, through incorporation of §216(b), expressly authorizes employees to bring collective age discrimination actions "on behalf of...themselves and other employees similarly situated." 29 U.S.C. §216(b) (1982 ed) [29 USCS §216(b)]. *Congress has stated its policy that ADEA plaintiffs should have the opportunity to proceed collectively. A collective action allows age discrimination plaintiffs the advantage of lower individual costs to vindicate rights by the pooling of resources.* The judicial system benefits by efficient resolution in one proceeding of common issues of law and fact arising from the same alleged discriminatory activity.

493 U.S. at 170 (emphasis added).

To establish that plaintiffs are "similarly situated," within the meaning of 29 U.S.C. § 216(b), the plaintiffs must contend that they were all victims of a "single policy or plan":

> In general, courts appear to require nothing more than substantial allegations that the putative class members were together the victims of a single decision, policy or plan infected by age discrimination.

***27** *Sperling,* 118 F.R.D. 392 at 407; *Frank v. Capital Cities Communications. Inc.,* 33 Empl. Prac. Dec. (CCH) ¶ 34,285, 33,084-85 (S.D.N.Y. 1983); *Owens v. Bethlehem Mines Corp.,* 108 F.R.D. 207, 208-09 (S.D.W.Va. 1985); *Allen v. Marshall Field & Co.,* 93 F.R.D. 438 (N.D. Ill. 1982) (allegations of campaign of discrimination sufficient).

Plaintiffs have been held to be "similarly situated" even though they are geographically distant from one another, *Lockhart v. Westinghouse Credit Corporation,* 879 F.2d 43 (3d Cir. 1989); *Heagney v. European American Bank,* 122 F.R.D. 125, 127 (E.D.N.Y. 1988), or worked at different corporate levels, *Frank v. Capital Cities Communications. Inc.,* 33 Empl Prac. Dec. (CCH) ¶ 34,285 (S.D.N.Y. 1983). Employees have been held to be "similarly situated " where they allege similar claims or were subjected to similar employment practices. *Palmer v. Readers' Digest Association,* 42 F.E.P. 212, 213 (S.D.N.Y. 1986); *Rojas v. Seal Produce, Inc.,* 82 F.R.D. 613, 616 (S.D. Tex. 1979)(Fair Labor Standards Act).

This case is ideally suited for § 216(b) treatment. First, all of the cases share a common factual underpinning. The plaintiffs:
- all worked for the same employer (Kmart);

- all held the same job title (Store Manager);

- all worked in the same region (Kmart's Southern Region);

- all worked under the same regional Vice President (John Valenti); and

- all were eliminated in the Valenti purge of one-third of the Region's Store Managers; and

- all were subjected to the same employment decision (demotion);

Second-and critically-*all of the plaintiffs rely on the same substantial body of evidence that Kmart was engaged in a plan to eliminate older Southern Region Store Managers.* While each plaintiff ***28** will certainly present evidence about his individual job performance and demotion, the central evidence of discriminatory motive will be collective.

Collective litigation is the *only* way that the plaintiffs can realistically litigate this case. Each plaintiff must be able to introduce all of the evidence described in our statement of facts to establish a pattern or practice of discrimination. For example, each would present the testimony of witness David Marzano that Regional Vice President John Valenti said, shortly before taking over the Southern Region,

> That's the trouble with Kmart. It's these older store managers, but we are planning to do something about it.

Supplemental Affidavit of David C. Marzano (H-104, Exh. 2) ¶ 6. Each plaintiff would need Marzano to testify as to Valenti's offers to build cases against noncooperative Store Managers. Each would need witness Christopher Powers to testify to the statements of Kmart's national director of store operations, Don Keeble that Kmart's "problem was that Kmart had these older managers who were accustomed to the old way of doing things. He said he didn't want to re-educate these people because they still wouldn't fit into the new image that he and Mr. Antonini wanted." Affidavit of Christopher M. Powers (H-104, Exh. 3). Each would need the testimony of the plaintiff's statistical expert, Leonard Cupingood. Each would present the testimony of many other witnesses, all combining to show a pattern or practice of age discrimination against older managers.

The plaintiffs must not only present this testimony, but must do so in a manner that has a realistic chance of persuading a jury. This means that the plaintiffs must present the testimony of *live* witnesses. If forced to proceed in individual cases and trials, the plaintiffs would be stymied logistically because witnesses such as Messrs. Marzano and Powers are private citizens who cannot put their lives and professions aside for years and do nothing but testify in individual Kmart Store Manager trials. The plaintiffs would be stymied financially because of the staggering cost of trying dozens of what would ***29** largely be the same case over and over. The cost of presenting a single expert witness, for example, would balloon from thousands of dollars to hundreds of thousands of dollars.

As a practical matter, the result of depriving the plaintiffs of § 216(b) treatment would be to create a lottery, in which perhaps one or two plaintiffs could litigate their cases with some live witnesses, while the rest would have to rely on "talking heads"-images of videotaped witnesses, electronically reproduced in courtroom television sets. We respectfully submit Judge Carnes overlooked a fundamental reality of jury trial litigation when she ruled, in her severance order, that "there are less costly alternatives to presenting live testimony in each trial," and told the parties to explore "mutually agreeable alternative means for presenting redundant testimony in the various cases." 449 F. Supp. at 790. Presenting a case to a jury by videotape, which is presumably what Judge Carnes meant, might be "less costly," but it would be utterly ineffective; no litigant can realistically expect to persuade a jury using videotaped testimony for the heart of his or her case. Of course, with annual revenues of forty billion dollars, Antonini deposition at 7, Kmart can afford to bring an unlimited number of live witnesses to an unlimited number of trials. Kmart would have the enormous advantage at each jury trial of presenting live witnesses against the videotaped testimony of a plaintiffs key witnesses.

This very point was recently made by a United States Magistrate Judge conducting a status conference in the case of severed *Grayson* plaintiff David Navickas. At the very mention of videotaped testimony, the Magistrate Judge spontaneously pointed out the ineffectiveness of such testimony:

Mr. Ford: Your Honor, one question about the mechanics of trial itself. Does the Court have any standing policy about the use of video depositions?

The Court: They're allowed to be used. I have some views as to how effective they are if they last more than about twenty five minutes.

Mr. Ford: I need to tell you because it's of a District Court's order here in Atlanta we may have to use video depositions by necessity.

The Court: Well, I just finished a three week trial where they had one witness testify for about eleven hours by videotape and I'm convinced the jury didn't get more than twenty five minutes worth of information out of it so I - if you're ***30** going to do

that I simply urge you - I mean you can use them, but I urge you to prune it down to just the parts that are the pithiest and the best for you for both sides because it's just - jurors fall asleep even faster than listening to them being read. That's just my experience.

See Transcript of Status Conference before United States Magistrate Judge David A. Baker in [*Gravso* plaintiff] *David Navickas v. K Mart Corporation,* Case No. 94-353-CIV-ORL-18, United States District Court for the Middle District of Florida, at 34.

Separate trials would also inevitably narrow the range of evidence that could be introduced at trial. Even if it were possible to present the entire story of the Valenti purge at every individual trial, a district judge is unlikely to allow that to occur, simply because of time constraints. But in order to judge any individual demotion, the jury must be able to see it in context; to see the "big picture." Individual trials will make that impossible. Kmart will effectively narrow the evidentiary record in any one case so that all the jury sees is the evidence Kmart created in that plaintiff's personnel file.

These concerns are concisely articulated in *Glass v. IDS Financial Services. Inc.*, 778 F. Supp. 1029, 1081 (D. Minn. 1991). The court held,

> The pattern and practice evidence should be presented on a class wide basis to protect the due process rights of the plaintiffs. The individual plaintiffs are less able to bear the costs of separate trials because they have fewer resources than [the defendant employer] and a class action will give them a fair and full opportunity to adjudicate their claims.

778 F. Supp. at 1081.

2. *This Case is Also Suited for § 216(b) Treatment Because the Plaintiffs Have Alleged, and Have Substantial Evidence to Prove, A "Pattern and Practice " of Discrimination.* Kmart sees this case not in terms of the plaintiffs' evidence of a common, company-wide discriminatory policy, but in terms of the company's defenses to that claim. This approach misconceives the issue. The question is whether the class has common claims, not whether the ***31** employer may have defenses - even ones specific to particular individuals - to the claims.[15] See *Glass v. IDS Financial Services. Inc.,* 778 F. Supp 1029, 1081 (D. Minn. 1991) (rejecting argument that plaintiffs were not similarly situated because of "various factual distinctions, including [defendant's] individualized defenses," and permitting § 16(b) suit based on "plaintiffs' allegations of a pattern or practice of age discrimination"); *Selzer v. Board of Education,* 112 F.R.D. 176, 178 & n.1 (S.D.N.Y. 1986) (rejecting defendant's argument that class should not be certified because each decision was taken under a decentralized process and its defenses to each action would be unique).[16]

***32** It is no doubt true that Kmart would have individualized defenses to the plaintiffs' claims here. Even if the plaintiffs showed that there was a pattern of discrimination, Kmart could still defeat any individual's claim by showing that he was terminated for non-discriminatory reasons. *See International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 362 (1977) (plaintiffs entitled to presumption that they were victims of discriminatory policy and are entitled to relief); *Franks v. Bowman Transportation Co.,* 424 U.S. 747, 772 (1976); *Baxter v. Savannah Sugar Refining Corp.,* 495 F.2d 437, 444-45 (5th Cir.) (after showing of a pattern of discrimination, employer must show by clear and convincing evidence that individual plaintiff was not victim of the practice), *cert. denied,* 419 U.S. 1933 (1974).

Indeed, the fact that such individualized defenses are almost always available to defendants in pattern-and-practice cases demonstrates the fundamental flaw in Kmart's approach. If they are virtually always present, and if their presence were sufficient to block resort to § 216(b), representative actions would almost never be appropriate, frustrating Congress's clear

intent that they be available to make class-wide age discrimination litigation practical and manageable. *See Hoffman-LaRoche,* 493 U.S. at 170 ("Congress has stated its policy that ADEA plaintiffs should have the opportunity to proceed collectively. A collective action allows age discrimination plaintiffs the advantage of lower individual costs to vindicate rights by the pooling of resources.").

Employers routinely defend group termination cases by arguing that non-discriminatory factors, usually specific to the particular individuals selected for discharge, explain the decisions. But this has not prevented plaintiffs from proceeding with class-wide claims at the initial phase of a pattern-and-practice trial. See *Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43, 52 (3d Cir. 1989) (possibility of individualized defenses does not preclude class-wide treatment of claims under § 216(b), even where plaintiffs were employed at different locations and challenged decisions were made by different managers). This is because, under the mechanism established by the Supreme Court in *Teamsters*, the ***33** defenses enter into the case only at the second stage. Had the district court permitted this case to proceed under that model, the jury would first have decided whether Kmart was guilty of a pattern of terminating older workers. *Teamsters,* 431 U.S. at 336 (issue in pattern-and-practice case is whether "discrimination was the company's standard operating procedure - the regular rather than the unusual practice").

Only *after* a determination had been made as to whether Kmart engaged in a pattern of discrimination would it become necessary to consider the company's explanations for individual employment decisions. If the plaintiffs succeeded in showing that during the Valenti Purge, "discrimination was [Kmart's] standard operating procedure," the burden would be on Kmart to prove that, notwithstanding the class-wide discrimination, age was not a factor in the decision regarding each plaintiff. *Teamsters,* 431 U.S. at 362 (plaintiffs entitled to presumption that they were victims of discriminatory policy and are entitled to relief); *Franks,* 424 U.S. 747, 772 (1976).[17] Kmart seeks to rely upon the very issues which are litigated in the second phase of a pattern-or-practice case as a rationale for omitting the first phase altogether.

The representative action, as envisioned by Congress, renders it unnecessary for each plaintiff to introduce the same evidence of an overarching pattern in his or her own trial, and permits one determination to take the place of dozens, or even hundreds. The question, therefore, is whether the ***34** class has common claims, not whether the employer may have defenses-even ones specific to particular individuals-to those claims. Kmart's explanations for individual decisions should not prevent the plaintiffs from proceeding on a class-wide basis with their claim that Kmart engaged in a pattern of eliminating older workers.

3. *The Grayson Severance Order Was Erroneous and Judge Shoob Should Not Have "Followed" It.*

Kmart challenges Judge Shoob's § 216(b) ruling because Judge Shoob "refused to follow Judge Carnes' [Rule 20 severance] ruling in *Grayson*..." Kmart Brief at 31. Kmart never even discloses that Kmart first sought severance from Judge Shoob (in the first of the two *Helton* severance motions, H-17). Kmart's interest in "comity" applies only to rulings favorable to Kmart.

This aside, the *Grayson* severance order should not have been "followed " because it is incorrect. It overlooks 29 U.S.C. § 216(b) and the Supreme Court's decision in *Hoffman-LaRoche. Inc. v. Sperling,* 493 U.S. 165 (1989). The *Grayson* severance order would "reverse" *Sperling,* rewrite the procedural law of employment discrimination, and outlaw virtually all multi-plaintiff discrimination cases.

The *Grayson* severance order raises an impossible barrier to nearly all multi-plaintiff employment discrimination litigation. Judge Carnes found a "somewhat close question" as to whether the first prong of Rule 20(a) (that of a "claim for relief" arising out of the same transaction, occurrence, or series of transactions or occurrences) was satisfied in *Grayson;* she concluded it was not because the plaintiffs had not:

> directed this Court's attention to any *discreet program or procedure employed by Kmart* that affected each of the plaintiffs in this litigation. Absent some causal link between a common and identifiable wrongful act on the part of the defendant and the adverse action with respect to each plaintiff, the first prong of Rule 20(a) is not satisfied.

849 F. Supp. at 788 (emphasis added).

***35** If this standard were the law in employment discrimination cases, there could be virtually no multi-plaintiff demotion or discharge cases. When employers discriminate, they hardly ever do so using a "discreet program or procedure."[18] Discrimination is illegal and immoral; like other wrongs, when it occurs it is far more likely to happen surreptitiously:

Unless the employer is a latter-day George Washington, employment discrimination is as difficult to prove as who chopped down the cherry tree.... Employers are rarely so cooperative as to include a notation in the personnel file, "fired due to age," or to inform a dismissed employee candidly that he is too old for the job.

Thornbrough v. Columbus and Greenville Railroad, 760 F.2d 633, 638 (5th Cir. 1985); *Warren v. Halstead Industries*, 802 F.2d 746, 753 (4th Cir. 1986) ("Rarely will there be 'eyewitness' testimony with regard to the employer's mental processes."). In this case, the evidence strongly suggests Kmart had a plan to eliminate older Store Managers and carried out the plan by building cases against them; but Kmart was not so brash as to publish its intentions. Multiple plaintiffs will virtually never find a "discreet program or procedure " directly affecting each of them.

Judge Shoob reasoned correctly when he denied Kmart's first severance motion in *Helton.* Judge Shoob acknowledged that intentional discrimination must usually be proved with circumstantial evidence and pointed out that a pattern of behavior itself constitutes an important element of a plaintiffs proof:

> The Court disagrees with defendant's argument that plaintiffs would be unable to prove a pattern and practice case *because* plaintiffs worked in different stores at different regions. Indeed, that the plaintiffs worked in different stores but allegedly were demoted in a similar fashion and within a similar time frame could be evidence of a company-wide policy.

September 30, 1993 Order (H-15) at 4.

***36** Nor did Judge Carnes properly address the second requirement for joinder under Rule 20(a), that cases share a "common question of law or fact." Judge Carnes stated in conclusory fashion that the *Grayson* cases lacked such common issues, but that cannot possibly have been so. These cases share hundreds of identical factual and legal issues. Virtually every fact recounted in the Statement of Facts portion of this brief-and that is merely an overview of the most important facts-is the subject of both factual and legal challenges by Kmart. Kmart has filed numerous lengthy motions to strike in the *Grayson* and *Helton* cases, all challenging exactly the same evidence. *E.g.*, Kmart Motion to Strike Plaintiffs' Irrelevant or Inadmissible Summary Judgment Evidence (H-122). Kmart has asserted a long list of challenges to the admissibility of the testimony of the plaintiffs' expert statistical witness, Leonard Cupingood. *Id.* Since Dr. Cupingood's testimony is identical in each case, the issues raised in Kmart's challenges are identical, as well. Every one of the many discovery and other procedural disputes arising thus far-including, for example, five contested motions involving the Antonini deposition (*e.g.*, H-16, H-21, H-23, H-61, H-67)-has been common to each case. We do not exaggerate to suggest that all 65 pages allotted for this brief could be taken up merely listing common issues of law or fact that have arisen or will arise in the *Grayson* and *Helton* cases. Litigating these cases separately would cause the very same issues to be decided again and again by district judges in dozens of trials. The rulings would inevitably be reviewed in individual appeals to the various circuits included in Kmart's Southern Region. The result would be massive duplication of effort and inconsistent rulings on the same issues.

The *Grayson* severance order overlooked 29 U.S.C. § 216(b) and its mandate that age discrimination suits proceed collectively:

The ADEA, through incorporation of §216(b), expressly authorizes employees to bring collective age discrimination actions "in behalf of...themselves and other employees similarly situated." 29 U.S.C. §216(b) (1982 ed) [29 USCS §216(b)].

Congress has stated its policy that ADEA plaintiffs should have the opportunity to proceed collectively. A collective action allows age discrimination plaintiffs the advantage of lower individual costs to vindicate rights by the pooling of resources. The judicial system benefits by efficient resolution in one proceeding of common issues of law and fact arising from the same alleged discriminatory activity.

***37** *Sperling*, 493 U.S. at 170 (emphasis added).

In *Sperling*, the Supreme Court (1) articulates a clear preference for collective age discrimination litigation; (2) acknowledges the primary importance of the very considerations of efficiency that the *Grayson* severance order rejected; and (3) makes plain that plaintiffs subject to common discriminatory activity raise "common issues of law and fact."[19] The *Grayson* severance order overlooked, and is irreconcilable with, *Sperling.*

The *Grayson* severance order also accepted a number of Kmart's arguments without questioning their logical or factual basis. The order accepted as true Kmart's assertion that a jury would be confused by the evidence submitted by each plaintiff, and that the cumulative impact of this evidence might overwhelm the jury's ability to focus on an individual case. What the order overlooked is that the great majority of the evidence in each plaintiffs case will be the same. All of the plaintiffs' claims rest principally upon the single body of evidence establishing that Kmart had a plan to eliminate older store managers. This evidence would only be presented once, so it could not confuse the jury.

The individual issues in each plaintiffs case are not complicated, and there is no reason to presume the jury could not sort them out, one by one. In the area of criminal law (where due process concerns are at their highest level), juries have been deemed capable of resolving far more complicated disputes. In *United States v. DiNome*, 954 F.2d 839 (2d Cir. 1992), for example, the Second Circuit ***38** affirmed the district court's denial of severance motions in a criminal conspiracy prosecution involving a 78-count indictment, 24 defendants, and evidence of more than ten years of criminal activity presented in a 16-month trial. 954 F.2d at 842. The court emphasized that a large quantity of evidence does not make a case so complex that a jury cannot decide it intelligently, and "sheer speculation" over jury confusion does not justify severance:

There is no support in caselaw or in logic for the proposition that a lengthy trial, a large number and variety of charges, and numerous defendants violate due process without a showing that the issues were actually beyond the jury's competence. No such showing was made in the instant matter. The crimes here may have been large in number and variety, but they were rather ordinary in nature, except in their viciousness. *The evidence could also be understood without difficulty, the alleged complexity stemming more from the abundance of evidence than from the subtlety of the analysis needed to consider it.*

The claim that the jury must have lacked the capacity to understand the instructions given it is thus sheer speculation. As we stated in *Casamento*,

Although the jury had to evaluate a tremendous amount of evidence, the nature of the evidence and the legal concepts involved in the case were not extraordinarily difficult to comprehend, as they might be, for example, in a complex antitrust case involving abstruse economic theories or an employment discrimination case involving technical statistical evidence and formulae.

887 F.2d at 1150. The voluminous body of evidence, the careful instructions of the trial judge regarding the right of each defendant to individualized consideration, the opportunity afforded the jurors to take notes throughout the trial, the outline of the elements of the offenses provided by the judge to the jurors, the numerous requests for readbacks, the length of the deliberations, and the absence of any concrete evidence of unusual juror confusion, reinforce our conclusion that the jury comprehended the case.

954 F.2d at 842-43 (emphasis added). The same can be said of this case. The volume of criticisms that Kmart generated for its targeted managers does not make the case complex. Any complexity in this case would arise from the statistical issues or the concepts of store management-and these issues would be identical regardless of the number of plaintiffs in a case.[20]

***39** The United States Supreme Court has recently reaffirmed that juries are presumptively capable of sifting through complicated facts and making individual determinations. In affirming a district court's refusal to sever a multi-defendant criminal case and force the government to try each defendant separately, the Court emphasized the many procedures available to a district court to assure proper consideration of the evidence:

Even if there were some risk of prejudice, here it is of the type that can be cured with proper instructions, and "juries are presumed to follow their instructions." *Richardson, supra,* 481 U.S., at 211, 107 S.Ct., at 1709. The District Court properly instructed the jury that the Government had "the burden of proving beyond a reasonable doubt" that each defendant committed the crimes with which he or she was charged. Tr. 864. The court then instructed the jury that it must "give separate consideration to each individual defendant and to each separate charge against him. Each defendant is entitled to have his or her case determined from his or her own conduct and from the evidence [that] may be applicable to him or to her." *Id.,* at 865. In addition, the District Court admonished the jury that opening and closing arguments are not evidence and that it should draw no inferences from a defendant's exercise of the right to silence. *Id.,* at 862-864. These instructions sufficed to cure any possibility of prejudice. See *Schaffer v. United States,* 362 U.S. 511, 516, 80 S.Ct. 945, 948, 4 L.Ed.2d 921 (1960).

Zafiro v. United States, 506 U.S. 534, 113 S. Ct. 933, 939 (1993).

Finally, the *Grayson* severance order also was written without benefit of the more recentlyobtained Marzano affidavits; the Powers affidavits; the Marzano deposition; and the Wester deposition. The testimony of Messrs. Marzano, Powers, and Wester lend great strength to the plaintiffs' fundamental claim that their demotions were part of a centralized plan conceived by upper management and executed by Mr. Valenti to eliminate older store managers.

In sum, there was no reason for Judge Shoob to have "followed" the *Grayson* severance order. That order would effectively nullify 29 U.S.C. § 216(b) and outlaw nearly all multi-plaintiff discrimination cases. The enormous multiplication of paperwork in *Grayson* kept Kmart's army of lawyers busy complying with the local rules of federal courts in three states, compiling eleven essentially identical pretrial orders, preparing for eleven trials, and making eleven photocopies of every piece of paper in the case. But it also tilted the judicial playing field drastically and unfairly in Kmart's ***40** favor. It turned a manageable discrimination case into a litigation nightmare. It misapplied Rule 20 and overlooked § 216(b) and the ADEA's preference for multiplaintiff litigation.

4. *The Plaintiffs' § 216(b) Motion Was Not Untimely.*

At pages 37-45 of its Brief, Kmart contends that Judge Shoob should have denied the plaintiff's § 216(b) motion because it was filed too late in the case. At most, this amounts to an argument that Judge Shoob abused his discretion by allowing the plaintiffs to amend their complaint so as to explicitly state that the action was brought on behalf of other "similarly situated" plaintiffs.[21]

Not surprisingly, Kmart did not include this issue among those it listed as appropriate for interlocutory review, because the matter lies so plainly within the district court's discretion. There are few federal policies more solidly established than that favoring liberality of pleading amendments. *Foman v. Davis,* 371 U.S. 178 (1962); *Nolin v. Douglas County,* 903 F.2d 1545, 1550 (11th Cir. 1990); *Esnev v. Wainwright,* 734 F.2d 748 (11th Cir. 1984); *Dussouy v. Gulf Coast Investment Corp.,* 660 F.2d 594 (5th Cir. 1981). Like the substance of the § 216(b) ruling, the timing lay fully within Judge Shoob's discretion. Kmart does not cite a single case in which an appellate court reversed a district court for a comparable ruling.

Judge Shoob had ample reason to approve of the timing of the § 216(b) motion. First, Kmart had forfeited any conceivable right to complain about delay of the *Helton* case. By unilaterally refusing to engage in any discovery until a ruling on its first motion for severance, Kmart delayed the case for nearly a year. Kmart delayed the Antonini deposition for more than a year, filing a total of 19 briefs (in the Northern District of Georgia alone) on various Antonini deposition motions, one of which Judge Shoob characterized as a "waste" of the Court's time. Order entered January 20, 1994 (H-72). In

***41** another Kmart Store Manager age case, Judge Britt expressed his exasperation with what he found to be Kmart's intentional and repeated refusal to comply with discovery orders:

> It's obvious that Kmart has stalled and stalled and stalled and is still stalling as of this moment and that nothing that Kmart tells the Court can be relied on by the Court and that puts the Court in a very bad position."

Reconsideration Brief Appendix, Exh. C (H-144).

Kmart carefully put off filing its *Helton* summary judgment motions until after March 1, 1994, apparently in hopes that a ruling on the motion would take up to another year.[22] The plaintiffs filed their § 216(b) motion *before* March 1 in hopes that the Court would resolve the motion by September 1994. This would have left six additional months for notification of the additional potential class members and any additional discovery before the district court would even have taken up the summary judgment motions.

Kmart was not prejudiced in the least by the timing of the § 216(b) motion. Any additional discovery efforts necessitated by the class ruling will supplement, rather than supplant the efforts Kmart has already undertaken in these cases. Kmart does not identify any way in which it acted or failed to act to its detriment simply because the motions were not filed earlier.

Kmart cannot believably claim it was surprised in the slightest by the prospect of a class-wide defense. Kmart has long had ample notice of the nature and scope of this controversy. First, of course, it knew of the demotions themselves. Kmart was inundated with discrimination charges, including (but by no means limited to) charges by the 16 *Helton* and *Grayson* plaintiffs. Many of these charges raised class-type allegations. *See* Memorandum of Law in Support of Plaintiffs' Motion to Permit Joinder of ***42** Similarly Situated Additional Plaintiffs Pursuant to 29 U.S.C. § 216(b), for Leave to Amend the Complaint, and to Authorize Notice to Potential Additional Plaintiffs (H-85) at 5 and accompanying Appendix Exh. "A."

Kmart's claims that adding additional Southern Region Store Manager plaintiffs will cause "potentially staggering" discovery and "massive expense and manpower demands," Kmart Brief at 42-43, is pure hyperbole. The additional discovery that Kmart imagines pales in comparison to the efforts Kmart has already expended on this litigation, even absent a class. Kmart has grotesquely over-litigated this case; the resources Kmart has already poured into the litigation would have been sufficient for a class action with hundreds of plaintiffs. In the course of its more than 100 motions, Kmart has repeatedly fought to sever the *Grayson* and *Helton* plaintiffs into 16 individual cases, each to be litigated and tried separately. Kmart has moved for separate trials on each of the plaintiffs' federal and state law claims. Thus, at a minimum, Kmart has told the federal courts it *wants* to conduct 32 separate trials. When it suits Kmart's purpose, Kmart spends effort and money without limits.

The addition of more Southern Region plaintiffs would not impose a "staggering " new discovery burden. Most of the materials and information Kmart claims it would have to produce in a class action have already been produced in other litigation. In *Autry v. Kmart Corporation. Inc.*, Civil Action File No. 92-105-CIV-3-BR, in the United States District Court for the Eastern District of North Carolina, Kmart assembled and produced the personnel file of every Southern and Southwestern[23] Region Employee at the level of Store Manager or higher who was demoted, terminated, or who resigned between 1988 and 1992. Kmart has also provided detailed statistical information on all management demotions, terminations and resignations during that same period. *See* Reconsideration Brief (H-144), Appendix Exh. D.

***43** The *Helton* plaintiffs had strong reasons for not filing their § 216(b) motion earlier. Between August and December of 1993, the parties planned and, ultimately, held settlement negotiations involving a possible global settlement of the claims of all *Helton* and *Grayson* plaintiffs. On August 20, 1993, Kmart's counsel wrote to plaintiffs' counsel proposing conditions for mediation. See Confidential Appendix to Reply Brief in Support of Motion to Permit Joinder of Similarly Situated Additional Plaintiffs (H-105). Among these was Kmart's insistence that, as part of any settlement, plaintiff's counsel would have to agree not to pursue claims on behalf of any other potential class members. *Id.* So long as there appeared to be a genuine chance of

settling the claims of the existing plaintiffs, the plaintiffs could not jeopardize that possibility by moving to add additional plaintiffs.

Preparations for the mediation ultimately took the entire autumn of 1993, and the mediation was not held until December. This delay was caused by the fact that Judge Carnes had ordered Kmart to produce additional information and documents in the *Grayson* case. The parties could not mediate until Kmart had provided the plaintiffs with these materials, which did not occur until the end of November 1993. The parties also had to change mediators because the first mediator Kmart proposed proved to have a conflict of interest. The mediation, which was unsuccessful, occurred in December. Most of December and January were taken up with the series of motions Kmart filed over the deposition of Joseph Antonini. The last of these was Kmart's eleventh-hour motion to start the deposition at 7:30 a.m. because of a "previously scheduled appointment" whose nature Kmart would not reveal to Judge Shoob. *See* Defendant's Motion for a Change in Start Time of Deposition (H-67) at 2, 5.[24]

While Kmart's maneuvering may not have been specifically intended to put off a § 216(b) motion, it should nevertheless be clear that any delay (1) was justified under the circumstances, (2) did ***44** not prejudice Kmart, and (3) was quite modest in light of the leisurely pace to which Kmart had held the progress of this case.

Kmart's claim that the § 216(b) motion was untimely is contradicted by Kmart's own claim that Judge Shoob should not have granted the motion without holding an evidentiary hearing. Kmart Brief at 55.[25] To the extent that plaintiffs are expected to support a § 216(b) motion with an evidentiary record, the motion should not be decided until there has been an ample opportunity for discovery. Thus, a § 216(b) motion should be made precisely when the plaintiffs made it-close to the end of the discovery period. In sum, Judge Shoob acted fully within his discretion in approving the timing of the § 216(b) motion.

Finally, Kmart repeatedly implies that the *Helton* class action motion was intended to "circumvent" Judge Carnes' severance order, but Kmart knows that is not the case. Not only was it logical to file the motion when we did--that is, after obtaining the Marzano and Powers evidence and failing to settle the cases by collective mediation at the end of 1993-it was also *always* logical to file the motion in *Helton,* rather than *Grayson.* As of early 1994 (before the *Grayson* severance order was entered), the *Grayson* summary judgment motions had been awaiting disposition for nine months, while the *Helton* summary judgment motions had not yet even been filed. Because Kmart had refused to engage in discovery in *Helton* until its severance motion was decided, the *Helton* case was effectively a year behind *Grayson. Grayson,* it seemed at the time, would soon have its summary judgment motions decided and go to trial, while *Helton* would sit for another year awaiting ruling on the anticipated summary motions. Thus, it made sense *even before. and completely independent of the Grayson severance order* to let *Grayson* go to trial as an 11-plaintiff case and propose *Helton,* which was going to sit idle for a year anyway, as the vehicle for a § 216(b) class. Judge Carnes' severance ***45** ruling, of course, foreclosed any realistic possibility of a § 216(b) motion in *Grayson,* but the *Grayson* plaintiffs had not planned to file one: they expected that Judge Canes would shortly deny the severance motion (as Judge Shoob had already done in *Helton)* and send their case to trial. Thus, the logic of filing the § 216(b) motion in *Helton,* rather than *Grayson,* had been evident well before Judge Carnes' severance order.

B. *Judge Shoob Correctly Defined the Opt-In Class.*

Kmart contends that Judge Shoob erroneously defined the rearward temporal scope of the opt-in class (that is, the earliest date on which a class member could have been demoted and still opt in as a plaintiff in this case) in two ways. First, Kmart says Judge Shoob erroneously applied the "piggybacking " rules in this circuit. Kmart Brief at 46-49, 52-55. Second, Kmart contends that plaintiffs demoted before the November 21, 1991 effective date of the Civil Rights Act of 1991 are subject to the 2- or 3-year statute of limitations that was in existence before, but was eliminated by, that Act, and that the claims of those persons are now time-barred. Kmart Brief at 49-52. Both contentions are wrong.

As a preliminary matter, it should be noted that these statute of limitations issues concern only potential additional opt-in plaintiffs who never filed timely charges of discrimination with the Equal Employment Opportunity Commission. The original *Helton* and *Grayson* plaintiffs, however, all filed timely charges (and all timely complaints), so their claims raise no limitations

issues. The temporal limitations on the opt-in class discussed below apply only to those who must rely on charges filed by others in order to join the suit.

1. *Judge Shoob Correctly Applied the Applicable "Piggybacking" Rules in this Circuit.*

Piggybacking is the principle that permits an individual to assert a Title VII or ADEA claim in federal court without first having filed his own charge of discrimination with the Equal Employment ***46** Opportunity Commission. The plaintiff "piggybacks" on one or more charges filed by others, when those charges put the employer on notice that others might assert similar claims.

In holding that Kmart had received sufficient notice of "class-type " discrimination claims to allow persons who had not filed their own charges to opt in, the district court did not rely only on charges filed by the original five *Helton* plaintiffs, but also on charges filed by others. This follows established law of this circuit. *Larkin v. Pullman-Standard Division. Pullman. Inc.*, 854 F.2d 1549, 1562-65(11th Cir. 1988), *vacated on other grounds sub nom Pullman-Standard. Inc. v. Swint*, 493 U.S. 929 (1989)(Rule 23 class members in Title VII action may "piggyback" on charge filed by nonplaintiff). The earliest "class-type" charge defines the rearward temporal scope of the class: all those challenging an employment decision made within 180 days before the charge was filed (or 300 days in a deferral state) may piggyback on the charge. *Id.*

The basic rule that ADEA plaintiffs who did not file EEOC charges may "piggyback" on classtype charges filed by others is not controversial. "Piggybacking" was most recently approved in this circuit in *Calloway v. Partner's National Health Plans,* 986 F.2d 446 (11th Cir. 1993).[26] While *Calloway* was a Title VII case, every circuit to have addressed the issue has permitted "piggybacking" by opt-in class members in an ADEA case. *Tolliver v. Xerox Corp,* 918 F.2d 1052, 1058 (2d Cir. 1990); *Anderson v. Montgomery Ward & Co,,* 852 F.2d 1008, 1016 (7th Cir. 1988); *Lusardi v. Lechner,* 855 F.2d 1062, 1078-79 (3d Cir. 1988); ***47** *Kloos v. Carter-Day Co.,* 799 F.2d 397, 400 (8th Cir. 1986); *Naton v. Bank of California*, 649 F.2d 691, 697 (9th Cir. 1981); *Mistretta v. Sandia Corp.*, 639 F.2d 588, 593-94 (10th Cir. 1980).

Charges filed against Kmart clearly contained "class-type" allegations. Kmart claims otherwise but, for obvious reasons, does not quote the charges. Kmart Brief at 47. The June 14, 1991 charge filed by *Gravson* plaintiff Mercer David Grayson stated, "For the past five years, the Company has systematically [retired or] demoted managers in the protected age group and replaced them with younger managers." The June 28, 1991, charge of discrimination filed by demoted Store Manager Doug Baer alleged, "My transfer and demotion was part of a discriminatory policy directed against me and other older managers who had twenty (20) years or more tenure with the company, who were over forty (40) years of age, and who made over sixty thousand dollars ($60,000.00) per year. " The August 24, 1991 charge filed by *Grayson* plaintiff John Thompson stated, "The employer is demoting and discharging older managers as a class. " Appendix to Brief in Support of Motion to Permit Joinder of Similarly Situated Additional Plaintiffs (H-85), Exh. T. Kmart received abundant notice that it was accused of discriminating against a class of older managers.

Judge Shoob used Mr. Grayson's June 14, 1991 charge to set the rearward temporal scope of the class. He held that opt-in plaintiffs who did not file EEOC charges would have to have been demoted on or before December 16, 1990 (which was 180 days prior to June 14, 1991), if they worked in Georgia or other "non-deferral" states; or on or before August 18, 1990 (which was 300 days prior to June 14, 1991), if they worked in Florida or other "deferral " states. Order of October 6, 1994 (H157) at 2. This was a straightforward application of *Larkin* and *Calloway,* and should not be overturned.

48 2. *No Potential Opt-in Plaintiffs Are Barred by the Pre-November 21, 1991 Statute of Limitations because All Were Demoted Within 3 Years of the Date on which the Complaint Was Filed.

Kmart argues that potential class members demoted before the November 21, 1991 effective date of the Civil Rights Act of 1991 (the "CRA") remain subject to the 3- (or in the case of non-willful violations, 2-) year statute of limitations that had been incorporated in Section 7(e)(1) of the ADEA. In the CRA, Congress deleted this statute of limitations and substituted a Title VII-like rule requiring a charging party to file suit within 90 days of receiving notice that the Equal Employment Opportunity Commission has terminated its investigation of the charge. We assume that the deletion of the old statute of

limitations was "substantive" and therefore applies only to claims accruing after the CRA's effective date, *Landgraf v. USI Film Products*, 114 S. Ct. 1483 (1994), so that the old statute remains in effect for those demoted before November 21, 1991.

The limitations period for those demoted before November 21, 1991 was tolled by the filing of the *Helton* complaint on October 29, 1992. First, the statute of limitations should be deemed tolled by the filing of a class complaint, *see Sperling v. Hoffman-LaRoche. Inc.*, 24 F.3d 363 (3d Cir. 1994); *In re: Western District Xerox Litigation*, 850 F. Supp. 1079 (W.D.N.Y. 1994), rather than by the individual acts of filing opt-in notices, *see O'Connell v. Champion International Corp.*, 812 F.2d 393 (8th Cir. 1987). This case illustrates why the *Sperling* rule is correct and the *O'Connell* rule is wrong: the dates on which class members learn of the class action and file their opt-in notices are filed are (a) largely a matter of chance, (b) likely to be after the limitations period expires, and (c) very much controllable by the defendant employer, who can delay opt ins with challenges to class certification and the notification process (as Kmart has here). Following the Supreme Court's *Sperling* ruling, class members receive notice of their right to join an ADEA action, but this notice may not be sent until many years after the challenged employment decision. Requiring opt-ins to be filed within 2 or 3 years ***49** of a challenged employment decision would make the opt-in procedure endorsed by *Sperling* meaningless: by the time a complaint was filed and the notices of opt-in rights mailed out, the opt-ins would inevitably be untimely. Thus, the statute of limitations should be deemed tolled by the filing of a class action complaint.

Here, the original *Helton* complaint was a class complaint. While the original complaint did not expressly state that it was filed "on behalf of persons similarly situated," the class action amendment to the complaint,[27] which did so state, related back to the original complaint under Rule 15(c)(2), Fed. R.Civ.P. This is because the class claims "arose out of the conduct... set forth in the original pleading" within the meaning of Rule 15(c)(2). The first paragraph of the original complaint stated, in pertinent part:

The respective claims of the plaintiffs arise from a pattern and practice of intentional age discrimination. The plaintiffs are all former Store Managers of retail stores owned and operated by defendant K Mart Corporation ("Kmart"). The plaintiffs are several of the large number of senior Kmart Store Managers who have, during the past several years, been terminated or demoted to "assistant " or "associate" Store Manager positions. The plaintiffs contend that Kmart has set about to replace them and other older Store Managers with younger managers.

Complaint (H-1) at 1. *See Anderson v. Montgomery Ward & Co., Inc.*, 852 F.2d 1008, 1017-19 (7th Cir. 1988)(no need to amend complaint to convert multi-plaintiff ADEA action to representative action and, in any event, amendment relates back); *Fleck v. Cablevision VII. Inc.*, 799 F. Supp. 187 (D.D.C. 1992)(claim of additional party related back where it arose from same transaction as claims in original complaint).

Hence, for statute of limitations purposes, the class action complaint is deemed to have been filed on October 29, 1992, and the claims of all class members would fall within the old 3-year limitations period. Judge Shoob's definition of the temporal scope of the class should not be disturbed. Finally, if the amendment to the complaint were not deemed to relate back, it should be considered filed ***50** on the day that the plaintiffs sought leave to amend, which was January 28, 1994.[28] In that event, the class of additional opt-in plaintiffs would include all persons demoted on or before January 29, 1991.

3. *Persons Who Filed Their Own EEOC Charges. Including All of the Original Grayson and Helton Plaintiffs. Are Not Subject to the Piggybacking Timeliness Rules: Opt-In Plaintiffs Who Did Not File Their Own EEOC Charges May Properly Piggyback on Mr. Grayson's Charge Even Though He Was Not an Original Plaintiff in Helton.*

In the discussion at pages 52-55 of its brief, Kmart seems to argue that the definition of "similarly situated" class members under 29 U.S.C. § 216(b) is somehow controlled by the rules for "piggybacking." Thus, Kmart argues that plaintiff Grayson cannot be part of the § 216(b) class because (a) one may only piggyback on the claim of an original named plaintiff and (b) one cannot be part of a § 216(b) class if one was demoted too early to piggyback on the EEOC charge of a named plaintiff.

This argument is incorrect. First, it is settled law in this circuit that class members may piggyback on any class-based charge, regardless of whether the person filing the charge is even a party in the action. *Larkin v. Pullman-Standard Division, Pullman. Inc.*, 854 F.2d 1549, 1562-65 (11th Cir. 1988), *vacated on* other *grounds* Sub *nom Pullman-Standard, Inc. v. Swint,* 493 U.S. 929 (1989)(Rule 23 class members in Title VII action may "piggyback" on charge filed by non-plaintiff).

More fundamentally, Mr. Grayson does not need to "piggyback" on *any* charge, because he filed his *own* charge. Having filed a timely charge (and, subsequently, a timely complaint), Mr. Grayson has already satisfied all limitations requirements under the ADEA. The same is true of all of the *Helton* and *Grason* plaintiffs. *The requirement that an opt-in plaintiff have been demoted within* ***51** *180 (or 300) days of the first class-type charge to have been filed applies only to those who did not file their own EEOC charges, and must therefore piggyback on another charge in order to sue.*

For Mr. Grayson to be included in the *Helton* class, Mr. Grayson must simply fit within Judge Shoob's definition of "similarly situated" plaintiffs. The class definition does have a temporal component. Here, the class includes all those swept up in the Valenti purge, which began in 1990. Hence, Judge Shoob defined the class of "similarly situated" persons as all Southern Region Store Managers demoted between January 1, 1990 and December 31, 1992. Since Mr. Grayson was demoted during that time, he fits within the § 216(b) definition. But the definition of persons "similarly situated" under § 216(b) is distinct from the timeliness constraints applicable to piggybacking opt-in plaintiffs. Since Mr. Grayson (like all of the other *Grayson* and *Helton* plaintiffs) filed his own timely charge, he does not need to piggyback on any other charge.

C. *Judge Shoob Was Not Reguired to Hold a Hearing Before Approving the Opt-In Class.*

There is absolutely no authority for the proposition that certification of a section 216 "opt-in class" requires the court in effect to try the case and find for the plaintiffs in advance of trial. *Cf. Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 177-78 (1974); *Kirkpatrick v. J.C. Bradford & Co.,* 827 F.2d 718 (11th Cir. 1987), *cert. denied,* 485 U.S. 959 (1988)(inappropriate for district court to evaluate the merits of class representative's theory of recovery in deciding whether to certify Rule 23 class); *Miller v. Mackey International,* 452 F.2d 424, 427 5th Cir. 1971) ("In determining the propriety of a class action, the question is not whether the ... plaintiffs have stated a cause of action or will prevail on the merits...."). As Professor Moore states in the Rule 23 context:

> It is now clear that placing the burden on the class representative to show there is a class and his right to represent it does not require that the merits of the action be established before a preliminary determination of the class question can be made.

3B *Moore's Federal Practice* ¶ 23.02-2 at 23-86.

***52** As the statement of facts in this brief reveals, the record is filled with evidence of a centralized discriminatory plan and Judge Shoob's § 216(b) order made express reference to this evidence. Moreover, if Kmart really thought section 216(b) "certification" required an evidentiary hearing, it would not contend, as it does repeatedly, that the plaintiffs should have moved for certification at the start of the case.

II. *JUDGE CARNES ACTED WITHIN HER DISCRETION IN DISMISSING THE GEORGIA GRAYSON PLAINTIFFS SO THAT THEY COULD OPT IN TO THE HELTON CLASS.*

A. *The Dismissal Without Prejudice lay within Judge Carnes' Discretion*

Kmart attacks as "inherently prejudicial" Judge Carnes' decision to dismiss the Georgia *Grayson* plaintiffs' cases without prejudice, so that they could opt in to the *Helton* class. This argument makes no sense. First, Kmart has not been "prejudiced" in the least. None of Kmart's efforts in *Grayson-in* discovery, in preparing its summary judgment motions, or in moving for severance-have been rendered superfluous. Kmart's discovery efforts will still be used at trial and Kmart will doubtless re-file its summary judgment motions in *Helton.* Other than photocopying the *Grayson* record (and Kmart's attorneys billed the plaintiffs for half of that exercise), Kmart expended no effort that was nullified by the "dismissal." And Kmart would have filed all its severance motions no matter when the *Helton* plaintiffs sought class treatment.

Judge Carnes' dismissal was designed to (1) permit the individual Georgia *Grayson* plaintiffs to join the *Helton* class while (2) affording Kmart an immediate opportunity to test, on appeal, the viability of its "law of the case " theory. Judge Carnes could have accomplished the same result by transferring her *Grayson* plaintiffs to *Helton* or by staying their individual cases, as did Judges Britt, Schlesinger, Sharp, and Kovachevich. Judge Carnes chose dismissal because she wished to make certain an immediate appeal would be available to Kmart. She did this by removing the "condition " from her August 23, 1994 dismissal order (that the plaintiffs could reopen if they were subsequently excluded ***53** from the *Heltn* class). Eliminating this condition required a "private" stipulation to the same effect: Kmart agreed that if the *Grayson* plaintiffs were ever excluded from proceeding collectively in *Helton* they could re-file their individual claims and Kmart would raise no statute of limitations or other timeliness objections:

MR. KNEISEL: To make sure that we can go up on appeal - I'm going to say a final appealable order, as opposed to a conditional order that can be modified and changed and, therefore, may not be appealable of right, which is why we out of concern to -

THE COURT: My order had so many contingencies in it that it wasn't much of a final order.

MR. KNEISEL [counsel for Kmart]: ... I think the only way that we can get the case up to the Eleventh Circuit for certain ... is to have a nonconditional dismissal that we can then appeal of right. And we think the appeal of right could then be consolidated within the interlocutory appeal and would make it much more likely that the Eleventh Circuit visit both of these issues ....

THE COURT: I just want you all to help me. I want to get it to the Eleventh - I want to get it to the Eleventh Circuit. How can I do that?

THE COURT: ... Well, I need some guidance from you because I am more than happy to try to handle this in a way where it is not with me anymore and the Eleventh Circuit deciding the propriety of sending this over to Judge Shoob. Do I need - I am sensitive to Mr. Klein's concerns. I need some help from you, Mr. Kneisel on how we can style that in a way where you can appeal and he is not endangered by the statutes of limitations and things.

MR. KNEISEL: I think the only way to assure an appellate review is to issue a nonconditional dismissal that allows us to appeal of right.

THE COURT: The problem is, I can't do that unless they move for dismissal. And you all are not going to do that, are you?

MR. KLEIN [co-counsel for plaintiffs]: Not an unconditional dismissal.

***54** THE COURT: I can't do that, Mr. Kneisel.... So you all should have the incentive, I think, to work out something to accommodate what we want to do here.

MR. KNEISEL: As I say, I would be willing for the sake of the dismissal to stipulate ... that these plaintiffs, in the event of a reversal of the dismissal and a reversal of Judge Shoob, could, in fact, reinstitute or re-file separate proceedings or separate cases, and the limitations period would be tolled...

MR. KLEIN: I was relying on your research when you told me that a dismissal under the terms that Judge Carnes has already ordered is probably not final and appealable. I don't know whether dismissal with the stipulation is any more appealable.

MR. KNEISEL: Well, I think the stipulation could be independent of the dismissal, in the sense that we would stipulate that they could re-file contingent upon the outcome, and that we would not raise the statute of limitations - I mean, we can toll the statute of limitations. And I think that is a private contract between the parties and is done all the time. It would be totally independent of what the Eleventh Circuit did and would allow them, if the Eleventh Circuit agrees with Kmart's position, to reinstitute these cases. They may have to file separate, new proceedings, but I think we can cover that in our stipulation, too.

THE COURT: I want to know whether or not it is appropriate for me, that is, the law of the case, to transfer this, given the fact that I have already ruled on that. That is the issue.

MR. FORD [co-counsel for plaintiffs]: As I understand it, Your Honor, we have moved to transfer the six Grayson cases to the Helton case, alternatively to stay that litigation, or alternatively to dismiss those cases without prejudice, so that they may file an opt-in into the Helton Case. And the Court has granted our alternative motion to dismiss the cases without prejudice.

THE COURT: Right.

MR. FORD: And we have an agreement with counsel for K Mart and the Court has also denied K Mart's request for award of attorneys' fees and costs for having obtained that relief for dismissal without prejudice.

And, thirdly, we have agreed with counsel for K Mart that there will not be any statute-of-limitations implications by virtue of the dismissal without prejudice ***55** in the event that any of the Grayson, the six Grayson, cases, which are being dismissed without prejudice, come back to this Court. Or whether -

THE COURT: Or come back anywhere.

MR. FORD: Or come back anywhere.

THE COURT: Or are reopened individually.

MR. FORD: Whether they are reopened individually or anything else.

THE COURT: Right. Sounds like you summed it up pretty well.

Transcript of October 25, 1994 Status Conference in *Grayson* at 42, 44-47, 49-50, 56-58, 84-84.

In substance, Judge Carnes' order was not a dismissal at all. In substance, Judge Carnes transferred her *Grayson* plaintiffs to the *Helton* class litigation. The Georgia *Grayson* cases are alive and well, and Kmart's defensive efforts have not been undermined in the least.

Both the decision to allow a Rule 41(a)(2) dismissal and the decision whether to attach conditions to the dismissal (such as the payment of costs upon refiling) lie within the district court's discretion. No circuit requires that defense costs be imposed as a condition of dismissal. *DWG Corp. v. Granada Investments. Inc.*, 962 F.2d 1201, 1202 (9th Cir. 1992); *McCants v. Ford*

Motor Company. Inc., 781 F.2d 855, 859-61 (11th Cir. 1986). Because the *Grayson* cases will move seamlessly into the *Helton* class action, Judge Carnes was fully within her discretion both to allow the dismissal and to disallow costs.

B. *Permitting the Grayson Plaintiffs to Opt in to the Helton Class Would Not Violate the Law of the Case Doctrine*

Kmart argues that the "law of the case" doctrine bars the *Grayson* plaintiffs from opting in to the *Helton* class. Kmart Brief at 60-64. This argument is specious. First, the doctrine applies only to appellate rulings; it leaves a district court free to reconsider its own decisions:

***56** The "law of the case" doctrine is "the rule under which the trial court and appellate courts are bound by any findings of fact or conclusions of law made *by the appellate courts* in a prior appeal of the case at issue. " *United States v. Burns,* 662 F.2d 1378 (11th Cir. 1981).... The issue normally arises in the context of a district court ignoring or contravening the ruling of a higher court in an earlier proceeding of the same case.... To hold that a district court must rigidly adhere to its own rulings in an earlier stage of a case would actually thwart the purpose of the doctrine. New developments or further research often will convince a district court that it erred in an earlier ruling, or the court may simply change its mind. We believe it would be wasteful and unjust to require the court to adhere to its earlier ruling in such an instance. See *also* lB Moore's Federal Practice § 0.404[1] (1982); *Gregg v. U.S. Industries, Inc.,* 715 F.2d 1522 (11th Cir. 1983).

Robinson v. Parrish, 720 F.2d 1548, 1550 (11th Cir. 1983)(emphasis added). *Accord, Larkin v. Pullman-Standard Division. Pullman. Inc.,* 854 F.2d 1549, 1563 (11th Cir. 1983).[29]

Even if the "law of the case" doctrine were theoretically available in this situation, it would not apply. First, Judge Carnes' severance order addressed solely the issue of joinder under Rule 20, Fed. R.Civ.P., not opt-in rights under 29 U.S.C. § 216(b). While we have contended that Judge Carnes *should* have considered the effect of § 216(b) and the *Sperling* decision in ruling on the severance issue, Judge Carnes plainly did not do so. Kmart's argument that the § 216(b) and Rule 20 issues *should* be decided under the same *standards* simply highlights the fact that they are, nevertheless, two separate legal issues. As Judge Carnes stated:

> THE COURT: But, see, I don't care about the Helton litigation.... It was a different issue. It was not the issue I had.

Transcript of October 25, 1994 Status Conference in *Grayson* at 37.

Moreover, a "commonly recognized" exception to the rule exists whenever "new evidence is available to the second judge." *Hayman Cash Register Co. v. Sarokin,* 669 F.2d 162, 169 (3d Cir. 1982). Discovery in *Grayson* closed nearly a year before it did in *Helton.* When briefing the severance issue, the *Grayson* plaintiffs lacked much of the evidence that later prompted the *Helton* plaintiffs to ***57** seek class certification. This included, for existence, the testimony that Southern Region Vice President John Valenti had described older store managers as "the problem with Kmart" and was "planning to do something" about that problem:

> That's the trouble with Kmart. It's these older store managers, but we are planning to do something about it.

Supplemental Affidavit of David C. Marzano (H-104, Exh. 2) ¶ 6. Judge Carnes' severance ruling and Judge Shoob's class action ruling not only decided different legal issues, but relied on different fact records.

Hayman Cash Register Co. v. Sarokin, 669 F.2d 162 (3d Cir. 1982), cited by Kmart at page 61 of its Brief, presented a compelling but easily distinguishable instance for application of the law of the case doctrine: the court where the action was first filed held that venue was appropriate in another district and transferred the case to that district. The court in the district to which the case was transferred, however, held that venue lay in the first district. In that situation, the court of appeals intervened to keep the case from being transferred perpetually back and forth between two courts, each of which insisted it should be sent to the other. That situation is not present here, since the plaintiffs' claims will remain part of the *Helton* litigation.

C. *Should the Grayson Plaintiffs Not Be Permitted to Opt In to the Helton Litigation. This Court Should Nevertheless Reverse Judge Cares' Severance Order and Re-Consolidate the Grayson Case.*

Judge Carnes' ruling can never be "law of the case" to this Court. *Christianson v. Colt Industries Operating Corp.,* 486 U.S. 800, 108 S. Ct. 2166, 2177 (1988)("Most importantly, law of the case cannot bind this Court in reviewing decisions below."). If this Court were to agree with Kmart's position that Judge Cares' severance order would otherwise bar the *Grayson* plaintiffs from opting in to the *Helton* class, or if this Court were to reverse Judge Shoob's § 216(b) ruling, we would then ask ***58** this Court to reverse the Grayson severance order as inconsistent with Rule 20(a), Fed. R.Civ.P., and 29 U.S.C. § 216(b).

Rule 20(a) of the Federal Rules of Civil Procedure provides in relevant part,

> All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action.

To join plaintiffs pursuant to Rule 20(a), a party must satisfy two tests: (1) that the asserted right to relief arises out of the same transaction or occurrence or a series of transactions or occurrences, and (2) that a question of law or fact common to all plaintiffs will arise in the action. *Mosley v. General Motors Corp.,* 497 F.2d 1330, 1333 (8th Cir. 1974). In *Mosley,* where each of the plaintiffs alleged that he had been injured by the same general policy of discrimination on the part of General Motors and the Union, even though some of the employees worked in different divisions within General Motors, the Eighth Circuit concluded that the allegation of a company-wide policy designed to discriminate in employment meant that all of the plaintiffs' claims arose out of the same series of transactions or occurrences. *Id.* The court reversed the district court's severance order as an abuse of discretion.

Many other courts have affirmed that multiple claims by multiple plaintiffs should be joined in "pattern and practice" discrimination cases--even where, unlike here, the plaintiffs held different types of jobs, worked in different divisions, and complained of different types of employment decisions. *Durant v. Maher Chevrolet. Inc.,* 759 F. Supp. 787 (M.D. Fla. 1991)(allowing joinder of 12 plaintiffs); *Bereton v. Communications Satellite Corp.,* 116 F.R.D. 162 (D.D.C. 1987)(allowing addition of plaintiff who had supervisory and hiring and termination authority, notwithstanding company's claim that employee participated in formulating the practices that the other plaintiffs challenged); *Griffin v. Wainwright,* 34 FEP Cases 1854, 1857 (N.D. Fla. 1980) (pattern and practice allegations justify joinder under Rule 20); *Bolling v. Mississippi Paper Co.,* 86 F.R.D. 6, 8 (N.D. Miss. 1979)(where ADEA ***59** plaintiffs allege a common plan or design to discriminate, the allegations are sufficient to demonstrate a common transaction or occurrence).

There is also a sound policy reason for permitting joinder where the plaintiffs allege a companywide discrimination policy:

> Each plaintiff is entitled to put on evidence of the alleged pattern and practice [of discrimination], and each clearly intends to do so. [cite omitted] If the claims were severed, the same evidence, would have to be

> presented in ... separate trials. It is far more convenient and economical for this evidence to be heard in one trial.

Kine v. Ralston Purina Co., 97 F.R.D. 477, 480 (W.D.N.C. 1983).

Judge Carnes' severance order applies an incorrect legal standard for Rule 20(a), particularly in light of § 216(b) and the *Sperling* decision. We discuss in Section I.A.3, above, why Judge Carnes' severance order was erroneous, and we incorporate that discussion by reference here. If the *Grayson* plaintiffs were for some reason held unable to join a class in *Helton*, the order severing the *Grayson* plaintiffs should be revered and the case reconstituted as an 11-plaintiff action.

CONCLUSION

Through the combined efforts of six United States District Judges, these cases now stand in their correct procedural posture: as a single "opt-in class action " under 29 U.S.C. § 216(b). Judge Shoob's order allowing the § 216(b) class in *Helton* and Judge Carnes' order allowing the *Grayson* plaintiffs to opt in to the *Helton* class are both discretionary and correct decisions. They correctly apply federal policy favoring multi-plaintiff ADEA litigation. They should be affirmed.

Footnotes

1 The class of "similarly situated" plaintiffs certified by Judge Shoob also includes Store Managers who were told they would be demoted, but then resigned. References to "demoted" managers in this brief include those people.

2 The plaintiffs also assert state law claims for intentional infliction of emotional distress.

3 References to the record in *Grayson* are designated "G-"; references to the record in *Helton* are designated "H-."

4 Kmart never discloses in its Brief the fact that its Rule 20 joinder issue was first raised-and rejected-in *Helton*, and only later accepted in *Gryson.* This fact completely undermines Kmart's argument that Judge Shoob was bound by some sort of "comity" principle to follow the *Grayson* severance ruling when he decided the § 216(b) motion in *Helton.*

5 Of course, Kmart did not argue that Judge Carnes should have followed Judge Shoob's *earlier* ruling on the very same severance issue. Kmart does not disclose the existence of that ruling in its Brief here.

6 Kmart wrote:
Kmart respectfully submits that this Order overrules, by indirection, the February 22, 1994 severance order previously entered in this case and as such, is inconsistent with law of the case principles that should govern these proceedings.

7 Judge Kovachevich ruled:
The Court does not find the defendant's "law of the case" argument to be meritorious.

8 Judge Shoob stated:
[T]he Court does not agree that the retransfer decision [by Judge Schlesinger] is inconsistent with "the law of the case ..."

9 This list does not include minor or undisputed motions, such as motions for extensions of time or leaves of absence. Kmart has filed a number of additional motions since the list was compiled.

10 These are Kmart's identical motions to strike in the severed cases of plaintiffs Grayson and Arrington.

11 Two of the appeals were to the Fourth Circuit, from the rulings by Judge Britt of the Eastern District of North Carolina staying the individual cases of severed *Grayson* plaintiffs Kondrad and Taper so that they could opt in to *Helton*. The Fourth Circuit subsequently dismissed those appeals.

12 As this Court has noted, Congress enacted the ADEA to combat *precisely* Mr. Antonini's prejudice:

> Congress ... concluded that the protections of the ADEA should be limited to persons over 40, since historically it has been within this age group that employees have been displaced largely on account of their age *because of the perceived decline in their long-range value to their employer*.
>
> *Goldstein v. Manhattan Industries, Inc.*, 758 F.2d 1435, 1443 (11th Cir. 1985)(emphasis added).

13 Thus far, Kmart has provided detailed statistical information for approximately one-half of the Southern Region, and the analysis in text is based on figures for that portion of the region.

14 Kmart deceptively claims that "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.'" Kmart Brief at 15. Kmart conceals a significant drop in Store Manager age during 1991 by averaging in the increase over three prior years, 1988 through 1990. Moreover, during the Valenti purge, Kmart was also "packing" the Store Manager population with older individuals by demoting older middle-level managers into Store Manager positions. 28 District Managers (or other higher officials) were demoted to Store Manager jobs at stores within the plaintiff's subregions. *See* Affidavit of Mercer David Grayson, attached as Exhibit "C" to the plaintiffs' Confidential Appendix in opposition to Kmart's Summary Judgment Brief in *Grayson* (G-81).

15 Kmart relies heavily on the district court's decision in *Lusardi v. Xerox Corp.*, 118 F.R.D. 351, 372-75 (D.N.J. 1987) (not permitting § 216(b) action to proceed because of differing individual circumstances surrounding each termination decision during a company-wide RIF), *modified on mandamus sub nom.* 855 F.2d 1062 (3d Cir.), *on remand*, 122 F.R.D. 463 (D.N.J. 1988). *Lusardi* is distinguishable as a far more complex case involving several different types of discrimination and a far greater number of decisions; furthermore this Court should reject *Lusardi* as wrongly decided, because it failed to focus on the similarity of the plaintiffs' claims, as required by § 216(b).

16 Although *Selzer* was a class action under Rule 23 of the Federal Rules of Civil Procedure, rather than a § 216(b) representative actions, its logic is persuasive in this context. There is no reason why the presence of possible individual defenses would be of any more consequence in preventing a representative action than they would be in a Rule 23 class action. If anything, the impact would be greater under Rule 23: in Rule 23 opt-out class actions, in order to protect the rights of absent class members, the claims of the named plaintiffs must be typical of the class and they must be adequate class representatives. Since only those who have opted into the § 216(b) action can be bound, they can participate directly in the litigation and protect their interests, making these concerns less critical. *Owens v. Bethlehem Mines Corp.*, 108 F.R.D. 207, 212 & n.7 (S.D.W. Va. 1985).

17 If Kmart were not found to have engaged in a pattern of discrimination, each plaintiff would have the opportunity to show, and the burden of proving, that he or she was discriminated against.

Even the possibility of individual burdens of proof, of course, does not defeat collective litigation. The district court's comment in *Sperling* that "each individual plaintiff must bear his or her burden of proof as to each element of [his] ADEA claim," 118 F.R.D. at 407, while overlooking the *Teamsters* burden-shifting rule, shows that individual burdens of proof (and the individual fact disputes they entail) are completely compatible with multi-plaintiff litigation.

18 The only exception we can imagine would be a reduction in force case where all of the decisions were based on some objective and universally applied criterion.

19 The *Grayson* severance order gives the ill-intentioned employer an invitation to discriminate on a mass basis, without fear that its victims would have a practical remedy. All the employer must do is paper its employees' files and avoid using a "discreet program or procedure," and it can eliminate any number of employees without their having the opportunity to combine their evidence or their litigation resources. Indeed, the more employees the employer eliminates, the more impractical any litigation would become.

20 Moreover severance would require dozens of courts and juries to decipher exactly the same statistical issues and study in great detail exactly the same rules and procedures for Store Managers.

21 Arguably, no such amendment was even necessary. *Anderson v. Montgomery Ward & Co., Inc.*, 852 F.2d 1008, 1017-19 (7th Cir. 1988)(no need to amend complaint to convert multi-plaintiff ADEA action to representative action and, in any event, amendment relates back).

22 We understand that the U.S. Administrative Office requires district judges to report any motions that were filed before March 1 of any year, but not decided by September 1 of the same year, and any motions that were filed by September 1 of one year but not decided by March 1 of the following year.

23 The Southwestern Region was merged into the Southern Region during the 1990 reorganization. Before the reorganization, Mr. Valenti had been Vice President of the Southwestern Region.

24 In denying this motion, Judge Shoob rebuked Kmart for having "wasted the court's time." *See* Order entered January 20, 1994 (H-72) at 1.

25 This issue *was* among those Kmart proposed for interlocutory review. Kmart now buries it at the end of its brief because it so blatantly refutes Kmart's timeliness argument.

26 *Calloway* also expressly holds that plaintiffs who never filed discrimination charges may "piggyback" onto a timely, class-based charge, even if the person who filed that charge is not a plaintiff in the same action as the "piggybacking" plaintiff. 986 F.2d at 449-50. *Calloway* emphasizes that the point of the piggybacking principle is to relax to charge-filing requirement where an employer has already received notice of class-type claims; the notice to the employer is the same regardless of who filed the charge.

27 The amendment was filed on October 18, 1994, after Judge Shoob's § 216(b) ruling (H-160).

28 The plaintiffs could control the date on which they sought leave to amend, but could not control the date on which the amendment would actually be filed, since that could only occur after the Court granted leave to amend, an event which was completely outside the plaintiffs' control.

29 As noted in this brief, both Judge Shoob's § 216(b) ruling and Judge Carnes' severance order were discretionary decisions. It makes even less sense to hold that a discretionary ruling is "law of the case."