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QUALIFYING TITLE VII CLASS ACTION DISCRIMINATION SUITS: A DEFENDANT'S PERSPECTIVE

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Corporations and unions today are faced with the increasing possibility of being embroiled in title VII class action suits. In order to respond to these prospects, each organization should know the general postures it can assume to limit such suits. The purpose of this article, then, is to sketch the requirements a plaintiff must meet in order to bring a class action and the defenses a defendant can utilize during the various stages of litigation.[1] As will be seen, the problems a defendant has in a title VII class action arise not only from the complexities inherent in any class action, but also from the varying approaches the circuit courts have taken in title VII class actions. According to the Fifth Circuit, a plaintiff in such a class action functions as a private attorney general to eliminate discriminatory employment practices indigenous to the defendant company.[2] Thus, the size of the class and the scope of the complaints are permitted to be quite broad. Other courts have indicated that title VII class actions will be carefully scrutinized to determine if they satisfy the prerequisites of rule 23 of the Federal Rules of Civil

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1. For a good example of the analysis a court will apply to determine whether a class action can be maintained, see Donaldson v. Pillsbury Co., 554 F.2d 825 (8th Cir. 1977); Doctor v. Seaboard Coast Line R.R., 540 F.2d 699 (4th Cir. 1976); Senter v. General Motors Corp., 532 F.2d 511 (6th Cir.), *cert. denied*, 97 S. Ct. 182 (1976); Ste. Marie v. Eastern R.R. Ass'n, 72 F.R.D. 443 (S.D.N.Y. 1976); Piva v. Xerox Corp., 70 F.R.D. 378 (N.D. Cal. 1975).

2. Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1125 (5th Cir. 1969) (concurring opinion).

Procedure.[3] Under such scrutiny, the class action may be limited to an attack upon those discriminatory practices which the individual plaintiff has suffered. Therefore, the class members which the plaintiff can represent and the types of complaints which he can bring under this approach are relatively narrow.

The corporate or union defendant must be aware of this conflict in perceptions of the role of title VII class action litigation as well as the procedural prerequisites to a class action in general, in order to effectively defend itself against such actions.

RULE 23(A)

A title VII class action must meet the standards of rule 23 of the Federal Rules of Civil Procedure, which govern class actions generally.[4] Rule 23(c)(1) provides that shortly after the initiation of the action and prior to the trial on the merits of the case, the court must determine on the basis of plaintiff's evidence, whether a class action should be permitted. If it allows the action, the dimensions of the class must be defined. The rule provides that the determination may be conditional, and may be altered or amended before the decision on the merits.

In *East Texas Motor Freight System, Inc. v. Rodriguez,*[5] the Court emphasized that failure of the named plaintiffs to move for class certification "bears strongly on the adequacy of the representation that those class members might expect to receive."[6] Although the court did not hold that it would never be proper for a trial court or a court of appeals to certify a class *sua sponte,* it did hold that the plaintiffs' failure to move for class certification prior to trial

3. East Texas Motor Freight Sys., Inc. v. Rodriguez, ___ U.S. ___, ___, 97 S. Ct. 1891, 1898, ___ L. Ed. 2d ___, ___ (1977) (finding of "across the board" class discrimination by the Court of Appeals for the Fifth Circuit reversed because plaintiffs not proper class representatives for the action under standards of rule 23); Taylor v. Safeway Stores, Inc., 524 F.2d 263, 269 (10th Cir. 1975); Mason v. Calgon Corp., 63 F.R.D. 98, 103-04 (W.D. Pa. 1974).

4. Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 499 (5th Cir. 1968). It should be noted that employment discrimination, by definition, has been construed as class-wide discrimination and thus broadly interpreted by the courts. *See, e.g.,* Taylor v. Safeway Stores, Inc., 524 F.2d 263, 269 (10th Cir. 1975); Blue Bell Boots, Inc. v. Equal Employment Opportunity Comm'n, 418 F.2d 355, 358 (6th Cir. 1969); Bowe v. Colgate-Palmolive, 416 F.2d 711, 721 (7th Cir. 1969); Jenkins v. United Gas Corp., 400 F.2d 28, 33 (5th Cir. 1968).

5. ___ U.S. ___, 97 S. Ct. 1891, ___ L. Ed. 2d ___ (1977).

6. *Id.* at ___, 97 S. Ct. at 1897, ___ L. Ed. 2d at ___; *see* Strozier v. General Motors Corp., 13 Fair Empl. Prac. Cas. 963, 964 (N.D. Ga. Mar. 24, 1976); Beasley v. Kroehler Mfg. Co., 406 F. Supp. 926, 931 (N.D. Tex. 1976); Brown v. Colman-Cocker Co., 10 Empl. Prac. Dec. ¶ 10,492 at 6091 (W.D.N.C. Oct. 16, 1975).

prejudiced the plaintiffs' effort to represent a class.

Rule 23(a) lists four general prerequisites to the institution of a class action,[7] which must be satisfied by the plaintiff.[8] As the majority of case authority has recognized, the affirmative burden of demonstrating facts sufficient to satisfy these requirements lies with the party bringing the class action.[9] Simply pleading conclusions which paraphrase the language of rule 23 will not suffice.[10]

Numerosity—Rule 23(a)(1)

The first prerequisite to a class action is that the purported number of members of the class be so large that it is impractical to have all of them appear together in court as named plaintiffs. Despite the fact that this is perhaps the easiest prerequisite for a plaintiff to meet, there are nevertheless many title VII cases on record which were not maintainable as class actions because an insufficient number of persons fell within the definition of the class.[11] While the

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7. Fed. R. Civ. P. 23(a) provides:

(a) Prerequisition 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.

8. Wright v. Stone Container Corp., 524 F.2d 1058, 1061 (8th Cir. 1975); Danner v. Phillips Petroleum Co., 447 F.2d 154, 164 n.10 (5th Cir. 1971); Cash v. Swifton Land Corp., 434 F.2d 569, 571 (6th Cir. 1970); Page v. Curtiss-Wright Corp., 332 F. Supp. 1060, 1071 (D.N.J. 1971).

9. Thompson v. Sun Oil Co., 523 F.2d 647, 649 (8th Cir. 1975); Cooper v. Allen, 467 F.2d 836, 839 (5th Cir. 1972); Poindexter v. Teubert, 462 F.2d 1096, 1097 (4th Cir. 1972); Cook County College Teachers Union, Local 1600 v. Byrd, 456 F.2d 882, 885 (7th Cir.), *cert. denied*, 409 U.S. 848 (1972); Bradley v. Southern Pac. Co., 51 F.R.D. 14, 15 (S.D. Tex.), *aff'd*, 486 F.2d 516 (5th Cir. 1973); Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 43 F.R.D. 452, 457 (E.D. Pa. 1968). *See also* Doctor v. Seaboard Coast Line R.R., 540 F.2d 699, 706 (4th Cir. 1976); Equal Employment Opportunity Comm'n v. Detroit Edison Co., 515 F.2d 301, 310-12 (6th Cir. 1975), *petition for cert. filed*, 45 U.S.L.W. 3047 (U.S. July 17, 1976) (No. 75-221); Walker v. Whitehead & Kales Co., 8 Fair Empl. Prac. Cas. 769 (E.D. Mich. Aug. 30, 1974) (court discusses all aspects of rule 23 and plaintiffs' proof requirements).

10. Cash v. Swifton Land Corp., 434 F.2d 569, 571 (6th Cir. 1970); Boylan v. New York Times Co., 2 EMPL. PRAC. GUIDE (CCH) (13 Empl. Prac. Dec.) ¶ 11,575 at 7064 (S.D.N.Y. Feb. 23, 1977); Lamphere v. Brown Univ., 71 F.R.D. 641, 644 (D.R.I. 1976); Page v. Curtiss-Wright Corp., 332 F. Supp. 1060, 1071 (D.N.J. 1971); Hyatt v. United Aircraft Corp., 50 F.R.D. 242, 246 (D. Conn. 1970).

11. *See, e.g.*, Roman v. ESB, Inc., 550 F.2d 1343, 1349 (4th Cir. 1976) (53 persons inadequate to form class); Hill v. American Airlines, 479 F.2d 1057, 1059 (5th Cir. 1973) (six persons insufficient to form class); Moore v. Western Pa. Water Co., 73 F.R.D. 450, 454 (W.D. Pa. 1977) (14 persons insufficient to form class); Palmer v. Kissinger, 2 EMPL. PRAC. GUIDE (CCH) (13 Empl. Prac. Dec.) ¶ 11,419 at 6408 (D.D.C. Dec. 6, 1977) (numerosity and ade-

precise number sufficient for a class action is not clear, the cited cases indicate the lower benchmark of an insufficient number is about 25. It should be noted that this prerequisite has two specific elements. First that the class is too numerous, and second, that because the class is so numerous, it is impractical to join all.

Most courts will allow past employees and rejected applicants as well as present employees to be included in the class in meeting the numerosity requirement of rule 23(a)(1).[12] A related question on which courts are divided is whether future employees may be included to satisfy the numerosity requirement.[13] The trend, as indi-

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quate representation not existent); Williams v. Wallace Silversmiths, Inc., 2 EMPL. PRAC. GUIDE (CCH) (13 Empl. Prac. Dec.) ¶ 11,556 at 6999 (D. Conn. Mar. 4, 1976) (27 persons inadequate to form class); Moore v. Consolidation Coal Co., 13 Fair Empl. Prac. Cas. 305, 307 (E.D. Tenn. Mar. 4, 1976) (13 persons inadequate); Gay v. Waiters' and Dairy Lunchmen's Union, Local 30, 10 Fair Empl. Prac. Cas. 864, 867 (N.D. Cal. Mar. 18, 1975) (184 persons were inadequate); McClinton v. Turbine Support, 68 F.R.D. 236, 238 (W.D. Tex. 1975) (29 persons insufficient to form a class); Bowen v. Banquet Foods Corp., 12 Fair Empl. Prac. Cas. 1345, 1346 (E.D. Mo. Sept. 23, 1975) (14 persons insufficient to form a class); Carey v. Greyhound Bus Co., 11 Fair Empl. Prac. Cas. 1,403, 1,404 (E.D. La. Dec. 12, 1975) (24 persons were inadequate); Wilburn v. Steamship Trade Ass'n of Baltimore, Inc., 376 F. Supp. 1228, 1233 (D. Md. 1974) (26 persons insufficient to form class); Muntz v. Ohio Screw Prods., 61 F.R.D. 396, 399 (N.D. Ohio 1973) (10 persons insufficient to form class); Tolbert v. Western Elec. Co., 56 F.R.D. 108, 115 (N.D. Ga. 1972) (eleven persons insufficient to form class); Chavez v. Rust Tractor Co., 2 Fair Empl. Prac. Cas. 339, 341 (D.N.M. Dec. 24, 1969) (eleven persons insufficient to form class). *But see* Horn v. Associated Wholesale Grocers, Inc., 555 F.2d 270, 276 (10th Cir. 1977) (46 persons sufficient); Mecklenburg v. Montana Bd. of Regents, 13 Fair Empl. Prac. Cas. 462, 465 (D. Mont. Feb. 17, 1976) (class of at least 105 sufficient); Crenshaw v. Maloney, [1976] LAB. REL. REP. (BNA) (14 Fair Empl. Prac. Cas.) 154, 155 (D. Conn. May 16, 1976) (16 persons sufficient; court noted that benchmark of 25 is frequently used); United States v. Terminal Transp. Co., 12 Empl. Prac. Dec. ¶ 11,060 at 4944 (N.D. Ga. June 28, 1976) (75 current employees and at least 23 rejected applicants in class); Hoston v. United States Gypsum Co., 67 F.R.D. 650, 654 (E.D. La. 1975) (56 persons sufficient to form a class); Richmond Black Police Officers Ass'n v. City of Richmond, 386 F. Supp. 151, 158 (E.D. Va. 1974) (88 persons sufficient); Newmon v. Delta Air Lines, Inc., 374 F. Supp. 238, 242 (N.D. Ga. 1973) (200 persons held sufficient number to form class).

12. Thornberry v. Delta Air Lines, 2 EMPL. PRAC. GUIDE (CCH) (13 Empl. Prac. Dec.) ¶ 11,513 at 6840 (N.D. Cal. Oct. 12, 1976); United States v. Terminal Transp. Co., 12 Empl. Prac. Dec. ¶ 11,060 at 4942 (N.D. Ga. June 28, 1976).

13. Cases that hold future employees cannot be counted to satisfy the numerosity requirement include: Moore v. Western Pa. Water Co., 73 F.R.D. 450 (W.D. Pa. 1977); Piva v. Xerox Corp., 70 F.R.D. 378, 387 (N.D. Cal. 1975); Davis v. Roadway Express, Inc., 11 Empl. Prac. Dec. ¶ 10,754 at 7168 (S.D. Tex. Aug. 7, 1975); Rockett v. Lyman, 11 Empl. Prac. Dec. ¶ 10,760 at 7189 (D. Hawaii Dec. 2, 1974). Cases which allow future employees to be included to satisfy numerosity are: Cross v. National Trust Life Ins. Co., 553 F.2d 1026, 1030 (6th Cir. 1977); Jack v. American Linen Supply Co., 498 F.2d 122, 124 (5th Cir. 1974); Taylor v. Vocational Rehabilitation Center, [1976] LAB. REL. REP. (BNA) (14 Fair Empl. Prac. Cas.) 452, 456 (W.D. Pa. Feb. 27, 1976); Thomas v. Microlab/FXR, Inc., 11 Fair Empl. Prac. Cas. 1167, 1169 (D.N.J. Dec. 3, 1975).

cated in *Piva v. Xerox Corp.*[14] is that, although future employees may be included in the class for some purposes, they will not be included to satisfy the numerosity requirement.[15]

Commonality of Questions of Law or Fact—Rule 23(a)(2)

The second criterion that a plaintiff must meet in order to maintain a class action raises the central issue as to whether there is indeed a "class" appropriate to be joined in a single courtroom. Since the purpose of entertaining class actions is to dispose of a multitude of claims in one adjudication, and thereby ease the burden on the court, the plaintiffs must be united by a thread of common factual or legal issues. Without such unity, the court would be compelled, in essence, to hold separate trials for each class member. In title VII class action litigation, the plaintiff must demonstrate a question of law or fact common to all class members. There appears to be a distinct split among the circuits on the requirements for determining existence of a common question. The Fifth Circuit has pioneered a distinctive approach towards rule 23(a)(2), which is decidedly unfavorable to class action defendants. It has held that common questions of fact and law are raised not only by allegations of similar discriminatory employment practices, such as a refusal to hire for racial reasons, but also by allegations of discriminatory employment practices per se. For example, in the Fifth Circuit a complaint alleging a discriminatory refusal to promote raises the common question of discrimination and permits a class challenge to discriminatory hiring, firing and prohibitions upon transfers.[16] This rationale has been adopted in various situations by other courts of appeal.[17] It was summarized by former Judge Kerner for the Seventh Circuit in *Bowe v. Colgate-Palmolive Co.*,[18] when he stated:

14. 70 F.R.D. 378 (N.D. Cal. 1975).

15. *Id.* at 388; *see* Holliday v. Red Ball Motor Freight, [1977] LAB. REL. REP. (BNA) (15 Fair Empl. Prac. Cas.) 58, 59 (S.D. Tex. June 8, 1977).

16. *See, e.g.*, Jack v. American Linen Supply Co., 498 F.2d 122, 124 (5th Cir. 1974); Carr v. Conoco Plastics, Inc., 423 F.2d 57, 62-66 (5th Cir.), *cert. denied*, 400 U.S. 951 (1970); Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1124 (5th Cir. 1969); Jenkins v. United Gas Corp., 400 F.2d 28, 33 (5th Cir. 1968); Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 499 (5th Cir. 1968).

17. *See, e.g.*, Senter v. General Motors Corp., 532 F.2d 511, 524 (6th Cir.), *cert. denied*, 97 S. Ct. 182 (1976); Rich v. Martin Marietta Corp., 522 F.2d 333, 340 (10th Cir. 1975); Barnett v. W.T. Grant Co., 518 F.2d 543, 547-48 (4th Cir. 1975); Wetzel v. Liberty Mutual Ins. Co., 508 F.2d 239, 250 (3rd Cir.), *cert. denied*, 421 U.S. 972 (1975).

18. 416 F.2d 711 (7th Cir. 1969).

[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.[19]

Although most other circuits which have ruled on the issue have adopted the Fifth Circuit's "across the board" approach,[20] there is a definite trend in many courts, including the Fifth Circuit, to look with greater scrutiny at the assumptions underlying this approach. Indeed the Fifth Circuit in the recent case of *Equal Employment Opportunity Comm'n v. D.H. Holmes Co.*[21] held that the Equal Employment Opportunity Commission (EEOC) would have to comply with the prerequisites of rule 23 when suing on behalf of a class of alleged discriminatees.[22] This indicates a change from the more liberal position that the court took in the past generally with title VII actions. Other courts are finding that the plaintiffs' claims are unique to him or her as an individual. For example, in *Hyatt v. United Aircraft Corp.*,[23] the court stated:

> It is for these reasons and particularly in view of the standard of conduct expected of district judges in this circuit in making class action determinations that this court respectfully declines the invitation tendered by counsel for plaintiff and the EEOC to subscribe to the Fifth Circuit's "across the board" class action concept which permitted a class action to be brought by a discharged employee who alleged various specific acts of discrimination as well as a general company-wide policy of racial discrimination.[24]

And in *White v. Gates Rubber Co.*,[25] the court also refused to accept the Fifth Circuit's view of the requirement that common questions of law or fact exist, stating that:

> It appears that in the Fifth Circuit this requirement is met by an "across the board" attack on employment practices, with the allegation of racial discrimination constituting a common question of fact. . . . However, this approach seems to be overbroad, because it substitutes a conclusory accusation for the actual similarity of griev-

19. *Id.* at 719.

20. *See* note 16, *supra*. One court found there was no nexus as required by 23(a)(2) and 23(a)(3) of the interests of the representative party with those of the class he sought to represent. Wells v. Ramsay, Scarlett & Co., 506 F.2d 436, 437 (5th Cir. 1975).

21. 556 F.2d 787 (5th Cir. 1977).

22. *Id.* at 797.

23. 50 F.R.D. 242 (D. Conn. 1970).

24. *Id.* at 248.

25. 53 F.R.D. 412 (D. Colo. 1971).

> ances which the rule would seem to require. . . . *In a sitation such as the one here, 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.*[26] (emphasis added)

Rule 23(a)(2) has been used increasingly to determine precisely what policy or policies are being challenged. This allows the court to determine whether any persons, other than the plaintiff, would allege the same type of discriminatory practices by the company, a determination essential to the existence of a class.[27] The court will also be able to define the breadth of the class by considering whether the affected area is a department, plant or a number of plants.

For example, in *Doctor v. Seaboard Coastline R.R.*,[28] the court examined each of the named plaintiffs' claims to determine if there was a common question of law or fact with the alleged class. One of the named plaintiffs was found not to be a proper representative of the class because there was no showing that any other member of the putative class had claimed he was unfairly discharged for allegedly stealing from the employer. Since there was no common question of discriminatory treatment with respect to the plaintiff, the court found that a class did not exist.[29]

The limiting use of rule 23(a)(2) is further exemplified in cases such as *Gresham v. Ford Motor Co.*[30] In that case, the plaintiff alleged, *inter alia,* that the defendant company unjustifiably issued disciplinary reports, refused to allow him to temporarily transfer to

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26. *Id.* at 413; *accord,* Taylor v. Safeway Stores, Inc., 524 F.2d 263, 270-71 (10th Cir. 1975); Green v. Missouri Pac. R.R., 523 F.2d 1290, 1299 (8th Cir. 1975); Tarvesian v. Carr Div., 407 F. Supp. 336, 339-40 (D. Mass. 1976); Crouch v. United Press Int'l, 10 Empl. Prac. Dec. ¶ 10,393 at 5703 (S.D.N.Y. Aug. 20, 1975); Pizano v. J.C. Penney Co., 12 Fair Empl. Prac. Cas. 1322, 1325 (E.D. Cal. July 31, 1975); Gillead v. Defense Supply Agency, 9 Empl. Prac. Dec. ¶ 10,089 at 7451 (S.D.N.Y. Apr. 11, 1975); Cofield v. Goldman, Sachs & Co., 364 F. Supp. 1372, 1373-74 (S.D.N.Y. 1973); Harding v. Atlanta City Directory Co., 3 Fair Empl. Prac. Cas. 1214, 1215 (N.D. Ga. Feb. 11, 1971).

27. Doctor v. Seaboard Coast Line R.R., 540 F.2d 699, 711 (4th Cir. 1976); Thompson v. Sun Oil Co., 523 F.2d 647, 649 (8th Cir. 1975); Minority Alliance Group, Inc. v. Cook County, 2 EMPL. PRAC. GUIDE (CCH) (13 Empl. Prac. Dec.) ¶ 11,497 at 6775 (N.D. Ill. Dec. 23, 1976); Parker v. Kroger Co., 2 EMPL. PRAC. GUIDE (CCH) (13 Empl. Prac. Dec.) ¶ 11,527 at 6890 (N.D. Ga. Dec. 9, 1976); Beck v. Mather, 411 F. Supp. 648, 650 (W.D. Va. 1976) (white female's allegation of discrimination raised no common issues with putative class of blacks in race discrimination case).

28. 540 F.2d 699, 711 (4th Cir. 1976).

29. *Id.* at 709; *see* Bailey v. Ryan Stevedoring Co., 528 F.2d 551, 554-55 (5th Cir. 1976), *cert. denied,* 97 S. Ct. 767 (1977); O'Connell v. Teachers College, 63 F.R.D. 638, 640 (S.D.N.Y. 1974).

30. 53 F.R.D. 105 (N.D. Ga. 1970).

lighter work and transferred him to a more dangerous job solely because of his race. In denying class action status, the court held that there was no indication that the defendant acted or refused to act in a general discriminatory manner which affected a class of employees, but had merely engaged in alleged individual discrimination. It found that resolution of the dispute would require only an examination of the particular facts involved. In discussing the plaintiff's argument, the court stated:

> The sole basis for allowing maintenance of this suit as a class action is that the actions taken against the plaintiff were allegedly motivated by racial discrimination. Only by accepting the premise that every civil action for racial discrimination in employment states a case for treatment as a class action can the plaintiff's position be accepted and the class action allowed to proceed.[31]

Similarly, in *Harding v. Atlanta City Directory Co.*,[32] an allegation of discriminatory refusal to hire which was unsupported by evidence of general action affecting a class of employees, was inappropriate as a class action. And, in *Cofield v. Goldman, Sachs & Co.*,[33] the plaintiff was informed that his employment application could not be given further consideration because of the negative view held by a senior partner regarding Blacks. Even though this allegation was supported by ten affidavits from Blacks which stated their belief of discrimination on the part of the company, the court found the evidence insufficient to support maintenance of a class action.[34]

Finally, the United States Supreme Court in two recent title VII cases, one a pattern or practice suit brought by the government and one a class action, rejected the "across the board" approach taken by the Fifth Circuit. *International Brotherhood of Teamsters v. United States*[35] is important, although not a class action, because many of the issues that arise in pattern or practice suits are identical to those in title VII class actions. The Court held that only specifically identifiable post-act victims would be entitled to relief because they alone had been victims of unlawful discrimination.[36] Prior to this decision, each court of appeals which had dealt with

31. *Id.* at 107.
32. 3 Fair Empl. Prac. Cas. 1214 (N.D. Ga. Feb. 11, 1971).
33. 364 F. Supp. 1372 (S.D.N.Y. 1973).
34. *Id.* at 1374.
35. ___ U.S. ___, 97 S. Ct. 1843, ___ L. Ed. 2d ___ (1977).
36. *Id.* at ___, 97 S. Ct. at 1865, ___ L. Ed. 2d at ___.

the issue had followed the "across the board" approach of the Fifth Circuit.[37] In so doing they afforded recovery to all members of the class where discriminatory practices had been found, regardless of whether each member of the alleged affected class could prove he actually applied for and was denied the desired job. Indeed, *Teamsters* allowed recovery only for applicants who applied for a job, filed a timely charge, and who did not receive the job for discriminatory reasons or who were dissuaded from applying because of the futility of so doing.

In *East Texas Motor Freight System, Inc. v. Rodriguez,*[38] the Court held that the certification of the named plaintiffs by the court of appeals as class representatives was improper because of their failure to clearly satisfy the typicality requirement of rule 23(a)(3) and the adequate representation requirement of rule 23(a)(4).[39] By analogy, it can be argued the Court would also strictly scrutinize the pleadings of the named plaintiffs to determine if there was, in fact, a common question with the putative class.

These cases indicate that the plaintiff must show a question of fact common to the class by presenting evidence that the defendant has acted in a general discriminatory manner toward numerous applicants or employees as distinguished from an isolated occurrence of discrimination. The requirement may be satisfied by direct evidence that the company had a policy of discriminating, or indirect evidence that numerous minority employees were in fact treated differently because of their race.

Once it is determined that the defendant has acted in a general discriminatory manner which created a class of affected employees, the court will use rule 23(a)(2) to determine the extent of that class. If the plaintiff has shown that the company has a specific policy which is alleged to be discriminatory, the actual application of the policy will itself define the scope of the class. In *Newmon v. Delta Air Lines, Inc.,*[40] a clerical employee alleged that the company's maternity leave policy was discriminatory. The court held that she could represent only the class of female ground personnel rather than including female flight personnel. It found that the company's leave policy varied between the two categories of personnel, and

37. *See* note 14 *supra.*

38. ___ U.S. ___, 97 S. Ct. 1891, ___ L. Ed. 2d ___ (1977).

39. *Id.* at ___, 97 S. Ct. at 1896, ___ L. Ed. 2d at ___.

40. 374 F. Supp. 238 (N.D. Ga. 1973).

that the job variances between the two categories were sufficiently different to necessitate development of separate facts in order to determine whether the company's plan discriminated against each category.[41]

In *Pizano v. J.C. Penney Co.*,[42] the plaintiffs sought to represent all Blacks and Mexican-Americans who had been or would be victims of the defendant's discriminatory practices throughout the state of California. The court limited the class to employees at the Modesto store where all the named plaintiffs were or had been employed, for there was not a sufficient showing of questions of law or fact common to the class the plaintiffs sought to represent.

Similarly, in *Hill v. American Airlines, Inc.*,[43] the plaintiff attempted to avoid the conclusion that only six employees could be members of the class by alleging that all persons in his job position at all of the defendant's terminals throughout the United States should be members of the class. The court rejected this contention, since the alleged discriminatory treatment did not emanate from a national policy and thus did not present substantial common questions of law or fact.[44]

In *Bradley v. Southern Pacific Co.*,[45] allegations that blacks were discriminatorily classified as mail porters and not as the higher paying mail clerks by the defendant were held to complain only of practices which prevailed in the mailroom and nowhere else. There was no reason to believe that a similar practice prevailed in the various other departments.[46] It is not difficult, however, for a court to afford a large scope to the class if there is any indication that the practice of discrimination exists throughout a number of facilities. In *National Organization of Women v. Bank of California*[47] a woman plaintiff alleged that the defendant denied promotions to women, and a black plaintiff alleged that the defendant denied jobs to Blacks. Despite the fact that the defendant argued that the actions should be restricted to the bank branches where the discriminatory practices allegedly took place, the court allowed the suit to proceed

41. *Id.* at 243.

42. 12 Fair Empl. Prac. Cas. 1322 (E.D. Cal. July 31, 1975).

43. 479 F.2d 1057 (5th Cir. 1973).

44. *Id.* at 1059.

45. 51 F.R.D. 14 (S.D. Tex. 1970), *aff'd*, 486 F.2d 516 (5th Cir. 1973).

46. *Id.* at 15; *see* Parker v. Kroger Co., Inc., 13 Empl. Prac. Dec. ¶ 11,527 (N.D. Ga. 1976); Taylor v. Safeway Stores, Inc., 524 F.2d 263 (10th Cir. 1975).

47. 5 Empl. Prac. Dec. ¶ 8510 (N.D. Cal. Feb. 28, 1973).

on a statewide basis.[48]

The importance of these cases is that any company-wide policy or practice which is potentially discriminatory, such as employment tests, maternity leaves or benefit policies, can be challenged by a class action as wide as the application of that policy. Practices which do not indicate the breadth of their application on their face can best be narrowed by a class action defendant emphasizing the factual differences arising between plants, departments and even job classifications. If these differences are adequately demonstrated, the court will realize that it needs to examine different sets of facts to determine that discrimination exists and that the purported class is really two classes or more.

Typicality of Claims—Rule 23(a)(3)

The third requirement of rule 23(a) is that the claim of the representative must be typical of the claims of the class. At first glance, this would appear simply to require that the person bringing the suit on behalf of the class be a member of the class. Rule 23(a)(3) assumes that there is in fact an affected class as contrasted with rule 23(a)(1) and (2) which determine whether there is a class at all. While the typicality requirement would seem to be a simple prerequisite to administer, its application in title VII class actions has not proceeded with complete clarity.

Courts will often combine the typicality analysis with either the adequacy of representation question or the question of common facts or legal issues. For example, in *Wells v. Ramsay, Scarlett & Co.*,[49] the court combined the questions of commonality and typicality in determining whether there was a "nexus" between the named plaintiff and the class he sought to represent.[50] It held that since the plaintiff was a foreman and not a member of the class of longshoremen he sought to represent, neither the requirements of commonality nor typicality were satisfied.

48. *Id.* at 7442; *see* Piva v. Xerox Corp., 70 F.R.D. 378, 387 (N.D. Cal. 1975) (court allowed suit to encompass 10 state districts); Alaniz v. California Processors, Inc., 73 F.R.D. 269, 275 (N.D. Cal. 1976) (class included all minority and female employees in 74 food processing plants across the northern part of the state); Guardian Ass'n New York Police Dept., Inc. v. Civil Service Comm'n, 2 EMPL. PRAC. GUIDE (CCH) 13 Empl. Prac. Dec. ¶ 11,611 (S.D.N.Y. Mar. 17, 1977).

49. 506 F.2d 436 (5th Cir. 1975).

50. *Id.* at 437; *see* Boylan v. New York Times Co., 2 EMPL. PRAC. GUIDE (CCH) (13 Empl. Prac. Dec.) ¶ 11,575 at 7063 (S.D.N.Y. Feb. 23, 1977) (court declined to give independent meaning to Rule 23(a)(3)); Piva v. Xerox Corp., 70 F.R.D. 378, 385 (N.D. Cal. 1975).

Courts will frequently combine their analysis of the typical claims requirement and the adequacy of representation requirement of subsections (3) and (4) of rule 23. As the court explained in *Taylor v. Safeway Stores, Inc.*:[51]

> The guiding rationale for many of the judicial interpretations of the typicality requirement has been the historical nexus between subsections (a)(3) and (a)(4); both of these subsections were derived from a common phrase in the original rule 23 requiring "one or more [representatives], as will fairly insure the adequate representation of all. . . ." Because of its source in the original rule, subsection (a)(3) should logically deal with the adequacy of representation, but due to the broad language of subsection (a)(4) that a representative must "fairly and adequately" represent the class, it is difficult to attach a meaning to (a)(3) that is not included or does not overlap somewhat with subsection (a)(4).[52]

The Court of Appeals for the Tenth Circuit in *Taylor* followed the trend of recent class action cases in giving an independent meaning to the typicality requirement of rule 23(a).[53] It reasoned that unless subsection (a)(3) was given an independent meaning, there would be no need to have it included as a prerequisite of rule 23(a). The court held that, at a minimum, subsection (a)(3) "requires that class-action plaintiffs establish that 'there is in fact a class needing representation.'"[54] In taking this approach the court expressly rejected the plaintiff's argument for adoption of the Fifth Circuit's "across the board" approach.

A similar application also occurred in *Chavez v. Rust Tractor Co.*,[55] a case in which the plaintiff had been discharged by the defendant, allegedly for discriminatory reasons. In addition to his own claim, plaintiff attempted to represent a class of Spanish-surnamed Americans, who had applied for and had been discriminatorily denied employment with the defendant. The court rebuffed this attempt since the plaintiff had not been refused employment and therefore did not meet the requirement that he "must be a member

51. 524 F.2d 263 (10th Cir. 1975). *See also* Rodrigues v. Pacific Tel. & Tel, 70 F.R.D. 414 (N.D. Cal. 1976); Dickerson v. United States Steel Corp., 2 EMPL. PRAC. GUIDE (CCH) (13 Empl. Prac. Dec.) ¶ 11,311 (E.D. Pa. Aug. 21, 1976).

52. Taylor v. Safeway Stores, Inc., 524 F.2d 263, 269-70 (10th Cir. 1975).

53. *Id.* at 270.

54. *Id.* at 270; *accord,* Dennis v. Norwich Pharmacal Co., 5 Fair Empl. Prac. Cas. 921, 923 (D.S.C. Feb. 26, 1973); Allen v. Pipefitters Local 28, 56 F.R.D. 473, 476 (D. Colo. 1972); Cunningham v. Ellington, 323 F. Supp. 1072, 1074 (W.D. Tenn. 1971).

55. 2 Fair Empl. Prac. Cas. 339 (D.N.M. Dec. 24, 1969).

of the class before he can represent the class in a class action."[56] The *Chavez* result is an unspoken rejection of the Fifth Circuit's theory that the common questions of fact were raised by allegations of discriminatory practices in general. Since the class was defined by types of discriminatory employment practices, such as refusal to hire, promote, and discharge, the plaintiff was not a member of the class of persons discriminatorily denied employment. Of course, the result would have been different had the Fifth Circuit's theory been employed. In *National Organization of Women v. Bank of California*,[57] a black job applicant who was refused employment was permitted to represent all Blacks and Chicanos who had been refused a job by the bank or who had suffered discrimination in the course of their employment as a result of their race.[58]

Having a typical claim or being a member of the class, however, means more than simply raising the same type of discriminatory employment allegations. Courts that have examined this requirement closely have required the plaintiff to present some evidence that he was qualified for the employment opportunity denied him. In *Johnson v. Lillie Rubin Affiliates, Inc.*,[59] a black woman alleged that the defendant company refused to employ black women other than as stockgirls solely because of race. The court denied the class action aspect of the case because the plaintiff had failed to establish that she was a member of the class, since she had not demonstrated that she was in fact qualified for any position other than stockgirl.[60]

In *East Texas Motor Freight System, Inc. v. Rodriguez*,[61] the Court held that the trial proceedings demonstrated that the named plaintiffs were not members of the class of discriminatees they sought to represent. The district court had found that class action plaintiffs lacked the qualifications needed to be hired as line drivers and were therefore in no position to complain of alleged discriminatory practices associated with that job. Consequently, they were not able to represent the class which allegedly suffered discrimination.[62]

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56. *Id.* at 341.

57. 5 Empl. Prac. Dec. ¶ 8510 (N.D. Cal. Feb. 28, 1973).

58. *Id.* at 7442.

59. 5 Empl. Prac. Dec. ¶ 8542 (M.D. Tenn. Jan. 16, 1973).

60. *Id.* at 7557 n.2. *See also* Cooper v. Allen, 467 F.2d 836 (5th Cir. 1972); Kinsey v. Legg, Mason & Co., 60 F.R.D. 91 (D.D.C. 1973).

61. ___ U.S. ___, 97 S. Ct. 1891, ___ L. Ed. 2d ___ (1977).

62. *Id.* at 1897. *See also* Golden v. Lascara, 12 Empl. Prac. Dec. ¶ 11,182 at 5441 (4th Cir. Sept. 17, 1976); Jenkins v. Blue Cross Mutual Hosp., Inc., 522 F.2d 1235, 1240 (7th Cir. 1975); Patterson v. Western Dev. Laboratories, [1976] LAB. REL. REP. (BNA) (13 Fair Empl.

Requiring a plaintiff to demonstrate that he or she is a member of the class qualified for the employment opportunity, is not the equivalent of proving that the failure to secure the employment opportunity was due to discriminatory reasons. Qualified minority members can be denied employment opportunities for other than discriminatory reasons. The functional equivalent of class membership is that an ordinary plaintiff must first establish a prima facie case of discrimination. The burden then is on the defendant to demonstrate that the denial of employment opportunities was not for discriminatory reasons. The United States Supreme Court established the elements for a prima facie case in *McDonnell Douglas Corp. v. Green.*[63]

> The complainant in a title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified . . .; (iii) he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications . . . . The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for employee's rejection . . . .[64]

The distinction between proving membership in the class and proving one's case was suggested in *Baxter v. Savannah Sugar Refining Corp.*[65] The plaintiff represented a class of all Blacks employed by the defendant at its refinery. His allegations were primarily directed against the defendant's policies and practices regarding promotion of employees. The plaintiff did not prove that his failure to be promoted was racially motivated, however, this did not prevent examination of the class claims of plant-wide discrimination. The court held that the plaintiff had not proved discrimination against any specific individual, but that the defendant's promotion procedures violated title VII because of the superviser's subjective evaluation of the employee's ability.[66]

Prac. Cas.) 772 (N.D. Cal. Sept. 14, 1976); Jones v. United Gas Improvement Corp., 68 F.R.D. 1 (E.D. Pa. 1975).

63. 411 U.S. 792 (1973).

64. *Id.* at 802.

65. 350 F. Supp. 139 (S.D. Ga. 1972), *modified,* 495 F.2d 437 (5th Cir.), *cert. denied,* 419 U.S. 1033 (1974). *See also* Satterwhite v. City of Greenville, 549 F.2d 347 (5th Cir. 1977).

66. Baxter v. Savannah Sugar Ref. Corp., 350 F. Supp. 139, 143 (S.D. Ga. 1972), *modified,* 495 F.2d 437 (5th Cir.), *cert. denied,* 419 U.S. 1033 (1974).

Other courts have struggled with the meaning of "typical claims." In *White v. Gates Rubber Co.*[67] the court held that "typical claims" meant that the plaintiff must demonstrate not only that there were other employees, who, like him, were minority members discharged from employment, but also that other hypothetical members of the class were in fact complaining that they were discriminatorily discharged.

> A more 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 as the plaintiff. It seems apparent that a claim cannot be typical of the claims of a class if no other member of the class feels aggrieved.[68]

Courts in title VII class actions often fail to see that rule 23(a)(2) is designed to determine, by looking for a core of common questions, if a class exists and what its size is, while rule 23(a)(3) is to determine whether the named representative falls within that class.[69] This is demonstrated in the following two cases.

In *Kinsey v. Legg, Mason & Co.*,[70] the plaintiff had been denied employment as a retail securities salesman. He sought to represent a class composed of Blacks who might have been employed by the defendant at its investment offices. In examining rule 23(a)(3), the court decided that the plaintiff could represent only retail securities salesmen, rather than institutional salesmen and non-sales personnel, since the qualifications, salaries and duties of the employees were different.

While the court's distinction between the groups of employees was perhaps proper, it hardly appears that this is a rule 23(a)(3) consideration. Holding that the elements of qualifications, salaries and duties go to the common questions of fact which determine the existence and scope of the class is a misdirection on the part of the court. Its conclusions appear to stem from the supposition that rule

67. 53 F.R.D. 412 (D. Colo. 1971).

68. *Id.* at 415; *see* Baxter v. Savannah Sugar Ref. Co., 350 F. Supp. 139, 143 (S.D. Ga. 1972), *modified*, 495 F.2d 437 (5th Cir.), *cert. denied*, 419 U.S. 1033 (1974); Hyatt v. United Aircraft Corp., 50 F.R.D. 242, 247 (D. Conn. 1970).

69. *See, e.g.*, Jacobs v. Martin Sweets Co., 550 F.2d 364, 371-72 (6th Cir. 1977); Wright v. Stone Container Corp., 524 F.2d 1058, 1062 (8th Cir. 1975); Bradley v. Southern Pac. Co., 486 F.2d 516, 518 (5th Cir. 1973); Huff v. N.D. Cass Co., 468 F.2d 172, 179 (5th Cir. 1972); Collier v. Hunt-Wesson Foods, Inc., 12 Empl. Prac. Dec. ¶ 11, 149 at 5283 (S.D. Ga. June 30, 1976).

70. 60 F.R.D. 91 (D.D.C. 1973).

23(a)(3) is satisfied when "there is no conflict or substantial diversity of interest between the representatives and the absentees."[71]

Likewise, in *Williams v. Mumford,*[72] the two named plaintiffs alleged a pattern or practice of racial discrimination against a class of black employees and job applicants. However, the particular allegations of discrimination were unique to the plaintiffs. Since proof of racial discrimination against them did not prove racial discrimination against the class, the court denied the class action motion on the basis that plaintiffs' claims were not "typical" of the class.[73]

The conceptual problem with this approach is that while a class action can be denied, the denial is based not on the fact that no class exists, but that a class, which presumably does exist, is not properly represented before the court. Furthermore, by failing to distinguish rule 23(a)(2) from rule 23(a)(3), a court is apt only to require common questions of fact or law and to ignore the requirement that the plaintiff be a member of the class. It is to the defendant's advantage then to demand that the court distinguish meaningfully between the two sections and insist that the plaintiff meet not just three, but all four prerequisites. Indeed, at times it may be more important to examine the degree to which the conflict of interest between class members and representatives may outweigh a representative's interest in class recovery. For example, in a case involving promotions to a higher job, a number of class members, including the representatives, may be vying for a limited number of openings. Where individuals compete among themselves to gain entrance into a specific job, it is highly arguable that such a case should not be brought as a class action. It was precisely this type of conflict of interest which guided the court in *City of Chicago v. General Motors Corp.*[74] to deny the appropriateness of a class action on grounds similar to that involved in a situation where a number of individuals are bidding for a few vacancies. The *General Motors* court held that the city could not represent a class of all persons adversely affected by automobile-generated pollution, since some

71. *Id.* at 99.

72. 6 Empl. Prac. Dec. ¶ 8785 (D.D.C. Aug. 20, 1973), *appeal dismissed,* 511 F.2d 363 (D.C. Cir. 1975), *cert. denied,* 423 U.S. 828 (1977).

73. *Id.* at 5385. *See also* Odom v. U. S. Homes Corp., [1977] LAB. REL. REP. (BNA) (15 Fair Empl. Prac. Cas.) 156, 157 (S. D. Tex. Dec. 19, 1975); Smith v. North Am. Rockwell Corp., 50 F.R.D. 515, 522 (D. Okla. 1970).

74. 332 F. Supp. 285 (N.D. Ill. 1971), *aff'd,* 467 F.2d 1262 (7th Cir. 1972).

class members such as auto dealers and gasoline vendors might have adverse and competing interests.[75]

Adequacy of Representation—Rule 23(a)(4)

The fourth and final general prerequisite to a class action is that the particular representative fairly and adequately protect the interests of the class.[76] Since the rights of all the members of the class are dependent on the success or failure of the class representative, he should be committed to the interest of every class member. With increasing frequency courts have denied class certification under subsection (a)(4), for one of three reasons: 1) the interests of the class action plaintiff are dissimilar to those of the class, or, 2) it can be shown that the plaintiff would probably not make a good faith effort to represent the class' interests, or, 3) the plaintiff's counsel is not competent or qualified in title VII cases. Defendants often succeed in preventing class certification under rule 23(a)(4) by showing that the plaintiff's interests are antagonistic to those of the remainder of the class. This standard makes its appearance in several forms, one of which centers on distinctions between the interests of job applicants, and past and present employees.

In *Hyatt v. United Aircraft Corp.*,[77] the plaintiff alleged that the defendant company had racially discriminated against its employees by unequal compensation, denials of promotions, and segregation of employees. However, since the plaintiff himself had voluntarily resigned from the company over a year and a half prior to the institution of the suit, the lack of familiarity with present employment conditions made him an inadequate representative for the class of present employees.[78]

In *White v. Gates Rubber Co.*,[79] the plaintiff alleged that he had been discriminatorily discharged but sought to represent past, pre-

75. *Id.* at 288.

76. *See* Gonzales v. Cassidy, 474 F.2d 67, 72 (5th Cir. 1973) (court established three-part test for Federal rule 23(a)(4) requiring purported representative to have a common interest with the class, to present the action vigorously and to employ qualified counsel).

77. 50 F.R.D. 242 (D. Conn. 1970).

78. *Id.* at 245. *See also* Hernandez v. Gray, 530 F.2d 858, 859 (10th Cir. 1976); Bradley v. Southern Pac. Co., 486 F.2d 516, 518 (5th Cir. 1973); Heard v. Mueller Co., 464 F.2d 190, 194 (6th Cir. 1972); Collier v. Hunt-Wesson Foods, Inc., 12 Empl. Prac. Dec. ¶ 11,149 at 5285-86 (S.D. Ga. June 30, 1976). *But see* Long v. Sapp, 502 F.2d 34, 42 (5th Cir. 1974); Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1124-25 (5th Cir. 1969).

79. 53 F.R.D. 412 (D. Colo. 1971).

sent and future employees who were claiming virtually all types of discrimination. The court held that the plaintiff could not be an adequate representative of present employees complaining of discriminatory internal policies, since he did not seek reinstatement. Since the plaintiff no longer had a personal stake in how the internal policies were administered, the court could not assume that he would fight to represent those interests.[80]

In *Burney v. North American Rockwell Corp.*,[81] the plaintiff alleged that the company applied more stringent work rules regarding tardiness to him because he was black and had, therefore, discriminatorily discharged him. He sought, however, to represent all black employees who had been hampered by the allegedly discriminatory work rules. The court held that a class action was not proper, since the court "cannot assume, for example, that plaintiffs will fairly and adequately represent the interests of other Negroes who were discriminated against in such areas as job assignments, overtime, or vacations."[82]

Most interestingly, the Fifth Circuit, which virtually ignores the requirements of "common questions of fact," does give credence to "adequate representation." In *Huff v. N.D. Cass Co.*,[83] the court denied a motion for class action. The plaintiff alleged that he had been discharged because of his race, and sought to represent all employees. He was held not to be an adequate representative of all employees, since the pre-trial conference revealed that the plaintiff was clearly discharged for incompetency.[84] While the Fifth Circuit spoke in terms of rule 23(a)(4), its analysis more properly falls within rule 23(a)(3); the plaintiff had not demonstrated that he was a member of the class, and therefore qualified to retain his position. Whether this is an (a)(3) or (a)(4) factor, it nevertheless is noteworthy that while the Fifth Circuit believes that general allegations of discrimination per se raise common questions of fact, it still might rigidly apply prerequisites of (a)(3) and (a)(4).

A plaintiff must show that he is the proper representative for the

80. *Id.* at 414; *see* Spirt v. Teachers Ins. and Annuity Ass'n of America, 416 F. Supp. 1019, 1024 (S.D.N.Y. 1976); Ashworth v. Sherwin-Williams Co., 10 Empl. Prac. Dec. ¶ 10,266 at 5110 (N.D. Ga. Feb. 22, 1974); Campbell v. Al Thrasher Lumber Co., 13 Fair Empl. Prac. Cas. 189, 190 (N.D. Cal. Mar. 22, 1973).

81. 302 F. Supp. 86 (C.D. Cal. 1969).

82. *Id.* at 90.

83. 468 F.2d 172 (5th Cir. 1972).

84. *Id.* at 178-79.

class and that he could adequately represent it. This requirement is based on the due process prerequisite that the interest of any party who is to be bound by the adjudication but is not before the court must be adequately represented.[85] Generally, courts will consider "the forthrightness and vigor with which the representative party can be expected to assert and defend the interests of the members of the class. . . ."[86]

Finally, in *Chrapliwy v. Uniroyal, Inc.*,[87] the court certified a class consisting of both former and present women employees represented by the named plaintiffs which also included both former and present women employees. The plaintiffs alleged a number of discriminatory practices, including layoff. Since reinstatement was one of the desired remedies sought by the class, but clearly applicable only to former employees, the court recognized that the named plaintiffs could fairly and adequately represent the entire class for determination of liability. A reinstatement remedy, however, could create conflicts between present and former employee members of the class, since the remedial order might be replacing one member of the class for another in a job assignment. Therefore, the court reserved judgment as to whether the two groups should be split into separate classes in the event the case should reach the issue of damages and reinstatement.[88]

Defendants have also succeeded in arguing that plaintiffs who are in one job category are inadequate representatives of those members of the class in a different job category. In *Knox v. Meat Cutters & Butchers*[89] the court relied on the decision in *Wells v. Ramsay, Scarlett & Co.*[90] in deciding that a plaintiff truckdriver would be an inadequate representative of a class of workers which included cleri-

85. Hansberry v. Lee, 311 U.S. 32, 45 (1940).

86. Mersay v. First Republic Corp. of America, 43 F.R.D. 465, 470 (S.D.N.Y. 1968).

87. 71 F.R.D. 461 (N.D. Ind. 1974). *But see* Held v. Missouri Pac. R.R., 64 F.R.D. 346, 350 (S.D. Tex. 1974) where the court ruled that plaintiff was unable to bear the costs of adequate representation and that personal antagonism existed between plaintiff and other purported members of class.

88. Chrapliwry v. Uniroyal, Inc., 71 F.R.D. 461 (N.D. Ind. 1976); *see* Nicodemus v. Chrysler Corp., 12 Fair Empl. Prac. Cas. 1265, 1267 (N.D. Ohio May 22, 1974).

89. 11 Fair Empl. Prac. Cas. 1327, 1330 (E.D. La. Mar. 24, 1975). *See also* Wells v. Ramsay, Scarlett and Co., 506 F.2d 435 (5th Cir. 1975); Collier v. Hunt-Wesson Foods, Inc., 12 Empl. Prac. Dec. ¶ 11,149 (S.D. Ga. June 30, 1976); Rodgers v. United States Steel Corp., 69 F.R.D. 382 (W.D. Pa.), *appeal dism'd*, 508 F.2d 152 (3rd Cir.), *cert. denied*, 423 U.S. 832 (1975); Anderson v. Southern Pac. Transp. Co., [1976] LAB REL. REP. (BNA) (13 Fair Empl. Prac. Cas.) 321 (N.D. Cal. Aug. 22, 1973).

90. 506 F.2d 436 (5th Cir. 1975).

cal workers. The court reasoned that the plaintiff had insufficient knowledge of the working conditions of the clerical workers to be an adequate representative,[91] stating that:

> He was a truckdriver who had no contact with the office clericals. No one from the production work force had ever applied for transfer to the office and vice versa. The office clericals were salaried, he was an hourly wage employee. He was a union member, they were not. He lacks the nexus therefore, to be a proper representative of them.[92]

Some courts have allowed class action plaintiffs to represent both hourly and management employees. In *Chambers v. Franchise Realty Interstate Corp.*,[93] the court rejected the argument that the plaintiffs could not adequately represent both management employees and hourly workers because their interests were not identical. It noted that "Since the basic question is not what plaintiffs do, but what is being done to them, this difference does not seem too consequential at this time."[94] Another aspect of the question of antagonistic interests focuses on whether a union can represent a class of discriminatees. Most courts have answered the question in the negative due to the antagonistic interests of the union members who allege discriminatory treatment and those who do not.[95] In *Germann v. Kipp*,[96] the union sought to represent white firemen who had a reverse discrimination claim based on the city's affirmative action plan. The court held that the union would not be a proper representative because there were members who had benefitted from the affirmative action program. Those members would "presumably

91. Knox v. Meat Cutters & Butchers, AFL-CIO, Local P-591, 11 Fair Empl. Prac. Cas. 1327, 1330 (E.D. La. Mar. 24, 1975).

92. *Id.* at 1330. *See also* Wells v. Ramsay, Scarlett & Co., 506 F.2d 435 (5th Cir. 1975).

93. 12 Empl. Prac. Dec. ¶ 11,151 (N.D. Ohio June 25, 1976).

94. *Id.* at 5289; *see, e.g.*, Donaldson v. Pillsbury Co., 554 F.2d 825, 831-32 (8th Cir. 1977); Women's Comm. for Equal Employment Opportunity v. NBC, 71 F.R.D. 666, 670 (S.D.N.Y. 1976).

95. *See* Equal Employment Opportunity Comm'n v. American Tel. & Tel. Co., 506 F.2d 735, 741 (3rd Cir. 1974); Air Line Steward & Stewardesses Ass'n, Local 550 v. American Airlines, Inc., 490 F.2d 636, 642 (7th Cir. 1973), *cert. denied*, 416 U.S. 993 (1974); Germann v. Kipp, 429 F. Supp. 1323, 1330 (W.D. Mo. 1977); Social Servs. Union, Local 535 v. County of Santa Clara, 12 Fair Empl. Prac. Cas. 570, 572-73 (N.D. Cal. Dec. 11, 1975); Lynch v. Sperry Rand Corp., 62 F.R.D. 78, 84 (S.D.N.Y. 1973); Banks v. Seaboard Coast Line R.R., 51 F.R.D. 304, 305 (N.D. Ga. 1970). *But see* Guardians Ass'n of New York City Police Dept., Inc. v. Civil Service Comm'n, 431 F. Supp. 526, 532-33 (S.D.N.Y. 1977); Thompson v. Board of Educ., 71 F.R.D. 398, 404-06 (W.D. Mich. 1976) (excellent discussion distinguishing opposite cases); Airline Pilots v. Continental Air Lines, 10 Fair Empl. Prac. Cas. 462 (N.D. Ill. Dec. 19, 1974).

96. 429 F. Supp. 1323 (W.D. Mo. 1977).

have interests diametrically opposed to those which plaintiffs assert."[97]

Analysis under rule 23(a)(4) has centered in some cases on the individual characteristics of the named plaintiff to determine his ability to vigorously prosecute the action. For example in *Cobb v. Avon Products, Inc.*[98] the court based its determination that plaintiff would be an inadequate representative on the fact that she maintained two full time jobs without revealing this to her employers. The court stated that 23(a)(4) requires:

> [T]hat the interests of the plaintiff may not be inimical to the interests of the class members and that said representative must be expected to pursue the action forthrightly and with vigor . . . . Adequacy of the representative is of monumental importance since representation demands undiluted loyalty to the class interests and because of the res judicata effect of judgment in a class action.[99]

After discussing the plaintiff's clandestine activities and the effect they had on her duties to the defendant, the court concluded that her "character and attitude toward her responsibilities" manifested her inability to fulfill "the treacherous duties of a class representative."[100]

Some recent cases have held that another factor to be considered in determining whether a plaintiff will be an adequate representative is his financial ability to maintain a suit on behalf of a class.[101] The reasoning behind this consideration is that the plaintiff has an obligation to prosecute the action in a vigorous fashion, and he

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97. *Id.* at 1330.

98. 71 F.R.D. 652 (W.D. Pa. 1976).

99. *Id.* at 654. *See also* Sutton v. Hedwin Corp., 2 EMPL. PRAC. GUIDE (CCH) (13 Empl. Prac. Dec.) ¶ 11,450 (D. Md. Oct. 4, 1976); Rodrigues v. Pacific Tel. & Tel. Co., 70 F.R.D. 414, 416-17 (N.D. Cal. 1976) (Portuguese-American not an adequate representative of Hispanic-Americans). *But see* Jones v. Milwaukee County, 68 F.R.D. 638, 641 (E.D. Wis. 1975) (composition of class extended beyond race and sex of representative party).

100. Cobb v. Avon Products, Inc., 71 F.R.D. 652, 655 (W.D. Pa. 1976). Many courts have considered the relationship between the representative and the employer important in deciding whether there is adequate representation. *See* Patterson v. Western Development Laboratories, [1976] LAB. REL. REP. (BNA) (13 Fair Empl. Prac. Cas.) 772, 773-74 (N.D. Cal. 1976) (present employees inadequate representatives for past employees). *But see* Hill v. Western Electric Co., 12 Fair Empl. Prac. Cas. 1175, 1178 (E.D. Va. Apr. 20, 1976); Sinyard v. Foote & Davies, [1976] LAB. REL. REP. (BNA) (13 Fair Empl. Prac. Cas.) 1257, 1260 (N.D. Ga. Sept. 19, 1975).

101. Guse v. J.C. Penney Co., 409 F. Supp. 28, 30-31 (E.D. Wis. 1976); Parker v. Kroger Co., 2 EMPL. PRAC. GUIDE (CCH) (13 Empl. Prac. Dec.) ¶ 11,527 at 6892 (N.D. Ga. Dec. 9, 1976); Wilson v. General Motors Corp., 11 Fair Empl. Prac. Cas. 1438, 1439 (S.D. Ind. July 3, 1975).

would be unable to conduct the litigation properly if he lacks the resources. If the representative plaintiff is unable to pay costs the action should be foreclosed. Normal litigation expenses will include providing notice and adequate discovery.[102] Rule 23 itself demands that the plaintiff pay for notice, which is mandatory in a (b)(3) action and discretionary in a (b)(2) action. If the class plaintiff cannot afford to vigorously represent the class, the interests of absent class members may be forgotten in an effort to obtain a settlement for the named plaintiff. The res judicata effect of such a judgment would prevent further adjudication of the absent members' claims. In *Parker v. Kroger*[103] the court based its finding that the plaintiffs would be an inadequate representative at least partially because of their failure to show that they had the financial ability to maintain a class action.

Finally courts will examine the conduct and qualifications of the class-action plaintiff's attorney in determining whether there is adequate representation of the absent class members. The United States Supreme Court in *East Texas Motor Freight System, Inc. v. Rodriguez,*[104] based its finding that the named plaintiffs would not be adequate class representatives, partly because of the failure of their attorney to move for class certification prior to trial. Justice Stewart noted that such failure was indicative of the quality of representation the class members might expect from such a plaintiff.[105] The requirement that counsel be qualified[106] was considered in *Johnson v. Shreveport Garment Co.*[107] in which the court found the plaintiffs failed to comply with the prerequisites of rule 23(a)(4) because of the shortcomings of their attorney. They did not satisfy their obligation to prosecute the action vigorously and effectively.[108] The court analyzed the quality of representation at each stage of the proceeding. It found that the class was adequately represented at the pretrial stage, but that the discovery effort was inadequate,

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102. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177-79 (1974); P.D.Q. Inc. v. Nissan Motor Corp. in U.S.A., 61 F.R.D. 372, 377 (S.D. Fla. 1973).

103. 2 EMPL. PRAC. GUIDE (CCH) (13 Empl. Prac. Dec.) ¶ 11,527 at 6892 (N.D. Ga. Dec. 9, 1976).

104. ___ U.S. ___, 97 S. Ct. 1891, ___ L. Ed. 2d ___ (1977).

105. *Id.* at ___, 97 S. Ct. at 1893, ___ L. Ed. 2d ___.

106. Gonzales v. Cassidy, 474 F.2d 67, 72 (5th Cir. 1973); Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 562 (2nd Cir. 1968); Piva v. Xerox Corp., 70 F.R.D. 378, 389 (N.D. Cal. 1975).

107. 422 F. Supp. 526 (W.D. La. 1976). *See also* Parker v. Kroger, Inc., 2 EMPL. PRAC. GUIDE (CCH) (13 Empl. Prac. Dec.) ¶ 11,527 at 6892 (N.D. Ga. Dec. 9, 1976).

108. Johnson v. Shreveport Garment Co., 422 F. Supp. 526, 541 (W.D. La. 1976).

consisting of only one set of interrogatories and a request for documents. Furthermore, the attorneys failed at trial to make a cogent presentation of the evidence they produced, and produced no evidence at all in some crucial areas. For example, there was no explanation of the significance of a chart that was introduced into evidence, nor was there an explanation of the statistical evidence which was introduced. The court reviewed the considerations involved when it stated that:

> Counsel must have sufficient experience and training to satisfy the trial court that he or she will be a strenuous advocate for the class. Counsel need not come to court with a resume and character references with which to prove his effectiveness; rather, his or her conduct in pretrial matters, discovery and the trial itself will be evidence of his or her capability adequately to represent the class.[109]

Because of the attorney's failure to prepare and present an effective case, the court withdrew the certification of the class it had made prior to trial.[110]

It would be a violation of due process to bind absent class members to a judgment where their interests had not been effectively represented.[111] Rule 23(a) places the burden on the plaintiff to show that each of the prerequisites has been satisfied and the parties should make certain that the four requirements are considered separately.

Functional Categories of Class Actions—Rule 23(b)

Once a title VII class meets the section (a) prerequisites and is accordingly granted class certification, the court must determine which of the three types of rule 23(b) class actions it has before it. For our purposes, only (b)(2) and (b)(3) classes are relevant, since (b)(1) is designed for those cases in which the prosecution of separate actions would create a risk of inconsistent or varying adjudications. As a practical matter, no title VII class actions have been brought under subsection (b)(1).

Rule 23(b)(2) is designed for situations where the defendant is alleged to have acted in the same illegal manner toward all the class members, making injunctive relief appropriate. It requires that:

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109. *Id.* at 535.

110. *Id.* at 541. *See generally* Taub v. Glickman, 14 Fed. R. Serv. 2d 847 (S.D.N.Y. Dec. 1, 1970).

111. *See* Hansberry v. Lee, 311 U.S. 32, 40 (1940).

> [T]he 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.[112]

In title VII class actions the plaintiff normally alleges that the defendant has pursued a discriminatory policy and practice. The courts are authorized under title VII to order affirmative, injunctive or declaratory relief, with orders of back pay being discretionary, and, therefore, most title VII class action suits are brought under Rule 23(b)(2). However, since rule 23(b)(2) is not designed for actions which primarily seek monetary damages, there is uncertainty about whether a suit seeking both injunctive and monetary relief can still be maintained under rule 23(b)(2). In *Robinson v. Lorillard Corp.*,[113] the court held that even though a class action is brought pursuant to rule 23(b)(2), which is designed to provide declaratory and not monetary awards, the court still can award monetary damages tangential to declaratory relief.[114]

The Third Circuit in *Wetzel v. Liberty Mutual Ins. Co.*,[115] held that subdivision (b)(2) was applicable even though changed circumstances made injunctive relief inappropriate. The court stated that:

> Rather, the language describes the type of conduct by the party opposing the class which is subject to equitable relief by class action under (b)(2). . . . Liberty Mutual's policies at the time these charges were made were such that final injunctive relief was appropriate. This satisfies the language of the rule.[116]

Since subdivision (b)(2) is still inapplicable where the relief sought is predominately in the form of individual damages, a defendant should stress the monetary nature of the relief sought in order to gain the benefits of (b)(3).

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112. Fed. R. Civ. P. 23(b)(2).

113. 444 F.2d 791 (4th Cir.), *cert. denied*, 404 U.S. 1006 (1971).

114. *Id.* at 802. *See also* Senter v. General Motors Corp., 532 F.2d 511, 525 (6th Cir. 1976), *cert. denied*, 97 S. Ct. 182 (1976); Rich v. Martin Marietta Corp., 522 F.2d 333, 341-42 (10th Cir. 1975); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 251-54 (5th Cir. 1974); Guardians Ass'n, Inc. v. Civil Service Comm'n, 431 F. Supp. 526, 533 (S.D.N.Y. 1977); Carter v. Newsday, Inc., 2 EMPL. PRAC. GUIDE (CCH) (13 Empl. Prac. Dec.) ¶ 11,345 (E.D.N.Y. Sept. 22, 1976) (notice of class certification required); Rosario v. New York Times Co., 10 Empl. Prac. Dec. ¶ 10,450 at 5948 (S.D.N.Y. Oct. 9, 1975). *But see* Cooper v. Phillip Morris, Inc., 9 Empl. Prac. Dec. ¶ 9929 (W.D. Ky. Apr. 15, 1974); McAdory v. Scientific Research Instruments, Inc., 355 F. Supp. 468, 472 (D. Md. 1973).

115. 508 F.2d 239 (3rd Cir.), *cert. denied*, 421 U.S. 972 (1975).

116. *Id.* at 251.

Subdivision (b)(3) is appropriate where there are claims of individual relief, but common questions of law or fact nevertheless predominate.[117] The main distinction between (b)(3) and (b)(2) requirements is the word predominate. It would appear that this additional requirement is simply that there be sufficient common questions so as to effect a savings of judicial time and effort, thus justifying the class action.

In the past, defendants sought treatment under subdivision (b)(3) because that subdivision required each individual claimant to prove the extent of his claim, while in (b)(2) actions, damages were awarded to the class.[118] This distinction between class actions certified under subdivision (b)(2) and those certified under (b)(3) can be inferred from the United States Supreme Court's recent decision in *International Brotherhood of Teamsters v. United States.*[119] The Court held that for plaintiffs to obtain financial relief in any class action they must establish that they were the actual victims of post-Act hiring or transfer discrimination.[120] Thus, if the case reaches the issue of damages, each class member would have to appear before a special master before the individual damages could be calculated and awarded. This limitation of relief to specifically identifiable post-Act victims makes the decision to certify the class action as a (b)(2) or a (b)(3) less crucial to the defendants. The classification as a (b)(3) action is still desirable for the defendant because of the notice requirements of rule 23(c)(1) and (2).[121]

Title VII Class Action Limitations in Particular

Once the court has drawn the parameters of the class action pur-

117. Fed. R. Civ. P. 23(b)(3) states: "[T]he 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." *See* United States v. United States Steel Corp., 520 F.2d 1043, 1052 (5th Cir. 1975), *cert. denied,* 97 S.Ct. 61 (1976).

118. *See, e.g.,* Air Line Stewards & Stewardesses Ass'n, Local 550 v. American Airlines, Inc., 490 F.2d 636, 642-43 (7th Cir. 1973), *cert. denied,* 416 U.S. 993 (1974); Freeman v. Motor Convoy, Inc., 68 F.R.D. 196, 202-03 (N.D. Ga. 1975); Chrapliwy v. Uniroyal, Inc., 71 F.R.D. 461, 463 (N.D. Ind. 1974).

119. ___ U.S. ___, 97 S. Ct. 1843, ___ L. Ed. 2d ___ (1977).

120. *Id.* at ___, 97 S. Ct. at 1865, ___ L.Ed. 2d at ___.

121. Notice to the class prior to certification is a mandatory requirement for subdivision (b)(3) class actions, but discretionary in a (b)(2) action. This notice must be paid by the class representative as discussed above. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 167 (1974); *see* Burwell v. Eastern Airlines, Inc., 68 F.R.D. 495, 499-501 (E.D. Va. 1975) (notice was required). *But see* Badgett v. International Bhd. of Electrical Workers, 12 Fair Empl. Prac. Cas. 97, 98 (N.D. Ohio Dec. 19, 1975) (no notice was required).

suant to Rule 23(a) and (b), further limitations can be made upon the class membership because it is a title VII action.

In non-class action title VII suits, a plaintiff must first file charges with the EEOC, allowing the Commission to seek voluntary conciliation with the corporation before the plaintiff can bring suit in district court.[122] Though most courts of appeals had recognized the right to class remedies without exhaustion of administrative remedies as required in adjudication of an individual claim, the Supreme Court did not finally settle the question until recently. In *Albermarle Paper Co. v. Moody,*[123] the court indicated that Congress intended such construction of the Equal Employment Opportunity Act of 1972.

Under the principle established in *Hecht v. C.A.R.E., Inc.,*[124] however, the class of plaintiffs includes only those persons whose claims were not foreclosed by the statutes of limitations in title VII and who therefore could have filed charges with the EEOC on the same date as charges were filed by the representative plaintiffs.[125] Thus, since EEOC charges must be filed within 180 days of the occurrence of the alleged discriminatory act,[126] those persons who desire to be members of the class must be contesting actions which occurred within the same time as the cause of action of which the named plaintiff complains. The 180 day limit is extended to 300 days after the alleged unlawful employment practice occurred, if the action is initially filed with a state or local agency.[127] Not all members of an employee class need to file charges with the Commission in order to share in a recovery of back pay, but that filing will not be permitted to expand the substantive rights beyond those intended by Con-

122. *See* 42 U.S.C. § 2000e-5 (Supp. V 1975).

123. 422 U.S. 405, 414 n.8 (1975); *see, e.g.*, Head v. Timken Roller Bearing Co., 486 F.2d 870, 876 (6th Cir. 1973); Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 720-21 (7th Cir. 1969); Rosen v. Public Serv. Gas & Elec. Co., 409 F.2d 775, 780 (3d Cir. 1969); Local 186, Int'l Pulp, Sulphite & Paper Mill Workers v. Minnesota Mining & Mfg. Co., 304 F. Supp. 1284, 1286 (N.D. Ind. 1969).

124. 351 F. Supp. 305 (S.D.N.Y. 1972).

125. *Id.* at 310. *See also,* Mather v. Western Air Lines, Inc., 59 F.R.D. 535, 536-37 (C.D. Cal. 1973); Laffey v. Northwest Airlines, Inc., 12 Empl. Prac. Dec. ¶ 11,216 at 5630 (D.C. Cir. Oct. 20, 1976) (case contains an excellent discussion on point); Ostapowicz v. Johnson Bronze Co., 541 F.2d 394, 399 (3d Cir. 1976); Senter v. General Motors Corp., 532 F.2d 511 (6th Cir. 1976), *cert. denied,* 45 U.S.L.W. 3459 (Jan. 11, 1977); Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 246 (3rd Cir.), *cert. denied,* 421 U.S. 972 (1975).

126. 42 U.S.C. § 2000e-5(e) (Supp. V 1975).

127. *Id.*

gress in such an action. As the court of appeals stated in *Laffey v. Northwest Airlines, Inc.*:[128]

> That filing, it seems clear, however, cannot revive claims which are no longer viable at the time of the filing. Any other result would produce an anomaly. Time-barred members could not press their claims individually either before the Commission or judicial tribunals; and surely the employer's liability to them cannot be made to depend upon whether they come into court in a different character.[129]

In *Evans v. United Airlines,*[130] the Supreme Court indicated that only those who could have filed timely claims can be considered members of the class.[131]

Another limitation upon class actions peculiar to title VII concerns the allegations which a plaintiff has standing to raise in his complaint. As established in *Sanchez v. Standard Brands, Inc.*,[132] a plaintiff has standing for those title VII allegations raised in the initial charge lodged with the EEOC and those which reasonably stem from the resulting EEOC investigation. 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."[133] This simply guarantees that a company can only be sued for discriminatory practices which it had an opportunity to conciliate with the EEOC. At the same time, it should prevent a plaintiff from expanding the suit through the vehicle of class action.

Notice to the Class Members

Once the court has determined that a class action is appropriate, the question of notice of the action to the absent class members

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128. 12 Empl. Prac. Dec. ¶ 11,216 (D.C. Cir. Oct. 20, 1976).

129. *Id.* at 5629.

130. ___ U.S. ___, 97 S. Ct. 1885, ___ L. Ed. 2d ___ (1977). The Court stated:

> A discriminatory act which is not made the basis for a timely [dis]charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. It may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately considered, it is merely an unfortunate event in history which has no present legal consequences.

131. *Id.* at ___, 97 S. Ct. at 1889, ___ L. Ed. 2d at ___.

132. 431 F.2d 455 (5th Cir. 1970); *see, e.g.*, Atkinson v. Owens-Ill., Inc., 9 Empl. Prac. Dec. ¶ 10,155 at 7700 (N.D. Ga. Mar. 31, 1975); Equal Employment Opportunity Comm'n v. MFC Servs. (AAL), 10 Empl. Prac. Dec. ¶ 10,292 at 5195 (S.D. Miss. Mar. 20, 1975); Equal Employment Opportunity Comm'n v. Rexall Drug Co., 9 Empl. Prac. Dec. ¶ 9936 at 6930 (E.D. Mo. Dec. 12, 1974); Sagers v. Yellow Freight Sys., Inc., 388 F. Supp. 507, 514 (N.D. Ga. 1973), *aff'd as modified*, 529 F.2d 721 (5th Cir. 1976).

133. Sanchez v. Standard Brands, Inc., 431 F.2d 455, 466 (5th Cir. 1970).

arises. In a rule 23(b)(3) class action suit, notice to the potential class members is mandatory, affording each member of the class an opportunity to exclude himself from the res judicata effects of the class action.[134] Notice is only discretionary in a rule 23(b)(2) suit.

This further emphasizes the argument that claims for back pay, as opposed to injunctive relief, must be pursuant to rule 23(b)(3). Injunctive relief against a discriminatory practice or policy necessarily extends to all members of the class; a back pay order does not. On the other hand, monetary damages flow to individual class members only as each class member can demonstrate his own particular injury. Thus if class members were not apprised of the action which will determine their right to damages, serious due process issues would be raised.

Under rule 23(c), upon receiving notice, a potential class member need do nothing if he wishes to stay in the class. Otherwise he must make the effort to so notify the clerk of the court where the action lies. This scheme naturally and intentionally works to the detriment of a defendant in a class action suit, and it is clear that this was intended by the designers of rule 23.

The issue of the cost of the notice is a substantial one, since that burden as a matter of fact can determine the outcome of the litigation. Certification of a suit as a class action must be made prior to the determination of the liability of the defendant, therefore, the courts regularly assign the costs of mailing the notices to the plaintiff.[135]

In *Eisen v. Carlisle & Jacquelin,*[136] the United States Supreme Court said that the cost of mailing the notice must be borne by the plaintiff. In that case the plaintiff claimed to represent the class of all buyers and sellers of oddlots on the New York Stock Exchange from May 1, 1962 to June 30, 1966 in an antitrust action. The purported class numbered approximately six million, but the Court

134. Fed. R. Civ. P. 23(c)(2) provides:

In any class 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.

135. *See* Carter v. Newsday, Inc., 2 EMPL. PRAC. GUIDE (CCH) (13 Empl. Prac. Dec.) ¶ 11,345 at 6147 (E.D.N.Y. Sept. 22, 1976).

136. 417 U.S. 156 (1974).

nevertheless held that the plaintiff must bear the burden of notifying the individual members of the class "whose names and addresses may be ascertained through reasonable effort."[137]

If the class action order is made after the court has already determined that the plaintiff and the members of the class are entitled to injunctive relief, the cost of sending the class action notice might be borne by the defendant. This situation will only arise in a rule 23(b)(2) action, since notice is mandatory under rule 23(b)(3) and must be issued prior to determination of liability. As an example, the plaintiff in *Meadows v. Ford Motor Co.*[138] sought an injunction against the company practice of refusing to hire women. The notice was not intended to advise the class members of the existence of the action as required under rule 23(b)(3). It was intended, rather, to inform the court which persons desired to have their names entered in a pool for possible employment selection by the defendant, pursuant to the court's final judgment.[139] This appears to be the only situation in which absent class members would receive the notice subsequent to the determination of liability.

A court may determine that the absent class members in a rule 23(b)(2) action must be notified because of due process considerations. Notice should be required where it appears that the rights of such absent members would be prejudiced because they had no opportunity to assess the adequacy of the class representatives. In addition, unless absent class members are given the opportunity to be heard, collateral attacks upon the final judgment could be successful, thereby preventing final resolution of all claims against the defendant which is the main purpose of class certification. The necessity of notice in a (b)(2) action is determined on a case-by-case basis. For example, *Lewis v. Philip Morris, Inc.*[140] involved a challenge by a sub-class to a judgment in a previous title VII action which purportedly bound the challenging sub-class. The court held

137. *Id.* at 173. "Where, as here, the relationship between the parties is truly adversary, the plaintiff must pay for the cost of notice as part of the ordinary burden of financing his own suit." *Id.* at 178-79.

138. 62 F.R.D. 98 (W.D. Ky. 1973), *modified*, 510 F.2d 939 (6th Cir. 1975).

139. *Id.* at 101. *But see* Alexander v. AFCO Corp., 380 F. Supp. 1282, 1286 (N.D. Tenn. 1974) (court ruled class action could not continue, even though previously certified as such, since no notice was given to members).

140. 419 F. Supp. 345 (E.D. Va. 1976). *See also* Parker v. Kroger Co., 2 EMPL. PRAC. GUIDE (CCH) (13 Empl. Prac. Dec.) ¶ 11,527 at 6892 (N.D. Ga. Dec. 9, 1976) (notice necessary if requirements of 23(a) had been met); Muntz v. Ohio Screw Prods., 61 F.R.D. 396, 398 (N.D. Ohio 1973) (notice of settlement required where no class certification existed, but settlement would have been binding on a class of employees).

that notice to all members of the class should have been given in order to satisfy the due process claims. It noted that: There is a point at which judicial paternalism is simply inoperable, and the class members must be given the ability and the opportunity to assess the adequacy of their representatives themselves by being served with a proper notification of the proceeding and their options therein.[141]

Proof of Claim Form

Strategically, the effect of the opt-out notice can be counterbalanced by the use of a "proof of claim" form. The form is designed to instruct the court, as well as the parties, of the particular damages which each of the class members suffered. If it is not returned within a reasonable time, damages cannot be determined and will not be awarded to the class member. In *Arey v. Providence Hospital,*[142] the court explained the reason that a proof of claim form should be included with the notice in a title VII case.

> Nevertheless, this court believes feedback from the known class members would be instructive and aid the court by providing information as to the scope of the class and the scope and diversity of discrimination claims, thereby allowing the court to rule more intelligently in future determinations regarding the boundaries of the class, the need for sub-classes, or even a re-evaluation of the class status designation itself. In the court's mind, the fact that this action is brought under Title VII and involves individual rights championed in the public interest is supportive of the court's desire for as much information as possible before making rulings affecting these rights. Therefore, the court directs the plaintiffs to include in their notice to known class members a 'Proof of Claim' form which would allow these members an opportunity to set forth their particular claims of discriminatory employment practices and the circumstances surrounding such claims.[143]

The practice of including a proof of claim form along with the notice was approved in a number of non-title VII class action cases.[144] Other courts have approved the mailing of a proof of claim

141. Lewis v. Phillip Morris, Inc., 419 F. Supp. 345, 353 (E.D. Va. 1976).

142. 55 F.R.D. 62 (D.D.C. 1972).

143. *Id.* at 71-72. *See also* Robinson v. Union Carbide Corp., 538 F.2d 652, 663 (5th Cir. 1976).

144. *See, e.g.,* Korn v. Franchard Corp., 50 F.R.D. 57, 59 (S.D.N.Y. 1970); Minnesota v. United States Steel Corp., 44 F.R.D. 559, 577 (D. Minn. 1968). *See also* 3 B. MOORE'S FEDERAL PRACTICE ¶ 23.55 at 23-1161 (Supp. 1976-1977).

form with the notice after the exact determination of the class size has been made.[145] If the defendant requests that proof of claim forms be used, the burden is shifted to the class to prove its case.

Applicability of Rule 23 to Suits Brought By the EEOC

A final question which should be considered is whether rule 23 must be applied to a pattern or practice suit brought by the EEOC. These suits closely resemble class actions when the Commission seeks the same broad injunctive relief and damages for victims of discrimination as is sought by a private class action plaintiff. The defendant is at a great disadvantage if EEOC actions are not treated as class actions, because the absent "class members" are not bound by the judgment and the employer is open to additional liability on the same charges.

Many courts have held that rule 23 does not apply in a suit brought by the EEOC under title VII, and refuse to characterize these suits as class actions. Instead they view them as actions filed in the public interest for the elimination of unlawful employment practices.[146] The vindication of the public right to equal employment opportunity is considered more crucial than the award of damages or injunctive relief to the victims of discriminatory treatment.

Other courts have concluded that the EEOC acts as a class representative and have certified it under rule 23(c)[147] or have dismissed the action for failure to meet the prerequisites of Rule 23(a).[148] In *Equal Employment Opportunity Comm'n v. Datapoint Corp.*,[149] the

145. *See* Iowa v. Union Asphalt & Roadoils, Inc., 281 F. Supp. 391, 402 (S.D. Iowa 1968), *aff'd*, 408 F.2d 1171 (8th Cir. 1969); Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 43 F.R.D. 452, 462 (E.D. Pa. 1968); Harris v. Jones, 41 F.R.D. 70, 74 (D. Utah 1966).

146. Equal Employment Opportunity Comm'n v. CTS, Inc., [1976] LAB. REL. REP. (BNA) (13 Fair Empl. Prac. Cas.) 852, 853 (W.D.N.C. Sept. 7, 1976); Equal Employment Opportunity Comm'n v. Vinnell-Pravo-Lockheed-Mannix, 417 F. Supp. 575, 577 (E.D. Wash. 1976); Equal Employment Opportunity Comm'n v. Lutheran Hosp., 7 Empl. Prac. Dec. ¶ 9205 at 7009 (E.D. Mo. Jan. 29, 1974). *See also* Equal Employment Opportunity Comm'n v. General Elec. Co., 532 F.2d 359 (4th Cir. 1976) where the court stated: "the standing of the EEOC to sue under title VII cannot not be controlled or determined by the standing of the charging party to sue, limited as he is in rights to the vindication of his own individual rights." *Id.* at 373.

147. Equal Employment Opportunity Comm'n v. Datapoint, 412 F. Supp. 406, 409 (W.D. Tex. 1975) (court certified action to protect defendant from subsequent suits on same cause of action).

148. Niedhart v. D.H. Holmes Co., 2 Empl. Prac. Guide (CCH) (13 Empl. Prac. Dec.) (P) 11,336 at 6124 (E.D. La. Aug. 27, 1976), *aff'd sub. nom.* Equal Employment Opportunity Comm'n v. D.H. Holmes, Co., 556 F.2d 787 (5th Cir. 1977); Equal Employment Opportunity Comm'n v. Continental Oil Co., 393 F. Supp. 167, 170 (D. Colo. 1975).

149. 12 Fair Empl. Prac. Cas. 1133 (W.D. Tex. Sept. 15, 1975).

court certified the action pursuant to rule 23(c) in order to protect the defendant from subsequent suits by those "on whose behalf the Commission sues."[150] It distinguished cases seeking injunctive relief only, from those in which both injunctive relief and damages were the object. In the former type, the court indicated that class action certification would not be appropriate. In *Niedhart v. D.H. Holmes Co.*,[151] recently affirmed by the Fifth Circuit, the court similarly found that "due process, judicial economy, manageability, and fair play"[152] require that the safeguards of rule 23 must be afforded the defendant in actions by other plaintiffs.

Defendants should insist that certain minimal procedural safeguards under rule 23 be complied with in suits brought by the EEOC under Title VII. These include a definition of the alleged class of dicriminatees being represented by the Commission and notice to this absent class of each sigificant step of the litigation. For example, the absent class members should be notified at the time the suit is filed on their behalf, and when it is terminated, whether by judgment or otherwise. By insistence on these standards, the defendant can attempt to insure that private parties to any subsequent action will be bound by the suit brought on their behalf by the EEOC.

CONCLUSION

The law of class actions in the civil rights area appears to be entering a transitional stage. Previously, the Fifth Circuit's adoption of an "across-the-board" approach in title VII cases had the effect of creating logjams in the judicial system. One might attribute this to the possibility that the Fifth Circuit had little concern for the requirements of the Federal Rules of Civil Procedure.

Hopefully, the United States Supreme Court decision in *East Texas Motor Freight System, Inc. v. Rodriguez*,[153] alerted all the courts of appeals to the necessity of examining rule 23(a) requirements more closely. Indeed, the Court's decision in *International Brotherhood of Teamsters v. United States*[154] relative to applicants

150. *Id.* at 1134.

151. 2 EMPL. PRAC. GUIDE (CCH) (13 Empl. Prac. Dec.) ¶ 11,336 (E.D. La. Aug. 27, 1976), *aff'd sub. nom.* Equal Employment Opportunity Comm'n v. D.H. Holmes, Co., 556 F.2d 787 (5th Cir. 1977).

152. *Id.* at 6124.

153. ___ U.S. ___, 97 S. Ct. 1891, ___ L. Ed. 2d ___ (1977).

154. ___ U.S. ___, 97 S. Ct. 1843, ___ L. Ed. 2d ___ (1977).

and non-applicants and their entitlement to relief indicates that class-wide allegations will no longer satisfy rule 23(a) nor will they allow recovery in the damage portion of the lawsuit on a class-wide basis. The judicial system will be better served by the close application of rule 23(a) and individuals who are discriminated against will not suffer if they file timely charges of discrimination. Moreover, the future of title VII class litigation will require stricter compliance with the Federal rules and this ought to expedite the handling of legitimate claims of discrimination and hasten the removal of actions without merit.