2-11-1983

Plaintiff Memo in Support of Class Action

Lewis M. Steel '63

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LISA M. AVIGLIANO, et al., Plaintiffs,	:	
-against-	:	77 Civ. 5641 (CHT)
SUMITOMO SHOJI AMERICA, INC., Defendant.	:	

PLAINTIFFS' MEMORANDUM OF LAW

IN SUPPORT OF MOTION TO CERTIFY CLASS ACTION

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STATEMENT OF FACTS

Plaintiffs in this case allege that defendant has discriminated against them and against women as a class by restricting them to clerical jobs and refusing to train and promote women to executive, managerial and/or sales positions. Plaintiffs allege that they have been discriminated against based on their sex and their national origin, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, et seq..*/

This motion is supported by the affidavit of Rosemary Bellini, the only remaining plaintiff in the Avigliano case still working at the defendant corporation, as well as the affidavits of Raellen Mandelbaum and Elizabeth Wong, two plaintiffs who are no longer employed by the defendant. The plaintiffs in these affidavits state that their failure to advance above the clerical level at Sumitomo Shoji America was the result of the policy and practice of the defendant to employ women in jobs of little responsibility only and to give virtually all of the supervisory, managerial, executive and sales jobs to male Japanese nationals. The plaintiffs state in these affidavits that they brought this action not only to benefit themselves but to obtain class relief for women.

As of this date, six of the original Avigliano plaintiffs have

*/ This Court granted a motion to dismiss with regard to plaintiffs' claims under 42 U.S.C. §1981. See opinion and order of June 5, 1979, reported at 473 F.Supp. 506.

also filed detailed answers to interrogatories (Avagliano, Bellini, Chenicek, Mandelbaum, Mannina and Wong).*/ These answers to interrogatories make clear that plaintiffs are complaining of class based discrimination. (See answers to interrogatories numbers 40, 45, 47, 48).

This motion is also supported by the affidavits of plaintiffs' counsel, Lewis M. Steel, which have been submitted in support of this motion as well as a similar motion in the Incherchera case pending before this Court. The September 24, 1982 Steel affidavit contains certain documents which support a conclusion that there exist common questions of fact or law in this case and that plaintiff's claims are typical of class members. The Court is referred to paragraph 9 of the Steel affidavit which refers to certain briefs which defendant filed in the United States Supreme Court in 1982 in which it admitted that it gives an employment preference to persons of Japanese nationality. In making these arguments to the United States Supreme Court, Sumitomo claimed it could fill its executive, managerial and sales positions exclusively with male Japanese citizens. The Supreme Court rejected this argument in Avagliano, et al. v. Sumitomo Shoji America, Inc., ___ U.S. ___, 102 S.Ct. 2374 (1982).

The effect of Sumitomo's "preference" on women is clearly seen

*/ Due to a typographical error, this case has been referred to as "Avigliano". The lead plaintiff's name is, in fact, Lisa M. Avagliano, and the United States Supreme Court decision reflects the proper spelling of her name. Ms. Avagliano is now married, and has used her married name, Lisa Mushnick, in signing her answers to interrogatories.

in the reporting forms (referred to as "EEO-1's") which Sumitomo has filed with the Equal Employment Opportunity Commission in 1975 and 1976, in response to interrogatories filed in this case.

The 1976 EEO-1 form shows that at that time, the defendant employed 89 women at its 345 Park Avenue office, 87 of whom were categorized as "office and clerical." None of these women were employed in any managerial, executive or sales position.*/

The September 24, 1982 Steel affidavit also incorporates data relating to female employment in other Sumitomo offices. As of the time that discovery ceased in the Avigliano case due to the filing of the motion to dismiss, Sumitomo employed 16 women at its 350 Fifth Avenue office, and employed an additional 103 women in nine other offices located around the United States. To date, the defendant has refused to update these figures, or supply breakdowns, despite interrogatory requests.

*/ Defendant in the Incherchera case has turned over to plaintiff's counsel a 1982 EEO-1 form which shows that there are presently 84 women employed in the company's headquarters office. It lists 74 of these women under the heading of office and clerical employees and 10 under the officials and managers category. During four days of depositions, however, plaintiff Incherchera testified repeatedly that while women may now be given managerial titles, essentially they are still doing clerical work and are given no responsibility. See, e.g., Incherchera deposition, 44-48. To date, defendant, despite interrogatory requests, has not provided plaintiffs with detailed job by job breakdowns by sex, nationality or national origin. In any event, even assuming that the defendant has made some attempt to break its total sex bar since the filing of this lawsuit, this would not be grounds for denying class action status.

Sumitomo has stated, however, in its supplemental answers to interrogatories that with regard to the positions that women contend they are excluded from, most are filled by Japanese nationals, and are selected for employment by the defendant's Japanese parent corporation. (See supplemental answer 13). Thus, it is clear that the discrimination complained of exists on a national as well as a local basis, and any defenses which Sumitomo may have would relate to nationwide practices.

ARGUMENT

A.

PLAINTIFFS FULLY SATISFY EACH OF THE RULE 23(a)(1)-(4) CRITERIA FOR MAINTENANCE OF THIS ACTION AS A CLASS ACTION

1. Numerosity

Rule 23(a)(1) requires a showing that "the class is so numerous that joinder of all members is impracticable." Plaintiffs in this action seek a nationwide class, as it is apparent that the policies and practices of defendant discriminate against women wherever they work. In such a situation, a national class is appropriate. Califano v. Yamasaki, 442 U.S. 682, 702 (1979). Assuming that Sumitomo's employment of women has remained constant since 1976, the class would contain at least 200 present employees, and there would obviously be many additional employees who have worked for defendant in the past or who have applied for employment. Clearly, a class of this size satisfies the numerosity requirement. Even assuming, however, that the class would be limited to the New York geographical area, or even to the 345 Park Avenue office, the minimum number of employees presently at Sumitomo in the class would be approximately 85. Again, additional women who have been employed by the defendant or who have applied for work would also be includable in the class. As courts have with regularity certified classes of this or smaller

numers of members*/ plaintiffs satisfy the numerosity requirement.

2. Commonality and Typicality

Rule 23(a)(2) and (3), respectively, require that there exist common questions of fact or law and that the named plaintiffs' claims be typical of those of the class members. As the Supreme Court has pointed out:

> The commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances, maintenance of a class action is economical and whether the named plaintiff's claims and the class claims are so intertwined that the interests of the class members will be fairly and adequately protected in their absence. General Telephone Co. of the Southwest v. Falcon, ___ U.S. ___, 102 S.Ct. 2364, 2371, n. 13 (1982).

Plaintiffs claim in this case that the "preferential" policies and practices of the defendant limit women to clerical and office work. This claim classically involves common questions of fact and law and fully satisfies the typicality requirement. Given Sumitomo's employment preference, a class of both applicants and employees is appropriate. General Telephone Co. of the Southwest v. Falcon, supra, 102 S.Ct. at 2371, n. 15.

*/ Korn v. Franchard Corp., 456 F.2d 1206 (2d Cir. 1972 (70 members)); Horn v. Assoc. Wholesale Grocers, 555 F.2d 270 (10th Cir. 1977 (41 members)); Martinez v. Richardson, 472 F.2d 1121 (10th Cir. 1973 (87 members)); Jones v. Diamond, 519 F.2d 1090 (5th Cir. 1975 (38 members)); Swanson v. American Consumer Indus., Inc., 415 F.2d 1326 (7th Cir. 1969 (40 members)); Sharon Steel Corp. v. Chase Manhattan Bank, 88 F.R.D. 38 (D.C.N.Y. 1980 (87 members)); Klamberg v. Roth, 473 F.Supp. 544 (S.D. N.Y. 1979 (70 members)).

In this case and the Incherchera case, there are now 13 plaintiffs. Obviously, the individual facts with regard to each differ. Some felt they were discriminated against at the time they were hired (e.g., Mannina and Mandelbaum answers to interrogatories, number 57). Others became aware of the pattern of discrimination while on the job. Some went to college; some did not. Some were more vocal in seeking promotions than others. Some were in administrative departments and others were in sales departments. None of these distinctions, however, should have any effect on the question as to whether a class should be certified. As the United States Court of Appeals for the Eighth Circuit made clear in a post-Falcon decision:

> Rule 23(a)(2) requires that there be common questions of law or fact among members of a class. The Rule does not require that every question of law or fact be common to every member of the class [citations omitted] and may be satisfied, for example, where the question of law linking the class members is substantially related to the resolution of the litigation, even though the individuals are not identically situated. Paxton v. Union National Bank, ___ F.2d ___, 29 FEP Cases 1233, 1241 (8th Cir., decided 9/10/82).

Plaintiffs in this case, of course, believe that each individually has a meritorious claim. Plaintiffs, however, need not establish a meritorious claim in order to represent a class. Sirota v. Solitron Devices, Inc., 673 F.2d 566, 571 (2d Cir. 1982), citing with approval Huff v. N.D. Cass Co., 485 F.2d 710, 714 (5th Cir. 1973) (en banc). See also Eisen v. Carlisle & Jacquilen, 417 U.S. 156 (1974). As the Court of Appeals in Paxton, supra, pointed out, . . . [the

employer's] discriminatory promotion procedures will effect individual employees in different ways because of their diverse qualifications and ambitions. These factual variations are not sufficient to deny class treatment to the claims that have a common thread of discrimination. . . ." 29 FEP Cases at 1241. The Court further stated, at 1242, "Typicality is not defeated because of the varied promotional opportunities or the differing qualifications of the plaintiffs and class members."

3. Adequacy of Representation

Rule 23(a)(4) requires that the representative party will fairly and adequately protect the interests of the class. Again, this requirement tends to merge with the commonality and typicality requirements. General Telephone Co. of the Southwest v. Falcon, supra, 102 S.Ct. at 2371, n. 13. Additionally, of course, this requirement concerns the competency of class counsel and possible conflicts of interest. Ibid. The September 24, 1982 Steel affidavit establishes that plaintiffs' attorneys are experienced in civil rights and employment law and have litigated many complex cases, including Avagliano v. Sumitomo Shoji America, Inc., ___ U.S. ___, 102 S.Ct. 2374 (1982). Counsel is aware of no conflict of interest question in the present litigation. Plaintiffs have alleged claims of discrimination that affect all members of the class. Plaintiffs' interest in eliminating the discriminatory practices does not conflict

with the interest of other, similarly situated women.

B.

PLAINTIFFS MAY MAINTAIN THIS SUIT AS A CLASS ACTION UNDER RULE 23(b)(2)

Plaintiffs seek to bring this suit under Rule 23(b)(2), which applies where the

> party opposing the class has acted or refused to act 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.

Basic to the claim in this case is the allegation that the defendant has limited the employment opportunities of the class and has done so on grounds which are generally applicable to the class. Clearly, therefore, appropriate final injunctive relief should be fashioned with respect to the class as a whole.

Title VII actions are appropriately certified as class actions under this provision. Wetzel v. Liberty Mutual Ins. Co., 508 F.2d 239 (3d Cir. 1975), cert. den. 421 U.S. 1011; Vulcan Society v. Fire Dept. of City of White Plains, 82 F.R.D. 379 (S.D.N.Y. 1979); Ste. Marie v. Eastern R.R. Ass'n, 72 F.R.D. 443 (S.D.N.Y. 1976); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974); Senter v. General Motors, 532 F.2d 511 (6th Cir. 1976); Rich v. Martin Marietta Corp., 522 F.2d 333 (10th Cir. 1975). The courts have been flexible in certifying broad classes under Rule 23(b)(2) for liability issues, while reserving the determination of individual claims for

later stages in the proceedings. Marcera v. Chinlund, 595 F.2d 1231 (2d Cir. 1979), vacated on other grounds, 442 U.S. 915 (1979); NAACP v. City of Corinth, 83 F.R.D. 45 (N.D. Miss. 1979).

CONCLUSION

This case bears tremendous similarity to Spiess v. C. Itoh, ___ U.S. ___, 102 S.Ct. 2951 (1983), which was remanded to the district court based upon the United States Supreme Court decision in this case. In Spiess, the Hon. Carl O. Bue, Jr., certified national classes on September 2, 1977. A copy of the decision is attached hereto. In that case, the three male American plaintiffs, who worked out of one of the defendant's offices, alleged they were barred from advancement because of the same preference for Japanese nationals which exists here. In this case, of course, plaintiffs allege that they are barred from advancement because of their sex as well as their national origin. In this case, as in Spiess, it is clear that there are common questions of law and fact which must be decided in order to resolve the issues before the Court. In Spiess, the court found that a national class was appropriate. Such a class is equally appropriate here.

For all of the above reasons, plaintiffs' motion to certify class action should be granted.

Dated: New York, New York
February 11, 1983

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

MICHAEL E. SPIESS, JACK K. HARDY and BENJAMIN F. ROUNTREE,

Plaintiffs,

V.

C. ITOH & CO. (AMERICA), INC.,

Defendant.

CIVIL ACTION

NO. 75-H-267

MEMORANDUM AND ORDER

I. MOTIONS PENDING

Presently pending before this Court are various motions filed by the parties in this action. These motions are resolved as follows:

1. Plaintiffs' Motion for Reconsideration of Motion for Temporary Restraining Order and Preliminary Injunction - denied.

2. Defendant's Motion to Dismiss Plaintiffs' Request for Punitive Damages - no ruling at this time.

3. Defendant's Motion to Amend Interlocutory Order of May 9, 1975 - denied.

4. Plaintiffs' Motion to Certify Class - granted.

II. PLAINTIFFS' MOTION FOR RECONSIDERATION OF MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Plaintiffs have filed their Motion for Reconsideration of Motion for Temporary Restraining Order and Preliminary Injunction. The file in this cause reflects that at a conference before the United States Magistrate on May 12, 1976, plaintiffs stated that they agreed to withdraw this motion. In view of plaintiffs' representations to the Magistrate, the motion is denied as moot.

III. AVAILABILITY OF PUNITIVE DAMAGES

Plaintiffs seek punitive damages as part of the relief sought in this case, as to both their § 1981 claim and their Title VII claim. Defendant vigorously opposes the availability of such relief under either statute. See Defendant's Motion to Dismiss (March 10, 1975); Defendant's Amended Motion to Dismiss (March 21, 1975).

A review of the legal authority in this area reveals that the courts are in disarray on the question of whether punitive damages are available in suits of this nature. Nor does there appear to exist any definitive Fifth Circuit authority on this point. The issue is a complex one, with a substantial argument to be made on each side. Should plaintiffs fail to establish liability of the defendant, the matter will, of course, be moot insofar as this particular case is concerned.

For these reasons, the Court concludes that this matter is one more appropriately decided during or subsequent to time of trial. Therefore, the Court declines to rule at this time on the availability of punitive damages. Defendant may re-urge its motion at the proper time in the unfolding of the case.

IV. DEFENDANT'S MOTION TO AMEND INTERLOCUTORY ORDER

Pursuant to 28 U.S.C. § 1292(b) and Rule 5(a), Federal Rules of Appellate Procedure, defendant moves this Court to enter an order amending its Memorandum and Order of January 29, 1976. Defendant seeks to amend said Order to include a statement that:

> "(1) Said Order involved a controlling question of law as to which there are substantial grounds for difference of opinion, and
>
> "(2) An immediate appeal from the Order may materially advance the ultimate termination of this litigation."

In its Order of January 29, 1976, this Court held that the white plaintiffs in this cause have standing under 42 U.S.C.

§ 1981 to bring this action. The Order also held that an allegation of discrimination against members of the white race may state a claim upon which relief may be granted under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.

In view of the decision of the United States Supreme Court in McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273, 96 S.Ct. 2574, 49 L.Ed.2d 493 (1976), this Court is of the opinion that there exists no "controlling question of law as to which there are substantial grounds for difference of opinion". Therefore, Defendant's Motion to Amend Interlocutory Order is denied.

V. MOTION TO CERTIFY CLASS

Plaintiffs have the burden of demonstrating that the requirements of Rule 23, Federal Rules of Civil Procedure, have been satisfied. Danner v. Phillips Petroleum Co., 447 F.2d 159 (5th Cir. 1971). Plaintiffs have moved for class certification. Defendant opposes the motion and urges the Court to deny it.

A. Class Proposed by Plaintiffs

Plaintiffs allege violation of both § 1981 and Title VII and propose classes under both theories.

1. Section 1981 Claim

Plaintiffs seek the certification of the following class pursuant to their § 1981 claim.

> "1981 Class: All persons, other than porters, secretaries and clerks, who are or were employees of C. Itoh & Co. (America), Inc., from May 9, 1972, to date, and all such future employees, who were, are or may be members of the American Staff of C. Itoh & Co. (America), Inc."

No statute of limitations requirement is expressed in § 1981; thus the applicable statute of limitations period is that which would be enforced for an analogous action brought in the forum state. The applicable Texas statute of limitations for Section 1981 claims is two years. Dupree v. Hutchins Brothers, 521 F.2d 236 (5th Cir. 1975).

Plaintiffs' First Amended Complaint, alleging existence of a class, was filed February 21, 1975. This tolled the running of the statute as against class members. Esplin v. Hirschi, 402 F.2d 94, 101 n.14 (10th Cir. 1968), cert. denied, 394 U.S. 928 (1969). Those persons who were employees of defendant during the two years preceding the filing of such complaint may properly be included in the proposed § 1981 class. The May 9, 1972, date chosen by plaintiffs falls outside this two-year time period.

The § 1981 class defined by plaintiffs is modified to reflect the two-year statute of limitations, and with this modification, is certified.

2. Title VII Classes

Plaintiffs, pursuant to their Title VII allegations, propose the adoption of three classes based upon race, color and national origin. Plaintiffs seek to represent certain non-yellow, non-Oriental, non-Japanese members of defendant's American staff. The classes as proposed by plaintiffs are:

> "Race Class: All employees other than porters, secretaries and clerks of C. Itoh & Co. (America), Inc., from May 9, 1972, to date, and all such future employees, who were, are or may be members of the American staff of C. Itoh & Co. (America), Inc., who are not Oriental.
>
> "Color Class: All employees, other than porters, secretaries and clerks, of C. Itoh & Co. (America), Inc., from May 9, 1972, to date, and all future such employees of C. Itoh & Co. (America), Inc., who are not yellow.
>
> "National Origin Class:[1/] All employees other than porters, secretaries and clerks of C. Itoh &

"Co. (America), Inc., from May 9, 1972, to date, and all future such employees of C. Itoh & Co. (America), Inc., who are not of Japanese national origin:

"Sub-Class (a) in that they were not born and raised in Japan and have no traceable ancestry to Japan; or

"Sub-Class (b) in that they were not born and raised in Japan, but were rather born and raised in the United States and are therefore, of American national origin."

(Brief in Support of Plaintiffs' Motion to Provisionally Certify Cause as Class Action at 22-24, filed March 15, 1976.)

B. Geographic Scope of Class

Plaintiffs seek certification of a nationwide class of persons employed by defendant's offices in Houston, Dallas, Chicago, New York, Atlanta, San Francisco, Detroit, Los Angeles, Seattle and other cities across the United States. (Plaintiffs' Exhibit 22; Nishitomi Deposition, p. 438, line 8; p. 449, line 10).

Defendant contends that the named plaintiffs may not represent a nationwide class, citing Hill v. American Airlines, Inc., 479 F.2d 1057 (5th Cir. 1973) as controlling. The Court of Appeals in that instance rejected the bid of a skycap for American Airlines at the San Antonio airport to represent a nationwide class. The rejection was based upon the fact that the employment practice complained of was a San Antonio practice, rather than a national policy. Defendant also cites Gresham v. Ford Motor Company, 53 F.R.D. 105 (N.D. Ga. 1970), in which the court addressed a "case of particular action taken against an individual, resolution of the dispute involving which will require only examination of the particular facts involved . . . ." Id. at 106-07. The cases cited by defendant are not, in the Court's opinion, controlling.

The discovery undertaken in this case indicates that the policies regarding compensation, benefits, promotion and training of which plaintiffs complain are applied at defendant's

offices throughout the company. There is no indication that plaintiffs' complaints arise from an "isolated factual situation". Furthermore, the facts of the instant case raise no spectre of unmanageability if a nationwide class is certified. The Court is of the opinion that any class certified in this case is properly nationwide in geographic scope.

C. Statute of Limitations

The classes as outlined by plaintiffs would encompass persons employed by the defendant company from May 9, 1972, and onward. Defendant urges that 42 U.S.C. § 2000e-5(e) constitutes a jurisdictional bar to the consideration by this Court of any claims of putative class members who left the employment of defendant prior to 180 days before May 9, 1974, the date on which charges were filed with the Equal Employment Opportunity Commission.

Section 2000e-5(e), the statute of limitations provision of Title VII, provides that charges of discrimination must be filed within 180 days after the occurrence of the alleged employment practice.[2/] In relation to members of a class, Section 2000e-5(e) has been construed to require that a class may consist only of those employees who could have filed valid charges of discrimination with the EEOC at the time the class representatives filed their charges. Wetzel v. Liberty Mutual Ins. Co., 508 F.2d 239 (3rd Cir. 1975).

The statute of limitations issue in the Title VII context was addressed by the Fifth Circuit Court of Appeals in United States v. Georgia Power Co., 474 F.2d 906 (5th Cir. 1973). The court there said:

> "Two important aspects of the limitations issue remain. First, in each case of claims for back pay and like damages the court must determine the most recent date on which the discriminatee's cause of action accrued. For

> "purposes of the statute of limitations, a cause of action accrues whenever an individual is directly and adversely affected by the discriminatory practices of the defendant. In individual cases this event may be the refusal to hire the discriminatee, refusal to promote on the basis of race, or dismissal from employment. The date of the last act of discrimination for purposes of the statute of limitations is a question of fact for the district court. Boudreaux v. Baton Rouge Marine Contracting, supra, 437 F.2d at 1014-1016."

Id. at 924. This holding was more recently reiterated by the Fifth Circuit in Equal Employment Opportunity Commission v. Griffin Wheel Co., 511 F.2d 456 (5th Cir. 1975), rehearing denied, 521 F.2d 223 (5th Cir. 1975).

Plaintiffs contend that because the policies here complained of are still in effect at the defendant company, these acts are continuing violations and that, consequently, ex-employees who left the defendant company over 180 days before May 9, 1974, should be made a part of the class. A past act may give rise to a present claim if the act is continuing in nature. Belt v. Johnson Motor Lines, Inc., 458 F.2d 443 (5th Cir. 1972). A past act is deemed to be a continuing violation where there is some present, continuing, adverse effect flowing from a past practice. Stroud v. Delta Airlines, Inc., 392 F. Supp. 1184, 1189 (N.D. Ga. 1975).

As to ex-employees, however, the direct and adverse effect of the alleged discriminatory practices of the defendant ceased upon termination of employment. In regard to former employees, the key date for computing the 180-day time period is the date of termination of employment.

In Olson v. Rembrandt Printing Co., 511 F.2d 1228 (8th Cir. 1975) (hereinafter "Olson"), the court declined to make a finding of continuing discrimination that would have allowed the plaintiff to sidestep the 180-day jurisdictional requirement. The Court in Olson said at 1234:

> "The rationale underlying the allowance of actions for continuing discrimination is to

"provide a remedy for past actions which operate to discriminate against the complainant at the present time. Termination of employment either through discharge or resignation is not a 'continuing' violation. It puts at rest the employment discrimination because the individual is no longer an employee. (cites omitted).

"As we noted in Richard [469 F.2d 1249], to construe loosely 'continuing' discrimination would undermine the theory underlying the statute of limitations. While the continuing discrimination theory may be available to present employees, cf. Griggs v. Duke Power Co., 401 U.S. 424, 429-30, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971) . . ., we do not think this theory has validity when asserted by a former employee. For such a former employee the date of discharge or resignation is the controlling date under the statutes, and a charge of employment discrimination must be timely filed in relation to that date."

Accord, Greene v. Carter Carburetor Co., 532 F.2d 125 (8th Cir. 1976).

This Court is in agreement with the rationale and holding of the above quotation from Olson. The Court therefore concludes that those putative class members whose employment with defendant terminated more than 180 days before May 9, 1974, the date of the filing of the EEOC charge are not properly includable in the classes which plaintiffs seek to represent.[3/]

D. Rule 23(a)

Paragraph (a) of Rule 23 states the four prerequisites to maintenance of a class action.[4/]

1. Numerosity

Rule 23(a)(1) requires that the class be so numerous as to render impractical the joinder of all members. Plaintiffs estimate that each of the classes proposed consists of approximately 100 persons. (Plaintiffs' Exhibits 22, 23, 24). Defendant's "American Staff" as of September, 1975, consisted of 76 persons. (Plaintiffs' Brief, filed March 15, 1976, Table 1).

Defendant contends that the class consists of a mere three persons for the reason that the named plaintiffs lack personal knowledge of defendant's practices and policies at offices other than defendant's Houston office, citing Chavez v. Rust Tractor Co., 2 FEP Cases 339 (D.N. Mex. 1969), in support thereof. This contention must be overruled. Chavez v. Rust Tractor Co., supra, requires only a showing of the existence of a class and in no way requires personal knowledge on the part of the named plaintiffs. Further, discovery in this case indicates that all American employees of defendant are subject to the personnel policies complained of, thus demonstrating the existence of a potential class, as required by Chavez.

The Court concludes that the required numerosity exists.

2. Commonality

Rule 23(a)(2) requires the existence of questions of law or fact common to the class. Discovery in this case indicates that defendant has maintained two separate systems for determining employee compensation and benefits, depending upon whether the employee was a member of the Japan Staff or the American Staff. (Tanaka Deposition, pp. 29-30; Plaintiffs' Exhibit 5). In addition, the Japan Staff appears to consist entirely of persons of Japanese national origin. (Nishitomi Deposition, p. 18). Statistics submitted by plaintiffs also seem to indicate that employees of American national origin compose a very small percentage of management in relation to their total numbers in the company. (Plaintiffs' Brief, March 15, 1976, Table 3 at 16).

Whether such allegations are true, and, if proven true, whether such facts violate Title VII and § 1981, constitute questions common to the classes alleged by plaintiffs. The Court concludes that the requisite commonality exists in the present case.

3. Typicality

Rule 23(a)(3) requires that the claims or defenses of the representative parties be typical of the claims or defenses of the class. The three named plaintiffs in the case at bar were all employed as members of defendant's American Staff. These plaintiffs complain that they have been discriminated against by defendant's different methods of providing compensation and benefits to members of the Japan Staff and the American Staff. Plaintiffs claim that by reason of race, color, or national origin they are barred from receiving the more favorable treatment accorded the Japan Staff.

Discovery in this case tends to indicate that only Japanese nationals are hired for the Japan Staff and that persons of American national origin are denied the greater benefits enjoyed by the Japan Staff. (Nishitomi Deposition, pp. 143-45, 177-83, 213-14, 218). If this be proven, the class representatives, as members of the American Staff, have labored under the same disadvantage as all other American nationals employed by defendant, and their claims are typical of those of the class.

Defendant contends that the interests of a terminated employee are in conflict with the interests of present employees, and that terminated employees cannot protect the interests of present employees. The Court cannot agree with this contention since to apply a rule of this sort would be tantamount to giving a company carte blanche to forestall a class attack on its policies by simply terminating those who might begin such an action. Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239 (3rd Cir. 1975), cert. denied, 421 U.S. 1011; Reed v. Arlington Hotel Co., 476 F.2d 721 (8th Cir. 1973), cert. denied, 414 U.S. 854.

Defendant contends that Rountree is an unfit representative because he claims only damages in the form of back pay, whereas the class members seek mainly declaratory and injunctive relief. Again, the Court must disagree. An award of back pay is an equitable remedy, Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971), cert. dismissed, 404 U.S. 1006, and in any case, a former employee may be permitted to seek vindication of class rights in the form of declaratory or injunctive relief. Wetzel v. Liberty Mut. Ins. Co., supra.

Defendant also appears to contend that the required "nexus," Huff v. N.D. Cass Co., 485 F.2d 710 (5th Cir. 1973) (en banc), between plaintiffs and class is lacking in that they seek to represent management, when they themselves are not members of management. This contention is easily met in this case, since plaintiff Hardy was, prior to his termination, a "kacho-dairi," or assistant department manager for the defendant company.[5/]

The Court finds that the claims of the representative parties are typical of those of the class.

4. Adequacy

Rule 23(a)(4) requires that the representative parties will fairly and adequately protect the interests of the class. Defendants urge that class representatives Spiess and Hardy are inadequate to represent a class composed of present and future employees.

Spiess and Hardy were discharged by defendant on January 9, 1976, and seek reinstatement. In defendant's view, these two men have interests antagonistic to those employees or applicants who are candidates to replace them.

While conflicting interests among class members are to be avoided, Hansberry v. Lee, 311 U.S. 32, 61 S.Ct. 115, 85

L.Ed. 22 (1940), any conflict of this sort is merely potential, and not actual, at the present time. Should such a conflict arise, the Court possesses flexibility in dealing with a class under Rule 23(c)(4).

At the present time the possibility of any future conflict is overridden by the potential benefits in the form of pay, benefits and opportunities that will accrue to all employees, including present and future employees, should plaintiffs prevail in this lawsuit. The Court concludes that the representative parties will fairly and adequately protect the interests of the class.

E. Rule 23(b)(2)

Once a plaintiff has demonstrated that the four prerequisites of Rule 23(a) are fulfilled, he must still show that at least one of the requirements under Rule 23(b) is met. Plaintiffs here seek certification under Rule 23(b)(2), which requires that

> "(2) the party opposing the class has acted or refused to act 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; . . . ."

The Advisory Committee in its Notes on the 1966 amendments to Rule 23 noted in relation to subdivision (b)(2) of that rule that:

> ". . . This subdivision is intended to reach situations where a party has taken action or refused to take action with respect to a class, and final relief of an injunctive nature or of a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, is appropriate . . . ."

Illustrative of such cases, in the Committee's opinion, are

> ". . . various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class . . . . [But]

"[s]ubdivision (b)(2) is not limited to civil rights cases."

Defendant focuses on that portion of the Committee opinion which states:

"The subdivision does not extend to cases in which the appropriate final relief relates exclusively or predominately to money damages."

Defendant urges that because plaintiffs have alleged that they are entitled to punitive damages that final relief in this case relates predominately to money damages, and that for this reason, certification under (b)(2) must be denied.

The Court has declined to rule on the availability of punitive damages under Title VII at this point in the litigation. See paragraph III, infra. Punitive damages have been held available in a cause filed pursuant to §§ 1981 and 1982, however. Lee v. Southern Home Sites Corp., 429 F.2d 290 (5th Cir. 1970). Plaintiffs have sought sweeping injunctive and declaratory relief and declaratory relief in this suit in addition to their request for punitive damages. Any attempt to divine at this point whether injunctive relief or damages predominate in this suit would in the Court's opinion be mere guesswork as to plaintiffs' motives in filing this suit and would likely prove fruitless.

The Court is in accord with the statement of Professors Wright and Miller on this topic.

"Disputes over whether the action is primarily for injunctive or declaratory relief rather than a monetary award neither promote the disposition of the case on the merits nor represent a useful expenditure of energy. Therefore, they should be avoided. If the Rule 23(a) prerequisites have been met and injunctive or declaratory relief has been requested, the action usually should be allowed to proceed under subdivision (b)(2). Those aspects of the case not falling within Rule 23(b)(2) should be treated as incidental."

7A WRIGHT & MILLER, FEDERAL PRACTICE AND PROCECURE: CIVIL § 1775 at 23 (1972, Supp. 1976). See also Lee v. Southern Home Sites Corp., supra (class certified pursuant to (b)(2) where punitive damages sought under §§ 1981, 1982).

A showing by plaintiffs of unlawful employment discrimination on the part of defendant would make appropriate the entry of an injunction that would halt such discriminatory policies and practices. Cf. Bing v. Roadway Express, Inc., 485 F.2d 441 (5th Cir. 1973). The Court concludes that plaintiffs have met the requirement of Rule 23(b)(2).

VI. SUMMARY

The Court is of the opinion that plaintiffs have met the requirements of Rule 23. The classes are therefore certified as proposed by plaintiffs, subject to the statute of limitations restriction discussed at V.C., infra.

DONE at Houston, Texas, this 2nd day of September, 1977.

Carl O. Bue, Jr.
United States District Judge

FOOTNOTES

1/ The actual effect of this definition is to create a class composed of persons of American national origin. This poses what appears to be a question of some novelty: may a person of American national origin assert under Title VII that he has been the victim of employment discrimination on the basis of his national origin?

At first blush, the case of Espinoza v. Farah Manufacturing Co., Inc., 414 U.S. 86, 94 S.Ct. 334, 38 L.Ed.2d 287 (1973), appears to dispose of such a claim. The Supreme Court there held that Title VII is not violated by discrimination based on citizenship. However, the Court recognized that

> ". . . [T]here may be many situations where discrimination on the basis of citizenship would have the effect of discriminating on the basis of national origin. In some instances, for example, a citizenship requirement might be but one part of a wider scheme of unlawful national origin discrimination. In other cases, an employer might use a citizenship test as a pretext to disguise what is in fact national origin discrimination. Certainly Title VII prohibits discrimination on the basis of citizenship whenever it has the purpose or effect of discriminating on the basis of national origin."

414 U.S. at 92.

The question regarding national origin is closely allied to the point recently decided in McDonald v. Santa Fe Trail Transportation Co., ____ U.S. ____, 96 S.Ct. 2574, 49 L.Ed.2d 493 (1976). The Supreme Court there held that both Title VII and § 1981 prohibit racial discrimination against whites, as well as against non-whites. That whites constituted a majority of the population was not a factor in the applicability of Title VII. 49 L.Ed.2d at 500.

The Court said in support of its holding:

> "This conclusion is in accord with uncontradicted legislative history to the effect that Title VII was intended to 'cover all white men and all white women and all

"Americans, 110 Cong. Rec. 2579 (Remarks of Rep. Celler) (1969), and create an obligation not to discriminate against whites, id., at 7218 (memorandum of Sen. Clark) . . . . We therefore hold today that Title VII prohibits racial discrimination against the white petitioners in this case upon the same standards as would be applicable were the Negroes and Jackson white."

49 L.Ed.2d at 500-01.

Under the reasoning of McDonald, which gives standing to majorities as well as minorities, Title VII would prohibit discrimination against persons of American national origin, just as it prohibits discrimination against those whose national origin springs from any other country.

2/ Section 2000e-5(e) of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000, amended by Pub. L. 92-261, effective March 24, 1972, provides in pertinent part:

"A charge under this section shall be filed within one hundred eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter . . . ."

3/ Contrary to the assertions of plaintiffs, it does not appear that the Fifth Circuit in Belt v. Johnson Motor Lines, 458 F.2d 443 (5th Cir. 1972), squarely addresses the issue here considered.

However, the recent Supreme Court case of United Air Lines, Inc. v. Evans, 45 U.S.L.W. 4566 (U.S. May 31, 1977), at 4567 n.8, may be read as adopting by implication the rule of Olson v. Rembrandt Printing Co., 511 F.2d 1228 (8th Cir. 1975), upon which this Court relies herein.

4/ Rule 23(a), Federal Rules of Civil Procedure, states:

"(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (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."

5/ Even if none of the named plaintiffs were management level personnel, the Court would be loath to make such a requirement in a case of this nature. Here, plaintiffs complain that management positions are inaccessible to Americans. To require that they be managers to make this claim is to inject into Title VII law a sort of "Catch-22" that ill suits the equitable purpose of Title VII.

The Court has read with attention the Fifth Circuit case of Wells v. Ramsey, Scarlett & Company, Inc., 506 F.2d 436 (5th Cir. 1975), cited by defendant in this connection. In that case the named plaintiff was a black longshoreman foreman. The court refused to certify the class because plaintiff's grievances were not representative of the class. The court specifically rested its decision in that case on the fact that the plaintiff was not a union member. This distinguished him from the rank-and-file longshoremen who received their work assignments from the union.

This Court believes that the Wells holding is closely tied to the facts of that case and does not obtain in the instant case where no such circumstance exists to distinguish management employees from non-management for purposes of the claims made.