For Opinion See 117 S.Ct. 447

Supreme Court of the United States.
K MART CORPORATION, Petitioner,
v.
Carl HELTON, Charles W. Kempton, Nick Payne, James E. Taylor, Bob Williams, and David Jack Rright, Respondents.
No. 96-98.
October Term, 1995.
July 18, 1996.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

Petition for a Writ of Certiorari

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QUESTIONS PRESENTED

1. Did the United States Court of Appeals for the Eleventh Circuit err when it affirmed a ruling allowing an ADEA class action to proceed that conflicts with the ruling in *Mooney v. Aramco Servs. Co.,* 54 F.3d 1207 (5th Cir. 1996) and other similar cases and is inconsistent with this Court's ruling in *Hoffman-LaRoche, Inc. v. Sperling,* 493 U.S. 165 (1989) on the following legal issues:

(a) Does the "similarly situated" standard under 29 U.S.C. § 216(b) allow a disparate treatment ADEA case to be converted into a class action on the eve of trial without considering the standards governing joinder and severance of claims under the Federal Rules of Civil Procedure;

(b) Is probative evidence of a discrete, identifiable policy of age bias required to permit an ADEA class action to proceed; and

(c) Should concerns about the "manageability" and "fairness" of proceeding with a series of multiple, disparate treatment claims in a single ADEA case limit the scope of the class?

2. Did the United States Court of Appeals for the Eleventh Circuit err in affirming the trial court's ruling granting the plaintiffs' untimely, post-discovery motion to convert their individual complaint into an ADEA class action where another federal judge in the same district had previously ruled that similar ADEA claims of eleven other plaintiffs represented by the same counsel could not be tried jointly in one case under Rules 20 and 42 of the Federal Rules of Civil Procedure?

3. Did the United States Court of Appeals for the Eleventh Circuit err in ruling that opt-in plaintiffs may join an ADEA class to assert individual, disparate treatment claims without having filed charges of discrimination with the EEOC, where the ruling conflicts with the decision in *Thomure v. Phillips Furniture Co.,* 30 F.3d 1020 (8th Cir.1994) ("piggy-backing" should be limited to cases attacking "continuing violations"), *cert. denied,* 115 S. Ct. 1255 (1995), and is inconsistent with numerous decisions emphasizing the importance of timely investigation and conciliation of employment discrimination claims?

***III** LIST OF PARTIES

The following parties were Plaintiffs below and are Respondents before this Court:

Original Plaintiffs: Carl Helton, Charles W. Kempton, Nick Payne, James E. Taylor, Bob Williams

Intervenors and Opt-Ins: David Jack Wright, Mike Williams, Larry Good, Robert Windell, Robert Defoe, Robert Ennis and Edna Portilla

The following party was a Defendant below and is

a Petitioner before this Court:

K Mart Corporation[FN1]

FN1. K Mart Corporation has no parent company or nonwholly owned subsidiaries.

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INTRODUCTION

Petitioner K Mart Corporation ("K Mart") respectfully prays that a writ of certiorari be issued to review the judgment and decision of the United States Court of Appeals for the Eleventh Circuit, filed April 9, 1996.

OPINIONS BELOW

The decision of the Court of Appeals for the Eleventh Circuit is published at 79 F.3d 1086 and is reprinted in the accompanying Appendix to this petition at pages 2-51. The unpublished June 29, 1994 opinion of the United States District Court for the Northern District of Georgia (Shoob, J.) is reprinted in the Appendix to this petition at pages 51-61.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1), which permits review by writ of certiorari before or after rendition of a judgment or decree by a United States Court of Appeals. The Eleventh Circuit's decision in this case was entered on April 9, 1996. K Mart timely filed a Suggestion of Hearing *En Banc* and Petition for Rehearing, which was denied by the Eleventh Circuit on June 17, 1996. The denial is reproduced in the Appendix to this petition at pages 93-95. This petition is timely filed.

***2** STATUTES INVOLVED

Relevant provisions of the Age Discrimination in Employment Act of 1967, as amended ("ADEA"),

29 U.S.C. §§ 621 *et seq.,* and the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. 201 *et seq.,* are set forth in the Appendix to this petition at pages 96-99.

STATEMENT OF THE CASE

1. Course of Proceedings and Disposition Below

On October 29, 1992, five plaintiffs filed this lawsuit in the United States District Court for the Northern District of Georgia in accordance with 28 U.S.C. § 1331 alleging, *inter alia,* that defendant had violated the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §§ 621, *et seq.,* by demoting them from their positions as store managers of five separate stores located in Georgia and Florida. Plaintiff's allegations in this case were essentially the same as the allegations in *Grayson, et al. v. Kmart Corp.,* Civil Action No. 1:92-CV-141-JEC (N.D.Ga.), filed more than ten months earlier by the same counsel. However, unlike the eleven plaintiffs in *Grayson,* the *Helton* plaintiffs did not allege that they had filed their lawsuit on behalf of other "similarly situated" employees or that the case should proceed as a class action under 29 U.S.C. § 216(b).

During more than two years of discovery, the parties exchanged information about the named plaintiffs and reviewed statistics about personnel decisions affecting store managers employed in the three "subregions" (the Bontekoe, Clifton, and Lynch regions) in which the *Grayson* and *Helton* plaintiffs had been employed. K Mart produced over 17,000 documents, including financial data about the operating results of other stores in plaintiffs' districts. K Mart expended considerable time and effort preparing specialized personnel listings about the more than 400 store managers employed in plaintiffs' "subregions" from 1990 to 1993. This data has been the subject of detailed analysis by the parties' experts.

On February 22, 1994, after completion of discovery in both cases[FN2], the Honorable Julie E. Carnes issued a detailed order ruling that the claims of the eleven plaintiffs in *Grayson* were not properly joined under Fed. R. Civ. P. 20 and that those claims should be severed for separate proceedings in accordance with Fed. R. Civ. P. 42(b). *Grayson v. K Mart Corp.,* 849 F. Supp. 785 (N.D.Ga. 1994) (reprinted in Appendix ("App.") at pp. 61-79). Six days later, on February 28, 1994, counsel for the *Grayson* plaintiffs filed motions on behalf of the five *Helton* plaintiffs to amend their complaint to convert the lawsuit to an "opt in" class action pursuant to 29 U.S.C. § 216(b).[FN3]

FN2. The *Helton* plaintiffs did not seek any extension of the discovery period or file any motion to expand the scope of discovery before discovery ended. *See* N.D.Ga. Local Rule 225-1(b) (Motions to extend discovery "must be made prior to expiration of the existing discovery period and will be granted only in exceptional cases....").

FN3. K Mart's motion for severance and transfer had been pending in *Grayson* since March 17, 1993, but the *Helton* plaintiffs took no action to convert their lawsuit to a class action until after Judge Carnes ruled. Obviously the *Helton* motions were a thinly veiled attempt to ask a different federal judge effectively to overrule the severance order in *Grayson.* Immediately after entry of the severance order and being unaware that Judge Carnes had already ruled on the transfer issue, *see Bell v. K Mart Corp.,* 848 F. Supp. 996 (N.D.Ga. 1994) (App. pp. 80-92), the *Grayson* plaintiffs from North Carolina and Florida withdrew their objections to the transfer of their severed claims to district courts in those states.

On July 29, 1994, Judge Shoob granted plaintiffs' motions. (*See* App., pp. 51-61). Focusing first on the class action issue, he concluded that the "similarly situated" language of 29 U.S.C. § 216(b)

did not require plaintiffs seeking to pursue an ADEA class action to establish that they had been affected individually by a "discrete program or procedure" of age bias and that "substantial allegations of common issues of law and fact" would justify allowing "collective" litigation of plaintiffs' claims. (App., p. 54). Citing his "limited discretion to deny a party leave to amend" and concluding that "substantial countervailing reasons" to deny plaintiffs' motion did not exist, Judge Shoob allowed the class action to proceed. (App., p. 57). Judge Shoob subsequently allowed this decision to be appealed to the Eleventh Circuit pursuant to 29 U.S.C. § 1292(b), and the Eleventh Circuit granted K Mart's Petition for Permission to Appeal.

In its April 9, 1996 decision styled *Grayson v. K Mart Corp.,* 79 F.3d 1086 (11th Cir. 1996) (App., pp. 2-51), the Eleventh Circuit Court affirmed in part and reversed in part the July 29, 1994 Order of the District Court.[FN4] The Eleventh Circuit affirmed the District Court's decision allowing plaintiffs to amend their complaint to create an opt-in class, but reversed and remanded the District Court's decision to broaden the temporal scope of the class to include persons, such as the plaintiffs in *Grayson,* who had been demoted more than three years before they opted into the ADEA class.[FN5] *See* note 4, *supra.* The Eleventh Circuit subsequently denied K Mart's timely Petition for Rehearing and Suggestion of Rehearing *En Banc.*

FN4. K Mart's interlocutory appeal in *Helton* had been consolidated with an appeal of right from a judgment entered in *Grayson, supra,* dismissing the plaintiffs' claims without prejudice to allow them the opportunity to opt-into the *Helton* class. Because the Eleventh Circuit concluded that the *Grayson* dismissal was not a final order, the court dismissed the appeals in that case and did not consider the substance of the *Grayson* court's severance ruling. (*See* App., pp. 12-16).

FN5. The EEOC filed a petition to intervene, which was granted while the appeal was pending; but the EEOC was not a party to the appeal. The plaintiffs argued that the EEOC's intervention mooted the appeal, but the Eleventh Circuit obviously concluded otherwise.

2. Statement of Facts

At the time of their demotions, the five original *Helton* plaintiffs lived and worked in five separate stores in five different cities in Georgia and Florida. Plaintiffs, who range in age from barely being protected by the ADEA (age 41) to age 51, allege that they were demoted because of their ages. Any similarity between plaintiffs' claims ends there. Each plaintiff worked in a different store, located in different districts, and reported to different District Managers at the time of his demotion. The three Florida plaintiffs did not even report to the same Regional Manager as the two Georgia plaintiffs. Because each K Mart store is operated as its own profit center, there is no dispute that the facts pertinent to each plaintiff's work history and background are very different. Adjudication of each plaintiff's individual claim will require analysis of fact-specific decisions made by many different supervisors based on the unique management circumstances and operations of each plaintiff's store.

After reviewing the evidence, Judge Carnes ruled in *Grayson* that plaintiffs had not "directed this Court's attention to any discrete program or procedure employed by K Mart that affected each of the plaintiffs in this litigation." (App., p. 66). She rejected plaintiffs' arguments that their demotions had resulted from "blind" adherence to any "discrete" or other identifiable policy to discriminate against older employees:

Plaintiffs point to centralized policy-making and review and claim that such control indicates that each plaintiff's local managers did nothing more than blindly implement company policy without exercising any independent judgment. *Plaintiffs' assertions are not supported by the record.* While the decisions to demote the plaintiffs could not have been

implemented without approval by the Southern Regional Vice President, John Valenti, the *undisputed evidence establishes that the recommendation to make such a demotion originated with the individual employee's district and regional managers.*

(App., pp. 68-69) (emphasis added).

Judge Carnes concluded that "each demotion decision affecting the plaintiffs in these cases was a discrete act by the defendant." (App., p. 70). In contrast, the Eleventh Circuit ruled as a matter of law that identifying a discrete policy of age bias was *not* a requisite of an ADEA class action case. Nevertheless, the appellate court's decision cited virtually every item of extraneous anecdotal (and K Mart submits inadmissible) evidence cited by the *Helton* plaintiffs as evidence that they were victims of an "age-motivated purge." (App., pp. 22-27). K Mart submits that such evidence, which consists principally of non-probative, misleading statistics, stray remarks by non-decisionmakers[FN6] and anecdotal testimony about time-barred events, shows no nexus whatsoever between any identifiable policy or practice of age bias and any of the individual employment decisions at issue in this litigation.

> FN6. The appellate court cited testimony from excerpts of speeches given by Mr. Joseph Antonini, K Mart's former Chairman, without regard to the context in which the remarks were made and without considering the undisputed evidence that Mr. Antonini, who was employed at a level at least six levels removed from plaintiffs, had no input whatsoever into any of the demotion decisions at issue. As ruled in *Nesbit v. PepsiCo, Inc.,* 994 F.2d 703, 705 (9th Cir. 1993), remarks by non-decisionmakers and similar stray remarks unrelated to any decision affecting the plaintiffs do not establish an ADEA case. *See. Price Waterhouse v. Hopkins,* 490 U.S. 228, 277 (1989) (O'Connor, J. concurring).

For instance, the Eleventh Circuit cited plaintiffs' "expert" statistics, which show merely that if no hiring, discharge or demotion decisions had been made (and no employee died or resigned), the workforce would "age" by three years over a three-year period and contain proportionately more older employees. Such testimony is meaningless. Obviously employment decisions were made and other events occurred (deaths and resignations) that changed the composition of the workforce. However, during the three-year period of the alleged "purge" of older store managers, the average age of the store manager workforce remained the same (age 41); the percentage of age 40 or older store managers increased from 48.8% to 55.1%; and the average earnings of the 40 or older group increased. The earnings of store managers under age 40 actually decreased. This data contradicts the assertion that an age-related "purge" occurred.

Similarly, the Eleventh Circuit cited the "building a case" testimony in the affidavit of Mr. W.A. Sands as support for plaintiffs' allegations that "K Mart targeted older store managers for criticism and built a paper trail that would be grounds for their demotion." (App., p. 25). However, the panel neglected to point out that when deposed in his own ADEA lawsuit against K Mart, Mr. Sands testified without equivocation that the evaluations of store managers that he prepared were accurate and that no superior told him to fabricate records to build a case against anyone. Similarly, the Eleventh Circuit failed to note that Mr. Charles Wester, who also supplied a non-probative, conclusory affidavit about file building, had lost his own ADEA case against K Mart on summary judgment. *See Wester v. Kmart Corp.,* Case No. 94-8504, 1995 LEXIS 20355 (S.D.Fla. 1995). FN[FN7][FN]

> FN7. Similarly, the testimony of David Marzano, who also had sued K Mart in a separate commercial dispute, lacks any probative value. Mr. Marzano testified that he had no knowledge whatsoever of any employment decision affecting plaintiffs or any other store manager in K Mart's South-

> ern Region; that he had no knowledge of personnel practices in the Southern Region; and that he had not had any business dealings with Mr. Valenti or any other K Mart manager after the relationship between his company and K Mart ended in March, 1989, *two years* before any of the decisions at issue occurred.

K Mart submits that any dispute about plaintiffs' "file building" theory actually highlights the reasons why this case should *not* be tried as an opt-in class action. Plaintiffs cannot have it both ways. Their case either arises out of an identifiable policy and practice of age bias; or it is based on a series of unique, discrete reports placed in plaintiffs' files to document individual performance. Indeed, during more than two years of discovery, not one manager or former manager with personal knowledge of plaintiffs' files has testified (either in *Helton* or *Grayson*) that any of the audits, financial reports, store visits and similar documents in those files were false or fictitious. *See, e.g., Barnhart v. Mack Trucks, Inc.,* 52 F.3d 328 (7th Cir. 1995) (plaintiff's "paper trail" contention does not establish a triable issue absent any "'factual evidence indicating that the complaints against [plaintiff] were fabricated or unfounded."').

Given the diversity of facts, background evidence and individual decision-making at issue, it would be impossible for K Mart to obtain a fair trial before a single jury if that jury were asked to distinguish between the different facts pertinent to each individual claim in one, multi-plaintiff trial:

> Each plaintiff must prove liability on the part of the defendant with respect to the adverse action defendant took with respect to him. It is precisely this need to focus the jury's attention on the merits of each individual plaintiff's case that counsels against proceeding with these cases in one consolidated trial. There is a tremendous danger that one or two plaintiff's unique circumstances could bias the jury against defendant generally, thus, prejudicing defendant with respect to the other plaintiffs' claims. In these cases, there are eleven factual situations and eleven sets of witnesses with testimony pertinent to those situations. Moreover, plaintiffs' state law claims arise under the laws of four different states. The resulting confusion and prejudice from the scenario presented by a common trial of all plaintiffs' claims against the defendant would be intolerable.

(App., pp. 73-74). Judge Carnes described these manageability and fairness concerns as the "overriding" reason the disparate treatment claims at issue in the *Grayson* case should not be tried together in one consolidated proceeding. (App., p. 76).

REASONS FOR GRANTING THE WRIT

1. The Eleventh Circuit's Decision That An ADEA Class Action Is Not Subject To The Standards Governing Joinder Of Multiple Claims Under The Federal Rules Of Civil Procedure Conflicts With Decisions Of This Court And Other Circuits.

The decision below is in direct conflict with the admonitions of this Court in *Hoffman-LaRoche, Inc. v. Sperling,* 493 U.S. 165 (1989); with the Fifth Circuit's decision ***11** in *Mooney v. Aramco Servs. Co.,* 54 F.3d 1207 (5th Cir. 1995); and with decisions of other circuits addressing "spurious" class actions under the FLSA. Accordingly, certiorari is appropriate here. *See Acosta v. Louisiana Dep't of Health and Human Res.,* 478 U.S. 251, 253 (1986) (granting writ to resolve conflicting interpretations of Fed. R. App. P. 4).

Judge Shoob declined to follow Judge Carnes's February 22, 1994 severance ruling in *Grayson, supra,* because that ruling was based on the proposition that plaintiffs had failed to establish that any "discrete program or procedure employed by K Mart ... affected each of the plaintiffs." *See Helton* (App., p. 53). Judge Shoob concluded (and the Eleventh Circuit Panel agreed) that the "similarly situated" requirement in Section 216(b) of the FLSA does not require the plaintiffs to demonstrate

a "discrete program or procedure." (App., pp. 53; 20-21). Citing the decision in *Hoffman-LaRoche, Inc. v. Sperling,* 493 U.S. 165 (1989), the courts below concluded that plaintiffs' "substantial allegations" that an upper-man-agement policy resulted in an age-related purge of older store managers were enough to permit the "opt-in" plaintiffs to proceed "collectively" in a single ADEA case. (App., pp. 54; 19).

In relying solely on the portion of the *Sperling* opinion sanctioning "collective," ADEA proceedings, *see* App., p. 19, the Eleventh Circuit Panel and Judge Shoob overlooked the procedural posture of the *Sperling* case. In *Sperling,* the Court's decision focused on the "narrow" issue of the propriety of issuing court-sanctioned notice to the members of a prospective opt-in class. *Sperling* does not sanction an eleventh hour, post-discovery ***12** amendment that would effectively overrule a contrary order entered by another judge in the same district; that would convert an individual case to an opt-in, class-wide action; and that would require the parties to begin expensive, new discovery when the case is ready for final disposition on the merits. *Sperling* did not address the "similarly situated" issue, the question of whether the "opt-in" joinder standards under 29 U.S.C. § 216(b) (1988) should differ from joinder standards under the Federal Rules of Civil Procedure, or the issue of whether persons who never filed any charges of discrimination should be allowed to "piggyback" on other charges.

In *Mooney v. Arabian American Oil Co.,* No. H-87-498, 1993 WL 739661 (S.D.Tex. Aug. 25, 1993) , *aff'd,* 54 F.3d 1207 (5th Cir. 1995), the District Court noted that *Sperling* was limited to the "narrow" procedural issue about notice and "did not address the 'similarly situated' issue," noting also that the district "court's 'similarly situated' determination [in *Sperling]* was preliminary in nature, based upon the record in its nascent form...." 1993 WL 739661 at *8 n. 9. As ruled in *Mooney,* after discovery is complete, "due process concerns require the court to scrutinize the opt-in plaintiffs and their respective claims with a more exacting eye to determine if they are in fact 'similarly-situated' within the meaning of the statute ...." *Id.* at *8. In dismissing the claims of more than 130 opt-in plaintiffs who had joined the case, the *Mooney* court concluded that an ADEA class action was not appropriate when adjudication of the "diverse" circumstances of each plaintiff would require an "individualized" factual inquiry and where the claims at issue were ***13** the product of "bottom up" decisionmaking, initiated "on a decentralized level by local management." *Id.* at *6.

The United States Court of Appeals for the Fifth Circuit affirmed dismissal of the "class" in *Mooney,* relying expressly on the District Court's decision. 54 F.3d at 1214-16. However, the Eleventh Circuit completely disregarded the class action ruling in *Mooney,* erroneously concluding that the manageability concerns flowing from joining of individual, disparate treatment claims of multiple plaintiffs in one ADEA lawsuit were irrelevant. This ruling overlooks the portions of the *Sperling* decision in which this Court, on four separate occasions, pointed out that 29 U.S.C. § 626(b) permits the joinder of multiple parties where there are "common issues of law and fact arising from the same alleged discriminatory activity." 493 U.S. at 170. In such a case, a district court must manage joinder in an orderly, sensible manner that is consistent with procedural protections in the Federal Rules, including adherence to an appropriate "scheduling order limiting time for various pretrial steps such as joinder of additional parties." *Id.* at 173.

As noted by the Fifth Circuit in *Mooney,* when considering a multi-faceted joint trial of a series of disparate treatment age discrimination claims, no court has allowed an ADEA class action to continue. 54 F.3d at 1214. *See, e.g., Gorence v. Eagle Food Ctrs., Inc.,* No. 93-C-4862, 1994 WL 445149 (N.D.Ill. Aug. 16, 1994); *E.E.O.C. v. MCI Int'l, Inc.,* 829 F. Supp. 1438 (D.N.J. 1993); *Ulvin v. Northwestern Nat'l Life Ins. Co.,* 141 F.R.D. 130

(D.Minn. 1991); *Pines v. State Farm Gen. Ins. Co.,* 58 Fair Empl. Prac. Cas. (BNA) 387 (C.D. Cal. 1992); *Walker v. Mountain States Tel. & Tel. Co.,* No. 87-M-790, 1988 U.S. Dist. LEXIS 17553 at * 4 (D. ***14** Colo. Sept. 26, 1988); *Lusardi v. Xerox Corp.,* 118 F.R.D. 351, 370-73 (D.N.J. 1987), *rev'd in part on other grounds sub. nom. Lusardi v. Lechner,* 855 F.2d 1062 (3d Cir. 1988), *adhered to on remand,* 122 F.R.D. 463 (D.N.J.), *app. dismissed,* 975 F.2d 964 (3d Cir. 1992). *See generally In re Fibreboard Corp.,* 893 F.2d 706, 711-712 (5th Cir. 1990) (joint trial of disparate, individual personal injury claims would be "no more than the testimony of experts regarding their claims, as a group, compared to the claims actually tried to the jury"). By failing to address the class action aspects of the *Mooney* ruling[FN8] or even consider the manageability and fairness factors inherent in allowing any class action to continue, the Eleventh Circuit committed clear error.

> FN8. The Eleventh Circuit cited *Mooney* only to support its holding regarding piggybacking. (App., p. 35). *See* Section 3, *infra.*

Moreover, the Eleventh Circuit's conclusion that "joinder" standards of the Federal Rules of Civil Procedure need not be considered in determining whether an ADEA class action should proceed is inconsistent with numerous cases holding that an ADEA opt-in class action under 29 U.S.C. § 216(b) is a form of "spurious" class action that is in the nature of a device for "permissive joinder" of parties. *Zahn v. International Paper Co.,* 414 U.S. 291, 298 n.6 (1973) (the "spurious" class action of former Rule 23(a)(3) was "merely an invitation to joinder...."); *Lipsett v. United States,* 359 F.2d 956 (2d Cir. 1966) (the "spurious" class action is a "mere device for permissive joinder" that differs from the representative form of class action); *Schatte v. International Alliance of Theatrical Stage Employees,* 183 F.2d 685, 687 (9th Cir. 1950) ***15** ("spurious class suit" is "merely a permissive joinder device in which the right and liability of each individual plaintiff is distinct"), *cert. denied,* 340 U.S. 827 (1950). Because opt-in joinder should be subject to the same standards as permissive joinder under Rule 20(a), the Eleventh Circuit Panel and Judge Shoob erred in refusing to consider those standards in applying the "similarly situated" language of 29 U.S.C. § 216(b). *See also Kainz v. Anheuser-Busch, Inc.,* 194 F.2d 737, 743 (7th Cir.), *cert. denied,* 344 U.S. 820 (1952).

The Eleventh Circuit's decision effectively resurrects an "across-the-board" form of ADEA class action that has been rejected in virtually every other type of class-wide case. *See, e.g., General Tel. Co. of Southwest v. Falcon,* 457 U.S. 147 (1982). In *Falcon,* this Court conclusively determined that claims of employment discrimination are not automatically susceptible to "across-the-board," class action treatment:

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

Id. at 157. As ruled in *Falcon,* if individual issues predominate, class action treatment is not appropriate. *See, e.g., Wheeler v. Columbus,* 703 F.2d 853, 855 (5th Cir. 1983) (where "[d]iscrimination in its broadest sense is the only ***16** [common] question alleged ..." class action treatment is not appropriate); *Dickerson v. United States Steel Corp.,* 582 F.2d 827, 834 (3d Cir. 1978) (finding issues unsuitable for class-wide joinder where "litigation of ... [a] purported general policy of defendant, as it might affect each plaintiff here, would inevitably focus in detail on the separate work histories of each plaintiff"). There is no policy reason for applying different standards in an ADEA class action case. *See Gorence v. Eagle Food Ctrs., Inc.,* No.

93-C-4862, 1994 WL 445149 at *10 (N.D. Ill. Aug. 16, 1994).

Application of these factors and appropriate "joinder" standards to the issues presented is consistent with *Sperling,* with *Mooney,* and with the majority of lower court decisions addressing ADEA class action manageability issues at the trial stage. Because the Eleventh Circuit's decision is inconsistent with this authority, a writ of certiorari should issue to clarify the law in this area.

2. The Writ Should Issue To Correct The Clear Error Allowing An Individual Action To Be Converted To A Class Action At The Eleventh Hour.

The Eleventh Circuit concluded, after reviewing plaintiffs' alleged "evidence," that Judge Shoob did not abuse his "discretion" in allowing an ADEA class action to proceed. However, for the reasons stated above, Judge Shoob and the Eleventh Circuit applied the wrong legal standards in deciding the class action issue. As recognized in *Lipsett v. United States, supra,* the "exercise of ***17** discretion based on a misconception of the law is an abuse of discretion." 359 F.2d at 959.

K Mart respectfully submits that the lower courts' rulings violate virtually every procedural safeguard designed to ensure fairness to litigants in federal courts. For instance, under Local Court Rules, the time for amendments had expired more than a year before plaintiffs moved to amend. Those rules also require class action determinations to be made promptly. However, Judge Shoob's ruling allows the case to be converted into an ADEA class action after discovery has closed, after motions for summary judgment have been filed, and after Judge Carnes had severed the *Grayson* cases for separate trials. The ruling requires discovery to be reopened; expands the geographic scope of the case from five stores in two states to encompass approximately 700 stores in eighteen states, the Virgin Islands and Puerto Rico; requires development and analysis of new statistics; and requires K Mart to compile thousands of pages of new documents. Obviously K Mart is prejudiced by these rulings.

The *Sperling* ruling does not sanction a district court's "unbridled discretion," 493 U.S. at 174, to allow class notice in a case such as *Helton,* which was not filed initially as a class action and in which plaintiffs did not seek leave to amend their complaint to allege a class action until discovery had been completed and Judge Carnes had issued severance and transfer orders in the *Grayson* litigation. Rather, a district court must "manage the process of joining multiple parties in a manner that is orderly, sensible, and not otherwise contrary to statutory commands *or the provisions of the Federal Rules of Civil* ***18** *Procedure.*" *Id.* at 170 (emphasis added). There is not any hint in *Sperling* that the interests of "judicial economy" outweigh the procedural protections in the Federal Rules against untimely amendments and improper joinder. In *Sperling,* this Court noted specifically that the authority to supervise notice to an ADEA class should be managed "in an orderly fashion ... reinforced by Rule 16(b), [FN9] requiring entry of a scheduling order *limiting time for various pretrial steps such as joinder of additional parties." Sperling,* 493 U.S. at 173 (emphasis added).

> FN9. According to Rule 16(b), deadlines established in a scheduling order can be extended only upon a showing of "good cause," Fed. R. Civ. P. 16(b); but plaintiffs failed to establish any "cause" for their delay in moving to amend. As recognized by many courts, "[t]he careful scheme of reasonable framing and enforcement of scheduling orders for case management would ... be nullified if a party could inject amended pleadings upon a showing of less than good cause after scheduling deadlines have expired." *Harrison Beverage Co. v. Dribeck Importers, Inc.,* 133 F.R.D. 463, 469 (D.N.J. 1990).

Under Local Court Rules governing this case and in accordance with the Scheduling Order entered on February 12, 1993, the time for amendment of the

Helton complaint to add class-wide claims expired not later than February 6, 1993, *more than one year before* plaintiffs filed their belated motion to amend. Even if the February 12, 1993 Scheduling Order were not binding under Fed. R. Civ. P. 16(b), the trial court's order is blatantly inconsistent with Rules requiring movants to make "timely application" for permissive intervention, Fed. R. Civ. P. 24(b), and providing that leave to amend a pleading should be granted only "when justice so requires." ***19**Fed. R. Civ. P. 15(a). "Justice" does not require a motion for leave to amend to be granted in circumstances involving undue delay, bad faith, dilatory motive or undue prejudice to the party opposing the amendment. *See Foman v. Davis,* 371 U.S. 178 (1962).

The trial court found that K Mart had not presented "countervailing reasons" warranting denial of plaintiffs' untimely motions. K Mart respectfully submits that this statement confirms that neither the trial court nor the Eleventh Circuit properly examined the substantive and procedural issues addressed above. Indeed, the need for significantly expanded discovery is often cited as a basis for denying a motion to amend submitted after or near the end of the discovery period. *See, e.g., Bryson v. Waycross,* 888 F.2d 1562 (11th Cir. 1989) (upholding district court's denial of plaintiff's motion to amend complaint to add new claims during the last week of the discovery period because the defendant would be unduly prejudiced); *Quaker State Oil Refining Corp. v. Garrity Oil Co.,* 884 F.2d 1510 (1st Cir. 1989) (affirming district court's denial of motion to amend submitted near the end of discovery period because nonmoving party would be prejudiced by need for additional discovery); *Addington v. Farmer's Elevator Mut. Ins. Co.,* 650 F.2d 663 (5th Cir.) (plaintiff's post-discovery motion to amend complaint to add new factual and legal claims was properly denied because of likelihood of prejudice to defendant), *cert. denied,* 454 U.S. 1098 (1981); *McCann v. Frank B. Hall & Co.,* 109 F.R.D. 363 (N.D. Ill. 1986) (post-discovery motion to amend complaint denied because it would unduly prejudice defendant by necessitating additional discovery).

***20** Reversal of the order granting plaintiffs' eleventh hour motions will ameliorate substantial prejudice to K Mart, will expedite disposition of the named plaintiffs' claims and will not prejudice their interests in any way. In light of the massive additional costs to defendant and substantial delays caused by adding new claimants to the lawsuit and effectively starting discovery over on the eve of trial, the fact that prospective, opt-in claimants may be foreclosed by their own inaction from pursuing individual ADEA claims is not a sufficient reason to allow a class action to commence at this stage in the case.

Another "countervailing reason" for denying plaintiffs' amendment is the issuance, a few days before plaintiffs moved to amend, of the thorough severance and transfer orders in *Grayson* and *Bell.* Even assuming Judge Shoob was not bound to follow *Grayson,* he should have given deference to the substance of Judge Carnes's ruling that standards of manageability and fairness should preclude joinder of these multiple, disparate treatment claims in one case. *Cf. Christianson v. Colt Indus. Operating Corp.,* 486 U.S. 800, 816, 817 (1988) (one court should not "revisit prior decisions of its own or of a coordinate court ... [absent] extraordinary circumstances such as where the initial decision was 'clearly erroneous and would work a manifest injustice.'"); *Feller v. Brock,* 802 F.2d 722, 727-28 (4th Cir. 1986) (recognizing the long-standing judicial policy that "coordinate courts should avoid issuing conflicting orders"); *Stevenson v. Four Winds Travel, Inc.,* 462 F.2d 899, 904-05 (5th Cir. 1972) (holding that one judge of a United States District Court should "respect and not overrule [the] decision and order" of a prior judge of the same court). *See generally* ***21***ACF Indus., Inc. v. Guinn,* 384 F.2d 15 (5th Cir. 1967) (finding abuse of discretion where judge vacated prior order of another judge in the same court), *cert. denied,* 390 U.S. 949 (1968); *Prack v. Weissinger,* 276 F.2d 446, 450

(4th Cir. 1960) ("in federal practice, judges of coordinate jurisdiction, sitting in cases involving identical legal questions under the same facts and circumstances, should not reconsider the decisions of each other").

Judge Shoob and the Eleventh Circuit converted this case to a class action without applying appropriate procedural provisions of the Federal Rules of Civil Procedure. Because those provisions and pertinent provisions of the employment discrimination laws that prevent litigation of stale claims are essential hallmarks of the "evenhanded" administration of justice, *see Baldwin County Welcome Ctr. v. Brown,* 466 U.S. 147,152 (1984), the Eleventh Circuit decision should be vacated and Judge Shoob's ruling reversed.

3. The Eleventh Circuit's "Piggybacking" Ruling Conflicts With Decisions Of The Eighth Circuit And This Court Strictly Enforcing The ADEA's Charge-Filing Requirement.

The decision below ignores precedent strictly applying the provisions of 29 U.S.C. § 216(d) (1994) that require the timely filing of a charge as a prerequisite to suit in federal court and also conflicts with the Eighth Circuit's decision in *Thomure v. Phillips Furniture Co.,* 30 F.3d 1020 (8th Cir. 1994), *cert. denied,* 115 S. Ct. 1255 (1995). Accordingly, certiorari is appropriate here. *See Acosta, supra.*

***22** The ADEA requires persons aggrieved by alleged age bias to file a timely charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"). 29 U.S.C. § 626(d). As many courts have recognized, the charge-filing requirement plays an essential role in the administrative and judicial enforcement of the ADEA. The interests served by the charge-filing requirement include "the promotion of informal, good faith negotiation and voluntary compliance, speedy and peaceful resolution of claims, preservation of evidence and records, and conserving court resources. ..." *Edwards v. Kaiser Aluminum and Chem. Sales, Inc.,* 515 F.2d 1195, 1199 (5th Cir. 1975); *see also Coke v. General Adjustment Bureau, Inc.,* 640 F.2d 584 (5th Cir. 1981) (*en bane.*) The Fifth Circuit Court of Appeals stated the following about the requirement:

It is logical that the 180 day notice was intended to ensure that potential defendants would become aware of their status and the possibility of litigation reasonably soon after the alleged discrimination.... In turn this would promote the good faith negotiation of employers during the 60 day conciliation period and provide an opportunity for preservation of evidence and records for use at a trial necessitated by failure of negotiation.

Powell v. Southwestern Bell Tel. Co., 494 F.2d 485, 488 (5th Cir. 1974). The administrative filing and conciliation requirements commonly are cited as a basis for refusing to allow punitive and compensatory damages under the ADEA because the availability of large monetary awards would discourage conciliation of claims before the EEOC. *See, e.g.,* ***23***Murphy v. American Motors Sales Corp.,* 570 F.2d 1226 (5th Cir. 1978); *Dean v. American Security Co.,* 559 F.2d 1036 (5th Cir. 1978), *cert. denied,* 434 U.S. 1066 (1978).

"Piggybacking," also known as the "single filing" concept, allows persons who did not file timely charges (and thus did not utilize the investigative and conciliation efforts of the EEOC) to rely on an ADEA charge filed by someone else. K Mart submits that there is no statutory basis and no basis in the jurisprudence of this Court for completely relieving a claimant from having to comply with this important, administrative prerequisite to suit. *See Delaware State College v. Ricks,* 449 U.S. 250, 256-57 (1980); *United Air Lines, Inc. v. Evans,* 431 U.S. 553, 558 (1977). *See also Lorance v. AT&T Technologies, Inc.,* 490 U.S. 900, 904 (1989).

The Eleventh Circuit allowed "piggybacking" based in large part on *Calloway v. Partners Nat'l Health Plans,* 986 F.2d 446 (11th Cir. 1993), a Title VII case applying the single filing concept in a non-class action case. The decision in *Anson v. Uni-*

versity of Tex. Health Science Ctr., 962 F.2d 539, 541 (5th Cir. 1992), also cited by the Eleventh Circuit, allowed piggybacking in an ADEA case; but that decision was based on the erroneous conclusion that when Congress changed "notice of intent to sue" language in the former "180-day rule" provision to a "charge" filing requirement, H.R. 5383, 95th Cong., 2d Sess. (1978), it effectively intended to permit persons to join ADEA cases without filing individual "charges" with the EEOC. To the contrary, Congress specifically noted that "[t]his change ... is not intended to alter the basic purpose of the notice requirement. ..." H.R. Conf. Rep. No. 950, 95th Cong., 2d Sess. 12 (1978) *reprinted in* 1978 U.S.C.C.A.N. 528, 534.

***24** The Eleventh Circuit's decision allowing a series of individual, disparate treatment claims to be added to this case without ever having been presented to the EEOC also conflicts with the *Thomure* decision, in which the Eighth Circuit refused to allow one plaintiff alleging discrimination arising out of a one-time pay cut to "piggyback" onto the charge of another plaintiff. In contrast to *Allen v. Amalgamated Transit Union Local 788,* 554 F.2d 876 (8th Cir.), *cert. denied,* 434 U.S. 891 (1977), which allowed "piggybacking" in the context of a class-wide, continuing violation claim attacking a discriminatory seniority system, the *Thomure* court recognized that individual employment decisions are "not the sort of continuing violation found in *Allen* for which one presumably could always file a charge as long as the violation continued." *Thomure,* 30 F.3d at 1027. Here, as in *Thomure,* the demotions at issue were one-time, discrete events that do not constitute a continuing violation. *See Ricks, supra; Evans, supra.* Accordingly, only those plaintiffs who filed timely charges of discrimination should be permitted to join the case.

Furthermore, even assuming that the single-filing rule should apply to opt-in class actions under the ADEA, the charge upon which the opt-in plaintiffs rely must provide sufficient notice of class-wide discrimination to allow investigation and conciliation by the EEOC. Although the Eleventh Circuit had not addressed this issue in an ADEA case previously, the Fifth Circuit has ruled that to be the foundation for a class action, a charge must allege class-wide discrimination or that it was filed on behalf of a class. *Anson,* 962 F.2d at 541-543; *accord, Kloos v. Carter-Day Co.,* 799 F.2d 397, 402 (8th Cir. 1986). ***25** Similarly, the Ninth Circuit has held that a lawsuit filed by a plaintiff whose administrative charge "expressed no intention to sue on behalf of anyone other than himself" could not form the basis for an "opt in" class action. *Naton v. Bank of California,* 649 F.2d 691, 697 (9th Cir. 1981).

The Eleventh Circuit Court of Appeals instructed the district court to rely on the charge of plaintiff Kempton, but even the Eleventh Circuit did not find that this charge gave adequate notice of "class action" claims when read alone. The Panel held that "Kempton's charge, *read together with the charges of the other named Helton plaintiffs,* provides adequate notice." (App., pp. 41-42) (emphasis added). Where, as here, none of these claimants gave notice that they sought to represent a class, and the EEOC did not conduct any class-wide investigation of the charging parties' claims, the Court should not permit a class action to proceed.[FN10]

> FN10. It is undisputed that there was no "class-wide" investigation or conciliation of the named plaintiffs' claims. Indeed, the record reflects that the only determination issued by the EEOC on any charge filed by the *Helton* (or *Grayson*) plaintiffs was a determination of "no cause" on the charge filed by plaintiff Williams. The Eleventh Circuit noted that the Williams charge referenced the demotion of "six other store managers," but failed to mention the EEOC determination rejecting the charge as meritless. (App., pp. 49-50).

The interests served by the charge-filing requirement would be severely and inappropriately com-

promised if large numbers of non-charge-filing plaintiffs were allowed to add their *separate,* disparate treatment claims to this case. Unlike the cases in other jurisdictions that ***26** have sanctioned "piggybacking," the charges filed by the *Helton* plaintiffs were not filed or investigated by the EEOC on a class-wide basis, and plaintiffs here do not have any basis to assert a "continuing violation" claim based on a series of discrete demotions affecting them individually. "Piggybacking" is not appropriate here, and the writ should be granted to resolve, the conflicting decisions about when, if ever, "piggybacking" should be allowed.

CONCLUSION

The writ should issue to consider whether or not the "similarly situated" language incorporated in the ADEA permits a disparate treatment case involving five plaintiffs to be converted to an opt-in class action after the close of discovery when a full factual record shows that individual claims predominate and that a multi-plaintiff trial would be impossible to manage in a fair and meaningful way. This Court has never considered this important issue, and the previous ruling in *Sperling* has led to conflicts between the Circuits on important issues that warrant review and clarification on certiorari. The conflicts between the Circuits on the "piggybacking" issue also presents a matter of first impression that should be addressed by this Court. For the reasons expressed ***27** herein, the writ should issue to review the questions addressed above.

Appendix not available.

K MART CORPORATION, Petitioner, v. Carl HELTON, Charles W. Kempton, Nick Payne, James E. Taylor, Bob Williams, and David Jack Rright, Respondents.
1996 WL 33422123 (U.S.) (Appellate Petition, Motion and Filing)

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