1999 WL 669229
Only the Westlaw citation is currently available.
United States District Court, N.D. Illinois, Western Division.

Missey JEFFERSON, Grover A. Shelton, Jr., Jack Allen, Jr., Elizabeth Brown, Robert Burrage, Linda Carter, Fernando Cole, Gerald Collins, Denver Edwards, Walter Flannigan, Charles Fiddis, Ray A. Gaddie, Charles Gray, Cyrus Hatchett, James L. Hopson, A.Z. Jefferson, Jr., Jennifer Johnson, Dennis Locke, Felicia Morris, James Stanis, Michele White–McIntosh, DeWanda Thomas, Dwight Williams and Kevin Williams, individually and on behalf of similarly situated persons, Plaintiffs,
v.
INGERSOLL INTERNATIONAL, INC., Ingersoll Milling Machine Company, Ingersoll Cutting Tool Company, Ingersoll Machinen Und Werkzeuge GMBH and Brian Howard, Defendants.

No. 98 C 50042. | Aug. 23, 1999.

Attorneys and Law Firms

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Opinion

MEMORANDUM OPINION AND ORDER

REINHARD, J.

***1** Plaintiffs have filed a multi-count complaint against defendants Ingersoll International, Inc., Ingersoll Milling Machine Company, Ingersoll Cutting Tool Company, Ingersoll Maschinen und Werkzeuge GmbH and Brian Howard, asserting claims under 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964, as amended ("Title VII"), 42 U.S.C. § 2000e *et seq*..[1]

Currently before the court is plaintiffs' motion for class certification and defendants Ingersoll International, Inc.'s and Ingersoll Milling Machine Company's corresponding motion to deny class certification. Plaintiffs seek to certify three classes:

A. One class relating to hiring policies and practices. Plaintiffs define the class as "all black persons who have unsuccessfully sought employment with Ingersoll International or Ingersoll Milling Machine Company or who have been deterred from applying for positions with them within the applicable limitations period, as determined with due consideration of evidence submitted under the continuing violation doctrine."

B. One class relating to compensation policies and practices. Plaintiffs define the class as "all black employees employed by Ingersoll International, Inc. or Ingersoll Milling Machine Co. within the applicable limitations period, as determined with due consideration of evidence submitted under the continuing violation doctrine."

C. One class relating to promotion policies and practices. Plaintiffs define the class as "all black employees of Ingersoll International, Inc. or Ingersoll Milling Machine Co. who have unsuccessfully sought promotions, have been passed over for promotions without the opportunity to apply, or have been deterred from seeking promotions within the applicable limitations period, as determined with due consideration of evidence submitted under the continuing violations doctrine."

Preliminary Matters

The parties have briefly touched on the issue of whether the corporate defendants are one employer for purposes of the anti-discrimination laws. This issue is currently being briefed separately and plaintiffs admit that at this time they are seeking class certification only as to Ingersoll International and Ingersoll Milling Machine Company. (Pl.Memo., p. 4) Thus, the court's order is limited to these two entities. (For ease of reference the court will refer to both defendants as "Ingersoll".)

In addition, in requesting the various classes, plaintiffs seek to invoke the continuing violation doctrine in an attempt to expand the limitations period and, consequently, the number of potential class members. As plaintiffs acknowledge (Pl.Memo., p. 63–64), whether the continuing violation doctrine should apply is dependent on the evidence. Any such evidence is not before the court and plaintiffs' request is premature. Therefore, any class is limited to the applicable limitations period.

Facts

The following is a brief overview of the facts. Ingersoll supplies special machine tools and cutting tools for the metal working industries. Its products range from large general purpose machines to specialized machines for dedicated tasks. It is a family-owned, private company, and in the last ten years Ingersoll Milling Machine Company has employed between 1,400 and 1,800 employees. A number of Ingersoll's written employment policies are published in an employee handbook known as the "Blue Book," which has been occasionally amended over the years. Ingersoll also has additional general corporate policy statements regarding employment and other matters, some of which are contained in its corporate policy books.

***2** Plaintiffs have filed a fourteen-count complaint against defendants. A general breakdown of the complaint is as follows:

- *Counts I and II*—class-wide allegations of race discrimination in promotions and transfers, in violation of § 1981 and Title VII, respectively;

- *Counts III and IV*—class-wide allegations of race discrimination in compensation, in violation of § 1981 and Title VII, respectively;

- *Counts v. and VI*—class-wide allegations of race discrimination in hiring and recruitment, in violation of § 1981 and Title VII, respectively;

- *Count VII*—allegations of race discrimination in terms and conditions of employment, brought by individual plaintiffs Missey Jefferson, Shelton, Allen, Collins, Gaddie, Gray, Hopson, Johnson, Morris, White–McIntosh, Thomas, Cole, Carter, Edwards, Flannigan, Brown and Hatchett pursuant to § 1981;

- *Count VIII*—allegations of race discrimination in terms and conditions of employment, brought by individual plaintiffs Missey Jefferson, Shelton, Gaddie, Gray, Johnson, Morris, and Cole pursuant to Title VII;

- *Count IX*—a § 1981 race discrimination claim based on constructive discharge/termination, brought by individual plaintiffs Hopson, Shelton, White–McIntosh, Johnson, Brown, Hatchett and Thomas;

- *Count X*—a Title VII race discrimination claim based on constructive discharge/termination, brought by plaintiffs Shelton and Johnson;

- *Count XI*—a § 1981 retaliation claim, brought by individual plaintiffs Missey Jefferson, Collins, A.Z. Jefferson, Johnson, Flannigan, Hatchett, Brown and Stanis;

- *Count XII*—a Title VII retaliation claim, brought by plaintiffs Missey Jefferson, A.Z. Jefferson, Johnson and Stanis;

- *Count XIII*—national origin discrimination claims, brought pursuant to § 1981 and Title VII by plaintiff Cole;

- *Count XIV*—age discrimination and retaliation claims, brought pursuant to the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.,* by plaintiffs Stanis and Cole.

This race discrimination case involves employment practices at Ingersoll. In general, in support of their request for class

action certification, plaintiffs have identified the following employment practices as resulting in unlawful race discrimination: (1) failure to post or disclose job promotions and job openings; (2) use of word-of-mouth hiring and nepotism in a predominantly white work force; (3) race-coding of applications; and, (4) use of a subjective decisionmaking process by a predominantly white supervisory staff in hiring applicants, promoting employees and assigning wages. (Pl. Rule 12N § 1.1) Plaintiffs challenge these policies under disparate impact and pattern-and-practice disparate treatment theories of discrimination.

Discussion

A litigant seeking to maintain a class action must first meet the prerequisites of "numerosity, commonality, typicality, and adequacy of representation" set forth in Rule 23(a). *Amchem Prod., Inc. v. Windsor,* 521 U.S. 591, 613 (1997); *General Tel. Co. v. Falcon,* 457 U.S. 147, 156 (1982). Once these four prerequisites are met, the potential class must also satisfy at least one provision of Rule 23(b). *Rosario v. Livaditis,* 963 F.2d 1013, 1017 (7th Cir.1992), *cert. denied,* 506 U.S. 1051 (1993).

***3** The class determination generally involves both factual and legal issues, and may require a probing behind the pleadings to determine whether the interests of absent parties are fairly encompassed within the named party's claim. *Falcon,* 457 U.S. at 160. Although typically the ultimate merits of the plaintiffs' claims are not addressed when determining class certification, *Lemke v. Suntec Indus., Inc.,* No. 94 C 500006, 1997 U.S. Dist. Lexis 19638, at *4 (N.D.Ill.Dec. 1, 1997) (Reinhard, J.), if the class representative's claim is weak and typical of the class, then the case should be dismissed with or without class certification. *Robinson v. Sheriff of Cook County,* 167 F.3d 1155, 1157 (7th Cir.1999), *petition for cert. filed,* 67 U.S.L.W. 3008 (U.S. June 16, 1999) (No. 98–2034); *see also Retired Chicago Police Ass'n v. City of Chicago,* 7 F.3d 584, 598–99 (7th Cir.1993).

Under the first factor enumerated in Rule 23(a), a proposed class must be so numerous that joinder is impracticable. Fed.R.Civ.P. 23(a)(1). In determining whether joinder is impracticable, the court considers a number of factors, including the size of the class, the geographic dispersion of its members, the nature of relief sought, the ability of the litigants to press their own claims, and the practicability of forcing relitigation of a common core issue. *Rosario v. Cook County,* 101 F.R.D. 659, 661 (N.D.Ill.1983). Commonality, the second factor under Rule 23(a), requires that there be questions of law and fact common to the class. *Rosario,* 963 F .2d at 1017. Some factual variation among the class claims will not defeat a class action. *Id.* "A common nucleus of operative fact is usually enough to satisfy the commonality requirement of Rule 23(a)(2)." *Id.* at 1018.

Typicality is closely related to commonality and these two factors tend to merge. *Falcon,* 457 U.S. at 157 n. 13; *Rosario,* 963 F.2d at 1018. A claim is typical if " 'it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory." ' *Id.* (*quoting De La Fuente v. Stokley–Van Camp, Inc.,* 713 F.2d 225, 232 (7th Cir.1983)). Even if based on the same legal theory, the claims must all contain a common core of allegations. *Allen v. City of Chicago,* 828 F.Supp. 543, 553 (N.D.Ill.1993).

Rule 23(a)(4), adequacy of representation, seeks to uncover conflicts of interest between named parties and the class they seek to represent. *Windsor,* 521 U.S. at 625. This factor is comprised of two parts: (1) the adequacy of the named plaintiffs' counsel; and, (2) the adequacy of representation provided in protecting the different, separate and distinct interests of the class members. *Retired Chicago Police Ass'n,* 7 F.3d at 598. Representatives must be part of the class and possess the same interest and suffer the same injury as the class members. *Windsor,* 521 U.S. at 625–26.

A. ***The Proposed Hiring Class***

1. ***Rule 23(a)***

***4** The court finds plaintiffs have met the four factors listed in Rule 23(a) with respect to all African–American employees who have applied at Ingersoll within the applicable limitations period.

a. ***Numerosity***

As for numerosity, plaintiffs allege the proposed class includes at least 100 members. Although Ingersoll disputes this number, it offers no evidence in support of a lesser number. Plaintiffs' evidence shows 47 African–American individuals applied at Ingersoll in 1997. (Pl.Exh. 38) Assuming an equivalent number applied in 1996 (Ingersoll did not retain applications for ten months of 1996), plaintiffs' estimate of 100 potential class members seems to be in the right ballpark. The court finds that under these circumstances, joinder would be impracticable. *See, e.g., Johns v. DeLeonardis,* 145 F.R.D. 480, 483 (N.D.Ill.1992) (court sees no reason to subject judicial system to the potential of 70 lawsuits).

b. ***Commonality, Typicality***
Commonality and typicality have also been met. The evidence shows the Human Resources Department screens applications and resumes, conducts initial interviews with external applicants, and provides information to the first-line supervisors regarding applicants. Individuals within the Human Resources Department race-coded or EEO-coded applications; approximately 450 such applications have been produced. (Pl.Exh. 38) Although the court makes no finding as to whether such evidence is indicative of race discrimination, plaintiffs' allegations regarding this systemic practice are common to the class as a whole and show both commonality and typicality. *See, e.g., Koski v. Booker,* No. 92 C 3293, 1993 U.S. Dist. Lexis 6262, at *6 (N.D.Ill. May 6, 1993) (systemic hiring practice of using race/gender quotas and different cutoff scores applied to all claims and evidenced typicality of all class members' claims).

However, the court rejects plaintiffs' attempts to include within the class any African–American individuals who were deterred from applying at Ingersoll. No proposed class representative asserts this claim. Moreover, such a subclass is too imprecise and speculative to be certified. *See Harris v. General Dev. Corp.,* 127 F.R.D. 655, 659 (N.D.Ill.1989) (proposed class of persons who allegedly were discouraged from applying at company too imprecise and speculative to be certified).

c. ***Adequacy Of Representation***
The court also finds the class members would be adequately represented. Ingersoll does not dispute the qualifications of the attorneys representing the proposed class members, and the court has previously noted their competence in litigating class actions. *See Betts v. Sundstrand,* No. 97 C 50188, 1999 WL 436579, at *7 (N.D. Ill. June 21, 1999) (Reinhard, J.). The court also finds the interests of all hiring class members are adequately protected.

2. ***Rule 23(b)(2),(3)***
A class action which meets all four of the requirements under Rule 23(a) must also qualify under one of the subsections of Rule 23(b). Here, plaintiffs seek class action status pursuant to Rule 23(b)(2) or (3). Under Rule 23(b)(2), plaintiffs must show Ingersoll 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. Fed.R.Civ.P. 23(b)(2).

***5** Under subsection (b)(3), the court must find that questions of law or fact common to the class members 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. Framed for situations in which class-action treatment is not as clearly called for as it is under subsections (b)(1) or (b)(2), subsection (b)(3) permits certification when a class suit may nevertheless be convenient and desirable. *Windsor,* 521 U.S. at 615. Special notice provisions apply if a class is certified pursuant to subsection (b)(3). Fed.R.Civ.P. 23(c)(2).

Courts have held that section 1981 and Title VII actions seeking monetary damages in addition to injunctive relief are appropriately brought under subdivision (b)(2). *Harris,* 127 F.R.D. at 663–64. This subdivision is particularly well-suited to the civil-rights field. *Windsor,* 521 U.S. at 614; *Harris,* 127 F.R.D. at 663–64; Fed.R.Civ.P. 23 advisory committee's note. Here, plaintiffs' allegations of disparate impact and pattern-and-practice disparate treatment affect all members of the hiring class similarly. *See Harris,* 127 F.R.D. at 664. Plaintiffs' request for monetary relief does not negate their request for injunctive relief, and their claims are especially suitable for certification under subsection (b)(2). *Id.; Allen v. Isaac,* 99 F.R.D. 45, 56 (N.D.Ill.1983), *rev'd on other grounds,* 881 F.2d 375 (7th Cir.1989); *see also Koski,* 1993 U.S. Dist. Lexis 6262, at *13–14 (proposed hiring class properly certified under Rule 26(b)(2)).

Because the court has determined that the hiring class is properly certified under Rule 23(b)(2), it need not address the applicability of subsection (b)(3).

B. ***The Proposed Compensation Class—Rule 23(a)***
For the following reasons, the court finds plaintiffs have not met the four factors listed in Rule 23(a) with respect to its proposed compensation class.

1. ***Numerosity***
Plaintiffs claim the compensation class has approximately 100 potential class members. The court is not persuaded the class will include this many members. Ingersoll's exhibit comparing the salaries of employees by salary grade, department and job code shows approximately 54 African–American employees are paid less than their colleagues in the same departments with the same job codes. *See* Def. Exh. 45.[2] The court finds joinder of these individuals is not impracticable, for several reasons.

First, all of these individuals are located in the Rockford area, so that it is easier to join potential plaintiffs. *Betts,* 1999 WL 436579, at *5. Second, "[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Mace v. Van Ru Credit Corp.,* 109 F.3d 338, 344 (7th Cir.1997). As Ingersoll points out (Def. Memo., p. 32 n. 21), litigants in this case would not face this problem, because compensatory damages, punitive damages, and attorneys' fees are potentially available under section 1981 and Title VII, which provides sufficient incentive.

2. ***Commonality, Typicality***
***6** As for commonality and typicality, the court finds plaintiffs have failed to meet the commonality and typicality factors under Rule 23(a). Plaintiffs allege the African–American employees are paid less than similarly situated white employees. Ingersoll has structured salary guidelines which are highly individualized. For example, employees fall within one of five general categories, each of which is given a general salary grade designation: (1) exempt/non-technical; (2) exempt/technical; (3) non-exempt/technical; (4) non-exempt/office; and (5) non-exempt/shop. (Def. Rule 12M ¶ 93) For each salary grade, Ingersoll has established broad, recommended salary ranges which apply to every job (except those at the officer level and above). (*Id.* ¶ 94) On an annual basis, supervisors are told what percentage of their department budget is allocated for salary increases; the supervisors determine what percentage to allocate to each employee. (Def. Rule 12M ¶ 97–98)

A representative comparison between several of the named class representatives shows how little their claims have in common:

Name	***Title***	***Dept./Div***	***Salary Grade***[3]	***Supervisor***
Missey Jefferson	Product Coordinator/Sr. Cost Analyst	Cost Accounting	N19/N20 ($22,800)	Pete Keefer, Jr.
Grover Shelton	Design Engineer	Eng'g/Prod. Mach. Div.	T22($37,200)	Duff Singer
Ray Gaddie	Detailer/Assoc. Engineer I	Eng'g/Prod. Mach. Div.	K10/T20 ($37,000)	Dan Clutter
Charles Gray	Sr. NC Programmer	NC Prog./Mfg. Div.	E26 ($38,000)	R on Huber, Alec Swan, Mark Kidd
A.Z. Jefferson	Surface Grinder	Light Mach. Shop/Mfg. Div.	F13 ($27,700)	Terry Woods
Jennifer Johnson	Sr.Clerk Typist/Adm. Asst.	Mfg. Eng'g Dept.; NC Programming Dept./Mfg. Div.	N17/N20 ($16,300)	Ron Huber

Felicia Morris	Documentation Detailer	Eng'g Dept./Prod. Mach. Div.	N23 ($23,000)	Scott Meyer
Fernando Cole	Layout Machinist; Layout and Deburr Machinist	Light Mach. Shop/Mfg. Div.	F13 ($30,400)	Loyd [sic] Sandidge, Alan Badger

As the above table shows, plaintiffs seeking to represent the promotion classes are (or were) employed in various departments, at various salary grades and with different salaries, and report to different supervisors. Plaintiffs' claims present individualized questions as to whether their salary grades and corresponding salaries are higher or lower than the salary grades and salaries of other similarly situated Caucasian employees. This involves an analysis of each employee's work experiences and duties, as well as the reasons for each supervisor's decision to assign a certain salary grade and salary to each individual. Such an analysis shows commonality and typicality are lacking here. *See Betts,* 1999 WL 436579, at *7 (and cases cited therein); *Tooley v. Burger King Corp.,* No. 93 C 7531, 1994 U.S. Dist. Lexis 17552, at *13–14 (N.D.Ill.Dec. 7, 1994) (various forms of discrimination at issue, including hiring, pay and working conditions, depended on a number of individualized factors which did not present common questions of law or fact), *adopted,* 1995 WL 170016 (N.D.Ill. Apr. 7, 1995); *Gray v. Walgreen Co.,* No. 82 C 5631, 1983 U.S. Dist. Lexis 11115, at *6–7 (N.D.Ill.Dec. 5, 1983) (plaintiff's claims of unequal pay, lack of promotional opportunities and other alleged discriminatory incidents involved different supervisors and were too individualized to be suitable for class treatment).

***7** Plaintiffs argue this kind of comparison misses the point because the salary levels were assigned pursuant to uniform (and allegedly discriminatory) policies and practices, which provide the requisite commonality and typicality. The court finds plaintiffs' evidence does not show such uniformity. Although plaintiffs argue to the contrary, it is clear from the record that first-line supervisors and managers make salary decisions, indicating a lack of commonality and typicality. *See, e.g., Betts,* 1999 WL 436579, at *6. While Ingersoll has general guidelines and policies for the supervisors and managers to follow, there is no centralized decisionmaking. Plaintiffs argue that all pay increases are to be approved by the President of Ingersoll Milling Machine Company, and can be overridden by the President of Ingersoll International, Inc. (Pl. Rule 12N ¶ 2.2.7) While this may be theoretically true, the President has never exercised such power. And as Wilson candidly stated, "Is there any place where that wouldn't exist?" (Wilson Comp. dep. p. 86)

Plaintiffs also rely on a 1996 memorandum from Tom Shifo, Ingersoll Milling Machine President, to the Vice President of Human Resources, wherein Shifo states, "I want to approve all salary changes." (Pl. Rule 12N ¶ 2.2.6) However, plaintiffs have produced no evidence showing the context of the memo, or what Shifo meant. For example, Shifo could have been motivated by budgetary reasons in wanting to approve all salary changes.

Plaintiffs point to Ingersoll's standardized forms used for salary increases, which contain a signature line for upper management and human resources. (Pl. Rule 12N ¶ 2.2.8, 2.2.11) Plaintiffs argue upper management and human resources approve salary changes and in the past have rejected supervisors' recommended salary increases. (*Id.* ¶¶ 2.2.8–2.2.9.11) Despite plaintiffs' representations, however, the court finds they have failed to show upper management uniformly and consistently makes salary decisions. On the contrary, upper management's review is limited primarily to determining whether the supervisors have stayed within their budget and have based their salary decisions on a recent performance evaluation. (Def. Rule 12M ¶ 112; *see also* Rule 12M ¶ 63) Thus, plaintiffs have failed to show a policy of race discrimination pervades Ingersoll's compensatory practices, sufficient to overcome the essentially individualized nature of their claims. *See Berggren v. Sunbeam Corp.,* 108 F.R.D. 410 (N.D.Ill.1985) (despite allegations of a general policy of sex discrimination in Sunbeam's compensatory and promoting practices, evidence showed individualized claims of discrimination; therefore, class certification denied).

Plaintiffs argue Ingersoll follows subjective compensation criteria in setting compensation and is subject to class-wide challenge on that basis. (Pl. Rule 12N ¶ 2.2.21) In further support of their theory, plaintiffs proffer statistics which allegedly show a statistically significant number of African–American employees are paid less than Caucasian employees. Plaintiffs are correct in that a disparate impact claim can be based on entirely subjective employment practices. *See, e.g., Mozee v. American Commercial Marine Serv. Co.,* 940 F.2d 1036, 1044 (7th Cir.1991). Moreover, an entirely subjective decisionmaking process can satisfy Rule 23's commonality and typicality requirements, if the plaintiff proffers significant proof that an employer's general policy of discrimination manifested itself in such a fashion. *Falcon,* 457 U.S. at 159 n. 15. However, where there are objective factors, even a generally subjective process will not satisfy Rule 23's commonality and typicality requirements. *Abrams v. Kelsey–Seybold Med. Grp., Inc.,* 178 F.R.D. 116, 132 (S.D.Tex.1997).

***8** The court rejects plaintiffs' argument for two reasons. First, plaintiffs' assertion that Ingersoll's compensation policies are

"unduly subjective" (Pl. Rule 12N ¶ 2.2.21), is unsupported. The evidence upon which plaintiffs rely, Ingersoll's written policy statements, shows that objective criteria, such as productivity and dependability, are to be considered in deciding salary levels. (Pl. Exh. 6, Bates Nos. ING101444, ING101443; *see also* Pl. Exh. 19, Bates No. ING101427, Personal Continuous Improvement Plan, listing numerous objective criteria). Second, plaintiffs' statistics do not carry the day. It is unclear how plaintiffs' expert arrived at the conclusion that African–American employees are paid substantially less than non-black employees. For example, there is no evidence the expert compared individuals within the same department and salary grade, within Ingersoll's structured salary guidelines. (Pl. Exh. 20; *see* Def. Exh. 45) Plaintiffs' argument does not show class certification is warranted. *See De La Fuente v. Chicago Tribune Co .,* No. 84 C 4596, 1985 U.S. Dist. Lexis 17512 (N.D.Ill. July 24, 1985) (while lack of an objective evaluation procedure may give defendant opportunity to discriminate, plaintiff must proffer proof of discriminatory policy before class can be certified; general statistics were not persuasive).

The court also agrees with Ingersoll that plaintiffs' class-wide allegations cannot be viewed in a vacuum. A majority of the named putative class representatives are also asserting individual claims of discrimination. Their individualized claims attack all aspects of the employment relationship, from terms and conditions of employment to constructive discharge. Yet, the goal of Rule 23 is judicial economy. *Falcon,* 457 U.S. at 159. The presence of numerous individual claims lends support to the court's conclusion that certifying this case as a class action would not advance the efficiency and economy of litigation, which is the principal purpose of the procedure. *Id.; see also Berggren,* 108 F.R.D. at 411.

3. ***Adequacy Of Representation***

As for the adequacy of representation under Rule 23(a)(4), the court finds the personalized nature of the plaintiffs' compensation grievances makes it unlikely the representative parties could fairly and adequately represent the interests of the class. *Allen,* 828 F.Supp. at 553; *Tooley,* 1994 U.S. Dist. Lexis 17552, at *17. The diversity of claims may create conflicting interests between class members. *Allen,* 828 F.Supp. at 554.

Because the court has determined that plaintiffs' proposed compensation class fails to satisfy all four factors under Rule 23(a), it need not determine whether subsections (b)(2) or (3) have been met.

C. ***The Proposed Promotion Class—Rule 23(a)***

For the same reasons applicable to the proposed compensation class, the court finds plaintiffs have failed to satisfy the requirements of Rule 23(a) with respect to their proposed promotion class.

1. ***Numerosity***

***9** Plaintiffs claim approximately 100 individuals are in the proposed promotion class. Ingersoll's EEO–1 reports show over 90 African–American individuals have worked at Ingersoll during the relevant years. It is not likely that all of Ingersoll's African–American employees will be asserting promotion claims, and plaintiffs assert currently 73 African–American employees are at Ingersoll. (Pl. Rule 12N ¶ 2.1.2.2) In any event, the court finds plaintiffs have not shown that joinder is impracticable, for the same reasons stated with respect to the proposed compensation class.

2. ***Commonality, Typicality***

The court's reasoning regarding the lack of commonality and typicality with the compensation claims applies with equal force to plaintiffs' promotion claims. For both the posted and unposted positions, it is clear from the record that first-line supervisors and managers make any final promotion decisions. (Def. Rule 12M ¶ 152, 154, 156) A representative from the Human Resources Department initially screens the qualifications of applicants for posted positions. However, such screening is limited to determining whether any employees are applying for a lateral position or a demotion. (Kampmier Dep. p. 55–56)[4] This limited review is insufficient to show a centralized promotion policy.

In short, despite their allegations and arguments to the contrary, similar to their compensation claims, plaintiffs' claims regarding Ingersoll's promoting practices relate to individualized claims of discrimination, which do not present common questions of law or fact sufficient to justify class action treatment. *See, e.g ., Berggren,* 108 F.R.D. at 411 (issue of whether a

particular job promotion depended on a variety of factors, including seniority, qualifications, performance, availability for work and did not present common questions of law and fact); *Tooley,* 1995 WL 170016, at *2–3 (issue of whether particular promotion denied was discriminatory would depend on a number of factors peculiar to the individual competing for the vacancy, indicating a lack of commonality and typicality in proposed class promotion claims); *De La Fuente,* 1985 U.S. Dist. Lexis 17512, at *1–22 (plaintiff alleging discrimination in promotional opportunities failed to show proof that his claims were common to a class).

3. ***Adequacy Of Representation***
Likewise, for the same reasons set forth above, plaintiffs have failed to show the representative parties would be able to adequately represent all those who claim they were discriminatorily denied a promotion.

Because the court has determined the proposed promotion class does not meet the requirements of Rule 23(a), it need not determine the applicability of subsections (b)(2) or (3).

Conclusion

For the reasons set forth above, the court certifies a hiring class as follows:

> All African–American individuals who have unsuccessfully sought employment with Ingersoll International or Ingersoll Milling Machine Company within the applicable limitations period.

***10** Thus, plaintiffs' motion for class certification is granted in part and denied in part and, accordingly, defendants' corresponding motion to deny class certification is granted in part and denied in part.

Footnotes

[1] While the class certification issue was pending, plaintiffs were ordered to file a fourth amended complaint to reflect this court's decision to reinstate their section 1981 claims. The court will consider the fourth amended complaint (hereinafter "complaint") in considering plaintiffs' request for class certification, but will omit any reference to the two additional plaintiffs with claims against Ingersoll Cutting Tool Company. Defendants' objections regarding plaintiffs' latest complaint, irrelevant to this motion, have been addressed in another Order.

[2] The report was run in 1999 and the numbers may vary slightly from the number of African–American employees who were paid less than their non-black counterparts in the past, during the applicable time period. Nonetheless, this information serves as a general guideline regarding the appropriate number of employees falling within the proposed class.

3 The salary listed is the employee's latest salary.

[4] An employee cannot move laterally or downward without the manager's approval. (Kampmier Dep. p. 55–56)