Title VII Class Actions: Promises and Pitfalls

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The Civil Rights Act of 19641 represented a comprehensive attempt on the part of the federal government to eliminate racial, religious and sex discrimination in various fields, including housing, education, voting rights, and public facilities. Its passage by Congress was "an epic legislative struggle,"2 due, in large part, to the inclusion of Title VII, aimed at prohibiting employment discrimination based upon race, color, religion, sex, or national origin.3 Much of the controversy surrounding Title VII concerned its enforcement provisions—not only how it was to be enforced, but who was to enforce it.4 Since both the federal government and the aggrieved employee have an interest in ending employment discrimination, responsibility for enforcement of Title VII could have been assigned to either the public or private sector. The version of Title VII which was originally approved by Congress placed primary responsibility upon the aggrieved individual to enforce the Act's provisions through federal court suit. Although the original Act created the Equal Employment Opportunity Commission (EEOC) it was not empowered to bring suit; its authority was limited to investigating charges of discrimination and seeking informal conciliation.5 The original Act provided that if this conciliation process was unsuccessful, responsibility for bringing an end to the unlawful practice

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4. Comment, Title VII and Postjudgment Class Actions, 47 Ind. L.J. 350, 351 (1972); see Vaas, supra note 2. See also Ashton, The Availability of Preliminary Injunctive Relief to Private Plaintiffs Pending Equal Employment Opportunity Commission Action Under Title VII of the Civil Rights Act of 1964, 8 Loy. Chi. L.J. 51 (1976). Earlier versions of Title VII provided for the establishment of an EEOC vested with broad enforcement powers. These powers were eliminated before passage of the legislation and responsibility for enforcement was vested primarily in the complainant. See Sape & Hart, supra note 1, at 825-30; Comment, Enforcement of Fair Employment Under the Civil Rights Act of 1964, 32 U. Chi. L. Rev. 490 (1965).

shifted to the private individual, who could then bring suit in federal district court. The enforcement provisions of Title VII were extensively amended in 1972, however, giving the EEOC power to sue on behalf of an aggrieved individual if its conciliation process has been unable to effect a successful agreement. Even under these amendments the Government does not bear sole responsibility for bringing suit. The individual retains a limited right of intervention if the suit is prosecuted by the EEOC and may initiate a suit in federal district court if: (1) the Commission dismisses the charge he has filed with it, or (2) 180 days have elapsed since the filing of the charge with the EEOC without either suit being filed by the EEOC or a conciliation agreement being effected.

It is, therefore, clear that even as amended much of the responsibility for enforcement of Title VII rests upon the aggrieved employee. It is left largely to the persons unlawfully discriminated against to bring suit to end employment discrimination. In light of this scheme, class actions are particularly useful, for they offer a means by which some of the burden of enforcement may be removed from the individual. Through the class action device the courts may "get behind" the claim of immediate and direct injury to an individual plaintiff, and fashion relief which will affect an entire class of similarly situated persons. In a class action the court will permit an individual plaintiff to act not only to enforce his own rights, but to enforce those of others as a "private attorney general" in furtherance of the congressional policy against employment discrimination.

6. See note 5 supra; Sape & Hart, supra note 1, at 825-27. The former § 2000e-5(e) provided, in part: "If . . . the Commission has been unable to obtain voluntary compliance with this title . . . a civil action may be brought against the respondent . . . by the person claiming to be aggrieved." The procedural discussions in this article apply only to suits against private employers. Different rules govern suits against governmental bodies.


There are, of course, various requirements which must be met before a suit under Title VII may proceed as a class action. Most importantly, the standards set forth in rule 23 of the Federal Rules of Civil Procedure must be satisfied. In its application of rule 23 to a possible class action, a court may define the class broadly or narrowly, restrict the issues which can be litigated, and declare the manner of relief available. Courts and commentators have recognized competing interests in applying rule 23 either liberally or restrictively to Title VII class actions. Since a judgment in a class action is binding upon all class members, a broad definition

Inc. 390 U.S. 400 (1968). See also S. Rep. 415, supra note 9, at 27; Jenkins v. United Gas Corp., 400 F.2d 28 (5th Cir. 1968).
13. Fed. R. Civ. P. 23. Sections (a) and (b) of rule 23 set forth the requirements which must be met:

(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.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(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; or

(3) the court finds that the questions of law or 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. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

of the class and issues may work adversely upon unnamed class members to whom the decision of the court may be res judicata. On the other hand, liberal application of rule 23 is in keeping with the congressional purpose of Title VII to end employment discrimination without placing an undue burden upon each private individual to seek his own relief. This article will examine how various courts have struck a balance between these competing interests in applying rule 23 to suits brought pursuant to Title VII. Particular emphasis will be placed upon the requirements of rule 23(a) and the notice requirements under 23(b).

**JURISDICTIONAL PREREQUISITES**

Outside the scope of rule 23, Title VII itself requires that before an aggrieved employee may initiate suit, he must first file charges of discrimination with the EEOC.\(^{15}\) It is now well settled that, in the class action context, only one class member must have filed such charges as a jurisdictional prerequisite to the suit.\(^{16}\) While participation in the class suit is not limited to employees who have actually filed charges with the EEOC, some courts have excluded from the class those employees who could not have filed such charges.\(^{17}\) For instance, where putative class members could not have filed timely charges of discrimination because they were not employed by the defendant at any time during the running of Title VII's statute of limitations, they will be excluded from the class.\(^{18}\)

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A corollary limitation imposed upon Title VII actions by this exhaustion of administrative remedies requirement is that the issues which can be litigated in the civil suit must bear a logical relationship to the issues contained in the Charge of Discrimination filed with the EEOC. A Charge of Discrimination must be filed in order to give the Commission an opportunity to fashion an administrative remedy to the alleged discrimination, thereby avoiding a costly and lengthy court action. The statutory purpose of the conciliation would be subverted by permitting a subsequent suit to encompass issues unrelated to the original charge. Generally, the judicial answer to this problem has been to limit the scope of the civil action to issues which could reasonably be expected to be within the scope of the EEOC investigation. The Fifth Circuit has stated that the specific words of the Charge of Discrimination need not approach the literal exactitude of the judicial pleading. The proper test is that

a judicial complaint filed pursuant to Title VII “may encompass any kind of discrimination like or related to allegations contained in the charge and growing out of such allegations during the pendency of the case before the Commission.” . . . In other words, the “scope” of the judicial complaint is limited to the “scope” of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination.

Most courts have viewed the factual allegations in the EEOC charge broadly, in order to support the subsequent “related” allegations in the civil complaint. Where the same type of discrimination—sex, race, or national origin—is charged in both complaints, the charges are generally held to be sufficiently similar. For instance, where the EEOC charge alleged only that the charging party was discharged from her job on the basis of her sex, she was allowed to challenge in the subsequent civil proceeding sexually discriminatory systems of seniority, promotion, and job classifications. Simi-
larly, racially discriminatory hiring practices are properly challenged in the civil complaint where the EEOC charge alleged only racially discriminatory conditions of employment. These cases view the underlying allegation of discrimination—whether racial, sexual, or based upon national origin—as the thread that ties together the EEOC charge and the civil complaint, despite the differences in the factual allegations in the two charges.

More troublesome to the courts are situations where the EEOC complaint alleged one form of discrimination, for instance sex discrimination, and the civil complaint seeks to litigate issues of a different form of discrimination, such as racial discrimination. The principal case in this area is *Sanchez v. Standard Brands, Inc.*, in which the Fifth Circuit held that a Spanish surnamed woman who alleged before the EEOC that she was discharged on the basis of sex could, in the subsequent civil suit, raise issues of national origin discrimination, despite her failure to allege such discrimination in the proceedings before the Commission. The determinative factor in the *Sanchez* decision was that the complainant could have been subjected to national original discrimination as well as sex discrimination, so that the EEOC in investigating her charge of sex discrimination would reasonably be expected to investigate the possibility of national origin discrimination. Implicit in this decision is the recognition that the ordinary complainant before the EEOC is often unsophisticated and unskilled in the law, and may be unaware of the full range of discrimination which is directed against him.

24. 431 F.2d 455 (5th Cir. 1970).
25. The court stated in *Sanchez*, "the charging party may have precise knowledge of the facts concerning the 'unfair thing' done to him, yet not be fully aware of the employer's motivation for perpetrating the 'unfair thing.'" 431 F.2d at 462. The consideration that the complainant is a layman, often an unskilled worker, is a recurring theme in cases interpreting the scope of the EEOC complaint. Most often quoted is *King v. Georgia Power Co*:

It appears that a large number of the charges with EEOC are filed by ordinary people unschooled in the technicalities of the law. As stated in the brief filed by EEOC: "To compel the charging party to specifically articulate in a charge filed with the Commission, the full panoply of discrimination which he may have suffered may cause the very persons Title VII was designed to protect to lose that protection because they are ignorant of or unable to thoroughly describe the discriminatory practices to which they are subjected."

295 F. Supp. at 947.

A recent case contrary to *Sanchez* is *Jenkins v. Blue Cross Mutual Hospital Ins. Inc.*, 522 F.2d 1235 (7th Cir. 1975). Without citing *Sanchez* the court in *Jenkins* held that a black woman whose EEOC Charge of Discrimination raised only racial discrimination could not in her subsequent lawsuit challenge patterns and practices of sex discrimination. In support of this position the court enunciated the following standard: "the correct rule to follow in construing EEOC charges for purposes of delineating the proper scope of a subsequent judicial
Later cases make it clear that the seemingly broad holding of *Sanchez* is limited to cases where the complainant could have been subject to the form of discrimination added in the civil complaint. For instance, charges of sex discrimination filed with the EEOC by a white female did not support a subsequent judicial challenge to racial discrimination, since there was no potential for race discrimination against a white female. Likewise, charges of racial discrimination are not sufficiently related to allegations of national origin discrimination. A black man who raises only racial discrimination before the EEOC cannot add allegations of sex discrimination in his civil suit.

**CLASS ACTION DETERMINATION**

The mere allegation in a civil complaint pursuant to Title VII that the suit is a class action does not entitle the suit to proceed as a class action. Under rule 23(c)(1) the court must determine whether a class action may be maintained “[a]s soon as practicable after . . . commencement.” A motion for class action certification may be made by either party or by the court on its own motion.

The courts are in agreement that the plaintiff bears the burden of inquiry is that ‘the complaint in the civil action . . . may properly encompass any . . . discrimination like or reasonably related to the allegations of the charge and growing out of such allegations.’” 522 F.2d at 1241, quoting Danner v. Phillips Petroleum Co., 447 F.2d 159, 162 (5th Cir. 1971).

28. EEOC v. General Elec. Co., 376 F. Supp. 757 (W.D. Va. 1974). This case distinguished *Sanchez* and stated the rule as follows:

Thus as the court noted in *Sanchez*, the remedial purposes of Title VII would hardly be served by requiring possibly inarticulate and unsophisticated working people for whom the statute was designed to protect to correctly state the precise type of discrimination in their charge to the EEOC in order to later bring suit on a different type of discrimination. This court agrees with *Sanchez* that the crucial element in a charge is the factual allegations and not the legal conclusion initially attached to the allegations. But as a caveat to this proposition, this court is of the opinion that the discrimination uncovered must at least have had the potential of prejudicing the charging party in order to be the subject of a later suit growing out of the charge. (footnotes omitted).

376 F. Supp. at 761.
30. FED. R. CIV. P. 23(c)(1). While it is not specified in the rule how long a delay between filing suit and seeking class certification may be countenanced, it has been held that one year is not unreasonable. Souza v. Scalone, 64 F.R.D. 654 (N.D. Cal. 1974).
31. See generally Senter v. General Motors Corp., 532 F.2d 511 (6th Cir. 1976); 3B Moore’s Federal Practice, § 23.50 at 23-1101 (2d ed. 1974) [hereinafter referred to as Moore’s Federal Practice.]
of showing that the prerequisites of rule 23 are met.\textsuperscript{32} Due to the power of the court to redefine the class, create subclasses, or dismiss the class counts altogether at any time during the pendency of the suit, this initial burden is usually a "minimal" one.\textsuperscript{33} Weighing the merits of the plaintiff's case is inappropriate at this time, as is any determination as to whether the complaint states a cause of action.\textsuperscript{34} An evaluation of the merits at this early stage in the litigation would result in trying the ultimate issue twice, at best a wasteful procedure. In sum, the cases appear to comply with Professor Moore's suggestion that the requisite preliminary showing be a "minimal demonstration that the complaint is sincere and the aggregate group claim [is] substantial," or a "demonstration that the claim put forth on behalf of the class is more than frivolous or speculative."\textsuperscript{35}

To determine whether an action is properly maintainable as a class action, the court is not bound by the pleadings, and may rely upon matters not made part of the complaint.\textsuperscript{36} Information obtained by way of discovery is appropriately considered, and the court can even go so far as to order an evidentiary hearing on the issue of class action maintainability.\textsuperscript{37}

**RULE 23(A) REQUIREMENTS**

The availability of the class action device as a powerful enforcement mechanism for Title VII is no longer in question. While the

\textsuperscript{32} Senter v. General Motors Corp., 532 F.2d 511 (6th Cir. 1976); Poindexter v. Teubert, 462 F.2d 1096 (4th Cir. 1972); Demarco v. Edens, 390 F.2d 836 (2d Cir. 1968); Mason v. Calgon Corp., 63 F.R.D. 98 (W.D. Pa. 1974).


\textsuperscript{35} 4B Moore's FEDERAL PRACTICE §23.45(3) at 23-804.

\textsuperscript{36} The scope of review of the district court's determination of the maintainability of a purported class action has been described as follows:

In determining whether an action brought as a class action is to be so maintained the trial court should carefully apply the criteria, set forth in Rule 23 ..., to the facts of the case; and if it fails to do so its determination is subject to reversal by the appellate court when the issue is properly before the latter court. On the other hand, where the trial court does apply the Rule's criteria to the facts of the case, the trial court has a broad discretion in determining whether the action may be maintained as a class action and its determination should be given great respect by a reviewing court.


Civil Rights Act itself is silent as to class actions, the courts have laid to rest initial doubts that the enforcement provisions of the Act envisioned such actions. Not only have class actions been held to be permissible under Title VII, but it has been recognized that a "suit for violation of Title VII is necessarily a class action as the evil sought to be ended is discrimination on the basis of a class characteristic, i.e., race, sex, religion or national origin." Of course, the strictures of rule 23(a) and (b) of the Federal Rules of Civil Procedure must still be met.

Before certifying a class action, the court must, pursuant to subsection (a) of the rule, determine that: (1) the class is so numerous that joinder of all its members is impracticable (numerosity); (2) common questions of law or fact exist as to the class (commonality); (3) the claims of the representative parties are typical of the claims of the class (typicality); and, (4) the representative parties will fairly and adequately protect the interests of the class. Taken as a whole, subsection (a) of the rule defines the outer limits of class membership and the propriety of the named plaintiff's representative status. It is the thrust of the rule to insure that the class whose rights are sought to be litigated in a single suit consists of persons similarly situated, and that the person who is suing on behalf of the class is the proper class representative.

In the past, most courts have given rule 23(a) a liberal interpretation in employment discrimination cases, consistent with the broad remedial policies underlying Title VII. These courts have permitted a single allegation of discriminatory conduct by an employer to launch what has been termed an "across the board" attack upon past, present and future policies and practices of the defendant-employer. For example, under the "across the board" approach, an employee who had been unlawfully discharged was permitted to represent a class consisting of present employees in a class action.

At this point it must be noted that the 1972 Amendment to the Act was in no way intended by Congress to supplant the class action remedy, or to change in any way class action practice under Title VII. See 118 Cong. Rec. H1863 (daily ed. Mar. 8, 1972).

41. FED. R. Civ. P. 23(a). The text of the rule is reprinted at note 10 supra.
to challenge not only discriminatory firing practices but also hiring and promotional policies and the maintenance of segregated facilities. Courts adopting this "across the board" analysis of Title VII class actions have recognized, either explicitly or implicitly, that whether the act or behavior complained of takes the form of enforcement of a company-wide discriminatory rule, or surfaces as a single act directed at one individual, the underlying moving force is racial, religious, or sexual prejudice, which Title VII intended to eliminate. Thus, these courts have been willing to "go behind" the solitary discriminatory act to examine policies and practices of the employer which are not direct contributing factors to the named plaintiff's particular grievance. All Title VII class actions strike a balance between preserving the integrity of rule 23 as a vehicle for the resolution of the same or similar claims in a single proceeding, and the effectuation of the goals of Title VII. These courts, it appears, give precedence to Title VII objectives over the preservation of pure class action standards. Not all courts accept the "across the board" approach, however, and apply the various requirements of rule 23 strictly.

**Numerosity**

The numerosity requirement is designed to insure that the named plaintiff's grievance is not personal to him, but that there are in fact many other persons similarly situated. Where the class consists of so few persons that joinder of their claims is not impracticable, class action status will be denied. As with all rule 23(a) requirements, the burden is upon the named plaintiff to show sufficient numerosity. The named plaintiff need not, to satisfy this burden, either identify all the class members or state their exact number. The court,

44. Id. The court justified its broad definition of the class as follows: The peculiar rights of specific individuals were not in controversy . . . [The suit] was directed at the system-wide policy of racial discrimination. It sought oblitera-
tion of that policy of system-wide racial discrimination. In various ways this was sought through suitable declaratory orders and injunctions against any rule, regulation, custom or practice having any such consequence. 417 F.2d at 1124, quoting Potts v. Flax, 313 F.2d 284, 289 (5th Cir. 1963).
however, must be able to determine that the class is sufficiently large so as to render the class action device the most efficient manner to manage the suit.

The numerosity requirement poses no problem in cases utilizing the “across the board” analysis, since the class in this type of suit is so broadly defined. More often than not, the class in an “across the board” case includes unascertained persons, such as future employees, or persons who have been deterred from applying for employment as a result of the defendant’s discriminatory reputation. In such cases the numerosity requirement is readily met; joinder of unascertained persons is obviously impracticable.

In cases where the putative class members can be identified, plaintiff must show that joinder of all such members is impracticable. Various factors bear upon impracticability of joinder. The sheer number of plaintiffs has been the overriding consideration and the focus of most cases construing rule 23(a)(1) with most courts denying class treatment where the putative class falls below an apparent cut-off point of twenty-five. A sensible approach, however, is to consider factors other than mere number—such as geographical location of the plaintiffs and their relationship to each other — to determine impracticability of joinder. This would permit class action litigation against a single employer by widely dispersed employees.

Commonality

Subsection (a)(2) of the rule requires that there be “questions of law or fact common to the class.” Again, in an “across the board” attack upon wide-ranging policies and practices, the commonality requirement is normally no bar to class certification. Diverse individual claims necessarily involve common questions despite their factual dissimilarity since underlying each grievance is the question of unlawful discrimination. Although class members have been

52. See, e.g., Senter v. General Motors Corp., 532 F.2d 511 (6th Cir. 1976), where an action challenging promotional procedures was held to present common questions, against the defendant’s claim that every promotional decision involves individual considerations as to each employee:

[Acceptance of this line of reasoning would mean that no cases alleging discrimination in hiring or promotions could be maintained as class actions. It is manifest
subjected to factually distinct acts of discrimination, the alleged motivation for these acts—unlawful discrimination—constitutes a common question of fact. As phrased in Hall v. Werthan Bag Corp. 53 “whether the Damoclean threat of a racially discriminatory policy hangs over the racial class is a question of fact common to all the members of the class.” For example, in Jones v. United Gas Improvement Corp.,4 a class consisting of past, present, and future black employees alleging a policy of racial discrimination in hiring, promotion, and conditions of employment was held to share common questions of law or fact.

While there may be some factual differences in the situations of individual class members, it would unduly restrict the remedial purposes of this civil rights legislation to fragment or dissolve a class action because of such nuances, when racial discrimination has been broadly alleged and all class members are potential victims of that discrimination.

While the commonality requirement is easily satisfied in “across the board” cases, courts unwilling to adopt this approach have denied class certification on the grounds that the requisite commonality is lacking. 54 These courts treat the various complaints of class members as individual grievances, personal in nature, rather than manifestations of unlawful discrimination. Because a resolution of the individual claims will require an examination of the peculiar circumstances of each class member, a class treatment is deemed

that every decision to hire, fire or discharge an employee may involve individual considerations. Yet when that decision is made as part of class-wide discriminatory practices, courts bear a special responsibility to vindicate the policies of the Act regardless of the position of the individual plaintiff . . . .

Here the question common to the class is whether Appellee’s procedures for making promotions have resulted in discrimination against its minority employees. 532 F.2d at 524.

Other examples of the “across the board” approach to the commonality requirement are found in Mack v. General Electric Co., 329 F. Supp. 72, 76 (E.D. Pa. 1971). (“Since a permeating policy of racial discrimination is alleged, there can be little doubt that there are questions of law and fact common to all class members . . . .”); Hecht v. Cooperative for American Relief Everywhere, Inc., 351 F. Supp. 305, 312 (S.D.N.Y. 1972). (“Plaintiffs do allege individual acts of discrimination of which they were the victims, but their argument extends much further since they contend that these acts are part and parcel of a pattern of discriminatory treatment of all women applicants and employees.”); Sullivan v. Winn-Dixie Greenville, Inc., 62 F.R.D. 370, 374 (D.S.C. 1974); Arey v. Providence Hospital, 55 F.R.D. 62 (D.D.C. 1972).

inappropriate. For instance, in *White v. Gates Rubber Co.*, a discharged employee sought to challenge the defendant's alleged discriminatory practices not only as to firing, but also hiring, promotion, compensation, and terms of employment. The class count was ordered stricken on the grounds that "it would be necessary to examine each instance of hiring, firing, promotion, and the like to determine whether or not the action was justified before any conclusions could be reached as to a general practice of the defendant."\(^{57}\)

A more recent example of the conservative approach to commonality is *Padilla v. Stringer*, a suit brought by a Mexican-American allegedly denied promotion to the position of zookeeper because he failed to meet the job requirement of possession of a high school diploma. Plaintiff sought to represent all other Spanish-surnamed individuals "who were, are, or will be discriminated against in their employment" at the zoo.\(^{58}\) The court permitted the plaintiff to litigate, in the class claims, only the issue of the high school diploma requirement for the job of zookeeper, holding that no commonality existed as to any other possible claims of discrimination:

> With the exception of plaintiff's challenge of the job requirement of a high school diploma or equivalent for the zookeeper position, it would be necessary to examine a myriad of facts and circumstances peculiar to each individual's claim in order to determine whether each individual member of the class has been discriminated against in his employment. There has been no showing that the defendants have dealt with the Spanish employees at the zoo with a blanket set of procedures, policies, or practices that were not applicable to all employees. The evidence mainly consisted of a series of isolated incidents of widely varying fact patterns which could be attributed to national origin discrimination or to other causes. Thus, with regard to the claim of any individual Spanish employee, a conclusion as to one employee in the class is not common or determinative when that issue arises with respect to another employee.\(^{60}\)

The narrow view represented by *White v. Gates Rubber Co.* and *Padilla v. Stringer* would appear to be inappropriate in employment discrimination litigation. It ignores the underlying precept that discrimination on the basis of a protected identifiable characteristic, such as race or sex, is by definition class discrimination. The gravat-
men of racial discrimination is that it ignores individual characteristics and focuses only upon race. Thus, if an individual plaintiff alleges discrimination on the basis of race, the employer's conduct toward all other employees of that race is necessarily called into question despite the differences in the purported class members' personal situations.

A further weakness of these cases is a misapprehension of the nature of the burden of proof necessary to sustain certification of the class. To deny a lawsuit class treatment because the claims of the purported class members are "isolated incidents of widely varying fact patterns" directed against them as individuals is to pass upon the ultimate issue of the suit. That is, it is the purpose of the litigation to determine whether the employer's conduct is, in fact, directed toward the employees as individuals or whether it is motivated by unlawful discrimination. At the outset of the litigation, when only the question of certification of the class is at issue, the court should not examine the merits of individual claims; rather it should determine whether the suit claims that the employer has acted on the basis of a protected class characteristic.

Typicality

The requirement that the claims of the representative parties be "typical of the claims of the class" has not generated as much litigation as other sections of the rule. However, the cases that have discussed typicality more than cursorily are not in agreement as to its meaning. Some cases have treated it as synonymous with either commonality or representativity and have declined to give it a meaning of its own. There is, indeed, a good deal of overlap among the subsections of rule 23. But, as other courts have recognized, the drafters of the rule must have intended independent meanings for the subsections or they would not have been separated.

The definition of typicality most often adopted appears to be based upon a common-sense reading of the rule:

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64. Professor Moore would disagree. He states, regarding the typicality requirement: “In fact, there is no need for this clause, since all meanings attributable to it duplicate requirements prescribed by other provisions of Rule 23.” 4B Moore’s Federal Practice §23.06-2 at 23-325.
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[A] reasonable reading of the requirement would seem to entail the necessity of demonstrating that there are other members of the class who have the same or similar grievances of the plaintiff. It seems apparent that a claim cannot be typical as the claims of the class if no other member of the class feels aggrieved... In other words, the fact that hypothetical claims would be similar is considered sufficient for finding the plaintiff's claim to be typical.65

Most Title VII plaintiffs will have little difficulty sustaining this minimal burden, particularly if the "across the board" approach is taken. It would appear that if the more stringent requirement of commonality is deemed met, "similarity" of grievances would be perforce established.

Representativeness

Rule 23(a)(4) requires that the court determine that "the representative parties will fairly and adequately protect the interests of the class." This subsection of the rule reflects the concern of the drafters that unnamed class members will be bound by an unfavorable judgment in a suit prosecuted by parties whose interests may be adverse to theirs. Thus, even courts which treat the other subsections summarily, or define commonality and typicality broadly, will approach the representativeness requirement with caution.

There are three criteria for adequacy of representativeness. First, the plaintiff's attorney must be qualified, experienced and vigorous in his prosecution of the lawsuit.66 Secondly, there must be no probability that the suit is collusive.67 Finally, the named plaintiff must have no conflict of interest with remaining class members.68 This final requirement is often phrased as a standing problem: whether the named plaintiff can adequately represent the remaining class members.69 Of the three components to representativeness, the question of standing has prompted the most litigation.

Most courts, consistent with the liberal definitions of commonality and typicality, have taken a broad view of standing in Title VII

litigation. The concept of standing traditionally entails "injury in fact." However, in the field of class action employment litigation, it is generally recognized that the named plaintiff has standing to represent the class even if his individual action is dismissed on the merits. That is, despite the conclusion that the representative party has himself suffered no injury, he may proceed to represent the class. Thus, it should be no bar to class action certification that the named plaintiff has not proven himself to be the victim of discrimination.

In this context an individual may represent class persons in occupations other than his own, people of races other than his own, and may, in his status as the representative of the class, challenge practices which could not, on the facts of the case, be applied to him. For example, in Parham v. Southwestern Bell Telephone Co., a named plaintiff alleged that the company's refusal to hire him was based upon racial discrimination. He was also permitted to challenge: (1) the company's job requirement of a high school diploma even though he had graduated from high school; and (2) the company's recruitment program even though that program had not deterred him from applying.

A recurring problem in the determination of representativity is whether a former employee can adequately represent any future employees of the company. Although this class representative may be adequately aware of past employment practices, his possible lack of familiarity with existing practice has caused some courts to fear that he will seek recourse for only his personal grievances and not for the class as a whole. The weight of authority, however, grants

70. Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 151-54 (1970). See also Linda R.S. v. Richard D., 410 U.S. 614, 617 (1973) (Court's jurisdiction may be invoked only where the complaint alleges that plaintiff himself has suffered "some threatened or actual injury resulting from the putatively illegal action ... ").


72. Crockett v. Green, 388 F. Supp. 912 (E.D. Wis. 1975), aff'd 534 F.2d 715 (7th Cir. 1976) (plaintiff who applied for job as bricklayer and mason permitted to litigate alleged discrimination against mechanics, electricians, heavy equipment operators and others.


74. Parham v. Southwestern Bell Telephone Co., 433 F.2d 421 (8th Cir. 1970); League of United Latin American Citizens v. City of Santa Ana, 410 F. Supp. 873 (C.D. Cal. 1976) (named plaintiff who was refused employment as firefighter permitted to challenge not only firefighter's written test, but policemen's written test).

75. 433 F.2d 421 (8th Cir. 1970).

a former employee standing to represent present and future employees. In fact, it has even been suggested that former employees are in a better position than present employees to present a vigorous and aggressive case against the company since they are free from any possible coercive influence exerted by the company. Furthermore, if former employees were denied representative status, it has been said "employers would be encouraged to discharge those employees suspected as most likely to initiate a Title VII suit in the expectation that such employees would be rendered incapable of bringing the suit as a class action." A former employee's unfamiliarity with current employment practices, finally, can be cured by means of discovery.

**RULE 23(B), NOTICE AND CLASS-WIDE RELIEF**

Once it has been established that the purported class action meets the four requirements of rule 23(a), the court must determine whether it satisfies the strictures of section (b) of the rule. That is, the suit may proceed as a class action only if it fits the definition of subsection (b)(2) or (b)(3). Subsection (b)(2) permits a class action when "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." Under (b)(3), a class suit is permitted if "the court finds that the questions of law or fact 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."


77. Wetzel v. Liberty Mutual Ins. Co., 508 F.2d 239 (3d Cir. 1975); Jack v. American Linen Supply Co., 498 F.2d 122 (5th Cir. 1974); Reed v. Arlington Hotel Co., Inc., 476 F.2d 721 (8th Cir. 1973); Tipler v. E.I. duPont deNemours and Co., 443 F.2d 125 (6th Cir. 1971). See also Long v. Sapp, 502 F.2d 34 (5th Cir. 1974) (plaintiff claiming racially motivated discharge allowed to represent all black persons who would have applied for employment but for the discriminatory hiring and recruitment practices of defendant); Scott v. University of Delaware, 68 F.R.D. 606 (D. Del. 1975) (university professor whose contract was not renewed is proper representative of class of blacks who have been discriminated against in recruitment and hiring). But see EEOC v. Detroit Edison Co., 515 F.2d 301 (6th Cir. 1975) (present employees cannot fairly and adequately represent those who were rejected or deterred from employment because of discriminatory practices).


80. The text of rule 23(b) is set out in note 10 supra. While there is a further subsection to section (b), (b)(1), it does not apply in employment discrimination litigation. The controversy apt to arise under section (b) is not whether the suit satisfies the requirements of the section, but whether a class suit should be certified as a (b)(2) or a (b)(3) class action.
Subsection (b)(2) class actions represent a more cohesive group of individuals, whose circumstances and interests are more nearly identical than in a (b)(3) suit. While the (b)(3) action is not the true successor to the "spurious" class action existing prior to the 1966 amendments to rule 23, it developed therefrom. Since the (b)(3) class is more heterogeneous than the (b)(2) class, the drafters of the rule considered it inequitable that non-party class members in a (b)(3) suit should be bound by the final judgment, absent notice of the pendency of the litigation and the opportunity to exclude themselves from it. Thus, section (c)(2) of the rule was designed to provide that in (b)(3) class actions the unnamed class members receive "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." In this manner non-parties are given the opportunity to avoid the res judicata effect of an unfavorable judgment by "opting out" of the class.

The onerous notice requirement in (b)(3) suits has assumed even greater proportions since the landmark decision of Eisen v. Carlisle & Jacquelin, in which the Court held that not only must the named plaintiff in (b)(3) suits provide individual notice to reasonably identifiable class members, but that the plaintiff must bear the full cost of such notice. In a sizeable lawsuit, as against a large company with many affected employees, the cost of providing notice could virtually bar the maintenance of (b)(3) actions.

While there is no dispute that notice is mandatory in (b)(3) class actions, in (b)(2) suits the rule only "permits" the court to order that notice of the litigation be given to non-parties. Accordingly,

82. Fed. R. Civ. P. 23 (c)(2) provides in full:
   In any action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.
84. Fed. R. Civ. P. 23(d) provides in pertinent part:
   In the conduct of actions to which this rule applies, the court may make appropriate orders . . . requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they
many courts have held that in (b)(2) suits notice is not mandatory, but may be ordered as a matter of the court's discretion. There is a growing body of authority, however, including recent decisions of the Second, Sixth, and Seventh Circuits, that outside the aegis of rule 23, some form of notice is a requirement of due process in all forms of representative actions, if the resulting judgment is to be binding on absent class members. It is not at all clear that these jurisdictions would demand individual notice in (b)(2) actions, as (b)(3) suits require. Nonetheless, notice sufficient to comport with due process would appear to be that which is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Notice by publication may satisfy this standard. Thus, even in jurisdictions which require notification of unnamed class members in order to accord finality to the judgment, the notice requirement is not as taxing in (b)(2) actions as it is in (b)(3) suits.

Fortunately for class action plaintiffs, it is generally recognized that employment discrimination suits are more appropriately certified under (b)(2) rather than under (b)(3). This is because the

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91. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 317-20 (1950) and cases cited therein. Notice by publication would be particularly appropriate in cases where potential class members were unascertainable. *Mullane* states:

This court has not hesitated to approve of resort to publication as a customary substitute in another class of cases where it is not reasonably possible or practicable to give more adequate warning. Thus it has been recognized that, in the case of persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights.

92. Class actions which meet the more rigorous requirements of (b)(2) certification will almost always qualify under (b)(3) as well. *See Wetzel v. Liberty Mutual Ins. Co.*, 508 F.2d
conduct of the employer-defendant is actionable "on grounds generally applicable to the class," i.e., on the grounds of unlawful discrimination. The relief sought is normally "relief with respect to the class as a whole": injunctive and declaratory orders. As stated in Senter v. General Motors Corp., "[l]awsuits alleging class-wide discrimination are particularly well suited for 23(b)(2) treatment since the common claim is susceptible to a single proof and subject to a single injunctive remedy."\textsuperscript{93} In fact, the Advisory Committee Notes for rule 23 support the judicial preference for (b)(2) certification in Title VII suits; they offer as an illustration of a 23(b)(2) class action a civil rights case "where a party is charged with discriminat-
ing unlawfully against a class, usually one whose members are in-
capable of specific enumeration."\textsuperscript{94}

In addition to obtaining injunctive relief in (b)(2) class actions, it is now generally recognized that individual damages, in the form of reinstatement and back pay, may be awarded in (b)(2) actions.\textsuperscript{95} The Advisory Committee warns that subsection (b)(2) "does not extend to cases in which the appropriate final relief relates \textit{exclusively or predominately} to money damages,"\textsuperscript{96} but no case has held that a request for class relief in the form of back pay automatically renders (b)(2) treatment inapplicable. The courts have, as a rule, characterized Title VII class actions as "essentially equitable in nature,"\textsuperscript{97} even when money damages are sought, and award back pay as an ancillary "make-whole" remedy to injunctive or declarative relief.\textsuperscript{98} Typical of the reasoning employed is that of the Fourth Circuit:

This is a case in which final injunctive relief is appropriate and the defendants' liability for back pay is rooted in grounds applica-

\textsuperscript{93} 532 F.2d 511, 525 (6th Cir. 1976).
\textsuperscript{94} Advisory Committee Notes, \textit{FED. R. CIV. P.} 23, at 298.
\textsuperscript{96} Advisory Committee Notes, \textit{FED. R. CIV. P.} 23 at 298 (emphasis added).
\textsuperscript{98} \textit{See} cases cited in note 92 \textit{supra}. 

239, 252 (3d Cir. 1975) (Virtually every class action meeting the requirements of 23(b)(2) will also meet the less severe requirements of 23(b)(3)). In these situations, which are common, the judicial preference is for (b)(2) certification. Senter v. General Motors Corp., 532 F.2d 511 (6th Cir. 1976); Bing v. Roadway Express, Inc., 485 F.2d 441 (5th Cir. 1973); Williams v. Local No. 19, Sheet Metal Workers Int. Ass'n, 59 F.R.D. 49 (E.D. Pa. 1973).

532 F.2d 511, 525 (6th Cir. 1976).
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...ble to all members of the defined class. Under these circumstances the award of back pay, as one element of the equitable remedy, conflicts in no way with the limitations of Rule 23(b)(2)."

The practice of granting back pay awards in (b)(2) class actions is not without its problems and critics. Since notification to non-party plaintiffs of the pendency of the law suit is not universally required, class members eligible for back pay awards may be prevented from claiming them simply because they did not know of the litigation. Concern for procedural fairness to the employer-defendant has also been expressed:

The defendant should be given the opportunity to assess prospective back pay claims early in the proceeding so as to weigh the pros and cons of settlement. In addition, a defendant should not be subjected to relitigation of individual back pay claims, a possibility which would tend to result from Rule 23(b)(2) classification and its consequent lack of notice to individual class members of the existence of the suit.

Flexibility in the management of class actions provided by rule 23, however, offers solutions to these problems. Rule 23(c)(4) authorizes the court to create subclasses and redefine the classes at any time during the pendency of the litigation. Thus, the employees to whom fairness demands individual notification of the suit can be designated as a (b)(3) class, with the remainder of the suit proceeding as a (b)(2) action. Or, as some courts have done, the litigation may be treated as a (b)(2) suit for the purposes of determining whether the employer has engaged in class-wide discrimination requiring injunctive relief. Once this liability has been established, the suit can then be designated as a (b)(3) suit for the purpose of litigating liability for individual back pay claims. Bifurcation of the class in this manner is consonant with both procedural fairness to the parties and broad remedial purposes of Title VII.

103. Rule 23(c)(4) provides as follows:
   When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class...
CONCLUSION

The vision of Congress in enacting Title VII was to remove artificial, arbitrary, and unnecessary barriers to employment when these barriers operate invidiously to discriminate against employees on the basis of racial or other impermissible classifications. While the Act makes a public promise to minorities that they shall receive equal employment opportunities, private parties, the victims of discrimination, are relied upon to put flesh on that promise. In this regard, the class action device must be viewed as the cutting edge of the enforcement provisions of Title VII. In this way the rights of many similarly aggrieved employees can be litigated together, taking some of the burden from the private sector while fostering judicial economy and efficiency. Most courts have recognized the special advantages of class actions in Title VII cases, and have not permitted overly technical interpretations of rule 23 to obstruct the congressional policy in favor of widespread elimination of employment discrimination.