HOW TO IDENTIFY EMPLOYMENT RELATED CLASS AND COLLECTIVE ACTIONS[1]

Prepared For Florida NELA
March 22-23, 2002 Conference

Written Materials Prepared by: Sam J. Smith[2] and Marguerite M. Longoria[3]

Presented by: Sam J. Smith

I. INTRODUCTION

This memorandum should assist employment law practitioners in identifying potential class and collective actions that may be litigated in federal court against private defendants pursuant to federal laws that regulate employment issues.[4] This memorandum will provide an overview of class and collective action litigation and guidance in developing a potential class case.

II. TYPES OF CLASS AND COLLECTIVE ACTIONS

There are two broad categories of federal "class" lawsuits involving employment issues. The first category includes those cases that may be brought as true class actions pursuant to Federal Rule of Civil Procedure 23. The second category includes those cases that may only be brought as opt in cases.

---

[1] This article was submitted to Florida NELA on March 8, 2002. The authors were assisted in creating this memorandum by their review of a comprehensive outline "Overview of Class Actions From the Plaintiffs' Perspective" prepared by Morris J. Baller; Saperstein, Goldstein, Demchak & Baller, Oakland, California, and presentations entitled "Practice Tips for Spotting Wage and Hour Issues: Common FLSA Issues and Exemptions," and "What are the Rules for FLSA Collective Actions?" by David Borgen; Saperstein, Goldstein, Demchak & Baller. The authors also wish to acknowledge the assistance they received in preparing these materials by reviewing pleadings from Hogan v. Allstate Insurance Co., Case No. 8:00CV2562-T-30B (M.D. Fla.) co-authored by co-counsel David Borgen and Aaron Kaufmann; Saperstein, Goldstein, Demchak and Baller.

[2] Sam Smith is the managing partner of Burr & Smith, LLP, located at 442 W. Kennedy Blvd., Suite 300, Tampa, Florida 33606, (813) 253-2010, ssmith@burrandsmithlaw.com.

[3] Marguerite M. Longoria is an associate at Burr & Smith, LLP. Her email address is mlongoria@burrandsmithlaw.com.

[4] This memorandum does not address litigation in state courts or litigation against public entities. State courts, including Florida, have their own class action procedural rules, which would apply to actions filed in state court. Public defendants may have additional immunities and administrative procedures that require careful review prior to filing a lawsuit on a class basis.

A. Rule 23 Class Cases

1. Overview of Rule 23 Actions

Employment related class cases that may be litigated as true class actions pursuant to Federal Rule of Civil Procedure 23 include race, national origin, or gender discrimination cases brought pursuant to Title VII, ERISA cases, and WARN[5] Act cases. The purpose of class actions is to conserve "the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion" rather than through a multiplicity of suits introducing cumulative evidence. General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 155 (1982), quoting Califano v. Yamasaki, 442 U.S. 682, 701 (1979). In order to effectuate these purposes, district courts are afforded broad discretion in deciding whether to certify a proposed class. Giles v. Ireland, 742 F.2d 1366, 1372 (11th Cir. 1984). In determining whether to certify a class, a district court should not decide the merits of the underlying dispute. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177-79 (1974). However, the court must conduct a rigorous analysis of whether the plaintiffs have met the standards under Rule 23. General Tel. Co. of Southwest v. Falcon, 457 U.S. 147 (1982).

In order for a lawsuit to be certified as a class action under Rule 23, the plaintiffs must first show that they have satisfied the following prerequisites:

> (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed.R.Civ.P. 23(a). Factors that determine numerosity include class size, ease of identification of the names and addresses of members of the class, ease with which the members can be served, and their geographic dispersion. Kilgo v. Bowman Transp., Inc., 789 F.2d 859, 878 (11th Cir. 1986). The Eleventh Circuit has suggested that a class of

[5] The Worker Adjustment and Retraining Notification Act ("WARN"), 29 U.S.C. §§2101-2109, was enacted to provide protection to workers, their families and to communities from the impact of layoffs and closings by requiring 60 calendar days notice, which provides workers transition time to adjust to prospective losses of employment, seek alternative jobs and/or obtain additional training. Johnson v. Telespectrum Worldwide, Inc., 61 F.Supp.2d 116 (D. Delaware 1999). The WARN Act applies to employers of 100 or more employees. 29 U.S.C. 2102. A "plant closing" is defined as the "permanent or temporary shutdown of a single site of employment … if the shutdown results in an employment loss at the single site of employment during any 30-day period for 50 or more employees excluding any part-time employees. 29 U.S.C. §2101(a)(2). An "employment loss" is an employment termination, other than a discharge for cause, voluntary departure or retirement; a lay-off exceeding 6 months, or a reduction in hours of more than 50 percent during any six month period. The requirement for notice is reduced or obviated by the "faltering company exemption, the unforeseeable business circumstance exemption, and the natural disaster exemption." 29 U.S.C. 2102(b).

less than 21 individuals is presumptively inadequate to meet the numerosity requirement, while one of more than 40 is presumptively adequate. Cox v. American Cast Iron Pipe Co., 784 F.2d 1546, 1553 (11th Cir. 1986). "Traditionally, commonality refers to the group characteristics of the class as a whole, while typicality refers to the individual characteristics of the named plaintiff in relation to the class." Piazza v. Ebsco Industries, Inc., 273 F.3d 1341, 1346 (11th Cir. 2001). "Adequacy of representation means that the class representative has common interests with the unnamed class members and will vigorously prosecute the interests of the class through qualified counsel." Id.

In addition to meeting the requirements of Rule 23(a), the plaintiffs must satisfy one of the criteria contained in Rule 23(b). See Jackson v. Motel 6 Multipurpose, Inc., 130 F.3d 999, 1005 (11th Cir. 1997). Rule 23(b)(1) allows certification when the prosecution of the action would create a risk of inconsistent adjudications, or when adjudication of a member's claim is as a practical matter dispositive of the interests of the class. In Piazza, the Eleventh Circuit held that an ERISA claim brought on behalf of a qualified plan was appropriately certified under Rule 23(b)(1). Members of a class certified under Rule 23(b)(1) are bound by the court's certification and cannot opt out of the litigation. Id. at 352.

Rule 23(b)(2) is appropriate for certifying class claims when the defendants have "acted . . . on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed.R.Civ.P. 23(b)(2). Like certifications under Rule 23(b)(1), members of a class certified under Rule 23(b)(2) may not opt out of the certification and notice is not required to individual class members.

Rule 23(b)(3) allows a case to proceed as a class action when "the court finds that questions of fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed.R.Civ.P. 23(b)(3). Members of a class certified pursuant to Rule 23(b)(3) are entitled to personal notice and an opportunity to opt out with respect to the damages claims. Jefferson v. Ingersoll, 195 F.3d 894, 897-99 (7th Cir. 1999). Rule 23(b)(3)'s predominance inquiry requires that issues that affect the class as a whole predominate over issues that are subject to individualized proof. Jackson v. Motel 6, 130 F.3d at 1005. This requirement is "far more demanding" than Rule 23(a)'s commonality requirement. Amchem Products, Inc. v. Windsor, 521 U.S. 591, 623 (1997).

In Drayton et al. v. Western Auto Supply Company, a federal district court in the Middle District of Florida concluded that plaintiffs had made the requisite showing for certification under both Rule 23(b)(2) and (b)(3). 2000 U.S. Dist. LEXIS 21681 **28 (M.D. Fla. 2000). The court described civil rights cases alleging unlawful, class discrimination as prime examples of Rule 23(b)(2) actions. Id., citing Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997). Quoting Shores v. Publix Super Markets, Inc., the court stated that the requirement under Rule 23(b)(2) that plaintiffs show defendant acted on grounds generally applicable to the class is encompassed in the commonality

requirement of Rule 23(a). Id., citing1996 U.S. Dist. LEXIS 3381 (M.D. Fla. 1996). It also noted that all the relief the proposed plaintiffs requested was equitable in nature, which it deemed consistent with the requirement in Rule 23(b)(2) that the class primarily be seeking injunctive and declaratory relief. The court responded to the plaintiffs' request, in the alternative, for certification under Rule 23(b)(3). Because the plaintiffs' employment discrimination claims were not "complicated by claims for compensatory and punitive damages," the court concluded common questions predominated, and that the plaintiffs satisfied the requirements for certification under Rule 23(b)(3). Id., at **29 citing Rutstein, 211 F.3d 1228. Ultimately, the court certified the class under Rule 23(b)(2), following Bing v. Roadway Express, Inc., which established that (b)(2) classes are preferred over (b)(3) classes in the Eleventh Circuit. Id. at **29 citing 485 F.2d 441, 447 (11th Cir. 1973).

2. Recent Developments Under Rule 23

a. Effect of the Civil Rights Act of 1991 on Class Actions

Prior to the adoption of the Civil Rights Act of 1991, employment discrimination class actions were typically certified under Rule 23(b)(2) or as a hybrid 23(b)(2)/(b)(3) certification. See Holmes v. Continental Can Co., 706 F.2d 1144 (11th Cir. 1983). This was possible, in part, because back pay has long been considered an equitable remedy under Title VII. Id. at 1152. Employment discrimination class actions were litigated under the Teamsters burden shifting approach using a two-stage procedure. Under the disparate treatment theory, a plaintiff's burden of proof at trial is to establish by a preponderance of the evidence that discrimination is the employer's "standard operating procedure" or "the regular rather than the unusual practice." Teamsters v. United States, 431 U.S. 324, 337 (1977); Cox, 784 F.2d at 1559.

Plaintiffs typically met their burden by offering evidence of statistics, substantiated by anecdotal evidence about the application of the discriminatory practice, which brings "the cold numbers convincingly to life." Teamsters, 431 U.S. at 339, 358. See also, Griffin v. Dugger, 823 F.2d 1476, 1525 (11th Cir. 1987). The inferences that can be drawn from a plaintiff's statistical proof and anecdotal evidence are common to the claims of all class members and raise common legal issues. Teamsters, 431 U.S. at 339-40; Bazemore v. Friday, 478 U.S. 385, 400-04 (1986); Hazelwood v. United States, 433 U.S. 299, 307 (1977). Proof of a pattern or practice of class-wide discrimination establishes a rebuttable presumption that each plaintiff was a victim of discrimination shifting the burden to the employer to prove that a particular class member is not entitled to relief. Teamsters, at 362. See also, Franks v. Bowman Transp. Co., 424 U.S. 747, 772 (1976); Cox, 784 F.2d at 1559. The employee may meet this burden with "clear and convincing evidence that job decisions made when the discriminatory policy was in force were not made in pursuit of that policy." Cox, 784 F.2d at 1559.

In 1991, Congress passed the Civil Rights Act of 1991, which among other things added the right to seek compensatory and punitive damages and a jury trial to remedies available in a Title VII lawsuit. In enacting the Civil Rights Act of 1991, Congress found

that "additional remedies under the federal law are needed to deter unlawful harassment and intentional discrimination in the workplace." Civil Rights Act of 1991 Congressional findings, Nov. 21, 1991, P.L. 102-166, § 2, 105 Stat. 1071. While the Eleventh Circuit has not squarely addressed the issue, the passage of the Civil Rights Act of 1991 and the addition of the right to seek compensatory and punitive damages and a jury trial under Title VII have caused some courts to question whether such legal remedies preclude certification of employment discrimination actions seeking monetary damages and whether individual damage proceedings may be bifurcated pursuant to the Teamsters burden shifting model. See Allison v. Citgo Petroleum Corp., 151 F.3d 402 (5th Cir. 1998), reh'g denied and prior opinion withdrawn, 151 F.3d 434 (5th Cir. 1998); Cf., Rutstein v. Avis Rent-A-Car Systems, Inc., 211 F.3d 1288 (11th Cir. 2000) (holding that compensatory damages sought in public accommodations action are too individualized for class treatment and that Teamsters burden shifting does not apply). In addition, the Eleventh Circuit has questioned the applicability of the Teamsters burden shifting to class actions unless the employment statistics show an "inexorable zero." See Cooper v. Southern Co., 2001 U.S. Dist. LEXIS 16809, *118-19 (N.D. Ga. 2001), discussing, Rutstein, 211 F.3d at 1236-37 and Reynolds v. Roberts, 202 F.3d 1303, 1319 n. 27 (11th Cir. 2000).

Other courts have continued to adhere to the Teamsters burden shifting approach and have ruled that the liability phase of a class action can still be certified under Rule 23(b)(2). See Robinson v. Metro-North Commuter Railroad, Co., 267 F.3d 147 (2d Cir. 2001). It appears that the Eleventh Circuit continues to allow the certification of class actions under Rule 23(b)(2) that seek only injunctive relief, including back pay, if back pay is sought as a group remedy. Murray v. Auslander, 244 F.3d 807, 812-13 (11th Cir. 2001).

b. Effect of Rule 23(f) on Class Actions

Prior to December 1998, interlocutory appeals of class certification decisions were very limited. If a lawsuit was certified as a class action, defendants were required to try the merits of the case before having an opportunity to appeal the certification decision. Faced with the costs and uncertainty of a class trial many defendants settled class actions after the plaintiffs achieved class certification. In December 1998, Rule 23(f) was added to the Federal Rules of Civil Procedure. This Rule permits discretionary review by the court of appeals of class certification decisions. In Prado-Steiman v. Bush, , the Eleventh Circuit set forth five factors that should be considered in determining whether to grant a Rule 23(f) petition for interlocutory review. 221 F.3d 1266 (11th Cir. 2000). The factors include: (1) whether the district court's ruling is likely dispositive of the litigation by creating a "death knell" for either the plaintiff or defendant; (2) whether the petitioner has shown a substantial weakness in the class certification decision such that the decision likely constitutes abuse of discretion; (3) whether the appeal will permit resolution of an unsettled legal issue that is important to the particular litigation as well as important in itself; (4) the nature and status of the litigation before the district court; and (5) the likelihood that future events may make immediate appellate review more or less appropriate. Id. In Carter v. West Publishing, Co., 225 F.3d 1258, 1262 (11th Cir. 2000),

the Eleventh Circuit held that Rule 23(f) limits an appellate court's review only to issues properly addressed by the district court's class certification order.

Rule 23(f) has been used to reverse the certification of numerous class actions since it was enacted in December 1998. See e.g., id.; Rutstein v. Avis, 211 F.3d 1228. Defendants are unlikely to attempt to resolve class actions until they have attempted to have the certification reversed pursuant to Rule 23(f). If a petition is granted for review under Rule 23(f) in the Eleventh Circuit, a briefing schedule is set according the standard Eleventh Circuit rules. Such an appeal can easily add a year of appellate work to the preliminary class certification phase of a class case.

B. Collective Action Cases

1. Overview of Collective Action Cases

Fair Labor Standards Act ("FLSA"), Equal Pay Act ("EPA") and Age Discrimination in Employment Act ("ADEA") cases may also be brought on behalf of a class of employees pursuant to the collective action provisions of the FLSA, 29 U.S.C. § 216(b). These cases differ from the true class actions under Rule 23 in that in order to participate in the action, the employee must affirmatively opt in to the case by filing a written consent to join form. 29 U.S.C. § 216(b); Garner v. G.D. Searle, 802 F.Supp. 418, 421 (M.D. Ala. 1991); Harrison v. Enterprise Rent-A-Car, Inc., 1998 U.S. Dist. LEXIS 13131, *3 n.1, 4 Wage & Hour Cases 2d (BNA) 1339 (M.D. Fla. 1998). An individual that does not opt in to the litigation is not bound by the court's decision.

The FLSA's "collective action" provision allows one or more employees to bring an action "on behalf of himself or themselves and other employees similarly situated." 29 U.S.C. § 216(b); Dybach v. State of Fla. Dept. of Corrections, 942 F.2d 1562, 1566 (11th Cir. 1991); Harrison, 1998 U.S. Dist. LEXIS 13131, * 3 n. 1. "The evident purpose of the Act [FLSA] is to provide one law suit in which the claims of different employees, different in amount but all arising out of the same character of employment, can be presented and adjudicated, regardless of the fact that they are separate and independent of each other." Shain v. Armour & Co., 40 F.Supp. 488, 490 (W.D. Ky. 1941).

To serve the "broad remedial purpose" of the FLSA, courts are afforded the power to give notice to other potential class members to "opt in" to plaintiffs' case. Dybach, 942 F.2d at 1567, quoting Braunstein v. Eastern Photographic Lab., Inc., 600 F.2d 335, 336 (2nd Cir. 1975), cert. denied, 441 U.S. 944 (1979). See also Hoffmann-LaRoche v. Sperling, 493 U.S. 165 (1989) ("[a] collective action allows … plaintiffs the advantage of lower individual costs to vindicate rights by the pooling of resources"). Court facilitation of a section 216(b) collective action also serves the goal of "efficient resolution in one proceeding of common issues of law and fact arising from the same alleged … activity." Hoffmann-La Roche, 493 U.S. at 170. Additionally, early court authorized notice protects against "misleading communications" by the parties, resolves the parties' disputes regarding the content of any notice, prevents the proliferation of multiple individual lawsuits, assures joinder of additional parties is accomplished

properly and efficiently, and expedites resolution of the dispute. 493 U.S. at 170-172; Garner, 802 F. Supp. at 427.

For an opt in class to be created under section 216(b), an employee need only show that she is suing her employer for herself and on behalf of other employees "similarly situated." Grayson v. K Mart Corp., 79 F.3d 1086, 1096 (11th Cir.), cert. denied, 117.S.Ct. 435 (1996). Plaintiffs' claims and positions need not be identical to the potential opt ins, they need only be similar. Id.; Tucker v. Labor Leasing, Inc., 872 F. Supp. 941, 947 (M.D. Fla. 1994). Plaintiffs need only demonstrate "a reasonable basis" for the allegation that a class of similarly situated persons may exist. Grayson, 79 F.3d at 1097.

Court facilitated notice to the "class" regarding FLSA collective overtime litigation is warranted when plaintiffs demonstrate that there are others who may wish to opt in and who are "similarly situated" with respect to the job requirements and pay provisions. Dybach, 942 F.2d at 1567-68; Garner, 802 F. Supp. at 419; Hipp v. Liberty Nat'l Life Ins. Co., 164 F.R.D. 574, 575 (M.D. Fla. 1996); Belcher v. Shoney's, Inc., 927 F. Supp. 249, 251 (M.D. Tenn. 1996). The standard for collective action notice "is a 'lenient one.'" Mooney v. Aramco Services Co., 54 F.3d 1207, 1213-14 (5th Cir. 1995); Harrison, 1998 U.S. Dist. LEXIS 13131, *12. "It is considerably 'less stringent' than the proof required pursuant to Fed.R.Civ.P. 20(a) or Fed.R.Civ.P. 23 for class certification." Grayson, 79 F.3d at 1096.

Discovery is not necessary for the court to issue notice. At the notice stage, courts determine whether plaintiffs and potential opt ins are "similarly situated" based upon detailed allegations in a complaint supported by affidavits. Grayson., 79 F.3d at 1097; Mooney, 54 F.3d at 1213-14; Harrison, 1998 U.S. Dist. LEXIS 13131, *8; Brooks v. Bellsouth Telecom, 164 F.R.D. 561, 568 (N.D. Ala. 1995); Sperling v. Hoffman-La Roche, Inc., 118 F.R.D. 392, 406-07 (D. N.J. 1998), aff'd. 493 U.S. 165 (1989). Defendant's rebuttal evidence does not bar section 216(b) notice; plaintiffs' substantial allegations need only successfully engage the employer's affidavits to the contrary. Grayson, 79 F.3d at 1099 n. 17.

Once the court makes the preliminary determination that the potential plaintiffs are similarly situated, the case proceeds as a collective action throughout discovery. Harrison, 1998 U.S. Dist. LEXIS 13131, *13; Hoffman v. Sbarro, 982 F.Supp. 249 (S.D.N.Y. 1997); Herrera v. Unified Management, 2000 U.S. Dist. LEXIS 12406, 6 Wage & Hour Cas.2d (BNA) 922 (N.D. Ill. 2000). Discovery is relevant thereafter both as to the merits of the case and to the second step in the collective action procedure, during which the court evaluates conflicting evidence developed in discovery to test the validity of the preliminary decision made at the notice stage. See Hipp v. Liberty Nat. Life Ins. Co., 252 F.3d 1208 (11th Cir. 2001).

Typically discovery can be limited to a representative sample of the opt in plaintiffs. McCrath v. City of Philadelphia, 1994 WL 45162 (E.D. Pa. 1994); Atkins v. Mid-America Growers, Inc., 143 F.R.D. 171, 174 (N.D. Ill. 1992). In addition, courts

may permit representative testimony at trial. Anderson v. Mt. Clemems Pottery Co., 328 U.S. 680 (1946); In re Food Lion Effective Scheduling Litigation, 861 F. Supp. 1263(E.D.N.C. 1994).

2. Fact Patterns To Look Out For

a. Wage and Hour Violations

Under the FLSA, employees are presumptively entitled to overtime pay for hours worked over 40 unless the employer meets its burden of proof that the employee fits within one of the exemptions contained in the Act. A wage and hour violation commonly exists when an employer pays an employee a salary, but no overtime premium, when the employee does not meet any of the FLSA exemptions. Another wage and hour violation, common seen, occurs when employers require employees who are nonexempt to work more than 40 hours without paying them overtime. Employers also must be careful to pay salaried workers in accordance with the salary basis test required for the executive, administrative, or professional exemptions; for example, deductions for partial days worked will violate the salary basis test. Failure to include certain bonuses within the overtime pay of nonexempt employees can also present an FLSA violation. In addition, many cases are litigated over whether waiting time, traveling time, and meal periods are compensable under FLSA.

(i) Executive Exemption

Employers seeking to qualify for the executive exemption must meet both the "salary basis" and the "duties" tests. The salary basis test requires payment of a predetermined salary or weekly amount of at least $155 per week. See 29 U.S.C. § 541.117 (See generally, 29 C.F.R. §541). This amount may not be reduced due to variations in the quality or quantity of work performed. A few very limited exceptions are permitted, allowing deductions from salary for personal absences or illness of a day or more (no partial day docking of pay) and disciplinary suspensions for violations of major safety rules (most disciplinary deductions from pay will be problematic). Auer v. Robbins, 519 U.S. 452 (1997); see also, Belcher v. Shoney's, Inc., 30 F.Supp.2d 1010 (M.D. Tenn. 1998) (salary basis test not met where manager required to repay cash shortages).

Employees must also qualify under the duties test that requires that their "primary duty" consist of management of the enterprise (or a department or unit thereof), and that they customarily and regularly direct the work of two or more other employees. 29 C.F.R. §541.119.[6] Titles to watch out for here are assistant managers, management

[6] This is the FLSA "short test" for the executive exemption (applying to employees paid more than $250/week; there is an obsolete "long test" that rarely applies to any putative executive due to the low minimum pay requirement. Also note that the "supervises two employee prong" of the test requires supervision of two full time employees or a group of part time employees whose hours total 80 per week at minimum. Jackson v. Go-Tane Services, Inc., 2000 U.S. Dist. LEXIS 12627 (N.D. Ill. 2000); 29 C.F.R. §541.105.

assistants, trainee managers, supervisors, etc, who do not supervise two or more full-time employees. See e.g., See Harrison v. Enterprise Rent-A-Car Co., 4 WH Cases 2d 1339 (M.D. Fla. 1998) (ordering collective action notice to 6,000 allegedly misclassified Management Assistants employed by over 60 subsidiaries around the country).

(ii) Administrative Exemption

In order to be considered exempt under the administrative exemption, an employee must be paid on a salary basis, see 29 U.S.C. § 541.211, or fee basis, see 29 U.S.C. § 541.213, and meet the duties test. According to the short test, an employee is exempt under the administrative exemption if: (a) her primary duty consists of "office or nonmanual work directly related to management policies or general business operations of [her] employer or [her] employer's customers;" and (b) her duties require "the exercise of discretion and independent judgment." 29 C.F.R. § 541(e)(2). Titles to watch out for here include sales employees, see Martin v. Cooper Elec. Supply Co., 940 F.2d 896 (3rd Cir. 1991), claims adjusters, Bell v. Farmers Ins. Exchange, 87 Cal. App. 4th 805 (March 5, 2001)), or investigative personnel, Bratt v. County of Los Angeles, 912 F.2d 1066 (9th Cir. 1990).

(iii) Professional Exemption

Generally, the same salary basis test applies (although some professionals may be paid on a "fee basis" for unique services). This exemption includes "artistic" professionals, "learned" professionals, and "teaching" professionals. The list of exempt professions includes: doctors, lawyers, registered nurses, engineers, and certified public accountants. Some prolonged advanced course of specialized academic education is generally required; a simple college degree is usually not sufficient.

(iv) Independent Contractor

FLSA coverage depends on "the 'economic reality' of whether the putative employee is economically dependent upon the alleged employer." Antenor v. D&S Farms, 88 F.3d 925, 933 (11th Cir. 1996). Indeed, "employment" under the FLSA "is defined with 'striking breadth." Harrell v. Diamond A Ent., 992 F.Supp. 1343, 1348 (M.D. Fla. 1997), quoting Nationwide Mutl. Ins. Co. v. Darden, 503 U.S. 318, 326, 112 S.Ct. 1344 (1992). See also Donovan v. Tehco, 642 F.2d 141, 144 (5th Cir. 1981) (FLSA's definition of "employee" is "exceptionally broad"). The economic reality factors used to determine employee status under the FLSA are: (1) degree of control exercised by the putative employer; (2) relative investments of the two parties; (3) employer's influence on employee's opportunity for profit and loss; (4) skill and initiative required by the job; (5) permanency of the relationship; and (6) degree to which the employee's tasks are integral to the employer's business. Harrell, 992 F.Supp. at 1348. Typical cases involve workers such as exotic dancers, taxicab drivers, and cable installers, where the putative employees are highly dependant on one putative employer and have little investment in operating their businesses.

b. EPA Violations

Collective actions asserting EPA claims may deserve closer attention in the future.[7] According to a study published by the General Accounting Office in October 2001, the wage gap between female managers and their male counterparts was even greater in 2000 than it had been five years earlier. Between 1995 and 2000, full-time female managers earned less than male managers in all 10 industries it studied. In seven fields, the earnings gap grew during the five-year period. See Appendix.

In Carter v. West Publishing Co., eight current and former employees of West Publishing Co. filed a collective action under the EPA and sought to certify a class under Rule 23 alleging violations of Title VII, based on allegations that they were denied opportunities to purchase stock and/or offered fewer shares than similarly situated male employees. 225 F.3d 1258 (11th Cir. 2000). The parties stipulated to toll the statute of limitations under the EPA until the court ruled on the motion for certification under Rule 23. Id.

c. ADEA Violations

ADEA procedures present a hybrid of those in Title VII and the FLSA. In Grayson v. K Mart Corp., the Eleventh Circuit confirmed that the "similarly situated" requirement in 29 U.S.C. section 216(b) only requires plaintiffs to show that their positions are "similar, not identical" to those held by the putative class members. 79 F.3d 1086, 1096 (11th Cir. 1996). The court stated that this may not require the plaintiffs to show a "unified policy, plan or scheme of discrimination." Id. at 1095. Grayson also held that a district court does not abuse its discretion by failing to hold an evidentiary hearing before certifying a class "unless the parties can show that the hearing, if held, would have effected their rights substantially." Id. at 1099.

Grayson established the perimeters for application of the single-filing or piggyback rule in collective actions in the Eleventh Circuit as well as the requisite action that an opt in plaintiff must take to toll the statute of limitations on his or her ADEA claim. An ADEA plaintiff must file a charge with the EEOC within 180 days or 300 days

[7] Because EPA violations typically present violations of Title VII as well the EPA, attorneys are more likely to move for Rule 23 certification of these claims because the EPA requires that potential opt ins plaintiffs file a consent to join the case in order to toll the statute of limitations. However, EPA violations that meet the standard for liquidated damages, may warrant separate notice to potential opt ins to preserve the EPA liquidated doubling of back pay awards. In addition, the statute of limitations for an EPA claim is two years or three years for willful violations.

of the alleged discriminatory act.[8] His or her ensuing civil action may not be filed until 60 days after respondent's receipt of notice of filing of the charge.[9] Grayson held that putative opt in plaintiffs to an ADEA case who have not themselves filed an EEOC charge can rely on the first timely filed charge of discrimination of a representative class plaintiff if the claims of the representative filing plaintiff and the non-filing plaintiff arose out of the same discriminatory treatment within the same time frame. Grayson, 79 F.3d 1086. ADEA plaintiffs in a collective action are deemed to commence their civil action only when they file their written consent to opt into the class action. Id. at 1106. According to Grayson, a putative plaintiff filing as to a cause of action that arose prior to the effective date of the Civil Rights Act of 1991 (November 21, 1991) must file a written consent to opt into the class action prior to the expiration of the statute of limitations on the ADEA claim.[10] Id. at 1107 n.39.

Recently, in Hipp et al. v. Liberty National Life Insurance Co., the Eleventh Circuit endorsed the two-tiered approach used in Lusardi v. Xerox Corp. of having a fairly lenient similarly situated standard at the notice phase followed by a more rigorous decertification standard at the close of discovery. 252 F.3d 1208, 1219 (11th Cir. 2001) citing 118 F.R.D. 351, 353-54 (D.N.J. 1987). The court suggested that the two-tiered approach is an "effective tool for district courts to use in managing" collective action cases, but held that the court below was not required to use this approach. Id. The court held that that the decision to create an opt in class is committed to the discretion of the district court. Id. The court noted that the fact that potential opt in plaintiffs work in different geographical locations does not preclude a finding that they are similarly situated when the plaintiffs and opt in plaintiffs hold the same job title and allege similar treatment by the employer. Id. at 1219. The court clarified the single filing rule to hold that unless the representative charge "clearly alleges a continuing, concrete" discriminatory policy, a non-charge filing opt in plaintiff may rely on a charge filed by a representative plaintiff only if the non-charge filing opt in plaintiff experiences discrimination during the period 180 days (non-deferral state) or 300 days (deferral state) prior to the date the representative plaintiff filed his charge. Id. at 1220. The court limited the forward scope of the class to the date the representative plaintiff's charge is filed. Id. at 1227.

The Eleventh Circuit has held that that disparate impact claims cannot be brought under the ADEA. Adams v. Florida Power Corporation, 255 F.3d 1322 (11th Cir. 2001). The Supreme Court granted certiorari of this case.122 S.Ct. 643 (2001). In Adams, the Eleventh Circuit Court of Appeals reviewed an order by a district court decertifying a

---

[8] Depending upon whether the charging party is in a non-deferral (29 U.S.C. §626(d)(1)) or a deferral state (29 U.S.C. §626(d)(2)). Grayson, 79 F.3d at 1100.

[9] 29 U.S.C. 626(d).

[10] This holding applied to plaintiffs governed by the two and three year statute of limitations for claims which accrued prior to the effective date of the amendment to the Civil Rights Act of 1991, which replaced those limitations periods with a ninety-day period in which to begin a civil action after the plaintiff has received the EEOC's notice that his charge was filed. Grayson at 1107 n.39. Grayson suggests that the analogous rule for an individual with a claim arising after the effective date of the Civil Rights Act, would be to require that the putative plaintiff file within 90 days from his or her receipt of the notice of right to opt into the class. Id.

class of former Florida Power employees it had conditionally certified three years earlier. The district court did so based upon its determination that the plaintiff's disparate impact claims would not lie under the ADEA and that their disparate treatment allegations were not sufficiently similar for class treatment. 255 F.3d 1322. The Eleventh Circuit held that claims for disparate impact cannot lie under the ADEA because the ADEA specifically permits an action otherwise prohibited if the differentiation is based upon "reasonable factors other than age." The court noted that disparate impact actions are not permitted under the EPA and likened the language in the EPA allowing differences in pay based on "any factor other than sex" with that in the ADEA. Id. at 1324 citing Ellis v. United Airlines, Inc., 73 F.3d 1008 (10th Cir. 1996). The court considered it's holding consistent with the Supreme Court's statement in Hazen Paper Co. v. Biggins that "disparate treatment captures the essence of what Congress sought to prohibit in the ADEA." Id. at 1326, citing 507 U.S. 604, 610 (1993).

III. WHAT DO YOU DO IF YOU THINK YOU HAVE A POTENTIAL CLASS CASE?

A. Selection of the Representative Plaintiffs

At the early stage of a class or collective action, no commitment should be made to the prospective client as to whether the client will ultimately be picked as a representative plaintiff. Once the case develops to the point where the filing of the complaint is imminent the representative plaintiffs should be chosen based on the quality of their claim, their ability to be an effective witness, their ability to communicate and lead other putative class members, and their ability to withstand the pressure of representing a class. Background checks of arrest records, bankruptcy suits and credits records (with the client's consent) are appropriate. An excessive number of representative plaintiffs will be problematic because each is subject to deposition and written discovery. Using too few plaintiffs runs the risk that a plaintiff will not adequately represent the class issues or that a plaintiff may be dropped from the suit through summary judgment, death, or withdrawal. From the initial consult and throughout the litigation, it is important to educate the representative plaintiffs regarding what to expect as the case develops. A retainer that details the commitment to the class and explains how class actions may be resolved may help if conflicts regarding the representative plaintiff's claims and the class claims develop.

Interviews with a broad number of witnesses should provide a fairly reliable and clear picture of corporate personnel practices and reveal discriminatory patterns. Initial client contacts will provide referrals to other dissatisfied employees. The information should be indexed in a witness database or list. The most valuable witnesses are current employees and recent past managers. Declarations obtained from putative class members and witnesses will be essential to support your motion for class certification or 216(b) notice. PACER searches of cases filed against the same defendants also provide valuable contacts to gain additional information and find additional witnesses.

Once a case is filed, communications with putative class members may be limited. For example, in the Middle District, Local Rule 4.04(e)[11] states that in any case "sought to be maintained as a class action" all parties are specifically prohibited from communicating concerning the potential class action with any potential or actual class member, not already a named plaintiff, without approval of the court. This includes direct and indirect solicitation to join in the action by the plaintiffs, and solicitation of requests by class members to opt out in class actions maintained under Rule 23(b)(3). This provision does not apply to collective action cases. Tucker v. Labor Leasing, Inc., 872 F.Supp. 941, 949 (M.D. Fla. 1994); Local Rule 4.04(e), M.D. Fla.

Always determine if an arbitration agreement exists for the individuals at issue in your potential class case.

Be certain that the plaintiffs have exhausted their requisite administrative remedies. Plaintiff's counsel should see that plaintiffs file their charges of discrimination as early as possible to maximize the back pay period, as it may toll the statute of limitations for every potential class member. Hipp, 252 F.3d 1208. If possible, the plaintiff's attorney should draft administrative charges so as to proceed with broad class allegations versus the narrow charges that are typically drafted by administrative agencies. Although additional plaintiffs may be able to rely on the single filing rule, it is important to file administrative charges for multiple plaintiffs to prevent having to rely on one charge that may be found to be untimely. A timely EEOC charge by one or more of the class representatives that states claims encompassing, or at least "like or related to," those alleged in the class action, is a prerequisite to litigation under Title VII and the ADEA.

You should prepare your representative plaintiffs for potential settlement issues. If a plaintiff has unrealistic expectations do not use that person to represent the class. No promises should be made that the representative plaintiffs will receive additional compensation for representing the class. Although some courts allow such additional compensation, your potential plaintiff should not rely on this to decide whether to be a representative plaintiff. A strong interest in challenging and changing the illegal practices is critical.

Collective actions under the FLSA or the EPA require quick action on the part of plaintiff's counsel because the statute of limitations is running on each individual's claims until a consent to join form is filed with the court.

B. Select A Proper Defendant

The defendant must have enough job vacancies or job positions at issue to make the case worth litigating on a class basis. In addition, the defendant must be solvent and have the ability to pay for the remedial measures and monetary relief that may be obtained if the action is successful. An employer with unsophisticated human resource

[11] The Middle District has recently indicated that it is considering deleting this provision from the local rules.

functions is likely to tolerate more violations of employment law and is therefore a good target.

C. Conduct Exhaustive Research of Your Legal Theory

Because pursuing a class action or collective action will require significant commitments of time for plaintiff's counsel, you should draft a comprehensive memorandum of the legal theories and factual bases underlying your case before filing suit. The legal research memorandum will assist in developing witness declarations, charges of discrimination, and early discovery requests. A thorough pre-complaint investigation is essential even after deciding to pursue your class action, because in drafting the complaint, the class must be identified as precisely and as broadly as possible, with the view to filing the petition for class certification closely on its heels. In the Middle District of Florida, Local Rule 4.04(b) requires that a petition for certification be filed within 90 days of the filing of the initial complaint. See e.g., Joshlin, et al. v. Gannett River States Publishing Corp., 1993 U.S. Dist. LEXIS 19674 (E.D. Ark. 1993)(denying class certification based upon the plaintiffs' failure to move for class certification within the ninety days following the filing of the complaint, as required by Local Rule 23(A)(1)) and Beavers v. American Cast Iron Pipe Co., 975 F.2d 792 (11th Cir. 1992) (refusing to provide notice from court to putative class members based upon plaintiffs' delay in seeking certification). The illegal practice(s) should be specifically described, and each element of the legal claims should be asserted and related to the facts. The plaintiffs' discovery plan should also be complete before filing the complaint and implemented immediately upon completion of the case management conference. Initial documents disclosures through Rule 26 are essential and counsel should be prepared to pose an immediate defense to defendant's inevitable objections as to their scope.

D. Find Resources to Litigate the Case

Class action litigation is tremendously demanding of time and financial resources. Counsel with a potentially viable large class action or collective action should consider associating with other attorneys or organizations who are knowledgeable and have the resources to litigate these cases. Such collaboration should be sought at the earliest stage of a potential case to prevent missteps that may make the action undesirable to litigate.

Case Compendium

The following compendium is designed to assist the reader to determine the characteristics of actions that have been certified to proceed as a class or collectively, as well as the characteristics of actions that did not achieve or maintain certification. It contains a chronological listing in reverse order of published cases arising out of the Eleventh Circuit Court of Appeals and the federal courts within its jurisdiction from February 1, 1997 through February 1, 2002, in which plaintiffs alleging claims under Title VII, ERISA and the WARN Act have attempted to certify classes under Federal Rule of Civil Procedure 23 and plaintiffs bringing claims under the FLSA and the ADEA attempted to proceed collectively.[12] Claims are separated by categories into those granting certification, granting limited certification, certifying for settlement purposes only, denying certification, and those granting or revoking certification, or revoking conditional certification (in come cases applying a heightened standard applied at second stage review.)

I. ERISA Cases:

a. ERISA Cases Granting Certification under Rule 23:

Lyons et al. v. Georgia-Pacific Corporation Salaried Employees Retirement Plan, 1999 U.S. Dist. LEXIS 5735 (N. D. Ga. 1999). In Lyons, a federal district court entered a brief order of final judgment pursuant to a stipulation between the parties certifying all participants (or beneficiaries of participants) in the plan who received a lump sum distribution of benefits under specific circumstances turning on valuation. It then granted defendants' motion for summary judgment against the class.

Groover et al. v. Michelin North America, Inc., 1999 U.S. Dist. LEXIS 9585 (E. D. Ala. 1999). The court granted plaintiff's motion to certify a class composed of 10,000 retired employees (or their survivors) of Michelin or its predecessors who suffered a reduction of medical benefits as a result of collective bargaining. There were nine named plaintiffs, composed of eight former employees and a surviving spouse, from Michelin's Opelika facility. The class members had retired from facilities in Alabama, Indiana, Wisconsin, Ohio, Florida, Oklahoma, Pennsylvania, Massachusetts, Indiana and California. While the plaintiffs sought to litigate under several separate agreements, the court concluded that the language in each was nearly identical. Therefore the court

[12] These courts have not published opinions addressing the requirements for plaintiffs to proceed collectively in an EPA case within the last five years. A recent example of an EPA action brought under section 216(b) may be found in EEOC v. Bell Atlantic Corporation, 1999 U.S. Dist. LEXIS 8813 (S.D. N.Y. 1999). Plaintiffs alleged discrimination in "wages" based upon their employer's refusal to provide female employees credit for absences during pregnancy while giving such credits to males for non-pregnancy related absences. Denying defendant's motion to dismiss, the court concluded that the definition in FLSA of "wages" included benefits and found plaintiffs had at least alleged a class-wide violation of the EPA. Id.

determined that the plaintiffs demonstrated questions of law and fact sufficient to meet the commonality requirement at the initial stage of litigation. Although the court expressed concern regarding potential class conflicts between older retirees and those who retired at a later date, it determined that doubts regarding the propriety of class certification should be resolved in favor of certification, noting the flexibility of "conditional certification." Because the plaintiffs did not seek extra-contractual or punitive damages, but injunctive relief ordering restoration of retirees to full medical benefits, and monetary relief limited to restoration of benefits, the court was satisfied that the requested monetary relief was incidental to the requested injunctive relief and certified the class under Rule 23(b)(2).

b. ERISA Cases Revoking Certification under Rule 23:

Piazza et al. v. EBSCO Industries, Inc., et al., 273 F.3d 1341 (11th Cir. 2001). Defendants appealed class certification of a class of "all Plan participants or beneficiaries from 1983 through to the present" alleging violations of ERISA. The named plaintiff was a former employee and plan participant who alleged undervaluation of stock. The court reversed certification of a class against defendant PwC (the entity that performed the stock valuation) for failure to meet the requirement of adequacy because Piazza's claim was time-barred. The court found that Piazza met the requirements of Rule 23(a) to represent a class against the Ebsco defendants because even though his standing was limited to the period in which he was a plan participant, his claim had the same essential characteristics as the other claims. Because the Ebsco defendants identified potential prejudice arising from certifying the class under Rule 23(b)(3), the court ruled that the lower court had abused its discretion in doing so, where certification under Rule 23(b)(1) was available. The court held that Piazza had standing as to the breach of fiduciary duty claim alleging lost profits due to defendants operation of competing companies, not as to defendants alleged under valuation of stock prior to the date of the stock sale (by which he was not injured). The court vacated certification of the class against the Ebsco defendants under Rule 23(b)(3), remanding the case to the district court.

2. Title VII Cases:

a. Title VII / 42 U.S.C. §1981 Cases Granting Certification under Rule 23:

United States EEOC v. S & O Inc., 213 F.3d 600 (11th Cir. 2000). In W & O, Inc., a district court certified a class of pregnant waitresses suing under the Pregnancy Discrimination Act, who were barred from waiting tables from the 5th month of pregnancy forward by a policy of their employer, Rustic Inn. The plaintiffs were waitresses who had either been removed from the schedule, had their hours reduced or who had quit in response to the policy. The Court affirmed the award of punitive damages, and vacated the lower court's award of front pay remanding for a determination as to reinstatement.[13]

[13] It is not evident from the opinion whether this class was certified under Rule 23(b)(2) or (b)(3).

Drayton et al. v. Western Auto Supply Co. and Advance Stores Co., Inc., 2000 U.S. Dist. LEXIS 21681 (M.D. Fla. 2000). In Drayton, a federal district court in the Middle District of Florida concluded that plaintiffs had made the requisite showing for certification under both Rule 23(b)(2) and (b)(3). 2000 U.S. Dist. LEXIS 21681**28. The court described civil rights cases alleging unlawful, class discrimination as prime examples of Rule 23(b)(2) actions. Id., citing Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997). Quoting Shores v. Publix Super Markets, Inc., the court stated that the requirement under Rule 23(b)(2) that plaintiffs show defendant acted on grounds generally applicable to the class is encompassed in the commonality requirement of Rule 23(a). Id., citing1996 U.S. Dist. LEXIS 3381 (M.D. Fla. 1996). It also noted that all the relief the proposed plaintiffs requested was equitable in nature, which it deemed consistent with the requirement in Rule 23(b)(2) that the class primarily be seeking injunctive and declaratory relief. The court responded to the plaintiffs' request, in the alternative, for certification under Rule 23(b)(3). Because the plaintiffs' employment discrimination claims were not "complicated by claims for compensatory and punitive damages," the court concluded common questions predominated, and that the plaintiffs satisfied the requirements of Rule 23(b)(3). Id., at **29 citing Rutstein, 211 F.3d 1228. Ultimately, the court certified the class under Rule 23(b)(2), following Bing v. Roadway Express, Inc., which established that (b)(2) classes are preferred over (b)(3) classes in the Eleventh Circuit. *Id*. at **29 citing 485 F.2d 441, 447 (11th Cir. 1973).

b. Title VII / 42 U.S.C. § 1981 Cases Granting Certification under Rule 23 for Settlement Purposes:

Abdallah, et al. v. Coca-Cola Co., 133 F.Supp.2d 1364 (N. D. Ga. 2001). For settlement purposes only, a federal district court conditionally certified a class of African American salaried exempt and non-exempt individuals employed by Coca-Cola in the United States between 1995 and 2000. Coca-Cola agreed to provide $113 million for programmatic relief and pay equity adjustments, a compensatory damages fund, a back pay fund, and attorney's fees, and a plan of allocation in the settlement agreement.

Ingram et al. v. Coca-Cola Company, 2001 U.S. Dist. LEXIS 8414 (N.D. Ga. 2001). For settlement purposes only, a federal district court in Georgia approved a class of 2200 African-American current and former salaried employees of Coca-Cola alleging systematic discrimination on the basis of race in promotions, compensation and performance evaluations in violation of Title VII and 42 U.S.C. 1981. The plaintiffs sought injunctive relief, back pay, compensatory and punitive damages, and attorneys' fees and costs. Among the criteria the court considered with regard to approval of the settlement was plaintiffs' likelihood of success at trial. The court commented that "the class might not prevail on the threshold issue of class certification, either initially or on inevitable appeal." Id. at *689. Notwithstanding, the court did conclude that the class was so numerous that joinder was impracticable [Id. at *697]; that at a minimum, the plaintiffs' allegations of the use of entirely subjective personnel processes that operated to discriminate would suffice to meet the requirement of commonality [Id., *697]; that the class representatives' claims were typical because their claims arose out of and involved application of the "same allegedly subjective, discretionary, and un-monitored

promotion, compensation and performance evaluation systems and the same alleged pattern and practice of discrimination" as those of the other class members [Id. at *698], and that the class representatives had adequately protected the interest of the class and shared a common interest in injunctive and monetary relief. [Id., *699] The parties consented to have their claims for injunctive and equitable relief certified under Rule 23(b)(2) and their claims for compensatory and punitive damages certified under Rule 23(b)(3). The court quoted a pre-Allison case, Holmes v. Continental Can Company, stating "[It is] possible to create hybrids in given cases…. [t]he fact that damages are sought as well as an injunction or declaratory relief should not be fatal to a request for a (b)(2) suit as long as the resulting hybrid case can be fairly and effectively managed." Id., quoting Holmes,706 F.2d at 1158 n.10 (11th Cir. 1983). Ingram distinguished the holding in Rutstein v. Avis Rent-A-Car as applicable to a non-employment cases, and applied the burden-shifting analysis in International Brotherhood of Teamsters v. United States, making the question of whether "a defendant engaged in a pattern and practice of discrimination" the "linchpin that connects the claims of all class members." Id., quoting 431 U.S. 324, 336 (1977). Following Teamsters, Ingram quoted Rutstein stating "the importance of a finding of class-wide discrimination in individual proceedings "predominates" because it "fundamentally affects each class member's underlying cause of action…" Id., quoting Rutstein, 211 F.3d 1228, 1234.

c. Title VII / 42 U.S.C. § 1981 Cases Denying Certification under Rule 23:

Reid et al. v. Lockheed Martin Aeronautics Co. et al., 2001 U.S. Dist. LEXIS N.D. Ga. 2001). Plaintiffs in Reid sued on the basis of race in violation of Section 1981, alleged a pattern and practice of disparate treatment and disparate impact on the basis of race in violation of Title VII, and for breach of contract in violation of state law, seeking injunctive relief, front and back pay, fringe and pension benefits, compensatory and punitive damages and attorney's fees. Individuals working at Defendant's Yarbrough subdivision alleged hostile environment and retaliation as well. Plaintiffs described an overall corporate culture antagonistic to black employees. The "Reid" plaintiffs sought to certify a class of salaried African-Americans employed at defendants' Marietta facility who were adversely affected by defendants' racially discriminatory employment policies and practices from 1996 to 2001, and a similar class of individuals employed in Marietta, Georgia; Palmdale, California; Ft. Worth, Texas, and Greenville, South Carolina. The "Yarbrough" plaintiffs sought certification of employees identically described but paid on an hourly basis. The court denied certification based upon its determination that plaintiffs failed to meet the commonality and typicality requirements of Rule 23(a) in the absence of a showing of centralized and uniform employment practices and statistical (rather than merely anecdotal) evidence. The court stated that class actions may not be appropriate where the alleged discrimination results from the actions of individual supervisors. Furthermore, it held that plaintiffs cannot represent individuals at facilities other than their own in the absence of a showing of centralized and uniform employment practices. The court also raised concerns regarding adequacy of counsel. The court determined that the class failed to meet the requirements for certification under Rule 23(b)(2) and/or (b)(3) and that the money damage demands predominated over the claims

for injunctive relief. It also determined that class litigation was not the superior method of resolving liability or damages issues, such as is required under Rule 23(b)(3). Finally the court found the demand for a jury trial by a single jury incompatible with hybrid certification.

Adler v. Wallace Computer Services, Inc., 2001 U.S. Dist. LEXIS 12881 (N. D. Ga. 2001). In Adler, plaintiffs alleged gender discrimination and sexual harassment seeking to represent all female sales representatives of defendant since 1996. They alleged a pattern and practice of discrimination in terminations, promotions, pay and job assignments as well as a hostile work environment. Plaintiffs sought compensatory and punitive damages, back and front pay, and injunctive and declaratory relief on individual claims and on behalf of the class. Noting that the defendant did not raise objections under Rule 23(a), the court commented that it would be difficult for the class representatives to satisfy the commonality component in light of the hostile environment claim. Focusing on Rule 23(b)(2) the court concluded certification was inappropriate because even if plaintiff could prove a pattern and practice of discrimination, each class member would have to show actual damage to receive compensation and individually demonstrate compensable emotional distress. The court also rejected certification under Rule 23(b)(3) because individual damages issues predominated over class-wide proofs. The court explained that the pattern and practice evidence Wallace presented did not establish discrimination by defendant against each member of the putative class. To establish discrimination as to each member, each would have to show she was denied a promotion, paid less, or terminated on the basis of discrimination, and defendant would have to be afforded the opportunity to articulate a legitimate, non-discriminatory reason as to each. The court stated that defendant would also have to be given the opportunity to show it would have taken the adverse action against plaintiff even absent the pattern and practice of discrimination. In addition, the court anticipated plaintiff-specific issues as to plaintiffs' hostile work environment sexual harassment claims to discover the reasonableness of each plaintiff's subjective perception of her environment. The court concluded these issues caused individual issues to predominate over class wide issues and that the predominance problem was further compounded by the demands for compensatory and punitive damages that would also require individualized proofs. Based upon the foregoing, the court determined that class resolution was not the superior method by which to resolve the controversies. Finally, the court declined hybrid certification based upon the individualized proofs required for the gender discrimination and/or harassment claims and plaintiffs' demand for jury trials that would be unduly burdensome to the resources of the court.

Cooper et al. v. Southern Company et al., 2001 U.S. Dist. LEXIS 16809 (N. D. Ga. 2001). In Cooper, a federal district court in the Northern District of Georgia denied class certification to a proposed class of 2,400 African-Americans alleging racially discriminatory employment policies in violation of Title VII and 42 U.S.C. § 1981, and seeking back pay, compensatory damages, punitive damages, declaratory and injunctive

relief. The prospective plaintiffs were employed in Georgia, Alabama, Florida and Mississippi. Named plaintiffs were seven past and present employees of defendant who alleged disparate treatment of a class of African-American employees ranging from upper and middle management to office and clerical staff, commission-paid sales personnel and unionized operations, maintenance and construction personnel. The court concluded that the class representatives failed in their showing of commonality, typicality and adequacy of representation. The court commented that establishing commonality or typicality for plaintiffs presenting factually dissimilar disparate treatment claims is more difficult than it is for plaintiffs alleging disparate impact. Cooper at *104. Plaintiffs also failed to provide a showing of pattern and practice of discrimination sufficient to impress the court because it did not approach the "inexorable zero" which Rutstein suggested was necessary for application of the Teamsters burden shifting approach. Id. at 119, quoting Rutstein, 211 F.3d at 1236-37. The court declined to certify the class under Rule 23(b)(2) based upon its conclusion that the plaintiffs' demands for compensatory and punitive damages predominated over their claims for injunctive relief and would require highly individualized findings of fact, creating manageability concerns precluding certification under Rule 23(b)(3). Id.

Wright v. Circuit City Stores, Inc., 2001 U.S. Dist. LEXIS 11643 (S.D. Ala. 2001). A federal district court in Alabama denied a petition for certification by a putative class of plaintiffs suing under 42 U.S.C. § 1981. The court refused to certify the putative class for lack of commonality and adequacy because the geographic scope of the class, which encompassed 15 states and 160 stores, was allegedly too broad in geographic scope; the 10-year temporal span of the adverse actions common to the class was too lengthy; the issues represented by the putative plaintiffs, which ran the entire gamut of experiences from hire to termination, were insufficiently narrow, and the class representatives could not show they shared the same interest or were subject to the same injuries as the class members. The court observed that the sole trait the putative plaintiffs shared was their race.

Communications Workers of America Local 3603, et al. v. BellSouth Telecommunications, Inc., 2000 U.S. Dist. LEXIS 20729 (N.D. Ga. 2000). Current and former electronic technicians filed disparate impact and disparate treatment claims against Bellsouth for discrimination in promotion and hiring in violation of the ADEA and Title VII. The proposed class included all "test-qualified" electronic technicians in Charlotte, North Carolina and Nashville, Tennessee, who were over 40 or female or both, who had been denied promotions or transfers between 1994 and 1995. The court declined to certify the class under Rule 23(b)(2) because their damages claims "predominated" over their claims for injunctive relief. The court also withheld certification under Rule 23(b)(3) because determinations of discrimination would require individualized case-specific inquiries. The court also denied even conditional certification of the opt in plaintiffs' ADEA claims under Section 216(b) based upon its conclusion that they presented insufficient evidence that the plaintiffs were similarly situated to meet the less stringent standard of Section 216(b).

Dyer et al. v. Publix Super Markets, Inc., 2000 U.S. Dist. LEXIS 4455 (M.D. Fla. 2000). In Dyer, plaintiffs sought to certify two classes of as many as 5,000 female workers who had worked, were working or would work at the Publix warehouses and distribution centers and manufacturing plants since May 22, 1991. The court found that significant variances in hiring practices between the defendant's facilities defeated any claim of commonality regarding hiring practices. In addition, the proposed class representatives failed the test of typicality because their experiences did not reflect many of the claimed problems. The court anticipated that the class representatives' experiences would prompt individualized defenses not typical of the class.

Hively, et al v. Waffle House, 2000 U.S. Dist. LEXIS 2012 (M.D. Fla. 2000). Four female former restaurant servers sought class certification of their claims of discrimination in promotion and wages under the Equal Pay Act and Title VII. The court decided that the named plaintiffs met the Rule 23 requirements for numerosity and commonality, but failed to meet the typicality requirement because they worked in just one restaurant out of 146 spread over three states. In addition, each of the plaintiff's employment situations was unique in terms of pay, position, and the manner of circumstances prompting her separation. The court stated that the requisite element of typicality is not present if the class representatives are subject to unique defenses that could be central to the litigation. Finally, the plaintiffs also failed to demonstrate adequacy to represent the class because of the variety of defenses to which each could be subject and the factual issues defendant could raise regarding lack of trustworthiness, honesty and credibility that could dominate the proceedings and prejudice class members.

Boyce et al. v. Honeywell, Inc., 2000 U.S. Dist. LEXIS 4854 (M.D. Fla. 2000). In Boyce, eight plaintiffs unsuccessfully sought to certify two subclasses, female employees alleging gender discrimination and nonwhite employees alleging racial discrimination, in a complaint alleging discrimination in all aspects of employment, including hiring, promotions, terminations and layoffs, based upon "anecdotal comments" allegedly evidencing a pattern or practice of bias based upon gender, race and national origin. Plaintiffs were all salaried present or former employees. Four were African-American women, one was an African-American male, one a native-American woman, one a white woman and the last an African-American retiree. They claimed disparate impact, disparate treatment and hostile environment discrimination. Plaintiffs requested a declaratory judgment, injunction, back pay, benefits, compensatory and punitive damages. The court stated that it could not identify an underlying common policy of discrimination common to plaintiffs' claims or evidence of a common, general policy with a disparate impact on the class. The court also concluded that the fact that some of the named representatives were supervisors made it highly likely the class representatives could hold interests antagonistic to absent class members. Finally, the court concluded the time period spanning from 1965, the effective date of Title VII to the date of filing in 2000, was prohibitive.

Faulk v. Home Oil Co., 184 F.R.D. 645 (M.D. Ala. 1999), aff'd 186 F.R.D. 660 (M.D. Ala. 1999). In Faulk, the court denied certification of a class of employees, former employees, and unsuccessful applicants for employment, seeking injunctive, declaratory

and monetary relief for discrimination in promotion, hiring and hostile environment in violation of Section 1981 and Title VII. The named representatives' EEOC charges were insufficiently broad to provide standing but the court found the named plaintiffs had standing to assert the Section 1981 claims of the class. The court also allowed for a sub-class composed of employees and applicants. However, the court declined to certify the hostile environment claims for lack of typicality since they were not susceptible to generalized proof. Finally, the court elected to adopt the Allison analysis from the Fifth Circuit, and concluded that plaintiffs' demands for compensatory and punitive damages predominated over their equitable claims and that their demand for trial by jury required individualized inquiries incompatible with certification under Rule 23(b)(2) or (b)(3).

Bostick v. SMH Inc., 1998 U.S. Dist. LEXIS 18015 (N.D. Ga. 1998). In Bostick, the plaintiff sought to represent a class of all current and former female employees who had been compensated less than similarly situated males in violation of Title VII, and current and former employees whom the defendant had unlawfully required to enter into mandatory arbitration agreements in violation of Title VII. [The court dismissed plaintiff's claim under the arbitration agreement for lack of standing because it had already ruled the arbitration provision of the employment agreement was valid and enforceable.] The court determined that the class plaintiff alleged of 55 individuals satisfied the numerosity requirement and the other requirements of Rule 23(a). However, she failed to obtain certification under Rule 23(b)(2) based on her failure to show defendant engaged in conduct generally applicable to the class and because the remedy she requested (back pay, front pay, compensatory and punitive damages, the difference between what plaintiff and class members and their male counterparts were paid, attorneys' fees and costs) related primarily to monetary damages. The court also denied certification under Rule 23(b)(3) because the defense of claims would turn on questions of law and fact pertaining only to individual class members and because there was no reason to believe certification of a class was the superior means of adjudicating the alleged gender discrimination claims. The court decided that the interest of individual class members in controlling any litigation alleging gender discrimination outweighed the interest of the plaintiff in pursuing the action as class litigation (noting in support that one putative class member had already indicated she had no interest in joining the litigation.)

Thornton et al. v. Mercantile Stores Co. et al., 13 F.Supp.2d 1282 (M.D. Ala. 1998). A federal district court in Alabama affirmed a ruling dismissing without prejudice plaintiff's motion for class certification of African American employees who sued for discrimination in advancement opportunities, pay and other terms and conditions of employment in violation of Title VII and Section 1981. The plaintiffs brought disparate treatment and disparate impact claims. Because the court also had before it defendants' pending motions for summary judgment to consider, it dismissed plaintiffs' motion for class certification without prejudice pending resolution of defendants' motion for summary judgment on the bases that defendants expressly assumed the risks of further litigation and the absence of prejudice to the putative class members.

Reyes et al. v. Walt Disney World Company, 1998 U.S. Dist. LEXIS 1937 (M. D. Fla. 1998). In Reyes, current and former Hispanic employees alleged national origin discrimination in violation of Title VII and Section 1981, claiming declaratory, injunctive and monetary relief. The court determined that the named plaintiffs lacked standing because although they purported to represent a class of individuals who were denied employment, at some time Disney had previously hired each of them. The court also decided the plaintiffs failed to satisfy the commonality and typicality requirements because of their "across-the-board" allegations of employment discrimination in the absence of evidence that the employer acted in a similar manner toward all members of a particular group, and decided their claims of disparate treatment were not susceptible to class certification due to the requirement of individualized proofs.

Griffis v. Emory University, 1997 U.S. Dist. LEXIS 22529 (N. D. Ga. 1997). A federal district court in Georgia denied certification of a class of approximately 382 African-American individuals denied employment at Emory University who sued for discrimination in violation of Section 1981 under a disparate treatment theory. Noting that the showing required for commonality and typicality frequently merge, the court concluded that plaintiff succeeded in showing commonality of questions of law and fact based upon statistical evidence of a discriminatory policy to fill positions based upon race, but concluded the plaintiff failed to demonstrate typicality because he could not demonstrate a centralized decision-making process and because of his intention to use the McDonnell Douglas analysis as to each class member. The series of mini-trials the court envisioned caused it to conclude that the action would frustrate the principal purpose of the class action device, which is to "aid the efficiency and economy of litigation."

d. Title VII / 42 U.S.C. § 1981 Cases Revoking Certification:

Alexander v. Fulton County, Georgia, 207 F.3d 1303 (11th Cir. 2000). The Eleventh Circuit heard the employer's appeal of a jury verdict on behalf of eighteen employees of the Fulton County Sheriff's Department suing on behalf of themselves and a class of "all similarly situated white employees of the sheriff's department" in a lawsuit alleging a "pattern or practice" of employment discrimination in violation of Section 1981, 1983 and Title VII. The district court certified a class under Rule 23(b)(2), but decertified it after trial for failure to meet the commonality and typicality prerequisites for a class action based upon the different types of discrimination claims alleged, which included discipline, promotions, transfers, reclassifications, promotional examinations, restorations of rank and appointments to unclassified positions. The court tried the plaintiffs' claims jointly under Rule 20(a). In pertinent part, the Eleventh Circuit decided that the district court did not abuse its discretion in finding that the efficiency of a consolidated trial outweighed the potential for unfair prejudice or jury confusion.

Carter v. West Publishing Co., 225 F.3d 1258 (11th Cir. 2000). In Carter, eight current and former employees of West Publishing Co. filed a collective action under the EPA and sought to certify a class under Rule 23 alleging violations of Title VII, based on allegations that they were denied opportunities to purchase stock and/or offered fewer shares than similarly situated male employees. 225 F.3d 1258. The court decertified the

class after it determined that the sole class representative lacked standing to represent the class because her EEOC charge was untimely and not subject to the continuing violations rule or equitable tolling.

Murry et al. v. Griffin Wheel Co., 1997 U.S. Dist. LEXIS 4207 (S. D. Ala. 1997). In Murry, the named plaintiffs in five consolidated cases unsuccessfully sought class certification of all employees at five plants operated by defendant. The court first observed that allowing class allegations would force postponement of disposition of a case that had been filed more than two years earlier. In response to plaintiff's speculation that "discovery may reveal that this matter meets certification criteria", the court stated that it was "impossible for it to comprehend how a series of disparate treatment race and sex cases" could be made into "a disparate treatment and impact case." The court stated that it "lacks the intellectual capacity, the strength of purpose, the learning, the ambition, the ability to innovate or the patience, to ride herd on this particular "would-be" class, much less the willingness to cooperate in what this court's experience tells us it would inevitably end up … as a contrived "settlement" with some sort of injunctive relief, a cockamamie distribution of settlement monies to class members who necessarily suffered entirely different amounts of alleged lost wages and mental anguish .. . the problems to be addressed before reaching [the question of punitive damages] would be virtually insurmountable [and] the court is exhausted just thinking about it." Id. at **7.

3. FLSA Cases:

a. FLSA Cases Granting Permission to Proceed Collectively:

Harper v. Lovett's Buffet, Inc., 1999 U.S. Dist. LEXIS 756 (M. D. Ala. 1999). A federal district court in Alabama granted a motion by plaintiffs employed at defendant's restaurant in Alabama for conditional certification of a class of individuals composed of all employees of defendant at all its locations. The class included "hourly wage employees" of defendant throughout the Southeast including dining room servers, food and salad bar workers, cooks, dishwashers, cashiers, hostesses, bakers and busboys. Plaintiffs alleged a long-standing, widespread practice of various minimum wage and overtime violations of FLSA under centralized policies and procedures designed to minimize labor costs. The court applied the standard endorsed in Grayson v. K Mart to determine if the plaintiffs were similarly situated. Based upon the fact that plaintiffs' evidence supported the allegations of violations at one restaurant but not at others, the court declined to send notice to hourly workers who had been employed at different restaurants spread among six states under different management personnel and in completely different environments. Plaintiffs also failed to present evidence to support their allegations of a corporate-wide incentive pay plan rewarding managers for conduct in violation of FLSA, or a uniform practice of discouraging overtime. The court authorized notice only to a smaller class of employees who had worked at the Dothan, Alabama restaurant, at which plaintiffs had presented evidence of FLSA violations.

Harrison v. Enterprise Rent-A-Car, Inc., 1998 U.S. Dist. LEXIS 13131 (M.D. Fla. 1998). In Harrison, a federal district court in Florida granted a motion to facilitate notice to a putative class of opt in plaintiffs. The named plaintiffs were former management assistants who alleged violations of FLSA's overtime requirements and sought liquidated damages and attorney's fees. They sought to represent all similarly situated management assistants employed by defendant in thirteen states. At the time the court considered the motion, fifty-eight individuals had filed consents to join and the plaintiffs anticipated a large number of "opt in plaintiffs." The court rejected defendant's contentions that the putative plaintiffs' range of duties was too wide and too varied to permit certification for notice purposes and that some employees in the putative class might prove to be exempt, given that defendant could subsequently move to decertify if warranted after discovery. Id. at *12.

b. FLSA Cases Denying Permission to Proceed Collectively:

Santelices et al. v. Cable Wiring and So. Fla. Cable Contractors, Inc., 2001 U.S. Dist. LEXIS 6787 (S. D. Fla. 2001). In this case, the plaintiff employee moved to allow notification to potential class members of a claim for unpaid overtime. The court cited Grayson v. K Mart Corp., for the proposition that a plaintiff who desires to proceed collectively must establish the existence of willing opt in plaintiffs by proffering evidence to the court that there are a number of employees who want to opt in and who are similarly situated by producing detailed allegations supported by affidavits. Id. at *4 quoting Grayson, 79 F.3d 1086, 1097. The court denied the motion for court ordered notification because plaintiff failed to demonstrate that there were such other employees similarly situated with regard to job requirements and pay provisions who desired to "opt in." In fact, plaintiff had produced only one consent to join form after the close of discovery in support of its position, in response to which defendants filed a motion to strike. Plaintiff failed to respond to the motion.

c. FLSA Cases Revoking Conditional Certification:

Mertz, et al. v. Treetop Enterprises, Inc., 1999 U.S. Dist. LEXIS 18386 (S. D. Ala. 1999). In Mertz, three individuals who were former hourly employees of Treetop (a franchisee of Waffle House, Inc.), a grill operator and servers, sought to represent hourly, non-exempt, non-management employees who were waitresses and/or grill operators for Treetop in Alabama, Mississippi and Tennessee. 872 consents were filed with the court and 19,000 court approved notices were sent to present and past employees. Plaintiffs alleged failure to pay wages, improper payment of wages or denial of overtime compensation. After discovery, the number of putative opt in plaintiffs was reduced to 535. The court noted that Treetop had large turnover in management personnel during the relevant period and that different unit managers had supervised the representative and putative plaintiffs. Plaintiffs submitted no evidence in support of their allegation of management's knowledge of illegal practices. The court concluded that the named plaintiffs improperly attempted to represent plaintiffs in a multi-state area, who reported to different management in different facilities, and that they failed to demonstrate a

reasonable basis to support assertions of class wide violations and/or a pattern of practice of class wide violation.

4. ADEA Cases:

a. ADEA Cases Granting Permission to Proceed Collectively:

Hipp et al. v. Liberty National Life Insurance Co., 164 F.R.D. 574, 576 (M.D. Fla. Feb. 6, 1996), aff'd 252 F.3d 1208 (11th cir. 2001). In Hipp, a federal district court in the Middle District of Florida certified a group of managerial employees of defendant in the United States over the age of 40 and hired on or after August 25, 1993. The district court declined to utilize the two-tiered approach established in Mooney v. Aramco Serv. Co. to determine if plaintiffs were similarly situated to the putative opt in plaintiffs. Id., citing 54 F.3d. 1207 (5th Cir. 1995). Instead it applied the standard enunciated in Grayson v. K Mart Corp., merely requiring plaintiffs to make substantial (detailed) allegations supported by affidavits, which successfully engage defendant's affidavits to the contrary. Plaintiffs in Grayson alleged a pattern and practice of age discrimination that violated the ADEA and resulted in constructive discharges. On review, the Eleventh Circuit described the two-tiered approach used in Lusardi v. Xerox Corp., 118 F.R.D. 351, 353-54 (D.N.J. 1987), as being an "effective tool for district courts to use in managing" collective action cases, but held that the court was not required to use this approach. 252 F.3d 1208, 1219 (11th Cir. 2001). The court held that that the decision to create an opt in class is committed to the discretion of the district court. Id. The court noted that the fact that potential opt in plaintiffs work in different geographical locations does not preclude a finding that they are similarly situated when the plaintiffs and opt in plaintiffs hold the same job title and allege similar treatment by the employer. Id. at 1219. The court clarified the single filing rule (also know as the "piggybacking" rule) and held that unless the representative charge "clearly alleges a continuing, concrete" discriminatory policy, a non-charge filing opt in plaintiff may rely on a charge filed by a representative plaintiff only if the non-charge filing opt in plaintiff experiences discrimination during the period 180 days (non-deferral state) or 300 days (deferral state) prior to the date the representative plaintiff filed his charge and the date of charge. Id. at 1220.

b. ADEA Cases Denying Permission to Proceed Collectively:

Communications Workers of America Local 3603, et al. v. BellSouth Telecommunications, Inc., 2000 U.S. Dist. LEXIS 20729 (N.D. Ga. 2000). Current and former electronics technicians filed disparate impact and disparate treatment claims against Bellsouth for discrimination in promotion and hiring in violation of the ADEA and Title VII. The proposed class included all "test-qualified" electronic technicians in Charlotte, North Carolina and Nashville, Tennessee, who were over 40 or female or both, between 1994 and 1995 who had been denied promotions or transfers. The court declined to certify the class under Rule 23(b)(2) because their damages claims "predominated" over the claims for injunctive relief. The court also withheld certification under Rule 23(b)(3) because determinations of discrimination would require

individualized case-specific inquiries. The court also denied conditional certification of the opt in plaintiffs' ADEA claims under Section 216(b) based upon its conclusion that there was insufficient evidence to meet the less stringent standard of Section 216(b) requiring a showing that the plaintiffs were similarly situated.

Armstrong et al. v. Martin Marietta Corp., 138 F.3d 1374 (11th Cir. 1998). Plaintiffs were employees who lost their jobs between 1992 and 1993, 28 of whom had filed charges under the ADEA. The court determined that where class certification is denied, the statute of limitations begins to run again as to all excluded class members, even during the pendency of an interlocutory appeal.

c. ADEA Cases Revoking Conditional Certification to Proceed Collectively:

Adams v. Florida Power Corporation, 95-00123-CV-OC-10A (M.D. Fla.), aff'd., 255 F.3d 1322 (11th Cir. 2001) cert. granted, 122 S.Ct. 643 (2001). In Adams, the Eleventh Circuit Court of Appeals reviewed an order by a district court decertifying a class of former Florida Power employees it had conditionally certified three years earlier. The district court did so based upon its determination that the plaintiffs' disparate impact claim would not lie under the ADEA and that their disparate treatment allegations were not sufficiently similar for class treatment. 255 F.3d 1322.

d. ADEA Cases Revoking Conditional Certification to Proceed Collectively Applying Heightened Standard at Second Stage Review:

Stone v. First Union Corporation, 2001 U.S. Dist. LEXIS 16776 (S. D. Fla. 2001). In this case the court reviewed conditional certification it had previously a class of employees of First Union National Bank of Florida were at least age forty while employed and who suffered adverse employment actions between 1992 and 1994 because of their age. The court determined that plaintiffs had to show, at a minimum, that they each sustained an adverse employment action and were over forty when it occurred. The named plaintiff had to show her position was similar, but not identical to those of the putative class members. Applying a heightened second-tier factual review at the close of discovery, the court decided to decertify based upon the different types of claims presented by the class members relating to several different mergers and acquisitions involving different entities and institutions. In addition, the employees held different job titles and classifications in different branches and divisions of defendant, and failed to show evidence of a pattern and practice of age discrimination to which they were all subjected.

5. WARN Act Cases:

a. WARN Act Case Denying Motion to Decertify:

Kelly v. Sabretech, Inc., 1999 U.S. Dist. LEXIS 15445 (S.D. Fla. 1999). In 1999, a federal district court in Miami denied defendant's motion to decertify a class of employees in Kelly v. Sabretech, Inc.. The class was composed of between 85 and 110

aircraft maintenance and repair employees whose facility was shut down in January 1997. The class had previously been conditionally certified under Rule 23(b)(3). The court confirmed that questions of law and fact were common to the class. It also decided the plaintiffs asserted similar interests and injuries and that the representative plaintiffs would fairly and adequately protect the interests of the class. The court also concluded that common questions of law and fact predominated and that a class action was the superior method of adjudication. Cf. Joshlin, et al. v. Gannett River States Publishing Corp., 1993 U.S. Dist. LEXIS 19674 (E.D. Ark. 1993). The court did however amend the scope of the proposed class to exclude all those employees who accepted transfers and to include those who were discharged within 30 days of the mass layoff.