

**Representative and Collective Actions Under the ADEA
Class Actions in Employment Law: Class Action Basics
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by
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I. Statutory Framework for ADEA “Class” Actions

ADEA “class” actions follow the procedures of Section 16(b) of the Fair Labor Standards Act, 29 U.S.C. § 216(b), not Rule 23 of the Federal Rules of Civil Procedure. Formerly known as the “spurious class action,” ADEA actions involving multiple plaintiffs are typically known as “representative” or “collective” actions because they require class members to “opt-in” in order to benefit or be bound by the case. In contrast, Rule 23 class actions bind absent class members unless they affirmatively “opt-out.” While the requirements and procedures of Rule 23 do not regulate ADEA class actions, many courts use the terminology of Rule 23 class actions in examining class action issues under the ADEA.

The differences in Section 16(b) class actions (ADEA and FLSA) are highlighted when plaintiffs seek to bring cases raising ADEA or FLSA claims and other claims subject to the class action procedures of Federal Rule of Civil Procedure Rule 23. ADEA and ERISA claims are a typical example. *See, e.g., Vaszlavik v. Storage Technology Corp.*, 183 F.R.D. 264 (D. Colo. 1998) and 175 F.R.D. 672 (D. Colo. 1997); *Krueger v.*

New York Tel. Co., 163 F.R.D. 433 (S.D.N.Y. 1995) (court certified ERISA class action and ADEA collective action for same group).

A. FLSA and ADEA Statutory Provisions - 29 U.S.C. §§ 216(b), 626(b)

Class actions under the FLSA are governed by Section 216(b), 29 U.S.C. § 216(b):

An action to recover the liability ... may be maintained in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

While the ADEA is a hybrid of Title VII and the FLSA, its class action procedures derive from the incorporation of provisions from the FLSA. Section 7(b) of the ADEA, 29 U.S.C. § 626(b) provides:

The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 215 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section.

Based on the text of the statute, the majority of courts recognize only two requirements for maintaining an ADEA or FLSA class action. First, that the plaintiffs are “similarly situated.” Second, that each individual file a written consent with the court to become a plaintiff. Most disputes about the formation and maintenance of ADEA class actions focus on the meaning and application of the “similarly situated” requirement.

B. Rule 23 Does Not Govern ADEA Class Actions

Most courts that have addressed the issue rule that ADEA class actions are not governed by Rule 23, but by the opt-in requirements of 29 U.S.C. § 216(b). *See Mooney*

v. Aramco Services Co., 54 F.3d 1207, 1214 n.8 (5th Cir. 1995); *Schwed v. General Electric Co.*, 1997 WL 204394, *1 (N.D.N.Y. 1997); *Abrams v. General Electric Co.*, 1996 WL 663889, *1 (N.D.N.Y. 1996); *Adkins v. E.I. Dupont De Nemours & Co.*, 1996 WL 431096, *2 (D. Del. 1996); *Mete v. New York State Office of Mental Retardation and Developmental Disabilities*, 62 FEP Cas. (BNA) 642 (N.D.N.Y. 1993); *Church v. Consolidated Freightways, Inc.*, 137 F.R.D. 294 (N.D. Cal. 1991). *But see Swoope v. Bellsouth Telecommunications, Inc.*, 1998 WL 433952, *5 (N.D. Miss. 1998); *Camp v. Lockheed Martin Corp.*, 1998 WL 906915 (S.D. Tex. 1998); *Shushan v. University of Colorado*, 123 F.R.D. 263 (D. Col. 1990).

1. Opt-in vs. Opt-out

The opt-in requirement under Section 216(b) means that no class member is bound by the case unless he or she affirmatively consents to become a class member. The opt-in requirement protects the interests of absent class members. As a corollary, Rule 23's requirement that the named plaintiffs adequately represent the class is designed to protect the interests of absent class members. While courts will consider whether the named plaintiff in an ADEA class action is representative of those "similarly situated" to her in the ADEA class action, the standard is not the same or as strict as the Rule 23 requirement that the named plaintiffs demonstrate that they adequately represent the class. *See Church v. Consolidated Freightways, Inc.*, 137 F.R.D. 294, 306 (N.D. Cal. 1991).

2. Similarly Situated vs. Typicality and Commonality

Under Rule 23, named plaintiffs must demonstrate that their claims are typical of the class and that common questions of law or fact predominate over individual questions.

This appears to be a more stringent test than the similarly situated requirement under Section 216(b). *Church v. Consolidated Freightways, Inc.*, 137 F.R.D. 294, 306 (N.D. Cal. 1991); *Heagney v. European American Bank*, 122 F.R.D. 125, 127 n.2 (E.D.N.Y. 1988). However, the general functions of the commonality and typicality elements are satisfied when plaintiffs in an ADEA action allege to have been victims of a “single decision, policy, or plan infected by discrimination.” *Church v. Consolidated Freightways, Inc.*, 137 F.R.D. 294, 306 (N.D. Cal. 1991), quoting *Sperling v. Hoffman-La Roche, Inc.*, 118 F.R.D. 392, 407 (D.N.J. 1988).

3. No Numerosity Requirement

Neither the ADEA nor Section 16(b) give any indication of a requirement comparable to the numerosity element of Rule 23(a)(1), which makes joinder impractical because the class is too numerous. Courts have permitted ADEA class actions without discussing whether the number of plaintiffs warranted class action treatment. *See Schwed v. General Electric Co.*, 1997 WL 204394, *1 (N.D.N.Y. 1997) (between 57 and 62 class members); *Mete v. New York State Office of Mental Retardation and Developmental Disabilities*, 62 FEP Cas. (BNA) 642, 1993 WL 226434, *5, n.4 (N.D.N.Y. 1993) (putative class of 53 members).

4. No Formal ADEA Class “Certification” Required

Rule 23 mandates court certification for the case to proceed as a class action.

Neither the ADEA, nor Section 216(b) contain such a requirement and plaintiffs should resist the imposition of a formal certification procedure.

Plaintiffs will likely need court authorization to send a notice to potential class members and therefore will need to request approval from the court for the case to be treated as a class action under Section 216(b). Defense counsel will typically try to turn plaintiffs’ request into a Rule 23 certification hearing. Indeed, many courts and counsel use the term “certification” in ADEA cases.

Plaintiffs’ counsel should oppose a Rule 23 “certification” procedure (even the terminology because of its traps), since the standards applied to ADEA class cases are separate and distinct from Rule 23, as explained earlier. *Abrams v. General Electric Co.*, 1996 WL 663889, *1, n.3 (N.D.N.Y. 1996).

II. Proceeding as a Class

A. The EEOC Charge Must Give Notice of Class-wide Allegations

Just as with individual ADEA claims, a prerequisite to filing an ADEA class action is the filing of administrative charges of age discrimination with the EEOC or an applicable state or local agency. 29 U.S.C. § 626(d).

1. Expressly Include Class-wide Claims

A charge of discrimination must provide sufficient information to give EEOC notice of the class-wide nature of the allegations contained in the charge to allow EEOC to investigate and conciliate on a class-wide basis, rather than on an individual claim. *See Church v. Consolidated Freightways, Inc.*, 137 F.R.D. 294, 300 (N.D. Cal. 1991).

Stating specifically that the charge is filed on behalf of the complainant and “all others similarly situated,” is not necessary, as long as the charge contains allegations of class-based treatment. *See Whalen v. W.R. Grace & Co.*, 56 F.3d 504, 507 (3d Cir. 1995); *Anderson v. Montgomery Ward & Co.*, 852 F.2d 1008, 1017 (7th Cir. 1988); *Thiessen v. General Electric Capital Corp.*, 996 F. Supp. 1071, 1075 (D. Kan. 1998).

In contrast, charges that merely speak about an individual’s termination and individual allegations do not provide the necessary notice to the EEOC of class-wide claims. *See Kresefsky v. Panasonic Communications and Systems Co.*, 169 F.R.D. 54, 59 (D.N.J. 1996). Failure to provide such notice in a charge will result in a court denying plaintiff’s request to proceed as a collective action. *Kresefsky v. Panasonic Communications and Systems Co.*, 169 F.R.D. 54, 60 (D.N.J. 1996).

2. Single Filing Rule

The “single filing rule” permits individuals to forego the requirement of individually filing a charge so long as one plaintiff has complied with ADEA Section 7(d). *See Tolliver v. Xerox Corp.*, 918 F.2d 1052 (2d Cir. 1990), *cert. denied*, 499 U.S. 983 (1991); *Thiessen v. General Electric Capital Corp.*, 996 F. Supp. 1071, 1074 (D.

Kan. 1998). In order for individuals in a collective action to invoke the benefits of the single filing rule, the charge must contain an allegation of class-wide discrimination sufficient to give the EEOC and the defendants notice of potential class claims. *Thiessen v. General Electric Capital Corp.*, 996 F. Supp. 1071, 1075 (D. Kan. 1998).

The single filing rule applies to individuals (typically opt-in plaintiffs) who could have filed a charge in the same time frame or on the same date as the plaintiff filed his charge. In other words, a plaintiff who has not filed a charge can “piggyback” onto the timely filed charge of another plaintiff who faced similar discriminatory treatment during the same time frame. *Gitlitz v. Compagnie Nationale Air France*, 129 F.3d 554, 557 (11th Cir. 1997).

The effect of the single filing rule is to fix a time frame of 300 days before and 300 days after the date of the named plaintiff’s charge. Individuals who could have filed a charge within this time frame, but did not, can piggyback onto the timely filed charge and would generally be permitted to opt-in to an ADEA class action. *See Whalen v. W.R. Grace & Co.*, 56 F.3d 504 (3d Cir. 1995).

B. Statute of Limitations for ADEA Class Actions

Whether the complaint is filed by an individual alone or a potential class, the ADEA complaint must be filed within 90 days of receipt of the notice from EEOC terminating its processing of the charge, as required by ADEA Section 7(e), 29 U.S.C. § 626(e).

1. Tolling of the Statute of Limitations

One issue that has split the courts concerning the statute of limitations in ADEA class actions is whether the filing of the class complaint tolls the statute of limitations for class members. In Title VII actions under Rule 23, the statute of limitations is tolled by the filing of the class complaint, allowing individuals to intervene as named plaintiffs in the class case and also permitting would-be class members to file separate actions of their own. *See Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983).

Most circuit courts that have addressed the issue apply the *Crown, Cork & Seal* rule to ADEA class actions. *See Armstrong v. Martin Marietta Corp.*, 93 F.3d 1505, 1508 (11th Cir. 1996) (“Membership in a pending class action . . . tolls the ninety-day period for filing an individual lawsuit.”); *Sperling v. Hoffman-La Roche, Inc.*, 24 F.3d 463, 471-72 (3d Cir. 1994); *Clark v. United Technologies Corp.*, 1997 WL 573431, *3 (D. Conn. 1997) (“the commencement of an ADEA class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action.”); *In re Western District Xerox Litigation*, 850 F. Supp. 1079, 1093 (W.D.N.Y. 1994) (“[T]olling commences . . . when the initial class action complaint was filed and not when class members opted into the certified class.”). *But see Grayson v. Kmart Corp.*, 79 F.3d 1086, 1105 (11th Cir.), *cert. denied*, 117 S. Ct. 435 (1996).

The leading case on tolling in an ADEA class action is *Sperling v. Hoffman-La Roche, Inc.*, 24 F.3d 463, 471-72 (3d Cir. 1994). The court held that opt-in plaintiffs may join the ADEA action after the limitations period for that individual had expired if the representative plaintiff's action was timely filed and the complaint clearly states its representative nature. Focusing on the statute of limitations provision of the ADEA, Section 7(e), 29 U.S.C. § 626(e), the Third Circuit noted that in constructing the ADEA from parts of Title VII and the FLSA, Congress originally incorporated Section 6^{1/} of the Portal-to-Portal Act, 29 U.S.C. § 255, but did not incorporate Section 7 of the Portal-to-Portal Act, 29 U.S.C. § 256,^{2/} which limits the time for opt-ins to join a representative action. Thus, the court found that Congress' selective incorporation meant that Congress

^{1/} Section 6 of the Portal-to-Portal Act established a two-year statute of limitations and a three-year statute of limitations for willful violations of the law. The incorporation of Section 6 into the ADEA was repealed by the Civil Rights Act of 1991. The new provision sets forth a statute of limitations like Title VII's, which is 90 days from the receipt of the EEOC notice terminating its processing of the charge. Pub. L. No. 102-166, § 115, 105 Stat. 1071, 1079 (1991).

^{2/} Section 7 of the Portal-to-Portal Act provides:

In determining when an action is commenced for purposed of section 255 of this title, an action . . . under the Fair Labor Standards Act of 1938, as amended. . . , shall be considered to be commenced on the date when the complaint is filed; except that in the case of a collective action instituted under the Fair Labor Standards Act of 1938, as amended, . . . it shall be considered to be commenced in the case of any individual complainant --

(a) on the date when the complaint is filed, if he is specifically named as a party plaintiff in the complaint and his written consent to become a party plaintiff is filed on such date in the court in which the action is brought; or

(b) if such written consent was not so filed or if his name did not so appear -

- on the subsequent date on which such written consent is filed in the court in which the action was commenced.

29 U.S.C. § 256.

rejected a provision that would have required opt-ins to file their consents with the court within the statute of limitations.

The Third Circuit emphasized the practical difficulties and policy concerns of a rule so limiting the time in which opt-ins could join an ADEA class action. In the *Sperling* case, the statute of limitations would have expired while the motion requesting authorization to serve notice on potential class members was still pending before the court. *Sperling v. Hoffman-La Roche, Inc.*, 24 F.3d 463, 467 (3d Cir. 1994). Courts can take months or years to rule on class notice or certification. If the statute of limitations was not tolled once the class complaint was filed, then class members' rights to join the case would expire before they even received notice of the action and their right to opt-in. This would be contrary to the remedial purposes of the ADEA. *Sperling v. Hoffman-La Roche, Inc.*, 145 F.R.D. 357, 365 (D.N.J. 1992).

Despite these practical impediments to forming the class, the Eleventh Circuit requires opt-in plaintiffs to file their consents within the applicable statute of limitations period, rejecting the majority rule that opt-ins may rely on the timely filed class complaint. *Grayson v. Kmart Corp.*, 79 F.3d 1086, 1105 (11th Cir.), *cert. denied*, 117 S. Ct. 435 (1996).

2. Filing a New Complaint Following the Denial of Class Certification

More complicated issues arise when a court denies class certification or decertifies a class and then the former class members seek to file their own action relying on the timely filed initial complaint. In *Armstrong v. Martin Marietta Corp.*, 138 F.3d 1374

(11th Cir.) (*en banc*), *cert. denied*, 119 S. Ct. 545 (1998), the Eleventh Circuit held that the statute of limitations ran from the date the district court dismissed the claims of 32 individuals from the class, finding that they were not “similarly situated,” and denying class certification. These 32 individuals filed their own suit more than 90 days after the order excluding them from the class. The appellate court reasoned that with the dismissal of their claims from the putative class, it was no longer reasonable for these individuals to rely on the timely filed suit of the named plaintiffs. Their suit was dismissed as untimely filed. However, the court allowed the claims of four plaintiffs to proceed, holding that the statute of limitations was “equitably tolled” because EEOC had misinformed them about the statute of limitations.

The Second Circuit permitted former plaintiffs who had timely opted into the case of *Lusardi v. Xerox Corp.*, 118 F.R.D. 351 (D.N.J. 1987), to file a new case after the *Lusardi* class had been decertified. *Tolliver v. Xerox Corp.*, 918 F.2d 1052 (2d Cir. 1990), *cert. denied*, 499 U.S. 983 (1991). The court held that the statute of limitations was tolled from the time the *Lusardi* class complaint was filed until the decertification decision, at which time the statute began to run anew.

Plaintiffs should not seek to abuse or overly expand the tolling rule. This concern prompted the First Circuit to rule that plaintiffs could not file successive class actions by relying on the first timely filed class complaint. *See Basch v. Ground Round, Inc.*, 139 F.3d 6, (1st Cir. 1998). In *Basch*, plaintiffs filed four successive class actions arising from the same set of facts and covering the same class. The district court denied class

certification in the first action. Plaintiffs dismissed the second action and limited the third action to state law claims. The fourth class action raised the same set of facts and claims under the ADEA as the previously filed cases. The First Circuit held that the policies supporting tolling do not permit plaintiffs to “stretch out limitations periods by bringing successive class actions. Plaintiffs may not stack one class action on top of another and continue to toll the statute of limitations indefinitely.” 139 F.3d at 11.

C. Coordinating Companion Litigation Brought by the EEOC

An EEOC lawsuit cuts off the right of private plaintiffs to file their own lawsuit under ADEA Section 7(c)(1), 29 U.S.C. § 626(c)(1). Thus private counsel planning to file a class action must either file first or work out an arrangement with the EEOC to protect the formation of the private class action.

Open and early discussions with EEOC counsel are imperative if plaintiffs’ counsel wants to preserve and pursue a private class action. Some of the key issues to discuss and reach agreement on are:

- ▶ identification of the class members in each suit;
- ▶ discovery expenses, expert witnesses fees and expenses, and work sharing;
- and
- ▶ attorneys’ fees (for private plaintiffs’ counsel).

The case of *AARP v. Farmers Group, Inc.*, 943 F.2d 996 (9th Cir.), *cert. denied*, 502 U.S. 1059 (1992), illustrates one successful model for coordinating private and EEOC class cases. First, plaintiffs filed an ADEA complaint alleging class-wide

violations and then quickly moved for notice to the potential class, which the court approved. Before the consent forms from the opt-in plaintiffs could be filed with the court, EEOC filed a separate action in the same court, alleging the same violations, but seeking only injunctive relief.

While ordinarily EEOC's suit could have precluded individuals from opting into the private suit, discussions and an agreement between private counsel and EEOC's attorneys produced a workable result for both private plaintiffs and the EEOC. EEOC agreed to structure its complaint without requesting individual damages and without naming aggrieved individuals. In this way, EEOC's suit did not terminate the right of individuals to opt-in to the private suit, according to the Ninth Circuit in *AARP v. Farmers Group, Inc.*, 943 F.2d at 1006.

Many of the affected employees opted-in to the private suit. After their consents were filed with the court, EEOC amended its complaint to list the remaining employees aggrieved by the employer's policy and to specifically request damages on their behalf.

III. Court Authorization to Proceed with a Collective or Representative Action under the ADEA.

In most cases, a court has at least two opportunities to examine and determine whether class members are sufficiently similarly situated to allow the case to proceed as a representative action under Section 216(b). First, upon the plaintiffs' request to send a notice to the prospective class, a court may "conditionally certify" a class using a fairly lenient standard for determining "similarly situated." See *Mooney v. Aramco Servs. Co.*,

54 F.3d 1207, 1213-14 (5th Cir. 1995); *Brooks v. Bellsouth Telecommunications, Inc.*, 164 F.R.D. 561, 568 (N.D. Ala. 1995).

The second stage occurs after discovery is largely complete. At this point, the court is likely to be presented with different motions necessitating a closer examination of whether the class members are similarly situated. Plaintiffs may move to bifurcate the trial into a class-wide liability phase and then an individual damages phase. *See Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1211 (5th Cir. 1995). Defendants may move to decertify the class, arguing that evidence gathered through discovery demonstrates that the class members are not similarly situated and that class treatment is therefore inappropriate. *See Mooney v. Aramco Servs. Co.*, 54 F.3d at 1213-14; *Lusardi v. Xerox Corp.*, 118 F.R.D. 351 (D.N.J. 1987).

Courts typically apply a higher standard for “similarly situated” at the second stage. *See Vaszlavik v. Storage Tech. Corp.*, 175 F.R.D. 672, 678-79 (D. Colo. 1997); *Thiessen v. General Electric Capital Corp.*, 996 F. Supp. 1071, 1080 n. 13 (D. Kan. 1998). This means that plaintiff must present substantial evidence supporting a finding that class members are similarly situated. Conclusory or unsupported allegations will not suffice. *See Adkins v. E.I. Dupont de Nemours & Co.*, 1996 WL 431096. *4 (D. Del. 1996) (plaintiffs’ conclusory allegations failed to meet burden of demonstrating class members were similarly situated). The result is that while many cases are “conditionally certified” for notice purposes, certification is often denied at the second stage of the analysis.

Thiessen v. General Electric Capital Corp., 996 F. Supp. 1071, 1080 n. 13 (D. Kan. 1998).

A. Court Approval of a Notice to Potential Class Members

In *Hoffman La Roche, Inc. v. Sperling*, 493 U.S. 165 (1989), the Supreme Court held that district courts should exercise discretion early in the litigation to facilitate and manage the formation of an ADEA class action, including the sending of notice to potential class members.

1. “Conditional Certification” of the Class - for Notice Purposes

Neither the ADEA, nor the FLSA prescribe a formal procedure for court authorization or monitoring of a collective or representative action. In the absence of statutory guidance, courts have imposed a form of “conditional certification” in determining whether it is appropriate to authorize the sending of a notice to potential class members. The main inquiry at this stage is whether the determination of whether the class members are “similarly situated.” Some courts have authorized notice based solely on the allegation in the complaint. *See Allen v. Marshal Field & Co.*, 93 F.R.D. 438, 442-45 (N.D. Ill. 1982). Other courts impose a modest burden on plaintiffs to produce some facts supporting the allegation. *See Sperling v. Hoffman-La Roche, Inc.*, 118 F.R.D. 392, 406 (D.N.J.), *aff'd*, 862 F.2d 439 (3d Cir. 1988), *aff'd*, 493 U.S. 165 (1989). A few courts have insisted on a more detailed showing comparable to that imposed under Federal Rule of Civil Procedure 23. *See Shushan v. University of Colorado*, 132 F.R.D. 263, 268 (D. Colo. 1990).

The *Sperling* approach to demonstrating the similarly situated requirement for class notice has been adopted by most courts. It is a fairly lenient standard, because of the minimal evidence available at the early stage of the litigation and the fact that plaintiffs only seek permission to send a notice to class members. See *Mooney v. Aramco services Co.*, 54 F.3d 1207 (5th Cir. 1995). At the notice stage, nothing more is needed than “substantial allegations that the putative class members were together the victims of a single decision, policy, or plan infected by discrimination.” *Sperling v. Hoffman-La Roche, Inc.*, 118 F.R.D. at 407. Accord *Mooney v. Aramco Services Co.*, 54 F.3d 1207, 1214 n.8 (5th Cir. 1995); *Krueger v. New York Telephone Co.*, 1993 WL 276058, *2 (S.D.N.Y. 1993).

Plaintiffs’ complaint and affidavits usually suffice to meet the minimal burden plaintiff has in obtaining conditional certification. At this early stage, courts do not assess the merits of plaintiffs’ complaint in order to determine whether a similarly situated group exists. The court’s role is to determine whether class treatment is appropriate toward an efficient resolution of the underlying issues --- whatever those issues may be. *Krueger v. New York Telephone Co.*, 1993 WL 276058, *2 (S.D.N.Y. 1993).

2. Discovery of Names and Addresses of Potential Class Members

Plaintiffs should move the court to direct defendants to furnish a list of the names and last-known addresses of all potential class members as the list to be used for mailing of the notices. Once a court has determined that the class proposed by plaintiffs are similarly situated, under the minimal showing required by *Sperling v. Hoffman-La Roche*,

Inc., 118 F.R.D. at 407, courts typically order defendant to produce a complete list. *See Krueger v. New York Telephone Co.*, 1993 WL 276058, *3 (S.D.N.Y. 1993).

3. Filing Consent Forms With the Court

Section 16(b) of the FLSA, as incorporated into the ADEA requires individual class members to file their “consents” with the court in order to be included in the class. Once counsel has secured consent forms from the opt-ins and filed the forms with the court, counsel and the opt-in plaintiffs may communicate freely without court supervision or intervention.

B. Demonstrating that Plaintiffs are “Similarly Situated” for a Determination of Class-Wide Liability and Damages

The courts have not developed a uniform approach to determining whether the representative plaintiffs and class members are similarly situated to allow the case to proceed as a class action at trial. Few age discrimination class actions get to trial. Most are settled, dismissed on summary judgment, or the class is decertified and only the remaining named plaintiffs’ claims are tried. *See e.g.*, *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207 (5th Cir. 1995) (trial of six employees after class of 154 employees was decertified).

The inquiry into whether plaintiffs and class members are similarly situated for a determination of liability is highly fact specific and depends on a case-by-case analysis. *See Mooney v. Aramco Servs. Co.*, 54 F.3d at 1212. The factors tend to cluster in three general areas: (1) centralization of the defendant’s activities; (2) common proof and defenses; and (3) similarities of the potential plaintiffs. *See Hyman v. First Union Corp.*,

982 F. Supp. 1, 2-4 (D.D.C. 1997). Most importantly, plaintiffs should emphasize to a court that the factors should be looked at as part of the entire picture of whether class treatment serves the purposes of the ADEA and serves as an effective mechanism for managing the case. *Hyman*, 982 F. Supp. at 5; *see, e.g., Schwed v. General Electric Co.*, 1997 WL 204394, *3 (N.D.N.Y. 1997).

1. Centralization of the Defendant's Activities

Plaintiffs should seek to demonstrate that the alleged discrimination was institutional or company-wide. At this stage, they must put forth substantial evidence that the class members were victims of a single decision, policy or plan infected by discrimination. *See Krueger v. New York Telephone Co.*, 163 F.R.D. 433, (S.D.N.Y. 1995) (collective action authorized where plaintiffs demonstrated that new hire and recent promotee exclusions from RIF were discriminatory elements of a company-wide plan); *cf. Brooks v. Bellsouth Telecommunications, Inc.*, 164 F.R.D. 561, 569 (N.D. Ala. 1995)(court declined to certify class because plaintiff failed to present sufficient evidence of systemic treatment).

Centralized decision making or direction from the top of the organization supports allegations that the discriminatory treatment was systemic. *Hyman v. First Union Corp.*, 982 F. Supp. 1, 3 (D.D.C. 1997). Decisions to reduce the work force are typically made at the highest level of an organization and are particularly appropriate for class treatment when other factors are also present. *Id.*

As long as plaintiffs can demonstrate that decisions were made and actions were taken because of a company-wide policy or practice, the court is more likely to find class treatment appropriate even if different managers and different divisions carried out the decisions. For example, in *Hyman v. First Union Corp.*, 982 F. Supp. 1, 3 (D.D.C. 1997), the court noted that while decisions were carried out by several layers of management, those decisions were infected with an age “bias on the part of top management that filtered down to the decision-makers.” In *Abrams v. General Electric Co.*, 1996 WL 663889, *2 (N.D.N.Y. 1996), the court found dispositive that each division used the same corporate downsizing policy and ranking structure, even though each division separately decided how many employees would be laid off.

In *Thiessen v. General Electric Capital Corp.*, 996 F. Supp. 1071, 1083 (D. Kan. 1998), plaintiff presented direct evidence that defendant engaged in a “blocker” policy to force older employees into early retirement or to eliminate the older employee’s position through restructuring. While the representative plaintiffs’ and opt-in plaintiffs’ claims varied considerably from failure to promote to discharge, the court found sufficient proof of a company-wide policy to permit “conditional certification.” *Thiessen v. General Electric Capital Corp.*, 996 F. Supp. at 1080.

The less centralized the decisions and directions become, the less likely a court is to grant class-wide treatment. In *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1214 (5th Cir. 1995), the Fifth Circuit held that the evidence submitted by the defendant refuted plaintiffs’ claims of a single reduction in force. Rather, the court found that the

downsizing of the work force was made on a “highly decentralized” basis by local managers in “93 different [] departments scattered over 11 separate locations.” *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1214 (5th Cir. 1995). The Fifth Circuit affirmed the district court’s denial of certification of the ADEA class.

2. Common Claims and Defenses

The greater the similarity in the claims raised and defenses to be asserted, the more likely a court is to determine that the class meets the similarly situated standard. Certainly, when the class claims all involved one form of discrimination, terminations, for example, the court’s task is an easy one. *See Hyman v. First Union Corp.*, 982 F. Supp. at 4 (D.D.C. 1997) (terminations due to acquisition).

When plaintiffs present varying claims, such as denial of promotion, demotions, and termination, the courts are more likely to rule that the plaintiffs are not similarly situated. *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1214 (5th Cir. 1995). However, if plaintiff can demonstrate a link between the company-wide discriminatory policy and the various actions, the likelihood of certification is increased. *Thiessen v. General Electric Capital Corp.*, 996 F. Supp. 1071, 1083 (D. Kan. 1998).

The possibility that defendant will assert separate and varied defenses to individual claims does not preclude a court from certifying a Section 216(b) class. *See Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43, 52 (1989). First, defendants must provide support for their assertion that a multitude of defenses make the case unsuitable for class-wide treatment. *Thiessen v. General Electric Capital Corp.*, 996 F. Supp. at 1084.

Without such evidence, a court cannot determine whether individual defenses would predominate at trial.

Second, if one main defense predominates the action, the possibility of other defenses does not negate a finding that the plaintiffs are similarly situated. In *Hyman v. First Union Corp.*, the court concluded that while defendants identified several possible defenses, the main defense would focus on the business necessity of the restructuring. 982 F. Supp. at 5. This defense was common to all of the plaintiffs.

Different defenses become problematic only when they present real difficulties in managing the case, as the district court found in *Lusardi v. Xerox Corp.*, 118 F.R.D. 351 (D.N.J. 1987). The *Lusardi* court concluded that a class of 1325 plaintiffs was not manageable, in part, because of the numerous and various defenses asserted by defendants. In *Mooney v. Aramco Servs. Co.*, the court reached the same conclusion based on the specter of the disparate defenses that could be raised by the defendants. 54 F.3d at 1214. Such individualized inquiries unique to each plaintiff precluded class treatment according to the Fifth Circuit.

3. Similarities of the Potential Plaintiffs

Courts examine the similarities or differences among plaintiffs in terms of age, job, education, tenure, salary level, reporting chain, and geographic location.

When plaintiffs present sufficient similarities in their employment situations and geographic location, a court is likely to conclude that they are similarly situated. In *Hyman v. First Union Corp.*, 982 F. Supp. 1, 4-8 (D.D.C. 1997), the plaintiffs and opt-ins

all came from a discrete geographic area, had similar job responsibilities, and all alleged unlawful termination. Indeed, the court found it significant that plaintiffs had not included all former First American employees in the class, but limited the scope of the class to exempt line employees whose job responsibilities are more similar. *Hyman*, 982 F. Supp. at 4.

In *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1211 (5th Cir. 1995), eighty-five employees sued for unlawful termination under Aramco's "Manpower Control Program" during 1984-87. The district court conditionally certified the action for notice purposes. After extensive discovery, the defendant move the court to "decertify" the case because of the differences among the plaintiffs, their claims, and the employer's defenses.

As for the differences among the plaintiffs, the court noted that the plaintiffs were of vastly different ages when hired and terminated, ranging from age 40 to 68. Plaintiffs held different jobs that required different skills. They were discharged by different supervisors over different years for a variety of reasons. The court found these differences among the plaintiff class significant enough to rule that the plaintiffs were not similarly situated. *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1214 (5th Cir. 1995).

In *Lusardi v. Xerox Corp.*, the district court decertified an ADEA class because of a "dramatic lack of similarity in age, salary, organization employment, and geographic location by state and city." 118 F.R.D. at 358. Coupled with plaintiffs' failure to uncover a company-wide policy or practice of age discrimination, these differences led the court to conclude that the plaintiffs were not similarly situated.

4. Statistical Proof Supporting Class-Wide Treatment.

Credible and probative statistics can also support class certification. *Hyman v. First Union Corp.*, 982 F. Supp. 1, 3 (D.D.C. 1997). Plaintiffs presenting statistical evidence to support class treatment are likely to confront opposition from defendant's own statistical expert, which certainly increases the costs of such litigation. However, the time and money may be well worth it if the statistics buttress the court's authorization of the class.

Strong statistics are key in an ADEA class case and weak statistics can doom a case. In *EEOC v. McDonnell Douglas Corp.*, 17 F. Supp. 2d 1048 (E.D. Mo. 1998), the district court granted summary judgment to the defendant, finding that EEOC failed to present sufficient evidence that age discrimination was the "standard operating procedure" in implementing a reduction-in-force. The court emphasized that "in an age discrimination case in the context of a bona fide RIF, the most significant statistic is the difference in the percentage of older employees before and after the RIF." In the EEOC's case, the difference was not statistically significant.

IV. Discovery in ADEA Class Actions

A. Discovery of Opt-in Plaintiffs

While Rule 23 permits depositions of and interrogatories to Rule 23 class members, Section 216(b) is silent on the issue. In *Krueger v. New York Telephone Co.*, 163 F.R.D. 446, 450 (S.D.N.Y. 1995), the court relied on the rationale permitting

discovery of Rule 23 class members to permit the depositions of fourteen opt-in plaintiffs in an ADEA class action. The court adopted specific standards for evaluating discovery requests on absent class members from *United States v. Trucking Employers, Inc.*, 72 F.R.D. 101 (D.C. 1976) and applied those standards to such requests on opt-in class members. “The most important relevant circumstances are that the party seeking discovery must demonstrate:

- ▶ [first] its need for the discovery for purposes of trial of the issues common to the class,
- ▶ [second] that the discovery not be undertaken with the purpose or effect of harassment of absent class members or altering the membership of the opposing class, and
- ▶ [third] that the interrogatories be restricted to information directly relevant to the issues to be tried by the Court with respect to the class action aspects of the case.

Krueger v. New York Telephone Co., 163 F.R.D. 446, 450 (S.D.N.Y. 1995), quoting *United States v. Trucking Employers, Inc.*, 72 F.R.D. 101, 104 (D.D.C. 1976).

Applying these standards to the ADEA case before, the district court allowed the defendant to depose fourteen opt-in plaintiffs, in addition to the nineteen opt-in depositions which plaintiffs had already agreed to, out of the 162 class members. The court ruled that the additional fourteen opt-in plaintiffs had experiences relevant to the

administration of the plan that plaintiffs claimed was discriminatory. *Krueger v. New York Telephone Co.*, 163 F.R.D. at 450.

B. Discovery Related to Individual Damages

Plaintiffs should typically move to bifurcate the trial of the ADEA class action into a stage one liability proceeding, followed by stage two proceedings, if liability is established, in which individual damages are determined. Consistent with this procedure, plaintiffs should also move the court to defer discovery on individual damages until after a finding of class-wide liability as an efficient procedure.

Defendants will likely oppose bifurcation and any consequent delay in discovery on individual damages, arguing that information from the plaintiffs on the scope of damages is necessary to adequately engage in settlement discussions without some measure of their potential exposure. Accepting this argument from defendants, the court in *Krueger* permitted interrogatories on the entire class, finding that defendants had reduced the burden on plaintiffs to “a 15-page questionnaire designed to elicit appropriate damages information in a convenient and organized manner.” 163 F.R.D. at 451.