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Processing the Explosion in Title VII Class Action Suits: Achieving Increased Compliance with Federal Rule of Civil Procedure 23(a)

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PROCESSING THE EXPLOSION IN TITLE VII CLASS ACTION SUITS: ACHIEVING INCREASED COMPLIANCE WITH FEDERAL RULE OF CIVIL PROCEDURE 23(a)

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Rule 23(a) of the Federal Rules of Civil Procedure contains four prerequisites to class action lawsuits. The rule provides that one or more members of a class may sue as a class representative 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.[1]

Judicial opinions have adopted the following shorthand to summarize these requirements: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation.[2] When a class action is initiated a federal court must measure the claims of the representative plaintiff against these requirements and must deny class certification to the suit unless the plaintiff satisfies each facet of the rule.[3]

In class action suits alleging violations of Title VII of the Civil Rights Act of 1964,[4] the Act's optimistically broad goal of eliminating all vestiges of employment discrimination[5] often conflicts with Rule 23's policy of protecting unrepresented, unnamed persons against potentially unfair res judicata consequences.[6] Efforts to re-

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1. FED. R. CIV. P. 23(a)(1)-(4). *See* 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 1762-1765 (1972). In addition to meeting the requirements of Rule 23(a), the action must satisfy Rule 23(b). FED. R. CIV. P. 23(b). *See* notes 110-16 *infra* & accompanying text.

2. *See* 7 C. WRIGHT & A. MILLER, *supra* note 1, §§ 1762-1765.

3. *See id.* § 1765.

4. 42 U.S.C.A. §§ 2000e to 2000e-17 (1974 & Supp. 1977) [hereinafter cited as Title VII]. Title VII prohibits employment discrimination on the basis of sex, race, color, national origin, or religion. *See* 42 U.S.C.A. § 2000e-2 (1974).

5. *See* 4 H. NEWBERG, NEWBERG ON CLASS ACTIONS § 7973a (1977).

6. *See* Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 562 (2d Cir. 1968), *vacated and re-*

solve the inherent conflict between these two policies have been stymied by the typical ad hoc determination of Title VII class status.[7] Consequently, interpretations of Rule 23(a) in Title VII class actions have not been uniform[8] and offer little guidance to the proper application of Rule 23(a)'s requirements to such actions.[9]

Faced with this conflict, many courts have relaxed the procedural requirements of Rule 23(a) to facilitate redress of Title VII violations.[10] As the courts recognized the Equal Employment Opportunity Commission's shortcomings in enforcing the Civil Rights Act[11]

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manded on other grounds, 417 U.S. 156 (1974) ("[C]ourts have expressed particular concern for the adequacy of representation in a class suit because the judgment conclusively determines the rights of absent class members."); Harriss v. Pan Am. World Airways, Inc., 74 F.R.D. 24, 42 (N.D. Cal. 1977); 7 C. WRIGHT & A. MILLER, *supra* note 1, § 1762, at 595; § 1765, at 617; § 1771, at 665 n.62.

Class members are not the only group whose interests are protected by Rule 23. If the class representative adequately represents the class, other class members will be bound by res judicata and thus will be precluded from bringing subsequent suits alleging that the employer's policies are discriminatory. *See, e.g.*, Lewis v. Philip Morris, Inc., 419 F. Supp. 345 (E.D. Va. 1976); Arey v. Providence Hosp., 55 F.R.D. 62, 68 (D.D.C. 1972). Thus, defendants also may benefit from class action designation: if the defendant prevails in a class action suit, he is insulated from further suits alleging the same discriminatory practices, but in the absence of class action designation, he may be subject to innumerable suits predicated on the same allegedly discriminatory policies. *See* Comment, *To What Extent Can a Court Remedy Classwide Discrimination in an Individual Suit Under Title VII?*, 20 ST. LOUIS U. L.J. 388, 390 & n.17 (1976) [hereinafter cited as *Classwide Discrimination*].

7. Note, *Representative Party Need Only Show Sufficient Nexus with Class for Title VII Class Actions to Continue*, 10 U. RICH. L. REV. 394, 401 (1976) [hereinafter cited as *Representative Party*]. *See also* Comment, *Continuation and Representation of Class Actions Following Dismissal of the Class Representative*, 1974 DUKE L.J. 573, 575.

8. *See Classwide Distrimination, supra* note 6, at 407.

9. *See Representative Party, supra* note 8, at 401.

10. Employment discrimination suits generally have received more liberal treatment than other types of class actions. *See* Comment, *The Class Action and Title VII—An Overview*, 10 U. RICH. L. REV. 325, 326 (1976) [hereinafter cited as *Class Action*]. *See also* 4 H. NEWBERG, *supra* note 5, § 7984, at 1302; 3B MOORE'S FEDERAL PRACTICE ¶ 23.10-1 (2d ed. 1974) [hereinafter cited as MOORE'S]; 7 C. WRIGHT & A.MILLER, *supra* note 1, § 1771, at 662-63. Although a complaint in an employment discrimination suit may be phrased in personal terms, "if the relief requested is applicable to a class *and is requested for such class*, the court will look beyond the individual claims to determine if the suit involves an overall attack on forbidden discrimination." Comment, *Class Actions and Title VII of the Civil Rights Act of 1964: The Proper Class Representative and the Class Remedy*, 47 TUL. L. REV. 1005, 1008 (1973). Despite the liberal treatment accorded employment discrimination suits, no court has explicitly excused the representative plaintiff from proving that all the requirements of Rule 23 are satisfied. Janofsky, *Class Actions Under Title VII*, 27 LAB. L.J. 323 (1976).

11. *See* 4 H. NEWBERG, *supra* note 5, § 7973a, at 1268. The EEOC recently has been subjected to extensive congressional criticism. *See* HOUSE SUBCOMM. ON EQUAL OPPORTUNITIES, STAFF REPORT ON OVERSIGHT INVESTIGATION OF FEDERAL ENFORCEMENT OF EQUAL EMPLOYMENT OPPORTUNITY LAWS, H.R. DOC. NO. 342-1, 94th Cong., 2d Sess. 11 (1976). In addition to the

they concluded that the only effective way to implement the Act's provisions was through private litigation.[12] Many of these courts have reasoned further that redressing prejudicial employment practices through class actions is more efficient than by the more cumbersome method of individual discrimination suits.[13] Thus, class action plaintiffs alleging broad charges of employment discrimination have been permitted to challenge every discriminatory employment practice of an employer, although the named plaintiffs have been injured by only one particular practice.[14] This approach, widely known by the term "across-the-board," enables plaintiffs aggrieved by an allegedly discriminatory discharge, for example, to represent not only other discharged employees but also employees allegedly discriminated against by the employer's hiring, job assignment, promotion, seniority, and discipline systems.[15] Similarly, former employees have been allowed to represent past, present, and future employees, whose allegations of employment discrimination necessarily would differ from those of the plaintiff.[16]

The development of the across-the-board approach has resulted in a superficial analysis of the requirements of Rule 23(a) by some

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failure of the EEOC to develop a "vigorous and orderly system for rooting out patterns and practices of employment discrimination," the subcommittee characterized the EEOC's litigation and compliance activities as "weak . . . largely ineffective [and] . . . poorly coordinated." *Id.*

12. *See* 4 H. NEWBERG, *supra* note 5, § 7973a, at 1268. Although a Title VII plaintiff's access to the courts is restricted by such requirements as that his complaint first must be filed with the EEOC, "this does not minimize the role of ostensibly private litigation in effectuating the congressional policies. To the contrary, this magnifies its importance while at the same time utilizing the powerful catalyst of conciliation through EEOC." Jenkins v. United Gas Corp., 400 F.2d 28, 32 (5th Cir. 1968).

Prior to Title VII's 1972 amendments providing enforcement authority to the EEOC, courts were more justified in permitting broadly-framed private actions because enforcement was limited, as a practical matter, to private individuals. The Department of Justice was the only governmental agency charged with enforcing the Act by seldom-used "pattern and practice" suits. Hence, private individuals were permitted to vindicate the public interest as "private attorney generals." *See, e.g.*, Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 715 (7th Cir. 1969); Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 499 (5th Cir. 1968); Jenkins v. United Gas Corp., 400 F.2d 28, 33 n.10 (5th Cir. 1968). Courts have not re-examined this concept, however, since the EEOC's acquisition of enforcement power.

13. *See* 4 H. NEWBERG, *supra* note 5, §§ 7973a, 7984, at 1301.

14. *See id.* § 7973b.

15. *See, e.g.*, Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969) (error to allow a discharged employee to represent only other discharged employees); Janofsky, *supra* note 10, at 325; cases cited note 38 *infra*.

16. Some courts have permitted rejected applicants to represent a class of the defendant employer's present employees. *See, e.g.*, Carr v. Conoco Plastics, Inc., 423 F.2d 57 (5th Cir. 1970).

courts, which have adopted the view that employment discrimination suits by definition are class actions[17] because the evil sought to be eliminated is typically class-oriented.[18] A danger inherent in substituting this conclusory approach for a thorough analysis of the named plaintiffs' allegations, however, is that the procedural prerequisites of Rule 23 tend to be ignored completely rather than merely relaxed or applied liberally and that the broad res judicata effects of a class action certification consequently are overlooked. One writer even has suggested that the procedural "obstacles" and "technicalities" of the rule are superfluous and should be disregarded in the Title VII context so as to effectuate congressional intent.[19]

Confronted with inconsistent lower court rulings regarding the applicability of Rule 23(a)'s requirements, the United States Supreme Court undertook review of a class certification order issued by the Fifth Circuit. In *East Texas Motor Freight System, Inc. v. Rodriguez*[20] the Supreme Court reversed the court of appeal's ruling and reinstated the findings of the district court that the named plaintiffs' class claims were without merit because "it was evident by the time the case reached that court that the named plaintiffs were not proper class representatives [inasmuch as they] were not members of the class of discriminatees they purported to repre-

17. *See, e.g.*, Georgia Power Co. v. EEOC, 412 F.2d 462, 468 (5th Cir. 1969) ("Discriminiation on the basis of race or sex is *class discrimination.*"); Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 499 (5th Cir. 1968) ("Racial discrimination is by definition class discrimination . . . ."); McLendon v. M. David Lowe Personnel Servs. Inc., 15 Fair Empl. Prac. Cas. 245, 247 (S.D. Tex. 1977); Hall v. Werthan Bag Corp., 251 F. Supp. 184, 186 (M.D. Tenn. 1966) ("Racial discrimination is by definition a class discrimination. If it exists, it applies throughout the class."); 3B MOORE'S, *supra* note 10, ¶ 23.10-1, at 23-2762 & n.4; *Classwide Discrimination, supra* note 6, at 392.

18. *See* note 4 *supra*. One commentator has stated: "Title VII discrimination is classwide discrimination because the operation of a discriminatory employment policy against an individual necessarily presents a question common to all persons possessing the class characteristic that precipitated the employer's unlawful action." *Classwide Discrimination, supra* note 6, at 392. In Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969), the leading case espousing this view, the court stated: "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 [such as] race, sex, religion or national origin." *Id.* at 719. The Courts of Appeals for the Fifth and Eighth Circuits also have adopted this position. *See* Parham v. Southwestern Bell Tel. Co., 433 F.2d 421, 428 (8th Cir. 1970); Georgia Power Co. v. EEOC, 412 F.2d 462, 468 (5th Cir. 1969); Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 499 (5th Cir. 1968).

19. *See Classwide Discrimination, supra* note 6, at 408.

20. 431 U.S. 395 (1977). For a discussion of *Rodriguez*, see notes 120-30 *infra* & accompanying text.

sent."[21] Referring implicitly to Rule 23(a)'s requirements of typicality and commonality, the Court in *Rodriguez* reiterated its position that "a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members."[22]

Although the scope of *Rodriguez* is uncertain because of its highly atypical facts, the Court clearly rejected an unrestrained application of the across-the-board approach:

> We are not unaware that suits alleging racial or ethnic discrimination are often by their very nature class suits, involving classwide wrongs. Common questions of law or fact are typically present. *But careful attention to the requirements of Fed. Rule Civ. Proc. 23 remains nonetheless indispensable.* The mere fact that a complaint alleges racial or ethnic discrimination does not in itself ensure that the party who has brought the lawsuit will be an adequate representative of those who may have been the real victims of that discrimination.[23]

To assess the impact of *Rodriguez* on future developments in the law, this Article undertakes an investigation of the background and development of both the broad and restrictive applications of Rule 23(a) in Title VII litigation. After identifying the differences in each approach, the Article then attempts to trace the development and to identify the current status of the law pertaining to the certification of Title VII class action suits in the Fourth Circuit.

Across-The-Board Class Allegations of Employment Discrimination

An early leading case approving the across-the-board approach to class action suits was *Johnson v. Georgia Highway Express, Inc.*,[24] in which a discharged employee sought to attack on behalf of all black employees all the defendant's allegedly discriminatory practices. The Fifth Circuit held that the district court improperly narrowed the scope of the Title VII class action to persons discharged by the defendant.[25] The court of appeals determined that the named

21. *Id.* at 403.
22. *Id.* (quoting Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 216 (1974)).
23. 431 U.S. at 405-06 (emphasis supplied).
24. 417 F.2d 1122 (5th Cir. 1969).
25. *Id.* at 1124.

plaintiff's across-the-board attack on the defendant's employment practices challenged a system-wide policy of racial discrimination, and it permitted the named plaintiff to seek relief against any rule, regulation, custom, or practice having a discriminatory effect.[26]

As a result of this ruling, Title VII plaintiffs have been allowed to attack all of an employer's allegedly discriminatory policies on behalf of other protected individuals, although the representative plaintiff was aggrieved by only one of the employer's practices.[27] Across-the-board challenges have been sustained by the Fourth,[28] Fifth,[29] Sixth,[30] Eighth,[31] and Tenth[32] Circuits.[33] The Fifth Circuit, however, has contributed most to the development of this form of relief to rectify employment discrimination.[34]

The widespread adoption of the across-the-board approach often resulted in courts routinely certifying classes simply on the basis of an allegation of pervasive employment discrimination, with little or no discussion of Rule 23(a)'s procedural prerequisites.[35] Thus, gen-

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26. *Id.*

27. *See, e.g.*, McLendon v. M. David Lowe Personnel Servs. Inc., 15 Fair Empl. Prac. Cas. 245 (S.D. Tex. 1977) (rejected applicants permitted to represent other Mexican-Americans and blacks who were employed or who might either seek or actually receive future employment); Walker v. Styrex Indus., 15 Fair Empl. Prac. Cas. 274 (M.D.N.C. 1976) (discharged blacks allowed to represent all blacks who either have been or might be affected by defendant's unlawful employment policies). Both *McLendon* and *Walker* deemed unnecessary the requirement that the named plaintiff be affected adversely by each challenged employment practice pursuant to which he brings a class action claim on behalf of other injured employees. *See also* Blake v. Los Angeles, 435 F. Supp. 55 (C.D. Cal. 1977). *But see* Oatis v. Crown Zellerbach Corp., 398 F.2d 496 (5th Cir. 1968) (plaintiff's class action claims limited to those practices affecting him personally).

28. *See, e.g.*, Barnett v. W.T. Grant Co., 518 F.2d 543 (4th Cir. 1975).

29. *See, e.g.*, Long v. Sapp, 502 F.2d 34 (5th Cir. 1974); Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969).

30. *See, e.g.*, Afro Ameican Patrolmen's League v. Duck, 503 F.2d 294 (6th Cir. 1974); Tipler v. E.I. duPont de Nemours & Co., 443 F.2d 125 (6th Cir. 1971).

31. *See, e.g.*, Reed v. Arlington Hotel Co., 476 F.2d 721 (8th Cir.), *cert. denied*, 414 U.S. 854 (1973); Parham v. Southwestern Bell Tel. Co., 433 F.2d 421 (8th Cir. 1970).

32. Rich v. Martin Marietta Corp., 522 F.2d 333 (10th Cir. 1975).

33. For additional cases adopting and rejecting the across-the-board approach, see 3B MOORE'S, *supra* note 10, ¶ 23.06-1, at 23-303 (Supp. 1977-78). In Taylor v. Vocational Rehabilitation Center, 13 Fair Empl. Prac. Cas. 452, 455 (W.D. Pa. 1976), a Pennsylvania district court adopted the approach while noting the Third Circuit's silence on the subject.

34. Recognizing the Fifth Circuit's sensitivity to the often subtle manifestations of employment discrimination, the court in Mack v. General Elec. Co., 329 F. Supp. 72 (E.D. Pa. 1971), considered that court of appeals the most expeienced and most qualified tribunal to remedy Title VII violations through such means as across-the-board relief. *Id.* at 74-76.

35. *See, e.g.*, Hill v. Singing Hills Funeral Home, 17 Fair Empl. Prac. Cas. 151 (N.D. Tex. 1978); McLendon v. M. David Lowe Personnel Servs. Inc., 15 Fair Empl. Prac. Cas. 245 (S.D.

eral allegations of sexual or racial employment discrimination have been held sufficient to satisfy the commonality and typicality requirements[36] and to permit the named plaintiff, although adversely affected by only one employment practice, to represent a class consisting of all persons affected by the employer's racially or sexually discriminatory policies.[37] In *Scott v. University of Delaware*,[38] for example, a black sociology professor, whose contract was not renewed, was allowed to represent a class of blacks affected by the defendant's allegedly discriminatory recruitment, hiring, promotion, wage, supervision, and discharge policies. In support of its decision, the court merely stated than an individual suffering employment discrimination because of his race was an adequate representative of other victims of the defendant's racially discriminatory practices, regardless of the manner in which he or the others had been injured.[39] The plaintiff ultimately was permitted to represent a class consisting of the past, present, and future black employees.[40]

In *Lamphere v. Brown University*[41] a female assistant professor of anthropology, who was denied tenure and a promotion, filed a Title VII class action on behalf of all past, present, and future female

Tex. 1977); Walker v. Styrex Indus., 15 Fair Empl. Prac. Cas. 274 (M.D.N.C. 1976); Jones v. United Gas Improvement Corp., 385 F. Supp. 420 (E.D. Pa. 1975); note 27 *supra*. *See also* cases cited notes 36-37 *infra*.

36. Harris v. Anaconda Alum. Co., 17 Fair Empl. Prac. Cas. 181 (N.D. Ga. 1978). *See also* Presseisen v. Swarthmore College, 71 F.R.D. 34 (E.D. Pa. 1976), in which the court concluded that an across-the-board allegation of permeating employment discrimination on the basis of sex satisfied both the commonality and typicality requirements of Rule 23(a). Accordingly, the court allowed the plaintiff-teacher with a sex discrimination complaint based on the college's failure to renew her contract to represent women allegedly aggrieved by policies regarding hiring, recruitment, discharge, promotion, wages, and job assignment.

37. *See, e.g.*, Barnett v. W.T. Grant Co., 518 F.2d 543 (4th Cir. 1975) (black employee who was denied promotion allowed to represent blacks allegedly discriminated against by the defendant's other employment practices); Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969) (discharged black employee could represent other black employees injured by defendant's hiring, firing, promotion, and other allegedly discriminatory practices); Presseisen v. Swarthmore College, 71 F.R.D. 34 (E.D. Pa. 1976) (female plaintiff who was denied reappointment permitted to represent women allegedly discriminated against by the defendant's recruitment, hiring, job assignment, promotion, compensation, and termination policies). *But see* Taylor v. Safeway Stores, Inc., 524 F.2d 263 (10th Cir. 1975) (plaintiff only allowed to represent other blacks employed in the warehouse in which he previously worked); White v. Gates Rubber Co., 53 F.R.D. 412 (D. Colo. 1971) (discharged plaintiff could represent only those other employees discharged because of their race or color).

38. 68 F.R.D. 606 (D. Del. 1975).

39. *See id.* at 608.

40. *Id.*

41. 71 F.R.D. 641 (D.R.I. 1976).

faculty members throughout the university. Although the defendant argued that the plaintiff could not represent female faculty members in other departments or who allegedly were injured by the university's decisions relating to hiring or promotion at non-tenured levels, the court rejected this view. Instead, it accepted the plaintiff's argument than an across-the-board allegation of sex discrimination was sufficiently common and typical of other types of employment discrimination claims based on sex to enable her to represent other women who might have suffered from differing manifestations of the single policy of discrimination.[42] Thus, the court allowed the plaintiff not only to challenge allegedly discriminatory policies not affecting her but also to cross departmental lines and to represent rejected applicants as well as past, present, and future employees.[43]

The court in *Lamphere* noted that no court of appeals had expressly rejected the across-the-board approach, although several district courts had either refused or failed to adopt it.[44] Nevertheless, the requirements of Rule 23(a) remain, despite the tendency of some courts using this approach to overlook them. Although some courts confronted with allegations of pervasive employment discrimination apparently do not undertake any examination of the Rule's procedural prerequisites, at least a perfunctory analysis is discernible among other courts that have certified broad-based class actions under Title VII. An analysis of how these latter cases have treated Rule 23(a) follows.

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42. *See id.* at 647. Although the court permitted the plaintiff to represent women in other departments who were the alleged victims of the university's discrimination, it nevertheless acknowledged cases such as Knox v. Meat Cutters, 11 Fair Empl. Prac. Cas. 1327 (E.D. La. 1975), in which another court had declined to certify an interdepartmental class action because the claims of the named plaintiff lacked a sufficient nexus with those of class members in other departments. The court in *Lamphere* explained, however, that "'nexus is a matter depending on the facts and circumstances presented in each case'" and that those cases failing to certify classes consisting of employees from various departments were distinguishable from the present situation. 71 F.R.D. at 647 (quoting 11 Fair Empl. Prac. Cas. at 1330). *See also* Sanday v. Carnegie-Mellon Univ., 17 Fair Empl. Prac. Cas. 562 (W.D. Pa. 1976), in which the court distinguished a university from a centrally-managed corporation in that decisions by university officials were not always made pursuant to a centralized, uniform policy.

43. 71 F.R.D. at 651.

44. *Id.* at 645 n.5.

Judicial Treatment of the Requirements of Rule 23(a) by Courts Adopting the Across-the-Board Approach

(1) Numerosity

As defined in Rule 23(a)(1), numerosity refers to a class "so numerous that joinder of all [its] members is impracticable."[45] Because the rule does not list a specified number of class members, however, application of this prerequisite has been inconsistent, and the results have been divergent particularly when potential class members number between ten and one hundred.[46] Subjective judgments by courts as to whether a specific number of potential class members would make joinder impractical have caused these mixed decisions and have provided little guidance to potential class representatives contending with Rule 23(a)(1)'s requirement of numerosity.[47]

Nevertheless, a few courts have attempted to analyze whether the numerosity requirement has been met in a given case.[48] Some guide-

45. FED. R. CIV. P. 23(a)(1).

46. In the following cases, the class was sufficiently numerous to satisfy the requirement: Arkansas Educ. Ass'n v. Board of Educ., 446 F.2d 763 (8th Cir. 1971) (approximately 17 class members); Cypress v. Newport News Gen. & Nonsectarian Hosp. Ass'n, 375 F.2d 648 (4th Cir. 1967) (18 in race discrimination case); Taylor v. Vocational Rehabilitation Center, 13 Fair Empl. Prac. Cas. 452 (W.D. Pa. 1976) (minimum of 45 in sex discrimination case); Hoston v. United States Gypsum Co., 67 F.R.D. 650 (E.D. La. 1975) (56 in race discrimination case); Watson v. City of New Orleans, 12 Fair Empl. Prac Cas. 1625 (E.D. La. 1974) (78 in race discrimination case); Tippett v. Liggett & Myers Tobacco Co., 11 Fair Empl. Prac. Cas. 1289 (M.D.N.C. 1973) (22 in sex discrimination case); Sabala v. Western Gillette, Inc., 362 F. Supp. 1142 (S.D. Tex. 1973) (26 in race discrimination case).

Other courts, however, when presented with potential classes within this same range have denied class certification. *See, e.g.,* Roman v. ESB, Inc., 550 F.2d 1343 (4th Cir. 1976) (53 in race discrimination case); Moore v. Consolidation Coal Co., 13 Fair Empl. Prac. Cas. 305 (E.D. Tenn. 1976) (13 female applicants for employment); Bowen v. Banquet Foods Corp., 12 Fair Empl. Prac. Cas. 1345 (E.D. Mo. 1975) (14 women challenging company's maternity policies); Carey v. Greyhound Bus Co., 11 Fair Empl. Prac. Cas. 1403 (E.D. La. 1975) (24-26 employees challenging seniority system as racially discriminatory); Dawkins v. Nabisco, Inc., 5 Fair Empl. Prac. Cas. 1374 (N.D. Ga. 1973) (10 in race discrimination case); Berg v. Richmond Unified School Dist., 11 Fair Empl. Prac. Cas. 1278 (N.D. Cal. 1973) (12 women in pregnancy benefits case); Tolbert v. Western Elec. Co., 56 F.R.D. 108 (N.D. Ga. 1972) (11 in race and sex discrimination case).

47. Some courts have decided the numerosity issue merely on the basis of the number of members potentially belonging to the class. *See, e.g.,* Hoston v. United States Gypsum Co., 67 F.R.D. 650 (E.D. La. 1975); Bowen v. Banquet Foods Corp., 12 Fair Empl. Prac. Cas. 1345 (E.D. Mo. 1975); Watson v. City of New Orleans, 12 Fair Empl. Prac. Cas. 1625 (E.D. La. 1974); Dawkins v. Nabisco, Inc., 5 Fair Empl. Prac. Cas. 1374 (N.D. Ga. 1973); Tippett v. Liggett & Myers Tobacco Co., 11 Fair Empl. Prac. Cas. 1289 (M.D.N.C. 1973).

48. As the number of class members decreases, the courts, before granting class certification, usually place greater reliance on the plaintiff's satisfaction of the other requirements of

lines were provided by *Sabala v. Western Gillette, Inc.*,[49] in which the District Court for the Southern District of Texas suggested the following factors as relevant in determining whether the joinder of all class members is impracticable—"the expediency of the joinder of all the potential plaintiffs, the inconvenience of trying individual suits, and the ability of the individual litigants to institute an action on their own behalf."[50]

(2) Commonality

Interpretations of Rule 23(a)(2)'s requirement that "there are questions of law or fact common to the class,"[51] similar to the judicial treatment of numerosity, have lacked uniformity.[52] Because neither the rule nor the accompanying Advisory Committee Note[53] specify the degree of the similarity required among class members' claims to present a common question,[54] inconsistent results are inevitable.[55] When presented with an across-the-board attack on an employer's policies, some courts simply have avoided analyzing this issue,[56] concluding instead that such a challenge necessarily raises common questions of law or fact.[57] Moreover, this element of Rule

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Rule 23(a). Exemplifying this approach is Cypress v. Newport News Gen. & Nonsectarian Hosp. Ass'n, 375 F.2d 648 (4th Cir. 1967), in which the court noted: "No specified number is needed to maintain a class action under FED. R. CIV. P. 23; application of the rule is to be considered in light of the particular circumstances of the case and generally, unless abuse is shown, the trial court's decision on this issue is final." *Id.* at 653; *accord,* Carey v. Greyhound Bus Co., 11 Fair Empl. Prac. Cas. 1403 (E.D. La. 1975); Tolbert v. Western Elec. Co., 56 F.R.D. 108 (N.D. Ga. 1972).

49. 362 F. Supp. 1142 (S.D. Tex. 1973).

50. *Id.* at 1147; *accord,* Advertising Special Nat'l Ass'n v. FTC, 238 F.2d 108, 119 (1st Cir. 1958) (" 'Impracticability' does not mean 'impossibility,' but only the difficulty or inconvenience of joining all members of the class.").

51. FED. R. CIV. P. 23(a)(2).

52. *See* 4 H. NEWBERG, *supra* note 5, § 7980, at 1290. *See generally* 3B MOORE'S, *supra* note 10, ¶ 23.06-1 (2d ed. 1974 & Supp. 1977-78).

53. *See* Advisory Comm. Note, 39 F.R.D. 98 (1966).

54. *See Developments in the Law — Class Actions,* 89 HARV. L. REV. 1318, 1454 (1976) [hereinafter cited as *Developments in the Law*].

55. *See* Advisory Comm. Note, 39 F.R.D. 98 (1966), which states: "In practice, the terms 'joint,' [and] 'common,' . . . which were used as the basis of the Rule 23 classification proved obscure and uncertain . . . . The courts had considerable difficulty with these terms." *Id.*

56. *See* 3B MOORE'S, *supra* note 10, ¶ 23.06-1; 4 H. NEWBERG, *supra* note 5, § 7980.

57. *See, e.g.,* Rich v. Martin Marietta Corp., 522 F.2d 333 (10th Cir. 1975); Barnett v. W.T. Grant Co., 518 F.2d 543 (4th Cir. 1975); Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239 (3d Cir.), *cert. denied,* 421 U.S. 1011 (1975); Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969); Norwalk CORE v. Norwalk Redev. Agency, 395 F.2d 920 (2d Cir. 1968);

23(a) arguably is superfluous because the existence of common questions is an implicit factor in the four alternative requirements of Rule 23(b), one of which also must be satisfied before a class action will be certified.[58]

Even among courts adhering to a liberal application of Rule 23(a)'s tests, however, a perfunctory analysis of commonality generally is made, but the inquiry has been simply whether the representative plaintiff's claims have some aspect or feature in common with those of the other class members.[59] Allegations of employment discrimination on the basis of sex[60] or race[61] have been held adequate to satisfy this lenient standard. Obviously, adopting this approach obviates the necessity of examining the employer's different practices to determine the similarities between individual class members' claims and those of the named plaintiff.

In *Harriss v. Pan American World Airways, Inc.*,[62] however, the

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Pendleton v. Schlesinger, 73 F.R.D. 506 (D.D.C. 1977); Alaniz v. California Food Processors, Inc., 73 F.R.D. 269 (N.D. Cal. 1976); Presseisen v. Swarthmore College, 71 F.R.D. 34 (E.D. Pa. 1976).

58. *See* 3B MOORE'S, *supra* note 10, ¶ 23.06-1, at 23-301; 4 H. NEWBERG, *supra* note 5, § 7980; 7 C. WRIGHT & A. MILLER, *supra* note 1, § 1763, at 609-10.

59. These cases hold that Rule 23(a)(2) does not require that the plaintiff's claims mirror completely those of the class; rather his complaint must share only some features in common with those of other class members. Thus, one court has observed:

> In passing on commonality, it is not appropriate to examine the likeness or relation of the several claims of all members of the class and their representatives. The only proper inquiry is, as the language suggests, whether there is some aspect or feature of the claims which is common to all. In any complaint alleging across-the-board discrimination, this requirement will be met.

Pendleton v. Schlesinger, 73 F.R.D. 506 (D.D.C. 1977). Other courts, at least implicitly, have adopted the same standard. *See, e.g.*, Senter v. General Motors Corp., 532 F.2d 511 (6th Cir.), *cert. denied*, 429 U.S. 870 (1976); Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969); Hall v. Werthan Bag Corp., 251 F. Supp. 184 (N.D. Tenn. 1966).

60. *See, e.g.*, Mecklenburg v. Montana State Bd. of Regents, 13 Fair Empl. Prac. Cas. 462 (D. Mont. 1976) ("the common issue of law and fact is the question of discrimination on the basis of sex"); Martinez v. Bechtel Corp., 11 Fair Empl. Prac. Cas. 898 (N.D. Cal. 1975) (plaintiff's allegations of discrimination raise questions common to members of the class). *See generally* 3B MOORE'S, *supra* note 10, ¶ 23.10-1, at 23-2765 & n.12.

61. *See, e.g.*, Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969) in which the court stated: "While it is true . . . that there are different factual questions with regard to different employees, it is also true that the 'Damoclean threat of a racially discriminatory policy hangs over the racial class [as] a question of fact common to all members of the class.'" *Id.* at 1124 (quoting Hall v. Werthan Bag Corp., 251 F. Supp. 184 (M.D. Tenn. 1966)). *See also* Marshall v. Electric Hose & Rubber Co., 68 F.R.D. 287 (D. Del. 1975); 3B MOORE'S, *supra* note 10, ¶ 23.10-1, at 23-2765 to 67 & n.12. One writer has concluded that "individual discrimination because of race is evidence of a policy of discrimination, which present[s] a common question." *Id.* at 23-2767 n.12.

62. 74 F.R.D. 24 (N.D. Cal. 1977).

court repudiated the liberal across-the-board approach on the commonality issue. The District Court for the Northern District of California concluded that a representative plaintiff must satisfy the commonality requirement and that a mere conclusory claim of racial or sexual discrimination was insufficient for this purpose; instead, a demonstration of the existence of specific grounds applicable and common to the entire class was necessary.[63] The court specified several criteria relevant to its inquiry: (1) Is the nature of the alleged unlawful employment practice one that affects only one or several employees, or is it one genuinely having a class-wide effect?[64] (2) Are the employment practices uniform or diverse?[65] (3) Is the class membership uniform, or is it diverse?[66] (4) Is the nature of the employer's management organization such that uniform policies are fostered?[67] (5) Does the time span covered by the allegations justify the inference "that similar conditions prevailed throughout the period?"[68]

These criteria certainly are pertinent to any determination of whether common questions of law or fact exist; they should be developed further and applied in other situations. Notwithstanding an increased reliance on these criteria, general principles governing the commonality issue still will be difficult to discern because the final determination turns upon the facts of each case.[69] A guideline suggested by *Harriss,* though, is that class membership should neither extend beyond "the bounds of the group shown to have been commonly affected; nor should the class be so narrowly drawn as to exclude others who would clearly be entitled to the same relief were the plaintiff to prevail."[70]

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63. *Id.* at 41.

64. *Id.*

65. *Id.* Considerations relevant to this determination include:

> Size of the work force; number of plants and installations involved; extent of diversity of employment conditions, occupations and work activities; degree of geographic dispersion of the employees and of intra-company employee transfers and interchanges; degree of decentralization of administration and supervision as opposed to the degree of local autonomy.

Id.

66. *Id.* This criterion should be considered "in terms of the likelihood that the members' treatment will involve common questions." *Id.*

67. *Id.* The degree of centralization is relevant to determining the probability of uniform employment and personnel practices. *Id.*

68. *Id.*

69. *See id.*

70. *Id.*

3. *Typicality*

Rule 23(a)(3) mandates that "the claims or defenses of the representative parties [be] typical of the claims or defenses of the class."[71] The perceived overlap between this provision and the other subsections of Rule 23(a) has led courts to ignore the typicality requirement completely[72] or to equate it either with the commonality requirement of Rule 23(a)(2)[73] or with the adequacy of representation requirement of Rule 23(a)(4).[74] Moreover, as with the commonality requirement, many courts presented with an across-the-board challenge have held that a generalized allegation of discrimination on the basis of sex[75] or race[76] establishes that the named

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71. FED. R. CIV. P. 23(a)(3).

72. *See, e.g.*, Pendleton v. Schlesinger, 73 F.R.D. 506, 509 (D.D.C. 1977); 7 C. WRIGHT & A. MILLER, *supra* note 1, § 1764, at 612.

73. *See, e.g.*, Piva v. Xerox Corp., 70 F.R.D. 378, 385 (N.D. Cal. 1975) ("commonality and typicality are so closely related that . . . they will be considered together"). *See also* Ruhe v. Philadelphia Inquirer, 14 Fair Empl. Prac. Cas. 1304 (E.D. Pa. 1975); 3B MOORE'S, *supra* note 10, ¶ 23.06-2, at 23-325; 4 H. NEWBERG, *supra* note 5, § 7983, at 1297.

74. *See, e.g.*, Women's Comm. for EEO v. NBC, 71 F.R.D. 666, 670 (S.D.N.Y. 1976)(equating typicality with one of the frequently adopted tests for adequacy of representation, the court considered whether "the representative parties and the other members of the class have no interests adverse to each other"); 3B MOORE'S, *supra* note 10, ¶ 23.06-2, at 23-326; 4 H. NEWBERG, *supra* note 5, § 7983, at 1296-97.

75. *See, e.g.*, Women's Comm. for EEO v. NBC, 71 F.R.D. 666, 670 (S.D.N.Y. 1976) ("If women in any position within the companies or unions have been denied opportunities *because they are women*, their claims are typical."); Ruhe v. Philadelphia Inquirer, 14 Fair Empl. Prac. Cas. 1304 (E.D. Pa. 1975).

In Kyriazi v. Western Elec. Co., 13 Fair Empl. Prac. Cas. 1342 (D.N.J. 1975), the defendant argued that the plaintiff's claim was atypical because unlike most of the other class members, she had been an engineer, and because whereas her employment had been terminated, the other proposed class members were job applicants. Although the court conceded that the plaintiff's claims "may be viewed as non-typical," it nevertheless certified the suit as a class action. *Id.* at 1343. Despite the acknowledged differences between the plaintiff's claims and those of the other class members, the court concluded that an allegation of general discrimination on the basis of sex satisfied the requirement of typicality. *See id.* at 1344. Similarly, in Piva v. Xerox Corp., 70 F.R.D. 378 (N.D. Cal. 1975), the court permitted the representative plaintiff to maintain a class action on behalf of other women whose claims as a class were broader than the plaintiff's individual claims. *Id.* at 387-88. In support of its decision the court noted that "the commonality and typicality requirements of Rule 23(a)(2) and (3) [should] be liberally applied in order to permit a Title VII plaintiff to challenge employment practices that are related but not identical to the practices which directly affected the plaintiff individually." *Id.* at 388.

76. *See, e.g.*, Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1124 (5th Cir. 1969) ("In this case it is clear that the appellate is a member of the class, i.e., a discharged Negro employee of the appellee, and his claim of racial discrimination is typical of the claims of the class."); Richerson v. Fargo, 61 F.R.D. 641, 642-43 (E.D. Pa. 1974); Mack v. General Elec. Co., 329 F. Supp. 72, 76 (E.D. Pa. 1971).

plaintiff's claims are typical of those of the class. Thus, instead of comparing the effects of the challenged policies on the representative plaintiff and the class members to determine whether typical claims in fact are present, these courts have accepted as sufficient evidence of typicality a mere allegation of discrimination on the basis of a class characteristic.[77]

Other courts do not emphasize the coextensiveness of the claims at all; instead, the possibility that the plaintiff and the class members occupy conflicting positions negates typicality. Under this rationale denial of class action status is warranted "when the legal or factual position of the representatives is markedly different from that of other members, even though common issues of law or fact are raised."[78] Most relevant to this inquiry is whether the plaintiff's interests are significantly antagonistic to those of the class members, such that "the potential for rivalry and conflict within the class is [so] substantial [as] to jeopardize the interests of class members."[79] This standard may be applied inappropriately in the context of the typicality requirement, however, because a determination of the adversity of the plaintiff's claim to those of the class is an analysis that is encompassed sufficiently by the adequacy of representation provision of Rule 23(a)(4).[80]

(4) Adequacy of Representation

The imperative of Rule 23(a)(4) that the representative plaintiff

77. "[T]he courts have held that typicality is satisfied simply from an allegation of discriminatory treatment against the class, of which the named plaintiff is a member." Ruhe v. Philadelphia Inquirer, 14 Fair Empl. Prac. Cas. 1304, 1309 (E.D. Pa. 1975). *See* cases cited notes 75-76 *supra;* 4 H. NEWBERG, *supra* note 5, § 7983.

78. Pendleton v. Schlesinger, 73 F.R.D. 506, 509 (D.D.C. 1977) (quoting 7 C. WRIGHT & A. MILLER, *supra* note 1, § 1764, at 614). One treatise has criticized this approach as constituting a mere restatement of the commonality requirement. According to the treatise, the standard relates to the "nature of the class and the homogeneity of its claims, rather than to the characteristics of the claims of the representative party." 3B MOORE'S, *supra* note 10, ¶ 23.06-2, at 64 (Supp. 1977-78).

79. Marshall v. Electric Hose & Rubber Co., 68 F.R.D. 287, 291-92 (D. Del. 1975); *accord,* Kolta v. Tuck Indus., Inc., 11 Fair Empl. Prac. Cas. 142, 144 (S.D.N.Y. 1975) (plaintiff's claims considered typical when no potential conflict exists between plaintiff and class members).

80. *See* 7 C. WRIGHT & A. MILLER, *supra* note 1, § 1764. Use of the coextensiveness standard as a test of typicality, however, is appropriate to buttress a finding of a lack of adversity or antagonism between the named plaintiff and the class members and thus to add further assurance that the named representative will represent the class adequately. *See id.* § 1769, at 656-57.

"will fairly and adequately protect the interests of the class"[81] generally has been interpreted to encompass at least two criteria: first, the plaintiff's counsel must be competent to conduct the litigation and must vigorously prosecute the suit, which must not be collusive; second, the plaintiff's interests must not be antagonistic to those of the other class members.[82] An occasional third criterion enumerated is that the interests of the representative must be coextensive with those of the class, an inquiry more appropriate to Rule 23(a)(2) or (3).[83]

The first criterion contemplated by the requirement of adequate representation, that the plaintiff's counsel is qualified and will prosecute the case vigorously, generally is presumed unless the court is presented with evidence to the contrary.[84] Its purpose is to elimi-

81. FED. R. CIV. P. 23(a)(4). This subsection has been characterized as "perhaps the most crucial requirement because the judgment will conclusively determine the rights of absent members." Harriss v. Pan Am. World Airways, Inc., 74 F.R.D. 24, 42 (N.D. Cal. 1977).

82. *See, e.g.*, Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 247 (3rd Cir.), *cert. denied*, 421 U.S. 1011 (1975); Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 562 (2d Cir. 1968), *vacated and remanded on other grounds*, 417 U.S. 156 (1974); Harriss v. Pan Am. World Airways, Inc., 74 F.R.D. 24, 43 (N.D. Cal. 1977); Presseisen v. Swarthmore College, 71 F.R.D. 34, 45 (E.D. Pa. 1976); Cottrell v. Virginia Elec. & Power Co., 62 F.R.D. 516, 521 (E.D. Va. 1974); 4 H. NEWBERG, *supra* note 5, § 7984; 7 C. WRIGHT & A. MILLER, *supra* note 1, § 1765, at 619. *See also* Sosna v. Iowa, 419 U.S. 393, 403 (1975) ("[W]here it is unlikely that segments of the class appellate represents would have interests conflicting with those she has sought to advance, and where the interests of that class have been competently urged at each level of the proceeding, . . . the test of Rule 23(a) is met.").

83. *See, e.g.*, Advertising Special Nat'l Ass'n v. FTC, 238 F.2d 108, 119 (1st Cir. 1958). Interpretations of this standard have varied. A coincidence of interests usually is deemed sufficient to insure adequate representation. *See, e.g.*, Driver v. Helms, 74 F.R.D. 382, 403 (D.R.I. 1977) (quoting Mersay v. First Republic Corp., 43 F.R.D. 465, 469 (S.D.N.Y. 1968)) ("'adequacy of representation' also means that 'the interests of the representative party must coincide with those of the class'"). *See also* Cottrell v. Virginia Elec. & Power Co., 62 F.R.D. 516, 521 (E.D. Va. 1974); Adderly v. Wainwright, 46 F.R.D. 97, 98 (M.D. Fla. 1968). Therefore, although coextensiveness generally does not require that the claims of the representative and the class members be identical, those parties nevertheless "should share common objectives and legal or factual positions." Fertig v. Blue Cross, 68 F.R.D. 53, 57 (N.D. Iowa 1974). Other courts, however, have required that the claims of the class representative be identical to those of the members. *See, e.g.*, Farmers Co-op. Oil Co. v. Socony-Vacuum Oil Co., 133 F.2d 101, 105 (8th Cir. 1942) ("Since in the present case the rights of the plaintiff and of its stockholders are not identical, it cannot be said that they belong to the same class nor that the plaintiff can act for them."); cases cited in 7 C. WRIGHT & A. MILLER, *supra* note 1, § 1769 n.31 (1972 & Supp. 1977). Basically a duplication of the requirement of typicality, the coextensiveness of the plaintiff's and the class members' claims more often is analyzed in that context. *See* 3B MOORE'S, *supra* note 10, ¶ 23.02-3.

84. *See* 4 H. NEWBERG, *supra* note 5, § 7984d. In evaluating the competency of counsel, the court will consider the "personal qualities of counsel, such as sincerity and tenacity, diligence, and experience and technical competence in the particular type of litigation." *Id.* (footnotes omitted).

nate the possibility of collusion between the plaintiff and the defendant.[85] The issue of vigorous prosecution rarely is raised,[86] but when it is asserted the plaintiff must sustain only a minimal burden of proof: he need not show that a majority of the class members authorized the litigation or considered his representation adequate.[87]

The conflict of interest component of Rule 23(a)(4) is intended to deny class action status in situations in which the antagonism between the representative and the class is fundamental, such as when the conflict concerns the subject matter of the suit.[88] Courts generally presume a lack of conflict between the representative and the class members.[89] In addition, if an irreconcilable conflict is manifest, a number of courts have divided the class into subclasses either before or subsequent to the commencement of the actual litigation in an attempt to preserve the class action.[90] Some courts have treated the standing requirements as a test of the adequacy of representation and have denied representative status to plaintiffs whose claims were not timely. These courts have insisted only that the

85. *See id.*

86. *See id.*

87. "[T]he representative party cannot be said to have an affirmative duty to demonstrate that the whole or a majority of the class considers his representation adequate. Nor can silence be taken as a sign of disapproval." Moss v. Lane Co., 50 F.R.D. 122, 125 (W.D. Va. 1970) (quoting Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 563 (2d Cir. 1968), *vacated and remanded on other grounds*, 417 U.S. 156 (1974)).

88. *See, e.g.*, Arkansas Educ. Ass'n v. Board of Educ., 446 F.2d 763, 767 (8th Cir. 1971); Redmond v. Commerce Trust Co., 144 F.2d 140, 151 (8th Cir.), *cert. denied*, 323 U.S. 776 (1944).

89. *See* 4 H. NEWBERG, *supra* note 5, § 7984a. To uphold a class designation, doubts often are resolved in favor of a lack of conflict. *See id.*

90. *See, e.g.*, Harriss v. Pan Am. World Airways, Inc., 74 F.R.D. 24, 45 (N.D. Cal. 1977); Bryan v. Amrep Corp., 429 F. Supp. 313, 317 (S.D.N.Y. 1977); *cf., e.g.*, Carr v. Conoco Plastics, Inc., 423 F.2d 57, 58 (5th Cir. 1970) ("[I]f upon [a] hearing on the merits it appears that persons who might otherwise be included in this 'class' have an adverse interest to protect, the trial court can realign the parties."); Hecht v. Cooperative for Am. Relief Everywhere, Inc., 351 F. Supp. 305, 313 (S.D.N.Y. 1972) ("If the necessity for establishing subclasses of individuals with diverse interests becomes apparent in the future, the court has power to make appropriate provisions to protect the interests of all."). Other approaches available in the event of a conflict include limiting the class to individuals whom the plaintiff would represent adequately, *see* Bryan v. Amrep Corp., 429 F. Supp. 313, 317 (S.D.N.Y. 1977); White v. Gates Rubber Co., 53 F.R.D. 412, 414 (D. Colo. 1971), or increasing the number of named plaintiffs to include others similarly situated and to insure the adequate representation of the entire class. *See* Sullivan v. Winn-Dixie Greenville, Inc., 62 F.R.D. 370, 376 (D.S.C. 1974); First Am. Corp. v. Foster, 51 F.R.D 248, 250 (N.D. Ga. 1970). If fair representation cannot be achieved, the court may dismiss the class action and still decide the individual claims. *See* Duncantell v. Houston, Tex., 333 F. Supp. 973, 974 (S.D. Tex. 1971). *See generally* 7 C. WRIGHT & A. MILLER, *supra* note 1, § 1765, at 623-25 nn.50-54.

91. *See, e.g.*, Jenkins v. General Motors Corp., 354 F. Supp. 1040, 1044 (D. Del. 1973) (employee discharged 4 ½ years prior to suit and not seeking reinstatement had no personal

named plaintiff and the class members share common legal or factual positions[92] because "[i]f the interests the class representative is protecting for himself individually are substantially coextensive with the interests of the members of the class [the] representative will ordinarily be an adequate protector of the interests of the class."[93]

(5) Requirements of Rule 23(b)

In addition to satisfying the four criteria of Rule 23(a), a suit must meet one of the three requirements of Rule 23(b) to be certified as a class action. Rule 23(b) provides:

> An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
> (1) The prosecution of separate actions by or against individual members of the class would create a risk of
> (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy

interest in suit's outcome and therefore was an inadequate class representative); Tolbert v. Danield Constr. Co., 332 F. Supp. 772, 775 (D.S.C. 1971) (because plaintiff had not worked for defendant within past three years, he could not "fairly and adequately protect the interests of the class"). *See also* Hyatt v. United Aircraft Corp., Sikorsky Aircraft Div., 50 F.R.D. 242, 245 (D. Conn. 1970); 4 H. NEWBERG, *supra* note 5, § 7984b.

92. *See* note 83 *supra.*

93. Newman v. AVCO Corp., 7 Fair Empl. Prac. Cas. 385, 390 (M.D. Tenn. 1973).

> already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.[94]

Although most Title VII suits can be certified under either subsection (b)(2) or (b)(3), the overwhelming majority of courts hold that class action status is appropriate under subsection (b)(2).[95] Certification under Rule 23(b)(2) generally is preferable because the judgment will be binding on all class members.[96] The requirement of Rule 23(b)(3) that notice be given to all reasonably identifiable members of a class,[97] because it increases tremendously the representative plaintiff's costs,[98] further buttresses courts' predilection to permit the maintenance of class actions under 23(b)(2). Moreover, courts have reasoned that Title VII suits are particularly amenable to (b)(2) treatment because "the drafters of Rule 23 specifically contemplated that suits against discriminatory hiring and promotion policies would be appropriately maintained under (b)(2)."[99]

The tendency of most courts in Title VII suits to certify class actions under Rule 23(b)(2), rather than under 23(b)(3), however, may unfairly bar judicial relief to individuals who have suffered

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94. FED. R. CIV. P. 23(b).

95. *See, e.g.*, Senter v. General Motors Corp., 532 F.2d 511, 525 (6th Cir.), *cert. denied*, 429 U.S. 870 (1976) ("Lawsuits alleging classwide discrimination are particularly well suited for 23(b)(2) treatment since the common claim is susceptible to a single proof and subject to a single injunctive remedy."). *See generally* 3B MOORE'S, *supra* note 10, ¶ 23.40; 7A C. WRIGHT & A. MILLER, *supra* note 1, § 1776.

96. As noted in 3B MOORE'S, *supra* note 10, ¶ 23.31[3]:

> If an action can be maintained under (b)(1) and/or (b)(2), and also under (b)(3), the court should order that the suit be maintained as a class action under (b)(1) and/or (b)(2), rather than under (b)(3), so that the judgment will have res judicata effect as to all the class . . . and not defeat the policy underlying the (b)(1) and (b)(2) class suits.

97. Rule 23(c)(2) provides that if a court certifies a class action under Rule 23(b)(3), it "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." FED. R. CIV. P. 23(c)(2). Although the giving of notice is mandatory in a Rule 23(b)(3) class action, the court in its discretion may determine the type of notice necessary in a particular case. 7A C. WRIGHT & A. MILLER, *supra* note 1, § 1786, at 139-40. Courts in their discretion also may order notice in a Rule 23(b)(1) or (b)(2) suit. *See* 3B MOORE'S, *supra* note 10, ¶ 23.45[1], at 23-704.

98. *See* 7A C. WRIGHT & A. MILLER, *supra* note 1, § 1786, at 148.

99. Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 250 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975). *See also* Van Gemert v. Boeing Co., 259 F. Supp. 125, 130-31 (S.D.N.Y. 1966); Advisory Comm. Note, 39 F.R.D. 98 (1966); Comment, *Rule 23: Categories of Subsection (b)*, 10 B.C. INDUS. & COM. L. REV. 539, 544 (1969).

from the same defendant's discriminatory employment practices. Frivolous suits certified under Rule 23(b)(2) preclude legitimate discriminatees from suing the employer if the representative plaintiff loses after a full trial on the merits.[100] Theoretically, the more frivolous the suit, the less difficulty the defendant will have in prevailing through an exposure of the claim's weakness. Thus, broad class certification is a two-edged sword: it can serve a valuable remedial and social function in appropriate circumstances, but it also presents a risk that potentially valid claims subsequently may be barred. The magnitude of this detrimental effect, of course, increases in direct proportion to the breadth of the class certified. Although courts should not blindly shift to a more frequent use of Rule 23(b)(3) to certify Title VII class actions, they should guard against unfair res judicata effects by exercising great care in certifying broad classes.

(6) Consequences of Across-the-Board Class Actions

The proliferation of across-the-board cases has caused many plaintiff's attorneys to perceive any Title VII claim as a potential class action. For example, a woman may be discharged or assigned to a different job because a visual handicap impedes her ability to perform exceedingly minute electronic plant assembly functions. She could file an across-the-board sex discrimination suit, alleging that her demotion or termination was a pretext for sex discrimination against her and the defendant's other female employees, applicants, and past employees. Such a tactic would unduly burden the defendant, who would confront a lawsuit whose dimensions had been distorted far beyond its true nature as a unique and individual, rather than a systematic, claim. Certain complaints, such as allegations of a discriminatory pension plan or segregated facilities, inherently may be of a class nature, even if stated on an individual basis, and others may fall into a "gray area." Nevertheless, many purported Title VII class actions originate from individual grievances involving no possible implications of systematic discrimination. Such frivolous class claims should be eliminated early in the judicial process, certainly before the time of trial and even before full-scale discovery on the merits has begun. This practice not only

100. *See* Tolbert v. Western Elec. Co., 56 F.R.D. 108, 114 (N.D. Ga. 1972); Arey v. Providence Hosp., 55 F.R.D. 62, 68 (D.D.C. 1972).

would spare defendants from the oppressive burdens associated with litigating needless class actions, but it also would free the plaintiff's claim from a class action's procedural complexities and delays.[101]

Several characteristics unique to the class action device operate to prejudice a defendant's position and to increase the probability that he will lose on the merits of the case. For example, a class action will not be dismissed merely because the named plaintiff's claim is adjudged invalid[102] or has become moot.[103] Moreover, participation in the litigation is not limited to those who have filed timely charges of employment discrimination with the EEOC: the named plaintiff may represent other minority group members who allegedly have suffered from employment discrimination, although their complaints were not the subject of either an EEOC investigation

101. For example, a plaintiff could become unwillingly "locked into" a class action, even before class certification, in a case that he wished to settle or dismiss. In McArthur v. Southern Airways, 15 Fair Empl. Prac. Cas. 1123 (5th Cir. 1977), the Fifth Circuit held that the trial court erred in permitting the plaintiffs, who had initiated their Title VII suit as a class action, to delete their class claims, although they sought to dismiss those allegations under FED. R. CIV. P. 15(a) before the defendant had filed a responsive pleading. Some form of notice pursuant to FED. R. CIV. P. 23(e) had to be given absentee class members prior to the dismissal or settlement of the proposed class action. 15 Fair Empl. Prac. Cas. at 1127.

102. *See, e.g.*, Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239 (3rd Cir.), *cert. denied*, 421 U.S. 1011 (1975); Huff v. N.D. Cass Co., 485 F.2d 710 (5th Cir. 1973); Reed v. Arlington Hotel Co., 476 F.2d 721 (8th Cir.), *cert. denied*, 414 U.S. 854 (1973). In *Huff* the district court found that the plaintiff, who alleged that he was discriminatorily discharged, was not a proper class representative because his dismissal resulted from unacceptable performance rather than from discrimination. The court consequently refused to allow the plaintiff to maintain a class action on behalf of legitimate discriminatees. 485 F.2d at 712. The Fifth Circuit, however, asserted that "the standard for determining whether a plaintiff may maintain a class action is not whether he will ultimately prevail on his claim," and held that the district court erred in denying class certification to the suit. *Id.* at 712. According to the court of appeals, the district court should use its evidentiary hearing on the plaintiff's ability to represent the class to "find out" about the plaintiff's claim without discovering "too much" about it. *Id.* at 714.

103. *See* Franks v. Bowman Transp. Co., 424 U.S. 747, 754 n.7 (1976) ("Title VII claims of unnamed class members are not automatically mooted merely because the named representative is determined to be ineligible for relief for reasons peculiar to his individual claim.") (citations omitted); Sosna v. Iowa, 419 U.S. 393, 402 (1975) ("[T]he controversy may exist, however, between a named defendant and a member of the class represented by the named plaintiff, even though the claim of the named plaintiff has become moot.").

If the plaintiff could not longer maintain a class action once his claim became moot, the defendant could defeat all class actions simply by granting the representative plaintiff the individual relief sought. By preventing the plaintiff from acting as a "private attorney general," such a practice would frustrate the effectuation of the broad social policy underlying Title VII. *See* Jenkins v. United Gas Corp., 400 F.2d 28, 32-33 (5th Cir. 1968). *See generally* 7A C. WRIGHT & A. MILLER, *supra* note 1, § 1776, at 42.

or conciliation attempt.[104]

These conditions, in combination with the success of across-the-board cases, have encouraged the instigation of class action suits under Title VII.[105] Unquestionably, the certification as a class action of an individual's allegation of discrimination increases the defendant's exposure and thereby adds leverage to the plaintiff's claim.[106] The sudden and often dramatic increase in the number of plaintiffs multiplies considerably the potential damage award. Companies defending class action employment discrimination suits frequently confront the risk of spectacularly large judgments and awards of

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104. *See, e.g.*, Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 498 (5th Cir. 1968). Recognizing that requiring numerous employees with the same grievance to file individual complaints with the EEOC would be wasteful, the court in *Oatis* concluded that permitting one aggrieved person to file with the EEOC and to bring suit on behalf of those similarly situated would be more efficient. *Id.* at 498. This approach, however, apparently conflicts with Title VII's policy that discriminatees allow their claims under the Act to be the subjects of administrative investigations and conciliation efforts before they resort to litigation. *See id.* at 497-98; *accord*, Jenkins v. United Gas Corp., 400 F.2d 28, 30 (5th Cir. 1968); Alleman v. T.R.W., Inc., 13 Fair Empl. Prac. Cas. 982, 984 (M.D. Pa. 1974) ("The objective of the EEOC is to rectify unlawful employment practices without first resorting to civil suits.") (citations omitted); Arey v. Providence Hosp., 55 F.R.D. 62, 66 (D.D.C. 1972) ("Congress intended that the EEOC have a chance to investigate informally and hopefully conciliate discrimination charge . . . prior to litigating those charges in Federal Court.").

In Wheeler v. American Home Prods. Corps., 16 Fair Empl. Prac. Cas. 157 (5th Cir. 1977), the Fifth Circuit went further to hold that otherwise untimely Title VII claims could be litigated even in the absence of class action status. The court considered the issue of whether intervenors in a class action, which later is determined not to be maintainable as such, are each required to satisfy Title VII's jurisdictional requirements before proceeding on a back pay claim, or "whether it is sufficient if one of the original plaintiffs had satisfied such requirements." *Id.* at 161. The court noted that an individual in a Title VII action must satisfy two jurisdictional requirements: first, he must file his charge with the EEOC; second, pursuant to 42 U.S.C.A. § 2000e-5(f)(1) (1974), he must wait until the EEOC finds reasonable cause to believe his charge and fails to conciliate with the defendant, dismisses his complaint, or retains its jurisdiction over the charge for more than 180 days. Members of a class action, however, need not comply with these jurisdictional prerequisites to receive a back pay award or injunctive relief. Relying on the congressional intent that back pay should be awarded to eliminate pervasive discrimination, the court failed to discern any rationale that could justify the awarding of back pay to class members while denying that relief to intervenors in situations when neither group had complied with the statutory jurisdictional requirements. 16 Fair Empl. Prac. Cas. at 162. Accordingly, the court permitted the intervenors to assert their claims for back pay, although they had not filed charges with the EEOC. *Id.*

105. By far the greatest number of class actions brought in the federal courts in recent years have been civil rights suits. Of the 12,016 class action suits brought during the fiscal years 1973-1976, 6,137 were civil rights class actions. *See* [1974, 1975, 1976] DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS ANN. REPS. The percentage increase in civil rights class action suits from 1975 to 1976 was 17.1%. *See* [1976] DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURT ANN. REP.

106. *See* H. NEWBERG, *supra* note 5, § 1214.

attorneys' fees.[107] Substantial legal fees will be generated regardless of the disposition of the case.[108] Thus, the considerations in defending a Title VII class action are somewhat different from those in defending many other types of lawsuits. The defendant's realistic objective is not to win at any expense but, rather, to minimize its own short-term legal, clerical, administrative, and executive costs[109]

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107. Awards of attorneys' fees in class action suits often are huge in comparison to the usually nominal damage awards received by the individual class members. *See Developments in the Law, supra* note 54, 1604 & n.111. In one private antitrust treble-damages class action, attorneys were awarded over five million dollars. *See* Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 47 F.R.D. 557 (E.D. Pa. 1969). Nearly $200,000 was awarded to attorneys in an action challenging the hiring and promotion practices of the Philadelphia Police Department. *See* Pennsylvania v. O'Neill, 431 F. Supp. 700 (E.D. Pa. 1977). *See also* Blank v. Talley Indus., Inc., 390 F. Supp. 1 (S.D.N.Y. 1975) (attorneys awarded $1.4 million in securities fraud class action). *See generally Developments in the Law, supra* note 54, 1604-09.

108. Despite the provision in § 706(k) of the Civil Rights Act of 1964 permitting "the court, in its discretion, [to] allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs," 42 U.S.C.A. § 2000e-5(k) (1974), successful defendants rarely have been permitted to recover attorneys' fees. In Christiansburg Garment Co. v. EEOC, 98 S. Ct. 694 (1978), the Supreme Court reaffirmed its earlier pronouncement that a prevailing plaintiff in a Title VII suit " 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.' " *Id.* at 698 (quoting Newman v. Piggie Park Enterprises, 390, U.S. 400, 402 (1968)). The Court, however, adopted a stricter standard with respect to awards of attorneys' fees to defendants, holding that a district court could award attorneys' fees to a prevailing defendant only if the plaintiff's action was "frivolous, unreasonable or without foundation, even though not brought in subjective bad faith." 98 S. Ct. at 700. Thus, merely because a plaintif did not prevail on the merits was insufficient reason to award attorneys' fees to the defendant. *Id.* at 701.

109. With regard to the administrative nuisance cost necessitated by the complex factual issues involved in Title VII suits, the liberal across-the-board approach has increased the defendant's burden in that he must produce information relating to a wide range of employment practices and a large number of employees that often are spread over immense geographical areas. On the filing of a complaint and an answer, the defendant immediately incurs substantial costs for the executive, clerical, administrative, and legal resources he uses in the compilation and analysis of his employment records for trial preparation. Even if the defendant prevails on a motion for summary judgment, which rarely occurs in Title VII cases, his expenses in preparing the motion with its supporting exhibits, affidavits, and depositions, and of producing documents requested by the plaintiff in discovery proceedings always will be great. Class actions often are unmanageable because of their size and complexity. As Chief Judge Lumbard wrote in his dissent to the landmark securities law case of Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968), *vacated and remanded on other grounds,* 417 U.S. 156 (1974): "The appropriate action for this Court is to affirm the district court and put an end to this Frankenstein monster posing as a class action." *Id.* at 572. A large corporate defendant thus may incur extensive costs merely to have the suit dismissed before trial, and this nuisance factor sometimes promotes early settlements of those claims that do not exceed these expenses.

A court may limit discovery to class issues before it certifies a class action. *See, e.g.,* Doctor v. Seaboard Coast Line R.R., 540 F.2d 699, 707 (4th Cir. 1976); Sutton v. Hedwin Corp., 13 Fair Empl. Prac. Cas. 1729, 1733 (D. Md. 1976). This amount of discovery alone, however, necessitates the production of records relating to a wide range of employment practices.

as well as to defuse the risk of the substantial long-term costs of an adverse judgment. Clearly, settlement pressures on the defendant are great, even when allegations of employment discrimination are without merit.

The same economic factors motivating employers to settle Title VII class actions likewise afford advantages to employees and their attorneys that may be unwarranted in some circumstances. Plaintiffs' attorneys can negotiate settlements, which include sizeable fees, for as much as several thousand dollars with a minimal expenditure, often limited to the costs of filing the complaint and serving voluminous boilerplate interrogatories. This potential bonanza for plaintiffs' attorneys may entice them to reach settlements that are not in the best interests of the class members, who, because of their relatively low stake in the action's outcome, generally cannot supervise closely their lawyer's conduct.[110]

As a result of these economic factors compelling settlement, the class action device can be abused by disgruntled members of protected classes. An extremely broad across-the-board class action suit alleging frivolous claims and forcing the employer to settle can become a weapon of revenge in the hands of dissatisfied employees.[111] The opportunity for harassment of employers is obvious,[112] and the concomitant possibility of "blackmail"[113] raises questions of due process for an employer that merit as careful consideration as that given to an employee alleging discrimination.

The temptation for employees to instigate Title VII "strike suits" designed to effect quick settlement is great. Although this possibility also exists in other types of legal disputes, safeguards typically

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110. Class action plaintiffs' attorneys often have a built-in conflict between their best interests and those of the class members. *See Developments in the Law, supra* note 54, at 1605.

11. *See* Arey v. Providence Hosp., 55 F.R.D. 62 (D.D.C. 1972), in which the court expressed concern that "a disgruntled employee who happens to be black may discover a weapon of revenge in the form of a major class action suit under Title VII, when the reason for that employee's discontent stems from causes other than race or sex discrimination." *Id.* at 68. *See also* Lamphere v. Brown Univ., 16 Fair Empl. Prac. Cas. 941 (1st Cir. 1977), in which the First Circuit noted that defendants have no general right of protection from unnecessary litigation. *Id.* at 943.

112. *Cf.* Cutner v. Atlantic Richfield Co., 16 Fair Empl. Prac. Cas. 743 (E.D. Pa. 1977) (filing of unsupported class allegations in hope that wide-scale discovery will reveal evidence to support charges is abuse of Rule 23).

113. Class actions have been characterized as "a form of legalized blackmail." *See* Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 9 (1971).

have evolved in these other areas to control plaintiffs who intentionally abuse the weaknesses in the system. Stockholder derivative suits, for example, have been restricted statutorily.[114] Similar safeguards should be adopted to prevent Title VII class action suits predicated on frivolous claims. Although Congress has not responded to this issue, courts have begun to recognize the problems accompanying the certification of across-the-board class actions.[115] Consequently, they are scrutinizing more closely claims based merely on the named plaintiff's conclusory allegations of an employer's discrimination against all past, present, and future members of a protected class by all types of practices and in all of the employer's locations and departments.[116]

Rejection or Limitation of the Across-The-Board Doctrine

In contrast to the liberal treatment accorded potential Title VII class action plaintiffs by federal courts adopting the Fifth Circuit's across-the-board approach, some federal courts have been more restrictive in applying the prerequisites of Rule 23(a) and have not accepted the conclusion that a broad allegation of employment discrimination automatically qualifies a suit as a class action.[117] Although a common characteristic such as race or sex is always present in Title VII suits, widely disparate factual circumstances nevertheless may separate the plaintiff and the proposed class members. Class actions are appropriate when employment practices such as segregated facilities or a discriminatory job assignment system affect all class members equally; certification of the suit as a class action may be unjustified, however, when the alleged discrimination affects class members in different ways or in varying de-

114. Rule 328(b) of the Maryland Rules of Procedure typifies the legislative response to shareholders' strike suits. If the plaintiffs in a stockholder derivative suit own neither stock valued at more than $25,000 nor more than five percent of the outstanding shares of any class of the corporation's stock, they must post security for the reasonable expenses that may be incurred by the corporation in defending the suit. Md. R. P. 328(b).

115. In addition to the risk of unjustified burdens upon defendants discussed in this section, broad class certification poses substantial res judicata risks for other discriminatees, as discussed in the preceding section.

116. *See Class Action*, *supra* note 10, at 326 & n.14.

117. *See, e.g.*, Coles v. Blue Cross, 16 Fair Empl. Prac. Cas. 210 (W.D. Pa. 1977); Valentino v. United States Postal Serv., 16 Fair Empl. Prac. Cas. 242 (D.D.C. 1977); cases cited in 3B Moore's, *supra* note 10, ¶ 23.06-1, at 23-303 (Supp. 1977-78); *Class Action*, *supra* note 10, at 328-29.

grees.[118] In recognition of these factors some federal courts have refused to certify suits in which intra-class differences have rendered the plaintiffs' claims inappropriate for class action treatment.[119]

The Supreme Court's decision in *East Texas Motor Freight System, Inc. v. Rodriguez*[120] seemingly verifies that the approach of these courts is not an unreasonably restrictive interpretation of Rule 23(a)'s requirements as applied to Title VII class actions. In *Rodriguez* the Court held that the Fifth Circuit erred in certifying as a class action a Title VII suit brought by three Mexican-American truck drivers.[121] The defendant trucking company maintained a policy prohibiting employee transfers from city to line driving jobs. Moreover, the company's collective bargaining agreement with the union required that seniority be computed only from the date an employee entered a particular job classification. The plaintiffs alleged that the combined effect of these two policies discriminated against them and black drivers in violation of Title VII. Emphasizing that the requirements of Rule 23(a) must be applied liberally in Title VII cases, the Fifth Circuit had reversed the district court's dismissal of the class allegations.[122] The court of appeals certified a class consisting of all the company's black and Mexican-American city drivers covered by the pertinent collective bargaining agreement and of all the black and Mexican-American applicants for line driver positions. According to the court, East Texas not only had perpetuated its past discrimination against blacks and Mexican-American drivers by maintaining the no-transfer rule and dual seniority rosters,[123] it also had discriminated against blacks and Mexican-Americans in its initial hiring procedures.[124]

The Supreme Court determined that the Fifth Circuit had erred in certifying this class action and in imposing potential classwide liability on the company because the named plaintiffs, by the time the case reached the court of appeals, were not members of the class they purported to represent and did not " 'possess the same interest

118. *See* H. NEWBERG, *supra* note 5, § 7980, at 1290.
119. *See Developments in the Law, supra* note 54, at 1489 & n.189.
120. 431 U.S. 395 (1977).
121. *Id.* at 403.
122. Rodriguez v. East Texas Motor Freight System, Inc., 505 F.2d 40, 50 (5th Cir. 1974).
123. *Id.* at 56.
124. *Id.* at 54-55.

and suffer the same injury' as the class members."[125] The Court articulated two reasons for its conclusion that the named plaintiffs lacked a sufficient nexus with the purported class members to represent those who may have suffered the alleged injuries: first, the three named plaintiffs lacked the qualifications to be hired as line drivers and, therefore, were not injured by the alleged discriminatory hiring practices;[126] second, the three plaintiffs stipulated that they had not been the victims of discrimination with respect to their initial hiring. Thus, they properly could not attack either the no-transfer rule or the seniority system on the ground that such "practices perpetuated past discrimination and locked minorities into the less desirable jobs to which they had been discriminatorily assigned."[127] In addition to their lack of class membership, two other factors indicated that the plaintiffs could not represent the class adequately: the plaintiffs had failed to protect the class members' interests by not moving for class certification prior to trial, and a majority of the union's local members had rejected a proposal to merge the city drivers' and line drivers' seniority lists and to authorize unrestricted transfers between the two jobs.[128]

Although conceding that discrimination suits are often "by their very nature class suits, involving classwide wrongs,"[129] the Court cautioned that "careful attention to the requirements of [Rule 23] remains nonetheless indispensable."[130] The opinion in *Rodriguez* failed to indicate, however, which, if any, of Rule 23(a)'s four requirements provided the basis for the Court's decision that the class was certified erroneously. Nor did it indicate which, if any, of the four grounds it discussed would alone warrant a denial of class certification. The only sound inference that can be drawn from the decision is that the Supreme Court has refused to treat Title VII claims predicated upon bare across-the-board allegations as class actions automatically and is encouraging the judiciary to analyze closely the facts of each proposed class action to determine whether they satisfy Rule 23(a)'s prerequisites.

125. 431 U.S. at 403 (quoting Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 216 (1974)).

126. 431 U.S. at 403.

127. *Id.* at 404.

128. *Id.* at 405.

129. *Id.*

130. *Id.* at 405-06.

Even before *Rodriguez*, a number of federal courts discerning the existence of intra-class differences had engaged in the type of strict scrutiny later sanctioned by the Supreme Court. Some of these courts predicated their denials of class action certification on the lack of typicality between the plaintiffs' claims and those of the potential class members;[131] others held that the plaintiff was an inadequate representative of the proposed class.[132] The lack of common questions of law or fact provided another reason for courts to decline certification to proposed class actions.[133]

Although courts refusing to follow the across-the-board doctrine have deemed various sections of Rule 23(a) unsatisfied, the determinative factor warranting a denial of class action status ultimately is the existence of sufficient intra-class differences to destroy the requisite community of interest between the plaintiff and the class.[134] The degree of difference among claims sufficient to justify a denial of class certification varies among courts,[135] however, making generalizations impossible. Clearly, under this approach plaintiffs must demonstrate more than is required by courts adopting the across-the-board doctrine; mere membership in a protected class and an alleged injury by an employment practice is insufficient to warrant the inclusion of other classes of grievances in the action. Although not requiring an absolute identity of claims, this stricter approach requires a showing of a reasonably coextensive interest between the representative plaintiff's claims and those of the proposed class.[136] Absent such proof, courts adopting this approach

131. *See, e.g.*, Taylor v. Safeway Stores, Inc., 524 F.2d 263 (10th Cir. 1975); White v. Gates Rubber Co., 53 F.R.D. 412, 415 (D. Colo. 1971).

132. *See, e.g.*, Hyatt v. United Aircraft Corp., 50 F.R.D. 242 (D. Conn. 1970). *See also* Bailey v. Ryan Stevedoring, 443 F. Supp. 899 (M.D. La. 1978), a post-*Rodriguez* case in which the court reversed a decision requiring the merger of two unions when its subsequently determined that the individuals who brought the suit had not suffered from any discrimination. *Id.* at 902.

133. *See, e.g.*, Hyatt v. United Aircraft Corp., 50 F.R.D. 242 (D. Conn. 1970); 4 H. NEWBERG, *supra* note 5, § 7980, at 1290. Commonality is evident when the challenged action affects all members of the purported class in the same manner, whereas commonality is more difficult to ascertain when the alleged discrimination affects the class members differently. *See id.*

134. *See Developments in the Law, supra* note 54, at 1489.

135. *See id.*

136. *See* 4 H. NEWBERG, *supra* note 5, § 7980, at 1293; § 7983, at 1298, 1300. Coextensiveness "may be satisfied even though varying fact patterns support the claims or defenses of individual class members or there is a disparity in the damages claimed by the representative parties and other members of the class." *Id.* § 7983, at 1300.

either will reject a request for class certification or, alternatively, will restrict the class until the required coextensiveness prevails among its remaining members.

Standing

Whenever a Title VII plaintiff contemplates broadening his employment discrimination suit into a class action, he must convince the court that he is a proper class representative under Rule 23. An additional prerequisite to the maintenance of the plaintiff's class action, however, is that he be a member of the class he purports to represent.[137] This is tantamount to an individual standing requirement,[138] a threshold determination that must be made before a court will consider the elements of Rule 23(a).[139] In *Association of Data Processing Service Organizations, Inc. v. Camp*[140] the Supreme Court enunciated a two-pronged test for standing: (1) injury in fact — the plaintiff must have suffered a legally recognizable injury, economic or otherwise;[141] and (2) zone of interest — the plaintiff's claims must be within the zone of interests protected by the statute

137. *See* 4 H. NEWBERG, *supra* note 5, § 7973d. *See also* Sosna v. Iowa, 419 U.S. 393, 403 (1975).

138. *See, e.g.*, O'Shea v. Littleton, 414 U.S. 488 (1974), in which the Court stated: "[I]f none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class." *Id.* at 494. Relevant to the Supreme Court's determination of a lack of controversy in *O'Shea* was the "absence of specific claims of injury as a result of any of the wrongful practices charged." *Id.* at 495 n.3. *See also* Sosna v. Iowa, 419 U.S. 393, 402-03 (1975) ("A named plaintiff in a class action must show that the threat of injury . . . is 'real and immediate,' not 'conjectural' or 'hypothetical.' "); 4 H. NEWBERG, *supra* note 5, § 7973d.

139. *See* 4 H. NEWBERG, *supra* note 5, § 7973d, at 1278. *See also* Sosna v. Iowa, 419 U.S. 393, 403 (1975) (conclusion that plaintiff is a member of class he seeks to represent "does not automatically establish that [he] is entitled to litigate the interests of the class . . . but it does shift the focus of examination from the elements of justiciability to the ability of the named representative to 'fairly and adequately protect the interests of the class.' ") (citation omitted); Pennsylvania v. Glickman, 370 F. Supp. 724, 727 (W.D. Pa. 1974) (named plaintiff's satisfaction of standing element and of requirements of Rule 23(a) and 23(b)(2) permits litigation to proceed as class action).

The requirement of standing has been treated as an implied element of adequacy of representation. *See* 7 C. WRIGHT & A. MILLER, *supra* note 1, § 1761, at 585 & n.9 (1972 & Supp. 1977). In *Rodriguez* the Supreme Court implicitly sanctioned this interpretation by concluding that the named plaintiffs could not porvide adequate class representation, in part because they were not members of the class they purported to represent and, therefore, could not have been injured by the alleged discriminatory practices. *See* 431 U.S. at 403-04; text accompanying notes 126-27 *supra*.

140. 397 U.S. 150 (1970).

141. *Id.* at 152.

or constitutional guarantee.[142] Assuming that the claims of most Title VII plaintiffs fall within the zone of interests protected by the Act, the primary inquiry in assessing standing is whether the named plaintiff must have suffered an injury in fact from every employment practice challenged. For example, although a discriminatory discharge clearly injures an affected employee and a discriminatory refusal to hire similarly aggrieves a rejected applicant, a question nevertheless remains as to whether a discharged employee should have standing to represent a rejected applicant and, conversely, whether an applicant should have standing to represent present or former employees.

The requirement of standing in Title VII suits receives judicial treatment comparable to that given the explicit elements of Rule 23(a). Courts adopting the across-the-board approach conclude that a plaintiff has standing to challenge employment practices that did not affect him personally.[143] Those courts applying a less abstract standard for injury in fact, however, may hold that the requirement of standing is unsatisfied unless the plaintiff is a member of the class affected by the specific practice challenged.[144] In *Berg v. Richmond Unified School District*,[145] for example, a female employee challenged her employer's pregnancy benefits system in a class action purporting to represent all female employees who had or would suffer from the system's discriminatory effects. Although

142. *Id.* at 153.

143. *See, e.g.*, Graniteville Co. v. EEOC, 438 F.2d 32 (4th Cir. 1971); Carr v. Conoco Plastics, Inc., 423 F.2d 57 (5th Cir. 1970); Briggs v. Brown & Williamson Tobacco Corp., 414 F. Supp. 371 (E.D. Va. 1976). Explicitly addressing the standing issue, the court in *Graniteville* asserted that a party "may even be aggrieved by employment practices to which he is not immediately subject." 438 F.2d at 37. Thus the court interpreted injury in fact to require that a plaintiff suffer only from the more abstract injury of race or sex discrimination in employment rather than from an injury caused by a specific employment practice, and it permitted the plaintiff to represent other blacks who might have been injured by the challenged discriminatory practice although the plaintiff did not allege that the practice had affected him personally. *See id.* In *Carr* the plaintiffs challenged both the defendant's hiring policies and its internal operations. Reasoning that the rejected applicants might have been injured by the defendant's discriminatory internal policies, the court upheld the plaintiffs' standing and permitted them to represent a broad class of employees of which they were not members. *See* 423 F.2d at 63-65.

144. *See, e.g.*, Jackson v. Dukakis, 526 F.2d 64 (1st Cir. 1975); Lightfoot v. Gallo Sales Co., 15 Fair Empl. Prac. Cas. 615, 618-20 (N.D. Cal. 1977); White v. Nassau County Police Dept., 15 Fair Empl. Prac. Cas. 266 (E.D.N.Y. 1977). *See also* cases cited in 3B MOORE'S, *supra* note 10, ¶ 23.10-1, at 23-2763 n.8. In *Jackson* the court held that the plaintiff lacked standing to challenge the defendant's allegedly discriminatory hiring practices because he had never applied for a job with the defendant and thus could not have suffered any injury in fact. 526 F.2d at 65-66. For a discussion of *Lightfoot*, see text accompanying notes 211-15 *infra*.

145. 11 Fair Empl. Prac. Cas. 1281 (N.D. Cal. 1973).

the district court certified her suit as a class action with prospective relief, it denied the plaintiff, who had not been pregnant, standing to seek retroactive relief on behalf of others previously affected by the system.[146]

Renewed Vitality for the Typicality Requirement

Although many courts have ignored the typicality requirement of Rule 23(a)(3) or have equated it either with Rule 23(a)'s commonality or adequacy of representation provisions,[147] some courts have rejected this trend and have regarded typicality as a separate and independent test for the maintenance of a class action.[148] As the court in *White v. Gates Rubber Co.*[149] stated, typicality "must be given an independent meaning,"[150] and requires the plaintiff "to demonstrate that other members of the class he purports to represent have suffered the same grievances of which he complains."[151] Likewise, in *Taylor v. Safeway Stores, Inc.*[152] the Tenth Circuit assumed a position contrary to the Fifth Circuit's across-the-board approach in Title VII class actions and concluded that Rule 23(a)(3) requires a comparison of the named plaintiff's claims with those of the proposed class.[153] Thus, in *Taylor* the mere assertion of pervasive employment discrimination was insufficient: the plaintiff had to prove the existence of a class with similar claims to avoid a dismissal of the suit's class action aspects.[154]

The Tenth Circuit in *Taylor* obviously approved the interpreta-

146. *Id.* at 1284.

147. *See* cases cited in 3B MOORE'S, *supra* note 10, ¶ 23.06-2, at 23-325; 80 DICK L. REV. 835, 837 & nn.18-19 (1976). One treatise has asserted that this is the proper approach because "all meanings attributable to [typicality] duplicate requirements prescribed by other provision in Rule 23." 3B MOORE'S *supra* note 10, ¶ 23.06-2, at 23-325.

148. *See, e.g.*, Taylor v. Safeway Stores, Inc., 524 F.2d 263 (10th Cir. 1975); Peterson v. Bender Co., 15 Fair Empl. Prac. Cas. 602 (N.D. Cal. 1977); Nguyen v. Kissinger, 21 Fed. R. Serv.2d 528 (N.D. Cal. 1976); White v. Gates Rubber Co., 53 F.R.D. 412 (D. Colo. 1971). This trend is discussed in 80 DICK. L. REV. 835 (1976).

149. 53 F.R.D. 412 (D. Colo. 1971). For a discussion of *White*, see 4 H. NEWBERG, *supra* note 5, § 7983, at 1299-1300; 80 DICK. L. REV. 835 (1976).

150. 53 F.R.D. at 415.

151. *Id.*

152. 524 F.2d 263 (10th Cir. 1975).

153. *Id.* at 270.

154. *See id.* The definition of typicality enunciated in *White* and *Taylor* has been criticized for emphasizing the "requirements for a threshold showing of the 'existence of a class,' and the further requirement to prove the merits of the action before a class will be certified." 4 H. NEWBERG, *supra* note 5, § 7983, at 1300.

tion given Rule 23(a)(3) in *White* that typicality should be accorded equal status with the other sections of Rule 23(a).[155] This conclusion is reasonable, considering that typicality was formulated as a distinct element by the drafters of Rule 23. Furthermore, the language of the rule fails to indicate that the typicality provision carries less weight than the other three subsections of Rule 23(a).[156]

Harriss v. Pan American World Airways, Inc.[157] also adopted a strict standard requiring a plaintiff to satisfy typicality by showing that his interests are "coextensive with the interest[s] of the entire class."[158] According to the court, coextensiveness meant that the interests of the plaintiff were aligned squarely with the interests of the class.[159] *Harriss* suggested several criteria to be evaluated in a determination of whether a sufficient community of interest exists between the plaintiff's claims and those of the class so as to establish typicality:

> (i) is plaintiff's situation — his position, occupation, and terms and conditions of employment — typical of the situation of those he seeks to represent;
>
> (ii) are the circumstances surrounding plaintiff's grievance typical of those relating to the claim of the class;
>
> (iii) will the relief sought by plaintiff benefit the class, and is plaintiff under the circumstances of the case likely to seek to benefit the class rather than merely himself.[160]

Although *Taylor* and *White* attributed an independent meaning to the typicality requirement, overlap is inevitable among Rule 23(a)'s four subsections, particularly between the typicality and the adequacy of representation provisions.[161] Confusing these two ele-

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155. *See* Valentino v. United States Postal Serv., 16 Fair Empl. Prac. Cas. 242, 245 (D.D.C. 1977); 80 DICK. L. REV. 835, 837 (1976).

156. An axiomatic principle of statutory interpretation is that the clear and unambiguous language of a statute is to be given its ordinary and customary meaning. *See* 73 AM. JUR. 2d *Statutes* § 194 (1974). Furthermore, a statute's drafters are presumed to have included every part of a statute for a particular purpose. *See id.* § 250 (1974).

157. 74 F.R.D. 24 (N.D. Cal. 1977).

158. *Id.* (quoting Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 563 (2d Cir. 1968), *vacated and remanded on other grounds*, 417 U.S. 156 (1974)).

159. 74 F.R.D. at 42.

160. *Id.*

161. *See, e.g.*, Taylor v. Safeway Stores, Inc., 524 F.2d 263, 270 (10th Cir. 1975) ("[I]t is difficult to attach a meaning to (a)(3) that is not included or does not overlap somewhat with subsection (a)(4)"); Sommers v. Abraham Lincoln Fed. Sav. & Loan Ass'n, 66 F.R.D. 581, 587 (E.D. Pa. 1975) (Rule 23(a)(3) and (a)(4)'s requirements overlap considerably but are not

ments, some courts have found a lack of typicality and therefore concluded that the plaintiff could not represent the class adequately.[162]

Inadequacy of Representation

As noted, a showing of standing generally preceeds the plaintiff's proof regarding compliance with the specific elements of Rule 23. After a plaintiff has met this threshold requirement, his failure to satisfy Rule 23(a)(4)'s adequacy of representation test is the most common reason courts refuse to certify Title VII class actions.[163] This requirement usually is interpreted as encompassing two principal criteria with which an adequate class representative must comply: the plaintiff's attorney must be qualified, experienced, and must vigorously prosecute the case, which must not be collusive; furthermore, the plaintiff's interests may not be antagonistic to those of the other class members.[164]

Courts failing to adopt the across-the-board approach, however, have ascertained additional reasons for concluding that a particular plaintiff cannot represent the class members adequately. A plaintiff who grossly has neglected his employment responsibilities, for example, may be deemed an inadequate class representative[165] because he similarly may disregard the duties accompanying that position.[166] Courts also may deny class certification to prospective plaintiffs who cannot afford the minimal costs of the litigation,[167]

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redundant because plaintiffs and class members conceivably could have similar claims without having coextensive interests).

162. *See, e.g.*, Lightfoot v. Gallo Sales Co., 15 Fair Empl. Prac. Cas. 615, 620 (N.D. Cal. 1977).

163. *See Class Action, supra* note 10, at 331.

164. *See* notes 81-90 *supra* & accompanying text.

165. *See* Cobb v. Avon Prods., Inc., 71 F.R.D. 652 (W.D. Pa. 1976); *cf.* Jones v. Pacific Intermountain Express, 16 Fair Empl. Prac. Cas. 359 (N.D. Cal. 1977) (imprisoned plaintiff cannot adequately represent class).

166. *See* 71 F.R.D. at 655.

167. *See* Wilson v. General Motors Corp., 11 Fair Empl. Prac. Cas. 1438, 1439 (S.D. Ind. 1975). Because the plaintiff in *Wilson* could not afford the minimal costs of litigation, his attorney advanced all the necessary expenses. The court concluded, however, that the attorney could recoup these advances only if the plaintiff recovered a substantial judgment. Consequently, it refused to permit the plaintiff to maintain a class action on the ground that he could not represent the class adequately. *Id.* at 1439; *accord*, Parker v. Kroger Co., 14 Fair Empl. Prac. Cas. 75, 83 (N.D. Ga. 1976) (plaintiff's ability to finance litigation is one factor to be considered in assessing the adequacy of his representation).

To assist them in ascertaining the plaintiff's ability to afford the litigation, courts have

and an inordinate delay in the prosecution of his suit similarly can vitiate the plaintiff's ability to represent the class,[168] as demonstrated in *Campbell v. Al Thrasher Lumber Co.*[169]

Even a potential conflict of interest between the plaintiff and some class members also may preclude the plaintiff from adequately representing the class. In *Social Services Union v. County,*[170] for example, two labor unions were prohibited from bringing charges alleging wage discrimination on behalf of their female members. A determinative factor in the court's decision was the potential conflict of interest between the unions, which had negotiated the pay scales in question, and the female employees. Because the male union members could have been affected adversely by a successful suit, the court concluded that the unions were inappropriate representatives of the potential class members.[171] In *Bailey v. Ryan Stevedoring Co.*[172] the conflict of interest was more pronounced. A majority of the class members in *Bailey* filed a petition stating that the relief sought was contrary to their interests. As a result of the obvious antagonism between the plaintiffs' claims and the interests they sought to represent, the court considered the plaintiffs to be inadequate class representatives.[173]

Factors Showing an Insufficient Community of Interest Between the Plaintiff and the Proposed Class

Courts often have denied class status, without a specific reference to or discussion of either standing or the four elements of Rule

ordered disclosure of information concerning the named plaintiff's financial status. *See, e.g.,* Rode v. Emery Air Freight Corp., 76 F.R.D. 229 (W.D. Pa. 1977); Guse v. J.C. Penney Co., 409 F. Supp. 28 (E.D. Wis. 1976).

168. *See, e.g.,* Burns v. Georgia, 15 Fair Empl. Prac. Cas. 1566 (N.D. Ga. 1977); LaFont v. Delta Air Lines, Inc., 16 Fair Empl. Prac. Cas. 170 (N.D. Ga. 1977); Lau v. Standard Oil, 70 F.R.D. 526 (N.D. Cal. 1975); Strozier v. General Motors Corp., 13 Fair Empl. Prac. Cas. 963 (N.D. Ga. 1975). Reasoning that the judiciary must ensure that class actions are brought "by plaintiffs who, by their own and their chosen counsel's diligence will be able to fairly represent the desired class," the court in *Lau* denied class certification because the plaintiffs failed to prosecute the suit in a timely, diligent manner. 70 F.R.D. at 528.

169. 13 Fair Empl. Prac. Cas. 189 (N.D. Cal. 1973).

170. 12 Fair Empl. Prac. Cas. 570 (N.D. Cal. 1975).

171. *See id.* at 572-73. The court posited that the matter could be resolved more satisfactorily by private suits. *See id.*

172. 528 F.2d 551 (5th Cir. 1976).

173. *See id.* at 553. In Droughn v. FMC Corp., 17 Fair Empl. Prac. Cas. 771 (E.D. Pa. 1977), the court held that a black female could not represent a class of black men and all women, who were the alleged victims of discrimination, because potential conflicts of interest existed between the two groups. *See also* Colston v. Maryland Cup Corp., 18 Fair Empl. Prac. Cas. 83 (D. Md. 1978).

23(a), when the named plaintiff's employment position did not have a sufficient community of interest with other job classifications included in the proposed class. Moreover, whether these other courts have predicated their decisions rejecting the maintainability of across-the-board class actions on the lack of typicality, on the plaintiffs' inadequate representation, or on the absence of standing is immaterial: the significance of these opinions lies in the factors deemed determinative by the courts in their conclusions that the plaintiffs' claims and those of the proposed classes were too dissimilar to merit class action treatment. The following analysis describes the types of circumstances that have been held sufficient to destroy the requisite community of interest.

Employees Affected by Different Employment Practices

The common rationale of this group of cases is that a plaintiff aggrieved by only one type of employment practice or policy has insufficient experience as to the adverse effects of other practices, both at his location and at others, to represent adequately employees who might have been injured in different ways. For example, the court in *White v. Gates Rubber Co.*[174] specifically declined to follow the Fifth Circuit's holding that an across-the-board attack on a company's employment practices satisfied the requirement of common questions of law or fact,[175] asserting that the approach was "overbroad" and that it substituted a "conclusory accusation for the actual similarity of grievances which the rule would seem to require."[176] The court thus refused to permit a discharged black employee to represent a class composed of all blacks and Spanish surnamed persons allegedly affected by all of the defendant's discriminatory employment practices.[177] A discharged black employee could not represent appropriately the entire class of minority employees allegedly affected by all aspects of the defendant's employment system, the court determined, because he had no "personal complaint" other than his discharge.[178] Accordingly, he was permit-

174. 53 F.R.D. 412 (D. Colo. 1971).

175. *Id.* at 413.

176. *Id.*

177. *Id.* at 413-14.

178. *Id.* at 413; *cf.* Richmond Black Police Officers Ass'n v. City of Richmond, 386 F. Supp. 151 (E.D. Va. 1974) (black policemen suing pursuant to 42 U.S.C. § 1981 (1970) lacked standing to maintain class action on behalf of former officers). Many cases have held that a discharged employee cannot qualify as a class representative for employees who currently are

ted to represent only a class of black employees allegedly discharged because of race. Other courts have held that a current employee could not represent a class of former employees discharged for allegedly racial reasons, because the current employee had not been affected adversely by the employer's termination policy.[179]

On similar reasoning, some courts have rejected proposed class actions by present employees who were seeking to represent rejected applicants or employees affected by other company practices. In *Mason v. Calgon Corp.*,[180] for example, a black plaintiff attempted to bring a class action on behalf of herself and other black employees against the defendant's discriminatory employment practices. The plaintiff alleged that the company's failure to provide her with adequate training to operate the machinery installed to automate her department ultimately resulted in her failure to be promoted and in her discharge. Denying certification of the class action, the court regarded the plaintiff's grievance as not sufficiently typical of claims of hiring and recruitment discrimination to satisfy the criterion in Rule 23(a)(3).[181]

In *Anderson v. Southern Pacific Transportation Co.*[182] the court refused to allow two black employees with promotion grievances to represent black employees and applicants who were the victims of the defendant's other allegedly discriminatory employment practices, because their claims were not typical of those of the entire class. The court determined that, at most, the claims were typical of those of other blacks who might have been denied promotions to the positions sought by the two named plaintiffs.[183]

Employees at Different Geographical Locations

Some courts have found typicality lacking when the plaintiff and

working for the defendant. *See, e.g.*, Heard v. Mueller Co., 464 F.2d 190 (6th Cir. 1972); Campbell v. Al Thrasher Lumber Co., 13 Fair Empl. Prac. Cas. 189 (N.D. Cal. 1973); Jenkins v. General Motors Corp., 354 F. Supp. 1040 (D. Del. 1973); Forst v. First Nat'l Bank, 5 Fair Empl. Prac. Cas. 609 (D.D.C. 1972); Tolbert v. Daniel Constr. Co., 332 F. Supp. 772 (D.S.C. 1971); Hyatt v. United Aircraft Corp., 50 F.R.D. 242 (D. Conn. 1970); Burney v. North Am. Rockwell Corp., 302 F. Supp. 86 (C.D. Cal. 1969).

179. *See* Patterson v. Western Dev. Labs, 13 Fair Empl. Prac. Cas. 772 (N.D. Cal. 1976).

180. 63 F.R.D. 98 (W.D. Pa. 1974).

181. *Id.* at 102-06. *See also* Harris v. Farmbest Foods, 16 Fair Empl. Prac. Cas. 342 (M.D. Ala. 1977).

182. 13 Fair Empl. Prac. Cas. 321 (N.D. Cal. 1977).

183. *Id.* at 322. *See also* Palmer v. Rodgers, 16 Fair Empl. Prac. Cas. 702 (D.D.C. 1975).

the proposed class members were located at physically separate facilities. In *Taylor* the Tenth Circuit held that a black plaintiff could not represent all other blacks located throughout Colorado who had been the objects of the defendant's allegedly discriminatory employment practices but could represent only those blacks employed at the defendant's Denver distribution warehouse.[184] According to the court, the plaintiff had failed to prove that his complaint of a racially discriminatory discharge was typical of the injuries received by any employees outside that particular warehouse.[185] Similarly, the district court in *Pizano v. J. C. Penney Co.*[186] held that rejected black and Mexican-American job applicants who sought to challenge the defendant's hiring practices did not satisfy the commonality or typicality requirements in a proposed class action encompassing the applicants at all of the defendant's stores. The court limited the suit to similarly-situated applicants, employees, or former employees at the defendant's Modesto, California, store.[187]

Smith v. Liberty Mutual Insurance Co.[188] provides an example of a court limiting the potential class in a Title VII suit both in terms of the members' employment status and their geographic location. The plaintiff in *Smith* alleged that he was refused a position as a mail clerk because he was black and male. Reasoning that other class members would not have the same or similar grievances as the named plaintiff, the court held that the typicality requirement had not been satisfied because the plaintiff complained only of a single discriminatory act and offered merely conclusory allegations concerning other class members and other employment practices.[189] The court indicated that if a class action was maintainable its scope would be limited to applicants who were refused employment in clerical positions at the defendant's Atlanta division office. Applicants for such positions at other offices would not be included, nor would applicants for technical positions.[190]

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184. 524 F.2d at 270-71.

185. *Id.*

186. 12 Fair Empl. Prac. Cas. 1322 (E.D. Cal. 1975).

187. *Id.* at 1324-25. *See also* Wilson v. General Motors Corp., 11 Fair Empl. Prac. Cas. 1438 (S.D. Ind. 1975); Doctor v. Seaboard Coast Line R.R., 13 Fair Empl. Prac. Cas. 135 (M.D.N.C. 1974), *aff'd*, 540 F.2d 699 (4th Cir. 1976).

188. 11 Fair Empl. Prac. Cas. 734 (N.D. Ga. 1975).

189. *Id.* at 739.

190. *Id.* at 735-36. *See also* Doninger v. Pacific Nw. Bell, 16 Fair Empl. Prac. Cas. 316 (9th Cir. 1977) (geographical dispersion destroys common questions of fact or law); Webb v.

Insufficient Nexus Among Applicants, Present Employees, and Former Employees

Numerous cases have held that present employees of a company, rejected applicants for employment, and former employees did not have a sufficient community of interest among themselves to enable them to represent each other in a Title VII class action. The court in *Moore v. Consolidation Coal Co.*[191] refused to permit a current employee and a rejected applicant to maintain a class action on behalf of all female applicants, whether they had been employed or rejected. The court held that the purported class failed because it included no more than thirteen members and because the various interests of the named plaintiffs potentially were antagonistic with each other and with the interests of the proposed class.[192] The reluctance of courts to certify classes consisting of present or prospective employees that are represented by a former employee[193] presumably arises from the belief that the named plaintiff would provide inadequate representation for the class. In *Campbell v. Al Thrasher Lumber Co.*[194] the court held that an American Indian who filed his suit more than three years after his voluntary resignation could not maintain a class action on behalf of present American Indian employees. The court reasoned that the plaintiff could not represent fairly and adequately the proposed class within the meaning of Rule

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Westinghouse Elec. Corp., 17 Fair Empl. Prac. Cas. 805 (E.D. Pa. 1978) (class membership limited to employees at one plant).

191. 13 Fair Empl. Prac. Cas. 305 (E.D. Tenn. 1975).

192. *Id.* at 306-07.

193. *See, e.g.*, Huff v. N.D. Cass Co., 468 F.2d 172, 179 (5th Cir. 1972) (en banc) (former employee with no possibility of reinstatement is not a proper representative of prospective or present employees). *See also* Heard v. Mueller Co., 464 F.2d 190 (6th Cir. 1972). In White v. Nassau County Police Dept., 15 Fair Empl. Prac. Cas. 266 (E.D.N.Y. 1977), present and former policemen were not permitted to represent rejected applicants. The prevailing trend, however, may be to allow present or former employees to represent all past, present, and future employees and applicants in an across-the-board attack. *See, e.g.*, Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975); Long v. Sapp, 502 F.2d 34 (5th Cir. 1974); Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969); Holliday v. Red Ball Motor Freight, 15 Fair Empl. Prac. Cas. 58 (S.D. Tex. 1977); Walthall v. Blue Shield, 16 Fair Empl. Prac. Cas. 626 (N.D. Cal. 1977); Smith v. Union Oil Co., 17 Fair Empl. Prac. Cas. 960 (N.D. Cal. 1977); Martinez v. Bechtel Corp., 21 Fed. R. Serv.2d 85 (N.D. Cal. 1975); 3B MOORE'S, *supra* note 10, ¶ 23.07, at 23-353 (Supp. 1977-78).

194. 13 Fair Empl. Prac. Cas. 189 (N.D. Cal. 1973).

23(a)(4)[195] partially because of the elapsed time between the plaintiff's employment and the filing of his suit.[196] Similarly, in *Hyatt v. United Aircraft Corp.*[197] the court refused to permit the named plaintiff, who had voluntarily terminated his employment with the defendant over one and one-half years prior to the filing of his complaint, to represent past, present, and future employees. The court concluded that the representative plaintiff could not protect adequately the interests of the class because he had no personal knowledge of the defendant's present employment policies or of the defendant's policies during the period commencing with his termination.[198]

Unique or Unusual Circumstances of the Plaintiff's Employment

Some courts have denied standing to a plaintiff in a proposed class action because his unique employment circumstances lacked the requisite nexus with those of the other class members. In *Odom v. United States Homes Corp.*[199] the court denied standing to a plaintiff,[200] a highly-trained computer specialist and accountant who had been discharged from his position as a corporate vice-president after complaining about company minority policies, purporting to represent a class composed of all present and future employees at the defendant's Stafford, Texas plant. Mere allegations of race discrimination, according to the court, did not automatically confer class representative status on a named plaintiff. Similarly, in *McFarland v. Upjohn Co.*[201] a black supervisor fired by the defendant after a heated argument with another supervisor sought to represent a class of past, present, and future black skilled craftsmen employed by the defendant. Characterizing the suit as a "broad brush" approach, the court declined certification, noting that the plaintiff's complaint merely "parroted" the requirements of Rule 23(a) without alleging any facts other than a "very personal and

195. *Id.* at 190.

196. *Id.*

197. 50 F.R.D. 242 (D. Conn. 1970).

198. *Id.* at 245. *See also* Aiken v. Neiman-Marcus, 17 Fair Empl. Prac. Cas. 240 (N.D. Tex. 1978); Jenkins v. General Motors Corp., 354 F. Supp. 1040 (D. Del. 1973); Tolbert v. Daniel Constr. Co., 332 F. Supp. 772 (D.S.C. 1971). *See generally* 4 H. NEWBERG, *supra* note 5, § 7984b, at 1305.

199. 14 Fair Empl. Prac. Cas. 156 (S.D. Tex. 1975).

200. *Id.* at 157-58.

201. 15 Fair Empl. Prac. Cas. 129 (E.D. Pa. 1977).

particularized incident."[202]

Another example of unique circumstances occurred in *Pendleton v. Schlesinger,*[203] in which the court denied class certification to two black male and two black female employees who attempted to represent a class of all past, present, and future employees, applicants, and potential applicants injured by the discriminatory recruitment practices of Walter Reed Army Medical Center. The court concluded that the claims of the two female employees, which involved alleged reprisals stemming from their participation in a protest against the defendant's employment policies, differed markedly from those of the proposed class. The plaintiffs consequently failed to satisfy the typicality requirement.[204]

Attempts to Cross Departmental Lines

Insufficient community of interest has been found to exist among groups of workers in different departments at an employer's plant in the absence of any or all of a number of factors, including: interchange between the two groups, similarity of work duties, common wages and benefits, or common supervision.[205] In the absence of a sufficient community of interest, some courts have disallowed the creation of a class across departmental lines[206] in situations involving rank and file employees and upper echelon employees,[207]

202. *Id.* at 129-30.

203. 73 F.R.D. 506 (D.D.C. 1977).

204. *Id.* at 509-10. Other courts also have prevented plaintiffs with unique grievances from representing their proposed classes. *See, e.g.,* Smith v. Liberty Mutual Ins. Co., 569 F.2d 325 (5th Cir. 1978) (alleged discrimination based on effeminate characteristics of male employee); Hauck v. Xerox Corp., 17 Fair Empl. Prac. Cas. 154 (E.D. Pa. 1978); Martinez v. Bethlehem Steel Corp., 17 Fair Empl. Prac. Cas. 113 (E.D. Pa. 1978); Gray v. IBEW, 73 F.R.D. 638 (D.D.C. 1977); Fernandez v. Avco Corp., 14 Fair Empl. Prac. Cas. 1004 (D. Conn. 1977); Martin v. Easton Publishing Co., 73 F.R.D. 678 (E.D. Pa. 1977).

205. This test is similar to that used by the National Labor Relations Board when it holds hearings to determine the most appropriate composition of a voting unit that will select a collective bargaining representative. The NLRB's community of interest test considers such factors as different wages or methods of compensation among employees; different hours of work; different employment benefits; separate supervision; degree of dissimilar qualifications, training, and skills; infrequency of contact with other employees; differences in work functions; amount of time spent away from employment situs; and bargaining history. *See, e.g.,* Olinkraft, Inc., 179 N.L.R.B. No. 61, (1969); Kennecott Copper Corp., 176 N.L.R.B. No. 13 (1969); Kalamazoo Paper Box Corp., 136 N.L.R.B. No. 10 (1962).

206. *See, e.g.,* Droughn v. FMC Corp., 17 Fair Empl. Prac. Cas. 771 (E.D. Pa. 1977).

207. *See, e.g.,* Webb v. Westinghouse Elec. Corp., 17 Fair Empl. Prac. Cas. 805 (E.D. Pa. 1978); Steur v. ITT Continental Baking Co., 17 Fair Empl. Prac. Cas. 116 (E.D. Va. 1977); Lo Re v. Chase Manhattan Corp., 431 F. Supp. 189 (S.D.N.Y. 1977); Dickerson v. United

union members and nonunion[208] or different union members,[209] and casual employees and permanent employees.[210]

For example, the District Court for the Northern District of California denied across-the-board class certification in *Lightfoot v. Gallo Sales Co.*[211] when the plaintiffs, black sales representatives of the defendant, sought to represent all past, present, and future black employees and applicants in all of the departments allegedly affected by any of the defendant's discriminatory employment practices. In its analysis of the standing issue, the court placed a strict burden of proof on the plaintiffs[212] and rejected the inclusion of any applicants in the class because none of the named plaintiffs had been discriminatorily refused employment.[213] The court then divided the employees into four subclasses: sales representatives, drivers, warehousemen, and clerical or office personnel.[214] Because different hiring qualifications and employment duties were applicable

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States Steel Corp., 14 Fair Empl. Prac. Cas. 1450 (E.D. Pa. 1976); Parker v. Kroger Co., 14 Fair Empl. Prac. Cas. 75 (N.D. Ga. 1976); Piva v. Xerox Corp., 11 Fair Empl. Prac. Cas. 1259 (N.D. Cal. 1975).

208. *See, e.g.*, Wells v. Ramsey, Scarlett & Co., 506 F.2d 436 (5th Cir. 1975); Valentino v. United States Postal Serv., 16 Fair Empl. Prac. Cas. 242 (D.D.C. 1977); Robbins v. O'Brien Corp., 14 Fair Empl. Prac. Cas. 934 (N.D. Cal. 1977).

209. *See, e.g.*, Ford v. United States Steel Corp., 17 Fair Empl. Prac. Cas. 940 (N.D. Ala. 1977); Parker v. Kroger Co., 14 Fair Empl. Prac. Cas. 75 (N.D. Ga. 1975).

210. *See, e.g.*, Gibson v. Local 40, ILWU, 543 F.2d 1259 (9th Cir. 1976).

211. 15 Fair Empl. Prac. Cas. 615 (N.D. Cal. 1977).

212. *Id.* at 618.

213. *Id.* at 619-20.

214. FED. R. CIV. P. 23(c)(4) provides in pertinent part: "When appropriate . . . a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly." This rule provides a useful mechanism for dividing an across-the-board suit into subclasses, each of which is represented fairly and adequately by a proper plaintiff. *See, e.g.*, Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1124 (5th Cir. 1969); Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 498 (5th Cir. 1968); Ostapowicz v. Johnson Bronze Co., 54 F.R.D. 465, 466 (W.D. Pa. 1972); Rios v. Steamfitter's Local 638, 54 F.R.D. 234, 237 (S.D.N.Y. 1971). *See generally* 3B MOORE'S, *supra* note 10, ¶ 23.65, at 23-1251; 4 H. NEWBERG, *supra* note 5, § 7980, at 1295. The risk of res judicata as to class members is diminished if the subclass mechanism is used. *Id.* § 7984, at 1302; *see* Dore v. Klepp, 522 F.2d 1369, 1374-75 (5th Cir. 1975). The use of this procedural device would allow employees in different geographical areas, employees affected by different employment practices, or employees in substantially different job classifications each to be represented by a named plaintiff prosecuting the action.

This approach may be viable as a method of accommodating diverse groups of employees in single class action. Unless each subclass is represented by a named plaintiff who is a member of that subclass, however, the court must still determine whether the named plaintiffs have a sufficient community of interest with the unrepresented subgroups sought to be made parties to the litigation so as to avoid an unfair res judicata effect on any of those groups. *See* 7A C. WRIGHT & A. MILLER, *supra* note 1, § 1790, at 191-92.

to each subclass, the plaintiffs, as sales representatives, held unique positions in the company, and their grievances were not related in any significant manner to those of employees in the other job classifications. Thus, the court held that the plaintiffs lacked the necessary nexus, or community of interest, to represent any subclass other than their own.[215]

Similarly, in *Knox v. Meatcutters, Local P-591*[216] the plaintiffs, discharged black truck drivers, sought to represent all past, present, and future black office and clerical employees. Noting that the facts and circumstances must be examined in each case to resolve the nexus issue, the District Court for the Eastern District of Louisiana concluded that because an insufficient nexus existed between the plaintiffs' claims and those of the office and clerical employees, the plaintiffs could not represent adequately those employees in a class action.[217] In its opinion, the court characterized the Fifth Circuit's seminal across-the-board decision, *Johnson,* as a "policy decision admonishing district judges not to be over-technical in limiting classes in Title VII cases," rather than as an inflexible holding requiring courts to certify interdepartmental classes consisting of employees having separate factual grievances.[218]

More recently, the District Court for the Northern District of California, in *Peterson v. Albert M. Bender Co.*,[219] rejected the defendant's contention that the Fifth Circuit either already had or should abandon the across-the-board approach, and held that a female underwriter's claims of sex discrimination were not typical of the claims of other women employed by the defendant. The majority of the defendant's other women employees were secretaries, clerks, or similar office personnel, and a sufficient factual nexus between the plaintiff's claim and those of the proposed class was lacking. Thus, the plaintiff was permitted to represent only other female underwriters.[220]

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215. 15 Fair Empl. Prac. Cas. at 620-21.
216. 11 Fair Empl. Prac. Cas. 1327 (E.D. La. 1975).
217. *Id.* at 1330.
218. *Id.* at 1339.
219. 15 Fair Empl. Prac. Cas. 692 (N.D. Cal. 1977).
220. *Id.* at 696-97.

TITLE VII CLASS ACTIONS AND THE COURT OF APPEALS FOR THE FOURTH CIRCUIT

Similar to other federal district courts and courts of appeals that have struggled with the conflicting policies of Title VII and Rule 23, the Court of Appeals for the Fourth Circuit has had difficulty in identifying the limitations on the across-the-board class action doctrine. Although it initially was receptive to this broad approach, this court, albeit through panels of different individual judges, has perceived that limitations on the doctrine comparable to those developing in other jurisdictions must be enforced. Four cases decided by the Fourth Circuit illustrate the evolution of the across-the-board approach in Title VII class actions.

The court expressly adopted the across-the-board approach in 1975. In *Barnett v. W. T. Grant Co.*[221] the plaintiff, a black male truck terminal employee of the defendant, unsuccessfully sought a position as an over-the-road driver with the company. After he had initiated an individual suit alleging discrimination on the basis of race, Barnett amended his complaint to obtain class action relief on behalf of all blacks who may have been affected by any discriminatory employment practices of the defendant.[222] The District Court for the Western District of North Carolina narrowed the class to include only those unsuccessful applicants for road driving positions, and that class, consisting of five persons, failed to meet the numerosity requirement of Rule 23(a)(1).[223]

The Fourth Circuit, however, through a panel of Judges Craven, Winter, and Butzner, reversed the district court.[224] The appellate court characterized the plaintiff's claim as an " 'across-the-board' attack on all discriminatory actions by defendants on the ground of race,"[225] which conformed to the remedial purposes of Title VII.[226] The judges reasoned that the lower court's "less charitable view, under which Barnett could as a class representative challenge only those *specific* actions taken by the defendants toward him, would undercut those purposes."[227] That Barnett allegedly had been ag-

221. 518 F.2d 543 (4th Cir. 1975).

222. Barnett v. W.T. Grant Co., 396 F. Supp. 327, 335 (W.D.N.C. 1974), *rev'd in part*, 518 F.2d 543 (4th Cir. 1975).

223. 396 F. Supp. at 336.

224. 518 F.2d at 548.

225. *Id.* at 547.

226. *Id.* at 548.

227. *Id.*

grieved by some of the company's discriminatory employment practices demonstrated a sufficient nexus between his claim and those of the potential class members who suffered from different, although equally racially motivated, company actions. Furthermore, because Barnett's interests were not antagonistic to those of any potential class members, he could represent the proposed class adequately.[228]

One year after *Barnett* the Fourth Circuit, through a different panel of judges consisting of retired Supreme Court Justice Clark and Judges Russell and Widener, established some limitations to the application of the across-the-board doctrine in Title VII class actions. In *Doctor v. Seaboard Coast Line Railroad*[229] four named plaintiffs brought a class action suit alleging unlawful racial discrimination by the defendant railroad and several unions. In response to the district court's *sua sponte* request for information and a statement on the propriety of class certification, the four plaintiffs had proposed that they be permitted to represent three classes: Richard H. Doctor would represent all of the employees in the Conductors' Consolidated Seniority District No. 1 discharged because of race; Frank W. Davis would represent all of the craft employees at the Hamlet terminal who had been denied promotion because of race; and Richard Doctor III and H. D. Goodwin would represent all of the craft employees at the Hamlet terminal who had been confined to the lowest positions at Seaboard because of race.[230] After reviewing the interrogatory answers and depositions, the district court denied certification of all the proposed classes except as to plaintiff Goodwin, for whom the court certified a conditional class, which included:

> [A]ll blacks employed at the Hamlet terminal who belong[ed] to the firemen and oilers craft and [were] in the positions of Service Workers, Unskilled or Semi-Skilled workers, and [had] been "locked-in" or [had] not been promoted because of present or past racial discrimination. In addition, the class include[d] all blacks employed at the Hamlet terminal who [had] no craft affiliation and who [had] sought but [had] been prevented from entering the firemen and oilers craft because of initial discriminatory hiring in the non-craft position.[231]

228. *Id.*
229. 13 Fair Empl. Prac. Cas. 133 (M.D.N.C. 1974), *aff'd*, 540 F.2d 699 (4th Cir. 1976).
230. *See* 540 F.2d at 699.
231. *Id.* at 703.

On appeal of the class certification denial the Fourth Circuit affirmed the district court's ruling, stating that the plaintiff's bare allegations of class status had not satisfied their burden under Rule 23(a).[232] Stating that a plaintiff must meet all the prerequisites of Rule 23(a), the court cited the Tenth Circuit's opinion in *Taylor* with approval and presumably agreed with the court's recognition of a separate and independent meaning for the typicality requirement. The court of appeals also approved the method used by the lower court for determining whether the plaintiffs had met their burden of establishing a class action. Under that procedure a trial court would review the pleadings but usually would base its determination on more information than that provided in the complaint itself. Specifically, the trial judge could permit discovery relative to the issue of class certification, and if necessary, he could conduct a preliminary evidentiary hearing.[233] The object of the court's inquiry during this procedure would be to identify the type or character of each named plaintiff's alleged injury without reaching the merits of the claims and then to determine whether the allegations presented issues of law or fact that were common to class, whether the plaintiff's claims were typical of those of the class members, and whether the purported class satisfied the numerosity requirement.[234] Absent an abuse of discretion by the trial court in deciding these matters, its conclusions regarding the maintenance of the class action would not be disturbed on appeal.[235]

Pursuant to this procedure the Fourth Circuit first examined the nature of each plaintiff's claim. Richard H. Doctor's sole complaint, set forth in the discovery record (principally his deposition), was that the union did not represent him fairly in processing a discharge grievance.[236] He made no claim of across-the-board discrimination. Citing *White v. Gates Rubber Co.*,[237] the court concluded that Doctor, who had only a discharge grievance, could not represent properly a class of ninety employees who had other complaints.[238] The court determined that the numerosity and typicality requirements

232. *Id.* at 707. *See also* Weathers v. Peters Realty Corp., 499 F.2d 1197, 1200 (6th Cir. 1974); Huff v. N.D. Cass Co., 485 F.2d 710, 713 (5th Cir. 1973) (en banc).

233. 540 F.2d at 707.

234. *Id.* at 708-09.

235. *Id.* at 709. *See also* Huff v. N.D. Cass Co., 485 F.2d 710, 713 (5th Cir. 1973)(en banc).

236. 540 F.2d at 705-06.

237. 53 F.R.D. 412 (D. Colo. 1971); *see* text accompanying notes 149-51 *supra.*

238. 540 F.2d at 709.

were not satisfied because Doctor was unable to identify any other employees within his craft possessing similar claims, although he had the benefit of nearly four years of discovery.[239] The court also held that the district court did not abuse its discretion in denying class representative status to Frank W. Davis, who had claimed that his promotion to a machinist had been delayed because he was unlawfully denied admission to an apprenticeship program. Like Doctor, however, Davis could not identify other blacks who were denied admission to apprentice programs.[240] Finally, H. D. Goodwin and Richard Doctor III alleged that the denial of a right in the collective bargaining agreement to transfer seniority from one craft to another constituted illegal discrimination.[241] The court stated that the enforcement of this senority system possibly could violate Title VII; nevertheless, to justify class certification "there must be a representative party who has been *personally aggrieved*" by the contested action.[242] Inasmuch as the plaintiffs never sought nor qualified for a transfer to another craft and they never suffered any loss of seniority by transferring, the court concluded that they were not "aggrieved" parties entitled to represent a class of employees who had suffered such a loss.[243] *Doctor's* "personally aggrieved" standard apparently limited *Barnett's* across-the-board approach by restricting the types of employment practices that a plaintiff could attack in a class action.[244]

The Fourth Circuit again considered the requirements for certification of a Title VII class action in *Roman v. ESB, Inc.*[245] In that case forty-four named plaintiffs brought an action alleging viola-

239. *Id. See also* McAdory v. Scientific Research Instruments, Inc., 355 F. Supp. 468, 473 (D. Md. 1973); Jurinko v. Edwin L. Wiegand Co., 331 F. Supp. 1184, 1185 n.1 (W.D. Pa. 1971), *modified and aff'd*, 477 F.2d 1038 (3d Cir.), *vacated on other grounds*, 414 U.S. 970 (1973); Olson v. Regents of the Univ. of Minn., 301 F. Supp. 1356, 1357 n.1 (D. Minn. 1969).

240. 540 F.2d at 710.

241. *Id.* at 711. Goodwin and Doctor also complained that they had been denied a promotion from the lowest position in their craft at the Hamlet terminal because of their race, and Goodwin appealed from the discovery limits imposed by the trial court in its certification of only a portion of the class sought. The court of appeals noted, however, that, by his own admission, Goodwin had restricted his class claims geographically to the Hamlet terminal and that the district court's limitation of discovery to that area was proper. *Id.* at 710-11.

242. *Id.* at 711.

243. *Id.*

244. *See also* Walker v. World Tire Corp., 563 F.2d 918 (8th Cir. 1977) (class dismissal upheld when plaintiff unable to show injury as to promotion and discharge allegations).

245. 550 F.2d 1343 (4th Cir. 1976)(en banc).

tions of section 1981[246] and Title VII and sought to represent all black employees and officials of ESB, a battery manufacturer. The alleged discrimination involved the company's hiring, discharge, layoff, pay, and promotion policies, but the primary thrust of the suit concerned a grievance over ESB's layoffs.[247] The district court determined that the class consisted of only those blacks involved in the layoffs, rather than of all black employees and applicants,[248] and it concluded that the fifty-three identifiable class members did not satisfy the numerosity requirement.[249] The trial court also held that ESB had not engaged in illegal employment discrimination.[250]

On appeal, in an en banc decision, the Fourth Circuit noted that the plaintiffs' main concern was ESB's layoff policy, and it therefore affirmed the district court's denial of class certification.[251] According to the appellate court the numerosity requirement was not satisfied because the suit already had forty-four named plaintiffs, and the burden of adding the nine other identifiable prospective class members as individual plaintiffs was slight.[252] Moreover, the district court had not abused its discretion in limiting the potential class to those injured by ESB's layoff policy, especially in the absence of any testimony concerning discriminatory practices other than the layoffs.[253] If a broad class action had been certified, the plaintiffs' continued failure to develop evidence of employment discrimination not involving layoffs could suggest their inability to provide adequate representation.[254] In contrast, in a non-class action proceeding, the court of appeals reasoned, the final judgment would have a res judicata effect only for the forty-four named plaintiffs, and no issue of adequate class-wide representation would be raised. Further, little prejudice could result from the trial court's dismissal of the class because any other alleged discriminatory policies very likely would be of a continuing nature and thus would not be barred by the statute of limitations.[255]

246. 42 U.S.C. § 1981 (1970).
247. 550 F.2d at 1345-46.
248. Roman v. ESB, Inc., 7 Fair Empl. Prac. Cas. 1063, 1080 (D.S.C. 1973).
249. *Id.*
250. *Id.* at 1082.
251. 550 F.2d at 1345.
252. *Id.* at 1348.
253. *Id.*
254. *Id.* at 1355-56.
255. *Id.*

In their dissent in *Roman,* Judges Winter, Craven, and Butzner, the panel that decided *Barnett,* noted that the majority did not purport to overrule the latter decision, which had permitted a plaintiff to maintain an across-the-board action challenging all of a defendant's unlawful employment practices, although not all such practices had caused injury to the plaintiff.[256] Nevertheless, the dissent observed that the majority deviated from the holding in *Barnett* in its affirmance of the district court's refusal to certify a class encompassing members whose complaints did not correspond precisely with those of the named plaintiffs.[257] The extent of this deviation, however, is not clear. If the plaintiffs in *Roman* had submitted evidence both of the existence of discriminatory practices other than ESB's layoff policy and of their ability to represent adequately the employees injured by those practices, would the majority have reached a different conclusion? If so, the Fourth Circuit still would recognize across-the-board class actions in Title VII suits as a vehicle for terminating employment discrimination in appropriate cases, although it would not certify any such action until a complete analysis revealed that the suit would satisfy all of Rule 23(a)'s requirements.

In August of 1978, the Fourth Circuit resolved many of these unanswered questions in *Shelton v. Pargo, Inc.*[258] The defendant in *Shelton* had appealed from the district court's ruling that Rule 23 (e) mandated notice of the voluntary dismissal, under Rule 41 (a), of a class action employment discrimination suit in advance of any class certification or hearing pursuant to Rule 23(c)(1). The court of appeals reversed, holding that the district court could, in its discretion, approve a class action settlement and dismissal without making a certification determination or giving notice to putative class members under Rule 23(e), if it was satisfied that there had been no collusion between the parties or attorneys nor prejudice[259] to absent class members.

The final pages of the opinion, decided by a panel consisting of Chief Judge Haynesworth and Judges Russell and Bryan, contain

256. *Id.* at 1357 (dissenting opinion).

257. *Id.* at 1361.

258. ___ F.2d ___, 17 Fair Empl. Prac. Cas. 1413 (4th Cir. 1978).

259. For example, in Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 42 F.R.D. 324 (E.D. Pa. 1967), a case in which the court ordered a proposed compromise settlement held in abeyance until a determination of class certification could be made under Rule 23(c)(1), the limitations period would have run out one or two weeks after the filing of the action.

important dicta clarifying the court's view concerning employment discrimination class certification. Citing *Cohen v. Beneficial Loan Corp.*,[260] the court first identified what it characterized as abusive class action suits brought "not to redress real wrongs, but to realize upon their nuisance value."[261] The court also noted the public policy in favor of settling such suits, "particularly . . . class action suits which are an ever increasing burden to so many Federal Courts"[262] and attributed this flood of litigation to the practice of many lawyers seeking to obtain monetary leverage over defendants by circulating "boiler plate" complaints containing conclusory class action allegations.

The court further stated that the early tendency of courts to treat employment discrimination class certification "somewhat cavalierly" no longer prevailed.[263] Rather, as the court observed:

> Courts have begun to give to class certification questions the care and attention they deserve and this applies to racial discrimination cases as well as to any other type of class actions. Discrimination cases do not qualify as *per se* class actions: they must meet the requirements of 23(c) (1) for class certification the same as any other type of action and may not be treated as true class actions merely because they are supported by "boiler plate memoranda laden with self-serving conclusions." Any notion that such cases do not require the same inquiry with reference to compliance with [Rule] 23 as other types of cases was authoritatively dispelled by the decision in *East Texas Motor Freight v. Rodriguez,* [431 U.S.] at 405, in which the Court said that, while "suits alleging racial or ethnic discrimination are often by their very nature class suits, . . . careful attention to the requirements of Fed. Rul. Civ. Proc. 23 remains nonetheless indispensable" in such cases. And that has long been the rule in this Circuit.[264]

Relying upon its opinion in *Doctor,* the court in *Shelton* concluded that trial courts could no longer confine themselves to the

260. 337 U.S. 541 (1949).

261. 17 Fair Empl. Prac. Cas. at 1418.

262. *Id.* at 1422.

263. In arriving at this conclusion, the court specifically rejected arguments proferred by the plaintiffs, based on two decisions from the Eastern District of Wisconsin certifying broad-based class actions: Rotzenburg v. Neenah Jt. School District, 64 F.R.D. 181 (1974) and Duncan v. Goodyear Tire and Rubber Co., 66 F.R.D. 615 (1975). The court disagreed with the holdings in those cases on the ground that they were inconsistent with the Supreme Court's *Rodriguez* decision. 17 Fair Empl. Prac. Cas. at 1423 n.47.

264. 17 Fair Empl. Prac. Cas. at 1423 (citations and footnotes omitted).

allegations of the complaint in determining the appropriateness of certifying lawsuits as class actions. Rather, the court suggested that trial courts should preliminarily explore the merits of the plaintiffs' claims before reaching any such decision and, if necessary, encourage the parties to engage in extensive discovery on this issue.

Citing its earlier decision in *Roman,* the court reiterated its insistence that plaintiffs be barred from representing class interests arising out of conduct by which they were not personally aggrieved. Thus, the court in *Shelton* strictly applied the Supreme Court's prescriptions in *Rodriguez* which, as the court noted, "may [have] sound[ed] the death knell for 'across-the-board' suits in discrimination cases."[265]

Applying these prescriptions to the facts of that case, the court in *Shelton* pointed out that since both the named plaintiff and intervenor were in fact hired by the defendant, they would have severe problems satisfying the numerosity or typicality tests of Rule 23 (a) if they purported to represent individuals who suffered discrimination from hiring or other policies or practices which never personally aggrieved the named parties. Thus, those allegations of the complaint were dismissed insofar as they alleged class-based claims of employment discrimination.

It is clear from the extensive analysis of Rule 23(a) which appears in *Shelton* that the Fourth Circuit has determined to adopt a strict approach to class action discrimination suits. It is also apparent that the Fourth Circuit has chosen to interpret the Supreme Court's *Rodriguez* decision as imposing significant impediments to class certification, particularly where the named plaintiff is unable to claim that he or she has been "personally aggrieved" by the employment practice or policy upon which he or she seeks to support a class action lawsuit.

CONCLUSION

Persons challenging discriminatory employment practices in violation of Title VII previously have experienced considerable success in maintaining across-the-board class actions. Emphasizing the importance of Title VII's remedial purposes, many courts have neglected the procedural requirements of Federal Rule of Civil Procedure 23 and have certified broad-based class actions without analyz-

265. *Id.* at 1423.

ing sufficiently the nature of the named representative's claim. More recently, however, the Fourth Circuit and several other courts have regarded across-the-board allegations with suspicion and, as a result, have begun to apply more strictly Rule 23(a)'s individual requirements in Title VII litigation. Although the extent of these stricter interpretations necessarily will be determined on an *ad hoc* basis, some agreement already exists that such factors as a plaintiff's unique employment status, his separate geographic locaton, his tenuous relationship with employees in other departments, the remoteness in time of his complaint in relation to those of other employees, or the peculiar nature of his Title VII claim tend to undermine that employee's ability to represent a class adequately. These elements should be utilized as criteria against which each Title VII proposed class action is measured, and any case whose facts exhibit too much disparity between the named plaintiff and the proposed class members under any one of these tests should be denied class certification.

Although these judicial analyses have limited blind applications of the across-the-board approach, they have not nullified the possibility of broad class certifications altogether. Rather, the decisions have warned prospective plaintiffs that broad allegations of employment discrimination are insufficient to achieve class action certification, which will be granted only after a court specifically has determined that a proposed suit satisfied all of the requirements of Rule 23(a). This stricter scrutiny of Rule 23(a)'s prerequisites, thus, will continue to permit the maintenance of broad class actions in appropriate circumstances while concomitantly minimizing the danger of unfair res judicata consequences and preventing the litigation of vexatious and frivolous suits.