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Federal Procedure - Standing of Class Representing Organizations - Smith v. The Bd. of Educ., 365 F.2d 770 (8th Cir. 1966)

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to *Reitman v. Mulkey* demonstrates that where any implications of a restrictive racial covenant is apparent the state cannot lend its support or give effect by its courts to such arrangements merely because they are not expressedly stated.

Gary E. Legner

Federal Procedure—STANDING OF CLASS REPRESENTING ORGANIZATIONS. In compliance with a previously valid non-discriminatory consolidation policy, the Morrilton, Arkansas, Board of Education dismissed all seven teachers of a Negro high school in order to implement a desegregation plan. This action brought by two of the Negro teachers, the Arkansas Teachers Association, Inc. (ATA), and the U.S. Government as intervenor, was an appeal[1] from a judgment of the U.S. District Court dismissing the complaint on its merits. The appellants sought an injunction requiring the employment of high school teachers without regard to race, and the reassignment of elementary teachers and pupils on a basis which disregards race. Alternatively, appellants sought relief by money damages, and the presentation and implementation of a plan of reorganization of the school system on a non-racial basis.[2]

The Court of Appeals, in holding that the Board of Education must give preference to the dismissed teachers in filling future vacancies also found that the ATA had standing as a party plaintiff to bring action on a constitutional question in behalf of its members.[3]

It is a general rule, that in order to have standing to litigate a constitutional question, one must be asserting the right in his own behalf;[4] and that a class action must be brought by a member of the class rather than, as here, by a class representing organization.[5] In the past, standing to representative organizations has only been allowed in absence of compliance with the above rules where:

(1) an attempt to assert rights as individuals might result in forfeiting the protection of those rights.[6]

1. Smith v. The Bd. of Educ., 365 F.2d 770 (8th Cir. 1966).

2. *Id.* at 773.

3. The court also reached the constitutional question involved holding the School Board's action deprived the plaintiffs of their constitutional rights under the fourteenth Amendment.

4. Fed. R. Civ. P. 17(a). Commented on in 3 J. MOORE, FEDERAL PRACTICE, Sec. 17.07 (2d ed. 1964). "An action shall be prosecuted in the name of the party who, by the substantive law, has the right sought to be enforced."

5. FED. R. CIV. P. 23(a).

6. NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 458-460 (1958).

(2) an organization litigates the scope of the constitutional protection afforded its members to act collectively.[7]
(3) courts have devolved upon parties a duty to protect constitutional rights of others and suit is instituted in performance of that duty.[8]

Here, the ATA falls in none of the defined categories.

In holding that the ATA had sufficient standing to bring the suit, the court declared that the general rule requiring a party to prosecute a constitutional right in his own behalf is only a rule of practice which may be outweighed by the need to protect fundamental rights.[9] Technical rules of representation must give way if the need under a broad constitutional policy is great enough.[10]

To substantiate the need in the instant case for a liberal evaluation of the requirement of standing, the court distinguished four pertinent factors:

(1) There is an element of deterrence, through fear of reprisal, when one makes his own assertion of constitutional rights.
(2) The possibility exists that the individual will lose interest in the litigation if and when he obtains other employment.[11]
(3) Integrated pupils possess appropriate concern about racial allocation of faculty.[12]
(4) The ATA is faced with the possibility that dismissals will adversely affect it as an entity through the loss of its membership and financial support.[13]

In holding that the ATA had standing as a real party in interest to bring an action on behalf of Negro school teachers, the court also decided indirectly the question of whether a class action can be brought by an association which is not technically an individual member of the class. They dismissed the objection found in 23(a) of the Federal Rules

7. NAACP v. Button, 371 U.S. 415 (1963).
8. Brewer v. Hoxie School District No. 46, 238 F.2d 91 (8th Cir. 1956).
9. Barrows v. Jackson, 346 U.S. 249, 257 (1953).
10. The court is vague in its definition of what constitutes sufficient need, but it can be seen that in an emotional area such as civil rights, the need would be sufficiently great.
11. Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 64-65, n.6 (1963).
12. Rogers v. Paul, 382 U.S. 198, 200 (1965); Bradley v. School Board, 382 U.S. 103, 105 (1965).
13. *Supra*, note 4.

of Civil Procedure requiring a class action to be brought by a member of the class by saying that because the ATA was found to be a real party in interest under 17(a) of the Federal Rules, it was also a proper party under 23(a).[14]

Consequently, the court, in the case at bar, has sparked a controversy because, by its own admission, the case "does not fit precisely certain of the categories in this area where standing has been recognized."

The need to protect fundamental rights seems to be the key concept behind the court's rationale in the instant case. This decision appears to be a restatement of the court's power to determine what the representation criterion shall be. In so doing it affirms the equitable right to shirk off blind adherence to technical rules when the needs of the public are at stake and, thereby, helps to preserve and maintain flexibility in the law.

Robert Wick

Workmen's Compensation—RECOVERY FOR FEDERAL PRISONERS UNDER FEDERAL TORTS CLAIMS ACT. Demko, a prisoner in the Federal Penitentiary at Lewisburg, Pennsylvania, was injured on March 12, 1962 while performing assigned maintenance work. He was awarded compensation[1] under the statutory provision for compensation of inmates so injured.[2] Subsequently, the respondent brought this action against the United States under the Federal Tort Claims Act[3] in the Federal District Court which entered judgment in favor of the respondent. The Court of Appeals for the Third Circuit affirmed,[4] finding that here compensation was not an exclusive remedy, thus holding contra to the view adopted by the Court of Appeals for the Second

14. 3 J. MOORE, FEDERAL PRACTICE, § 23.04, at 3419 (2d ed. 1964).

1. On his release from prison, Demko was to be awarded $180 per month to continue so long as his disability continued which was later increased to $245.31 per month.

2. "The Corporation . . . is authorized to employ the fund and any earnings that may accrue to the corporation as operating capital in performing the duties imposed by this chapter; in the repair, alteration, erection and maintenance of industrial or other assignments; in paying under rules and regulation promulgated by the Attorney General, compensation to inmates employed in any industry, or performing outstanding services in institutional operations, and compensation to inmates or their dependents for injuries suffered in any industry or in any work activity in connection with maintenance or operation of the institution where confined. In no event shall compensation be paid in a greater amount than that provided in the Federal Employees' Compensation Act." 18 U.S.C. § 4126 (1948), as amended, 18 U.S.C. § 4126 (1961).

3. 28 U.S.C. § 1346 (b) (1946).

4. Demko v. United States, 350 F.2d 698 (3rd Cir. 1965).