1987

Rebuilding The Barriers: The Trend In Employment Discrimination Class Actions

Judith J. Johnson
Mississippi College School of Law, jjohnson@mc.edu

Follow this and additional works at: http://dc.law.mc.edu/faculty-journals

Part of the Labor and Employment Law Commons

Recommended Citation

This Article is brought to you for free and open access by the Faculty Publications at MC Law Digital Commons. It has been accepted for inclusion in Journal Articles by an authorized administrator of MC Law Digital Commons. For more information, please contact walter@mc.edu.
Rebuilding the Barriers: The Trend in Employment Discrimination Class Actions¹

By Judith J. Johnson*

INTRODUCTION

Congress intended that employees vindicate the rights given them under Title VII of the Civil Rights Act of 1964 by private action.² For several years private actions proved to be very successful in eliminating employment discrimination.³ Recent decisions of the Supreme Court and lower courts have limited the effectiveness of the private employment discrimination suit as a major deterrent and remedy for such discrimination.⁴ This is especially true in the area of class action suits, which have been the single most effective tool in eliminating employment discrimination.⁵ Many courts today interpret Rule 23, the federal rule governing

---

* Associate Professor of Law, Mississippi College of Law. B.A. University of Texas at Austin, 1969; J.D., University of Mississippi, 1974. I would like to thank Craig Callen, Cecile Edwards, Howard Fenton, William Page, J. Allen Smith, and Craig Turner for editorial assistance and Bruce Thompson for editorial and research assistance.

¹ The objective of Congress in the enactment of Title VII is ""to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."" Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971).

² 42 U.S.C. § 2000e. ""Suits brought by private employees are the cutting edge of the Title VII sword which Congress has fashioned to fight a major enemy . . . [to] continuing progress, strength, and solidarity in our nation, discrimination in employment."" Wetzel v. Liberty Mutual Ins. Co., 508 F.2d 239, 254 (3d Cir. 1975). See infra text accompanying note 22.

³ See infra notes 21-22.


⁵ See infra notes 21-22.
class action suits, so restrictively that such suits are becoming unworkable.6

The present trend is the result of more than a decade of debate among scholars, courts, and lawyers regarding how courts should apply Rule 23 to employment discrimination suits. In the early years of employment discrimination suits, courts substantially relaxed the requirements of Rule 23, sometimes ignoring them altogether. Courts assumed that since employment discrimination was an injury to a class, most employment discrimination cases should be automatically certified as class actions.7

Opponents of such permissive certification argued that Rule 23 should be applied strictly and narrowly by requiring that the class representative only represent persons whose claims are virtually identical to his or hers. The result of such restrictive certifications was that the courts can rarely find a sufficiently numerous class of persons who have such identical claims. The courts are then compelled to deny class certification for lack of numerosity (one of the requirements of Rule 23).8

The movement toward restrictive certification, resulting in the present trend, has been gaining strength over the past ten years.9 Some proponents of restrictive certification believe that since Title VII has been the law for over twenty years, its objective has been achieved and employers should no longer be harassed by threats of massive class action suits. While it is no doubt true that there is less blatant discrimination today than formerly, it must also be recognized that many employers still tolerate subtle — and in some cases not so subtle — forms of discrimination which cannot be ferreted out by individual actions.10

---

7. See infra text accompanying notes 39-41, 48.
8. See infra text accompanying notes 214-17.
10. See, e.g., Watson v. Fort Worth Bank & Trust, 798 F.2d 791, 815 (5th Cir. 1986) (Goldberg, J., dissenting), cert. granted, 107 S.Ct. 3227 (1987); Palmer v. Schultz, 815 F.2d 84 (D.C. Cir. 1987) (lengthy discussion of the legal principals that apply to pattern or practice disparate treatment claims); Hammon v. Barry, 813 F.2d 412, 433-47 (D.C. Cir. 1987) (Lengthy dissent by Circuit Judge Mikva concerning the failure of the majority to consider properly the effect of the past pattern or practice of race discrimination on the racial composition of the Fire Department of the District of Columbia. The majority had reversed a lower court decision upholding race-conscious hiring provisions of the affirmative action plan of the Fire Department.); Morris v. Bran-
The thesis of this article is that restrictive certification, as predicted early on, is draining the life out of Title VII. Class actions are a necessary tool to vindicate Title VII rights, and the courts should not eliminate such actions in deference to a false assumption that only a person with the same claim as the class can be an adequate representative. The courts are expecting a perfect class representative, thus ignoring the realities of Title VII litigation. It is difficult for anyone to sue his or her employer. Class representatives are not as likely to present themselves in such suits as in other litigation. Furthermore, only the largest employers employ enough people with identical current claims to fill a class. Therefore, the present trend must be reversed. If class actions are to be a viable tool in the enforcement of Title VII, the courts must be willing to certify smaller classes and to accept as a class representative one whose claims are related, but not identical, to the claims of the class.

This article analyzes the present trend in a historical context and suggests solutions which allow the courts to take into consideration the problems the Title VII plaintiff faces, while assuring compliance with Rule 23.

I. Background

A. Title VII

Title VII of the Civil Rights Act of 1964, which was designed to eliminate all vestiges of employment discrimination, was one of the most controversial pieces of legislation ever to be passed by Congress.
The proponents originally modelled the Act after the National Labor Relations Act, giving the agency, the Equal Employment Opportunity Commission, the same enforcement powers as the National Labor Relations Board has under the Act. In order to weaken the Act and to make it more palatable to its opponents, however, later compromises stripped the EEOC of enforcement powers. Congress intended to leave enforcement of the Act in the hands of private parties and the courts to overcome fears that EEOC enforcement would be too vigorous. Thus, it is ironic that the courts found in the class action suit an even more urging passage of what was to become the Civil Rights Act of 1964, "warned of 'a rising tide of discontent that threatens the public safety' in many parts of the country." Civil Rights and Job Opportunities — Message From the President of the United States, H.R. Doc. No. 124, 88th Cong., 1st Sess. 11174, 11174 (1963). After a review of the limited progress in five areas (equal accommodations in public facilities, desegregation of schools, fair and full employment, community relations service, and federal programs), President Kennedy in his conclusion stressed again the real danger of legislative inaction. Id. at 11179.


The Act authorized the Attorney General to proceed if there was reasonable cause to believe that the defendant had engaged in a pattern or practice of employment discrimination. 42 U.S.C. § 2000e-6(a) (1982).

Under the present procedure, which is largely unchanged, the charging party files a charge, and the EEOC conducts an investigation and makes a determination whether there is reasonable cause to believe discrimination has occurred. 42 U.S.C. § 2000e-5(b) to (d) (1982). The Commission then attempts conciliation, and if unsuccessful, the charging party receives a right to sue letter. He or she then brings suit in federal court for a de novo determination on his or her claim. 42 U.S.C. § 2000e-5(f)(3) (1982).

effective enforcement vehicle than vigorous EEOC enforcement would have been.\textsuperscript{17}

It soon became apparent that the public role in the enforcement of Title VII was inadequate.\textsuperscript{18} As a result, in 1971, along with other amendments to Title VII, Congress again considered giving the EEOC power to issue cease and desist orders.\textsuperscript{19} Opponents argued that the federal courts were enforcing the statutes effectively through the class action mechanism.\textsuperscript{20}

The bill which passed the House would have essentially eliminated the use of class actions in Title VII cases by requiring that all class members file, or be named in, the charge.\textsuperscript{21} Congress ultimately rejected that provision, and the conference committee endorsed the use of class actions by agreeing that """Title VII actions are by their very nature class complaints, and that any restriction on such actions would greatly undermine the effectiveness of Title VII.""\textsuperscript{22}

\textsuperscript{17} See Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 719-20 (7th Cir. 1969). See also Jackson v. Seaboard Coast Line R.R., 678 F.2d 992, 1001-05 (11th Cir. 1982) (filing of an EEOC charge is not a jurisdictional prerequisite to maintenance of Title VII class action); Miller v. International Paper Co., 408 F.2d 283, 289-90 (5th Cir. 1969) rev'g 290 F. Supp. 401 (S.D. Miss. 1967) (discussing the policy of conciliation as applied to the roles of the EEOC and Title VII).

\textsuperscript{18} The Attorney General pursued only a few big cases, and the EEOC was swamped by a burgeoning backlog. See B. SCHLEI & P. GROSSMAN, supra note 10, at 933; Sape & Hart, supra note 15, at 846 & 889; Rutherglen, supra note 16, at 694.

\textsuperscript{19} Proponents of EEOC cease and desist power introduced bills each session after Title VII passed. See Sape & Hart, supra note 15, at 830-37.

\textsuperscript{20} See Rutherglen, supra note 16, at 713-16.

\textsuperscript{21} H.R. 1746, 92d Cong., 1st Sess. § (3)(e) (1971). Furthermore, the conference committee spokesman agreed that in areas in which the committee had not acted to the contrary, it was to be assumed that present case law developed by the courts would continue to govern Title VII cases. See Sape & Hart, supra note 15, at 846.

\textsuperscript{22} One inference that can be drawn from this legislative history is that had the courts been less successful in securing compliance with Title VII, the support for granting cease and desist power to the EEOC would certainly have been more vigorous. S. REP. No. 415, 92d Cong., 1st Sess. 27 (1971). The 1972 amendments, inter alia, gave the EEOC power to sue in individual cases and transferred the responsibility for pattern and practice suits in the private sector to the EEOC. Charge filing and limitation periods were also extended. 42 U.S.C. §§ 2000e-5(f)(1), 2000e-(6)(c), 2000e-16 (1982). See Rutherglen, supra note 16, for a different interpretation but a good discussion of the legislative history of Title VII and the 1972 amendments.
B. Class Actions Generally

Thus, Congress left the enforcement of Title VII in the hands of the courts and gave its imprimatur to eradication of discrimination through private class action suits. An allegation of employment discrimination, however, is not enough to maintain a class action suit. Rule 23 of the Federal Rules of Civil Procedure requires that a class of persons exist and that the plaintiff be an adequate representative of that class. The policy of Rule 23 is to assure adequate representation of absent class members.\(^2\)

In order to determine whether the class representative can adequately represent a class, the court must decide whether the class meets the prerequisites of Rule 23(a),\(^2\) and whether the action falls into one of the three categories of class suits described in Rule 23(b).\(^2\)

\(^2\)\text{7A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 1765 (2d ed. 1986) [hereinafter Wright, Miller & Kane]. At least prior to the recent cases interpreting the Supreme Court's pronouncements in \textit{Falcon and Rodriguez}, this was especially true in Title VII cases, because of Title VII's "remedial and humanitarian underpinnings" and "the crucial role played by the private litigant in the statutory scheme." Sanchez v. Standard Brands, Inc., 431 F.2d 455, 460 (5th Cir. 1970). \textit{See} Smalls, \textit{Class Action Under Title VII: Some Current Procedural Problems}, 25 Am. U. L. Rev. 821, 822 (1976).}


24. Rule 23(a) provides:
(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. \textit{Fed. R. Civ. P. 23(a)}.

25. Rule 23(b) provides:
(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied and in addition:
The four requirements of Rule 23(a) are sufficient numerosity, commonality, typicality, and adequacy of representation. Of these, commonality is closely related to the third requirement, which has given

(1) the prosecution of separate actions by or against individual members of the class would create a risk of
   (A) inconsistent or varying adjudication 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 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 laws 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 individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

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


27. Since the disjunctive is used, the court need find only common questions of law or fact. See Moore, supra note 23, at ¶ 23.06-1.

In civil rights cases prior to General Telephone Co. v. Falcon, 457 U.S. 147 (1982), as the foundation of across-the-board certification, the courts have found that common questions of law or fact existed when discrimination was alleged. See, e.g., Johnson v. Georgia Highway Express, 417 F.2d 1122 (5th Cir. 1969). The "Damoclean threat of a racially discriminatory policy hangs over the racial class [and] is a question of fact common to all the members of the class." Hall v. Werthan Bag Corp., 251 F. Supp. 184, 186 (M.D. Tenn. 1966). One commentator has opined that the commonality requirement is superfluous and that courts tend to apply it vaguely, because it is a necessary ingredient in determining that the case falls into one of the categories under Rule 23(b). 7A Wright, Miller & Kane, supra note 23, at § 1763. See Strickler, Protecting the Class: The Search for the Adequate Representative in Class Action Litigation, 34 DePaul L. Rev. 73, 98-100 (1984).
courts the most trouble, typicality. Under the third requirement, the claims or defenses of the representative parties must be typical of the claims or defenses of the class. Courts tend to merge the typicality requirement with commonality, or with the fourth requirement, adequate representation by the class representative.

Because courts tend to merge typicality, commonality, and adequacy of representation, commentators suggest the following analysis: Rule 23(a)(1) focuses on who the proposed class members are and requires that they be identified and that joinder be impracticable; Rule 23(a)(2) focuses on the claims of the class and requires a commonality of relationship between those claims; Rule 23(a)(3) focuses on the claim of the class representative and requires that it have the essential characteristics common to the class claims; Rule 23(a)(4) looks at all facts regarding the representative and requires that he adequately represent the class.

The Supreme Court has made it clear that adequacy of representation is constitutionally required. Since class action decrees bind the class, the class representative must adequately represent the class in order for the decree to comport with due process of law. The requirements of typicality and commonality bear heavily on adequacy of representation. Thus a central problem is how closely connected the claims of the representative and of the class must be to assure adequate representation. Courts which hold that the claims must be identical or co-extensive are obviously applying the requirement too restrictively. How similar the claims must be is the subject of much disagreement and is at the core of the conflict between the restrictive and liberal theories of class certifications.

29. See 7A Wright, Miller & Kane, supra note 23, at § 1764; Strickler, supra note 27, at 100-02; Rutherglen, supra note 16, at 698.
30. Professor Moore suggests that courts should attempt to give independent meaning to Rule 23(a)(3) rather than needlessly interpret the various subsections of the Rule as confluent. Moore, supra note 23, at ¶ 23.06-2. See Strickler, supra note 27, at 97-99.
34. 7A Wright, Miller & Kane, supra note 23, at § 1764.
35. If the requirements of Rule 23(a) are met, the class must then fit into one of the categories under Rule 23(b). Fed. R. Civ. P. 23(b). The advisory committee note to the 1966 amendments to the rule indicates that Rule 23(b)(2) was intended to function as an effective vehicle for bringing suits alleging discrimination. Amendments
C. Historical Background: The Development of the Across-the-Board Theory of Class Certification

As the law developed under Title VII, the courts accepted the responsibility, delegated to them by Congress, of eliminating employment to Rules of Civil Procedure, 39 F.R.D. 69, 102 (1966) (Advisory Committee's Note to Rule 23(b)(2)). Professor Rutherglen believes that this result is unwarranted and that certification under (b)(1) or (b)(3), depending on the issues involved, would also be in keeping with the nature of the suit. Rutherglen, Notice, Scope, and Preclusion in Title VII Class Actions, 69 Va. L. Rev. 11 (1983) [hereinafter Rutherglen, Notice, Scope and Preclusion]. Rutherglen reasons:

An action to restructure hiring or promotion practices, or to reform a seniority system, meets the requirements of subdivisions (b)(1) and (b)(2) of Rule 23. Such actions fall under subdivision (b)(1) if individual actions might require the employer to establish inconsistent employment practices or might, as a practical matter, affect the interests of other employees not party to individual actions. They fall under subdivision (b)(2) if the disputed employment practice applies generally to the class, and class-wide injunctive or declaratory relief might be appropriate.

Id. at 20 (footnote omitted).

Professor Rutherglen believes that such class allegations are equally amenable to treatment under Rule 23(b)(3), since they also seek individual compensatory relief. Id. at 23.

However most Title VII classes proceed under subsection (b)(2) because the plaintiffs generally seek an injunction to halt discriminatory practices, and relief will then benefit the class as a whole. See 7A Wright, Miller & Kane, supra note 3, at ¶ 23.1(10-2), 23.40. Monetary relief in the form of backpay is commonly requested; however, (b)(2) is still appropriate because the relief sought is equitable in nature. Moore, supra note 23, at ¶ 23.40[4].

In addition to the requirements of Rule 23(a) and (b), two other prerequisites are often cited: a definable class must exist, and the representative must be a member of the class he seeks to represent. 7A Wright, Miller & Kane, supra note 23, at ¶ 23.1, 1759. The first requirement, it would appear, is really a restatement of the Rule 23(a)(1) requirement of numerosity and (a)(3) requirement of typicality. See generally Warren, Title VII of the Civil Rights Act of 1964 and Class Action Litigation, 34 Baylor L. Rev. 177, 183 (1982). Furthermore, the requirement that the representative be a member of the class assures that he or she has standing to represent the class. Standing is used to insure a constitutional case or controversy as well as to require that there be sufficient nexus between the representative and the class. The nexus requirement is really a restatement of typicality to ensure adequacy of representation. Moore, supra note 23, at ¶ 23.04[2]. Thus, whether these last requirements are additional to Rule 23(a) is debatable.

The final provision of Rule 23 identifies, inter alia, the court's role in class action litigation. Rule 23(c)(1) provides that the court must determine as soon as is practicable whether the class action is maintainable. The order may be conditional and may be altered or amended at any time before decision on the merits. Fed. R. Civ. P. 23(c)(1). Subsection (d) gives the trial court discretion to make orders for the conduct of the
discrimination. They extensively used the mechanism of the class action suit for this purpose. The Fifth Circuit took and maintained the lead, treating allegations of discrimination as appropriate for class treatment in most cases. It developed an across-the-board theory of class certification based on the concept that if the employer discriminates, as to race, in one instance, then he or she discriminates in all. "Racial discrimination is by definition class discrimination. If it exists, it applies throughout the class." Therefore, when a class action was alleged under

class action. Fed. R. Civ. P. 23(d). Subsection (c)(4) permits the court to divide the class into subclasses and maintain the class as to particular issues. Fed. R. Civ. P. 23(c)(4). Rule 23 lodges power in the court to supervise and direct the class action and protect the members of the class. See Moore, supra note 23, at ¶ 23.02-1; Rutherglen, supra note 16, at 691. Subsection (e) requires court approval of all settlements, as well as such notice to the class as the court directs. Fed. R. Civ. P. 23(e). Finally, subsection (c)(3) provides that a judgment rendered in all three types of class actions is res judicata as to all members of the class except those who have opted out of classes certified under Rule 23(b)(3). Fed. R. Civ. P. 23(c)(3).

Unlike Rule 23(b)(2), Rule 23(b)(3) requires notice and an opportunity to opt out. See, e.g., Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 173-76 (1974) (Rule 23(b)(3) requires notice of right to opt out); Penson v. Terminal Transport Co., 634 F.2d 989, 993-94 (5th Cir. 1981) (Rule 23(b)(2) does not require notice of right to opt out). See also 7B Wright, Miller & Kane, supra note 23, at § 1786.


The concept that racial discrimination is by definition class discrimination was expanded by the Fifth Circuit in Oatis v. Crown Zellerbach Corp., 398 F.2d 496 (5th Cir. 1968). In Oatis the district court had limited the class to those persons who had filed charges with the EEOC. The Fifth Circuit rejected this idea and said that to require every employee to file a charge "would tend to frustrate our system of justice and order." Id. at 499. The court believed the better approach would be for one person to raise the issue before the EEOC and bring an action for himself and all others similarly situated. The court quoted the Supreme Court's decision in Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968), for the proposition that suits under Title VII are private only in form, and that one who obtains injunctive relief does so as a "'private attorney general', vindicating a policy that Congress considered of the highest priority." Id. at 499. Because "'[r]acial discrimination is by definition class discrimination'" the court went on to say that the class action must of course meet the requirements of Rule 23(a) and (b)(2) and stated without elaboration that the requirements were met. Id.
Title VII, the position of the adherents to the across-the-board theory was that the requirements of Rule 23 should be loosened substantially to allow certification of a broad-based class action whenever possible. The common question was racial discrimination. The plaintiff's claim was typical if he allegedly had been aggrieved by racial discrimination. Thus, if the class representative alleged racial discrimination, then he could represent a class of all black persons alleging discrimination and employed by the defendants.

The across-the-board class action mechanism sometimes led to extreme results. Some courts blatantly ignored the requirements of Rule 23 in order to achieve the Congressional policy of Title VII. In such cases almost any allegation of discrimination was sufficient to justify cer-

Shortly thereafter, the Fifth Circuit decided Jenkins v. United Gas Corp., 400 F.2d 28 (5th Cir. 1968). The court rejected the employer's claim that the plaintiff's claim was made moot by the latter's acceptance of the promotion that he alleged had been denied in a discriminatory fashion. The court stated:

[with so much riding on the claim of the private suitor, the possibility that in this David-Goliath confrontation economic pressures will be at work toward acceptance of preferred post-suit jobs and the equal possibility that an employer would devise such a resist-and-withdraw tactic as a means of continuing its former way calls for the trial court to keep consciously aware of time-tested principles particularly in the area of public law.]

400 F.2d at 33.

The court based its decision on its conviction that congressional intent was to leave enforcement of Title VII in the hands of the individual claimants. As the court said of such a claimant, "that individual, often obscure, takes on the mantle of the sovereign." Id. at 32. The fact that he is charging discrimination embues the charge with "heavy overtones of public interest." Whether in name or not, the suit is preforce a sort of class action for fellow employees similarly situated." Id. at 33. The court reversed the trial judge's decision that no common question of law or fact existed, because the trial level decision was based on the fact that different circumstances surrounded the different jobs of the members of the class. The appellate court rejected the employer's argument that, due to the representative's promotion, no class existed, since the representative had alleged "plant-wide system-wide racially discriminatory employment practices." He was therefore still entitled to an injunction and backpay, if he prevailed. Id. at 33-34. The court said that there was no question regarding adequate representation and that the trial court could divide the class into subclasses if necessary. Id. at 35.

38. See Bing v. Roadway Express, Inc., 485 F.2d 441, 446 (5th Cir. 1973).

tification of a class action. Thus the policy of Title VII came into conflict with the policy behind Rule 23.

The Fifth Circuit first articulated the across-the-board theory of class actions in Johnson v. Georgia Highway Express. The lower court had limited the scope of the class to those employees discharged because of race. The Fifth Circuit held that the trial judge’s narrow definition of the class was inappropriate, because the suit was an “‘across the board’ attack on unequal employment practices alleged to have been committed by the appellee pursuant to its policy of racial discrimination.”

The complaint described various acts of discrimination and asserted a company-wide policy of discrimination. The court of appeals, therefore, reasoned that the plaintiff intended to represent all employees harmed by the alleged discrimination, whether it manifested itself in discharge, hiring, promotion, or segregated facilities.

The significance of Johnson is not just that its court was first to apply the term “across-the-board.” The formulation was not refined in that case. Johnson’s importance lies in Judge Godbold’s concurrence. In his concurrence he presaged concerns which were to develop later regarding the “across-the-board” theory. Since the pleadings did not define a class by acts, time, persons, plant supervisors, or other particulars, Judge Godbold stated that the

appellant has done no more than name the preserve on which he intends to hunt. Over-technical limitation of classes by district courts will drain the life out of Title VII . . . . But without reasonable specificity the court cannot define the class, cannot determine whether the representation is adequate, and the employer does not know how to defend.

Judge Godbold cautioned that an overly-broad class would be so unfair

40. See Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969); see generally Anderson, supra note 36, at 907-08.
41. For policy behind Rule 23, see supra text accompanying note 23.
42. Johnson v. Georgia Highway Express, 417 F.2d 1122 (5th Cir. 1969).
43. Id. at 1124.
44. Judge Godbold clarified what the appellate court was telling the district court: that the district court had defined the class too narrowly. Instead it must precisely define the class considering “the tests of adequate representation, protection of the interests of the class, and manageability of the lawsuit.” Id. at 1125 (Godbold, J., concurring).
45. Id. at 1126.
to absent members as to amount to deprivation of due process. He also concluded that the broad class action is "dandy for the employees if their champion wins," but catastrophic if he loses "or proves only such limited facts that no practice or policy can be found, leaving him afloat but sinking the class . . . ."46

Judge Godbold's warning was not heeded. The Fifth Circuit's across-the-board theory of class certification was accepted by virtually every circuit,47 and it seemed that the mere allegation of class discrimination was sufficient to warrant certification. Plaintiffs' lawyers developed "boiler plate" class action pleadings which were often scrutinized only slightly by the courts.48

The Fifth Circuit's decision in Rodriguez v. East Texas Motor Freight System49 was the pinnacle of the across-the-board theory. Its reversal by

46. Id.
48. See, e.g., Senter, 532 F.2d at 524 ("The operative fact in an action under Title VII is that an individual has been discriminated against because he was a member of a class.''); Rich v. Martin Marietta Corp., 522 F.2d 333, 340-41 (10th Cir. 1975) (The action of the district court in reducing the class "to those individuals only who were of the same race or ethnic origin and who performed the same job" if allowed "would effectively make Rule 23 a nullity.''); Barnett, 518 F.2d at 547 ("Viewed broadly, [the plaintiff's] suit is an 'across the board' attack on all discriminatory actions by defendants on the ground of race, and when so viewed it fits comfortably within the requirements of Rule 23(b)(2)."'); Rodriguez v. East Texas Motor Freight System, 505 F.2d 40, 50 (5th Cir. 1974), vacated on other grounds, 431 U.S. 395 (1977) ("[T]he requirements of Rule 23(a) must be read liberally in the context of suits brought under Title VII . . . . Suits brought under these provisions are inherently class suits.''); Long v. Sapp, 502 F.2d 34, 43 (5th Cir. 1974) ("[S]he occupies the position of one she says is suffering from the alleged discrimination. She has demonstrated the necessary nexus with the proposed class for membership therein.''); Tipler v. E.I. D. D. e N. e M. o u r s and Co., 443 F.2d 125, 131 (6th Cir. 1971) (In discussing the scope of a complaint "federal courts should not allow procedural technicalities to preclude Title VII complaints.''); Parham, 433 F.2d at 428 ("Parham's failure to establish his claim for individual damages will not bar relief for the class he represents. The very nature of a Title VII violation rests upon discrimination against a class characteristic, i.e., race, religion, sex or national origin.''); Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 715 (7th Cir. 1969) ("When . . . the alleged discrimination has been practiced on the plaintiff because he or she is a member of a class which is allegedly discriminated against, the trial court bears a special responsibility in the public interest to resolve the dispute by determining the facts regardless of the position of the individual plaintiff.'").
the Supreme Court in 1977 marked the onset of retrenchment from broad certifications. In *Rodriguez* the district court had dismissed a class action which alleged discrimination by a trucking company against blacks and Mexican-Americans.\(^50\) The trial court dismissed the class after the trial, because the plaintiffs had failed to move for class certification or to offer proof of liability or damages as to the class.\(^51\) Furthermore, the plaintiffs had stipulated before trial that the only issue before the court involved the plaintiffs' individual claims.

Although the lower court had found that the plaintiffs were not qualified, because of their age, weight, and driving records, to be road-drivers, the Fifth Circuit chose not to comment on this finding.\(^52\) Rather, it reversed the case as to the plaintiffs and certified the class on appeal, stating that there was no serious dispute that the plaintiffs satisfied the first three criteria of Rule 23(a).\(^53\)

The only analysis the Fifth Circuit attempted was with regard to adequacy of representation. The defendants had offered evidence that the plaintiffs had acted in a manner antagonistic to the interests of the class. The evidence was based on the fact that a majority of the minority members of the union had rejected the relief requested by the plaintiffs in the complaint.\(^54\) The court found that the union meeting vote

\(^{50}\) It was a common practice at that time to hire minorities as city drivers to deliver merchandise locally, but to exclude them from over-the-road jobs, which paid more and were considered more prestigious. The defendant, East Texas Motor Freight Co. had, in addition, followed a "no transfer" policy prohibiting drivers from transferring between the two job classifications. Thus, in order for a city driver to become an over-the-road driver, he had to resign his city driving job and relinquish his seniority. As a further barrier, he had to have had three years "immediate prior line haul road experience," which obviously was impossible for city drivers to meet. 505 F.2d at 46-48. The plaintiffs had applied for over-the-road jobs in 1970, and East Texas Motor Freight Co. stipulated that the applications had never been considered. The Fifth Circuit properly found that these policies were discriminatory, since the defendant had never hired a minority person as an over-the-road driver until one of the plaintiffs filed an EEOC charge in 1970. *Id.* at 48. At that time three Mexican-Americans were hired. No blacks had ever been hired, and 35% of the city drivers were black or Mexican-American. *Id.* at 48.

\(^{51}\) *Id.* at 49.

\(^{52}\) *Id.* See infra text accompanying note 61.

\(^{53}\) *Id.* at 50.

\(^{54}\) Plaintiffs had requested that the separate city and over-the-board drivers' seniority lists be merged to create a single seniority system based on the employee's date of hire by the company. *Id.* at 50.
rejecting such relief was not as significant as the company urged, since voters included employees of other companies and only represented the opinion of one local, rather than including employees from all the areas covered by the company. The court concluded that Title VII and Section 1981 had been violated and remanded the case to the trial court for determination of a remedy within the limits described.

D. East Texas Motor Freight System v. Rodriguez

As the across-the-board theory was reaching its zenith in the courts of appeal, the Supreme Court changed the direction of the developments in class actions and attempted at least to refine across-the-board suits. It reversed the Fifth Circuit in East Texas Motor Freight System v. Rodriguez. The Supreme Court held that the court of appeals erred in certifying the class under the facts of the case. The Court determined that the plaintiffs were not adequate representatives of the class. It cited as error the Fifth Circuit's discounting of the plaintiffs' failure to move for class certification, the circuit court's disregard of the stipulation in the trial

55. Id. at 50-51. The court did not comment on the significance for adequacy of representation purposes of the plaintiffs' failure to move for class certification and stipulation that the trial only involved the plaintiffs' individual claims. The court did note that in a colloquy between the trial judge and the plaintiffs' attorney, the attorney urged that there was still a live class. Id. at 52. However, this also should bear on adequacy of representation, since the plaintiffs had failed to move for such certification prior to the trial and had stipulated away the class issue.

56. We hold, not that all minority city drivers with three years experience at city driving must be permitted to transfer, but only that they may not be excluded unless they fail to meet other qualifications that either have no disparate impact along racial or national-origin lines or that can be justified as essential for safety or efficiency. Id. at 62.


58. The Supreme Court made it clear, in the recitation of facts in Rodriguez, that the Fifth Circuit had picked and chosen from the trial record in an improper manner. In order to certify the class on appeal and find class-wide liability, the Fifth Circuit said that the case had been tried as a class action. The Supreme Court said that this was contrary to the understanding of the trial judge and that the Fifth Circuit had quoted a portion of a colloquy with the judge in the record out of context to support the statement. In fact, "as the full colloquy reveals, the trial judge ruled that evidence concerning general company practice would be admitted, not because of the class allegations, but only because it was probative with respect to the plaintiffs' individual claims." Id. at 402 n.6.
court that the issues to be resolved concerned only the individual plaintiffs, and its minimization of the antagonism evidenced by the union meeting vote regarding relief to be requested at trial.

The decision hinged on the finding by the trial court that the plaintiffs were not qualified for the line driver positions even under non-discriminatory criteria. The Court, therefore, held the plaintiffs were not members of the class they purported to represent at the time the class was certified. "As this Court has repeatedly held, a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members." 61

Since the plaintiffs were not qualified to be line drivers, they could not represent persons who were qualified but were discriminatorily denied those jobs. The Court also noted the plaintiffs' stipulation that their employer had not discriminated against them during initial hiring. As a result, "[plaintiffs] were hardly in a position to mount a classwide attack on the notransfer rule and seniority system on the ground that these practices perpetuated past discrimination and locked minorities into the less desirable jobs to which they had been discriminatorily assigned." 62

This language has been cited as a rejection of the across-the-board approach. Since the plaintiffs had not been aggrieved by hiring practices, they could not represent persons who had been. 63 Taken in context, however, the Court's holding meant only that the plaintiffs could not represent a class since they had not been injured at all. Thus, Rodriguez could have been interpreted to preclude class suits by persons not injured by discrimination at all. This interpretation leaves open the possibility that "same interest" could be freedom from discrimination and "same injury" could mean simply any act of discrimination actually experienced, regardless of the form.

This conclusion is further bolstered by the fact that at the end of the opinion the Court endorsed the foundation of the across-the-board theory:

59. See supra note 55.
60. Rodriguez, 431 U.S. at 404-05. The Court noted that a different case would be presented after the class had been certified. In such a case, the class would have independent existence. Id. at 406 n.12.
61. Id. at 403.
62. Id. at 404.
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 indispensible. 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.64

Prior to Rodriguez, only one circuit had expressly rejected the across-the-board theory of class certification.65 Subsequently, many appellate courts revised or articulated for the first time their views on across-the-board certification.66

Some courts believed that Rodriguez approved the across-the-board theory, and that "same interest, same injury" could be liberally interpreted.67 Others believed it unequivocally eliminated across-the-board

---

64. 431 U.S. at 405-06.

One such court said that "[s]ome generalization from the Rodriguez dicta is essential if the broad remedial purposes of Title VII are to be served and if Rule 23 is not to be emasculated. Nor, in my opinion, is Rodriguez inconsistent with the policy favoring across-the-board challenges to discriminatory employment practices." Muka v. Nicolet Paper Co., 24 Fair Empl. Prac. Cas. (BNA) 672, 674 (E.D. Wis. 1979) (citations omitted). These courts interpreted Rodriguez as applying simply to the situation in which the named plaintiffs have not been discriminated against at all. 24 Fair Empl. Prac. Cas. (BNA) at 674. See Vuyanich v. Republic Nat'l Bank, 82 F.R.D. 420, 433 (N.D. Tex. 1979); Arnett v. American Nat'l Red Cross, 78 F.R.D. 73, 77 n.6 (D.D.C. 1978).

certification. Still others allowed across-the-board attacks in only some circumstances. Over time, however, the trend started by Rodriguez proved to be a retreat from across-the-board certification.

Despite the Supreme Court decision, the Fifth Circuit continued to apply the across-the-board theory, reasoning that Rodriguez was not contrary to its policy of favoring across-the-board certification. In Falcon v. General Telephone Co., the Fifth Circuit held that it still permitted across-the-board attacks on discrimination and that

[i]t is therefore apparent that this court permits an employee complaining of one employment practice to represent another

68. See, e.g., Stastny v. Southern Bell Tel. & Tel. Co., 628 F.2d 267, 273 n.7 (4th Cir. 1980); Tuft v. McDonnell Douglas Corp., 581 F.2d 1304 (8th Cir. 1978).

Still other courts said that the across-the-board theory had to be re-evaluated in light of Rodriguez, and that the courts that interpreted it to allow continuance of such certifications failed to deal adequately with the more general observations of the Rodriguez Court about adherence to the requirements of Rule 23. "By limiting the impact of Rodriguez, the courts' capacity to effectuate the purposes of Rule 23(a) would be diminished." Local 194, Retail, Wholesale and Dep't Store Union v. Standard Brands, Inc., 85 F.R.D. 599, 605 (N.D. Ill. 1979). Still others took a middle ground, finding that the reasoning of adherents to the across-the-board theory was more persuasive, but that all of the requirements of Rule 23, especially adequacy of representation, should be met. See, e.g., I.M.A.G.E. v. Bailar, 78 F.R.D. 549, 555 (N.D. Cal. 1978). The Third Circuit articulated yet a different approach: the class must first meet the requirements of Rule 23(a), then once properly certified, some requirements of the rule may be relaxed to permit consideration of claims that might not otherwise satisfy it. Alexander v. Gino's, Inc., 621 F.2d 71, 75 (3d Cir. 1980), cert. denied, 449 U.S. 953 (1980).

70. See generally Anderson, supra note 36.
71. Satterwhite v. City of Greenville, 578 F.2d 987, 993-94 n.8 (5th Cir. 1978), vacated and remanded, 445 U.S. 940 (1980). Ironically, in Satterwhite, the Fifth Circuit en banc did attempt to follow Rodriguez by vacating the panel opinion allowing a plaintiff who lost on the merits to continue to represent a class. The court en banc declared her to be an inadequate representative under Rodriguez. The Supreme Court vacated and remanded, citing Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326 (1980) and United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980), which indicated that even if the plaintiff's claim becomes moot, he or she does not necessarily lose his or her ability to represent the class. See Strickler, supra note 27, at 131.
complaining of another practice, if the plaintiff and the members of the class suffer from essentially the same injury. In this case, all of the claims are based on discrimination because of national origin. It is consistent with the holding in Rodriguez and the policy of Title VII to allow a plaintiff to represent a class suffering from a common discriminatory complaint. While similarities of sex, race or national origin claims are not dispositive in favor of finding that the prerequisites of Rule 23 have been met, they are an extremely important factor in the determination that can outweigh the fact that the members of the plaintiff class may be complaining about somewhat different specific discriminatory practices.\(^7\)

At the other end of the spectrum, in Stastny v. Southern Bell Telephone & Telegraph Co.,\(^7\) the Fourth Circuit stated emphatically that Rodriguez rejected the basis for the across-the-board theory, namely that such actions are by their very nature class actions.\(^7\) Earlier in Hill v. Western Electric Co.,\(^7\) this same circuit said that

\[\text{all blacks and females have an interest in being free from discrimination in employment. In a very broad and loose sense, any member of any such class who suffers discrimination has the same interest as other members of the class who suffered discrimination in very different circumstances and by very different means, but clearly that is not the thrust of Rodriguez [sic]. The interest of these named, employed plaintiffs in being free of discrimination in job assignments and in promotions is so different in kind from that of people who were denied any}\]

\(^7\) 626 F.2d at 375.
\(^7\) 268 F.2d 267 (4th Cir. 1980).
\(^7\) Id. at 273 n.7 (citing International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977)). The court required substantial proof on the merits of the allegations of a pattern or practice of discrimination. It assumed that the inquiry into commonality, typicality, and adequacy of representation is inextricably intertwined with an inquiry into the merits. The court found that a pattern or practice of discrimination must be proven under either the disparate impact or disparate treatment theories, and must affect all class members "in substantially, if not completely, comparable ways." 628 F.2d at 273. Therefore, such pattern or practice must be shown to exist before a claim can be certified. See infra text accompanying notes 162-73 for a discussion of proof at the class certification hearing.
\(^7\) Hill v. Western Electric Co., 596 F.2d 99 (4th Cir. 1979).
employment that the named plaintiffs may not properly maintain an action for redress of alleged discrimination in hiring.\textsuperscript{77}

The restrictive certification proponents presume that discrimination is a discreet and isolated occurrence, while the across-the-board proponents of liberal certification believe that \textquotedblleft[w]here the common thread of discrimination is alleged to weave through the defendant's employment practices, the varying ways in which the alleged discriminatory policy affects different class members, if at all, should not preclude class certification.\textsuperscript{78}

E. General Telephone Co. v. Falcon

The Supreme Court, however, did not endorse the view of the proponents of liberal certification. In early 1982, the U.S. Supreme Court reversed the Fifth Circuit in General Telephone Co. v. Falcon.\textsuperscript{79} In its reversal of Falcon, the Supreme Court clarified the meaning of \textquotedblleft same interest, same injury.\textsuperscript{80}

In Falcon, the district court certified a class of all Mexican-American employees and applicants for employment. Falcon's individual complaint was that he had not received a promotion while less qualified whites had. Following the trial, the district court decided that Falcon had not been discriminated against when he was hired, but that the company had discriminated against him in its promotion practices. With regard to the class, the district court found that the company did not discriminate classwide in promotion practices, but that it did discriminate in its hiring practices.\textsuperscript{81} The Fifth Circuit affirmed the class certification based on its conviction that across-the-board actions were proper.\textsuperscript{82} The Supreme

\textsuperscript{77}. Id. at 101-02.
\textsuperscript{78}. Jordan v. County of Los Angeles, 669 F.2d 1311, 1322 (9th Cir. 1982), vacated, 459 U.S. 810 (1982). The Ninth Circuit also continued to apply across-the-board certification and allowed the requirements of Rule 23(a) to be liberally applied.
\textsuperscript{82}. In its decision, the Fifth Circuit affirmed the individual relief but held the district court's finding insufficient to support class relief. Subsequently, the Supreme Court vacated the judgment. It based its decision on Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981). The Fifth Circuit then vacated the portion of its opinion regarding individual liability and remanded to the district court. At this point, the Supreme Court granted certiorari. 457 U.S. at 154-55.
Court disagreed with the proposition underlying the across-the-board rule, that racial discrimination is by definition class discrimination; it stated that there is a wide gap between (a) an individual's claim that he has been denied a promotion on discriminatory grounds and his otherwise unsupported allegation that the company has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class claims will share common questions of law or fact and that the individual's claim will be typical of the class claims.\(^8\)

The Court said the gap could be bridged by showing not only the validity of the plaintiff's claim, but also

1. that this discriminatory treatment is typical of [defendant's] promotion practices,
2. that [defendant's] promotion practices are motivated by a policy of ethnic discrimination that pervades [one of defendant's divisions] or
3. that this policy of ethnic discrimination is reflected in [defendant's] other employment practices, such as hiring, in the same way it is manifested in the promotion practices.\(^4\)

The plaintiff had failed to bridge the gap. Instead the Court said he adduced proof of intentional discrimination with regard to his own claim and statistical evidence to indicate disparate impact with regard to the class.\(^5\) The Court finally said that the district court erred when it failed to evaluate whether the plaintiff was a proper class representative. The Court reiterated that all the prerequisites of Rule 23(a) must be satisfied. It then remanded for that determination.\(^6\)

The Court in Falcon clearly indicated that even though racial discrimination is by definition class discrimination, discrimination alone

\(^8\) 457 U.S. at 157 (footnote omitted).
\(^4\) Id. at 158.
\(^5\) Id. at 157-59. See infra text accompanying notes 247-48. See also Strickler, supra note 27, at 132 n.302. Professor Strickler points out that the plaintiff in Falcon used statistics to prove the class discrimination. Statistics are equally useful in proving both disparate impact and disparate treatment claims. Since Falcon was not attacking a neutral employment practice, Professor Strickler's conclusion is that the class claim was a disparate treatment claim as well.
If the individual and class claims had to be proved using only anecdotal evidence, disparate treatment class actions would be impossible.
\(^6\) See infra text accompanying notes 98 and 99 for subsequent case history.
no longer supplies the common question of law or fact, nor does the plaintiff's allegation of discrimination meet the typicality requirement.\textsuperscript{87} Furthermore, the court may not single out employment discrimination actions for favored treatment under Rule 23.\textsuperscript{88}

Nevertheless, the Court did not say that Title VII class actions were to be subjected to greater scrutiny. It also left an important window open for broad-based class actions in footnote 15. In that footnote, the Court, by way of example only, said that the plaintiff could represent others complaining of different practices if the employer used a biased testing procedure to evaluate applicants for hire and promotion, or if it operated under a general policy of discrimination, such as subjective decision making, which manifested itself in the same way in hiring and promotion.\textsuperscript{89}

After \textit{Falcon}, some lower courts continued to use the across-the-board analysis for a time, but even the Fifth Circuit finally found that liberal across-the-board certification was no longer viable.\textsuperscript{90}

F. Post Rodriguez-Falcon Interpretation of Rule 23 Requirements Generally

Although some courts had already interpreted \textit{Rodriguez} to prohibit across-the-board class actions,\textsuperscript{91} the effect of \textit{Falcon} was much more pro-

\textsuperscript{87} 457 U.S. at 157.

\textsuperscript{88} \textit{Id.} at 161. Another significant case intervened between \textit{Rodriguez} and \textit{Falcon}, General Tel. Co. v. EEOC, 446 U.S. 318 (1980). In that case, the Supreme Court held that the EEOC did not have to comply with the requirements of Rule 23. "When the EEOC acts, albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination." 446 U.S. at 326. Some commentators believe that this decision underlies the Court's decision in \textit{Falcon} since the private litigants no longer need latitude to act in the public interest. Anderson, \textit{supra} note 36, at 919-20. This reasoning appears to be sound. The Supreme Court cited General Tel. Co. v. EEOC for the proposition that while the EEOC does not have to comply with Rule 23, Title VII suits must meet the prerequisites of Rule 23 since Title VII contains no special authorization for class suits by private persons. 457 U.S. at 156.

\textsuperscript{89} 457 U.S. at 159 n.15. Footnote 15, as will be discussed \textit{infra} (text accompanying notes 121-37), if properly interpreted can be utilized to continue broad-based class actions in many situations.

\textsuperscript{90} \textit{See infra} note 93.

\textsuperscript{91} \textit{See}, e.g., \textit{Stastny} v. Southern Bell Tel. & Tel. Co., 628 F.2d 267, 273 n.7 (4th Cir. 1980); \textit{Tuft} v. McDonnell Douglas Corp., 581 F.2d 1304 (8th Cir. 1978).
nounced. The change in philosophy was nowhere more profound than in the Fifth Circuit which had originated the across-the-board theory. In Wilkins v. University of Houston, the Fifth Circuit admitted that Falcon and another recent case tilted

the decisional calculus . . . against the individual plaintiffs and
the plaintiff class . . . . Falcon tightens the requirements for class
certification in Title VII cases such as this, reversing our own
decision in Falcon and casting cold water on the former liberal
application of our 'across-the-board' rule by enjoining careful
attention to the prerequisites of Rule 23(a), Federal Rules of
Civil Procedure, in Title VII cases.

In Vuyanich v. Republic National Bank, the Fifth Circuit applied the
narrowest possible view of Falcon. In that case, one of the named plain-
tiffs (Vuyanich) was a black female who alleged, inter alia, discharge
from her job because she was married to a white male. The other named
plaintiff (Johnson) was an unsuccessful applicant for a management trainee
position. After a trial on the merits, the court found liability for some
of the subclasses. The Fifth Circuit reviewed the propriety of the class
certification based on Falcon and found that the two named plaintiffs
had been permitted to assert claims that were neither common nor typical
of their individual claims. According to the court, the trial court should
have limited Vuyanich's claims to race discrimination in termination

93. Wilkins v. University of Houston, 695 F.2d 134 (5th Cir. 1983).
94. The other case was Pullman-Standard v. Swint, 456 U.S. 273 (1982). In
that case the Court disapproved the standard of review applied by the Fifth Circuit
in discrimination cases. The Fifth Circuit had distinguished between ultimate and sub-
sidiary facts. It defined a finding of discrimination vel non to be an ultimate fact which
the court could review outside of the clearly erroneous standard of Rule 53(A). The
Fifth Circuit had used this mechanism to reverse findings of no discrimination by lower
courts.
95. 695 F.2d at 135 (footnote omitted).
96. Vuyanich v. Republic Nat'l Bank, 723 F.2d 1195 (5th Cir. 1984), cert. denied, 469 U.S. 1073 (1984). The district court certified several subclasses of black and female past and present employees as well as unsuccessful applicants. It also allowed intervenors
to represent some of the subclasses. After a trial on the merits, liability was found as
to some of the subclasses.
as a non-exempt employee and Johnson's claims to sex discrimination in hiring exempt employees.

The Fifth Circuit had reversed its position, from allowing a class representative to represent anyone to allowing a representative to represent only those in his or her exact situation. The effect of this type of decision was to curtail severely the utility of Rule 23 in employment actions. Few employers are large enough to discriminate within their employment practices against enough people, within six months, to satisfy the numerosity requirements of 23(a).

The remand of Falcon to the district court followed the Vuyanich case. The trial court noted that the Supreme Court's pronouncement in Falcon, and the Fifth Circuit's interpretation thereof, indicated that class certifications in employment discrimination cases would be "drastically curtailed." Thus, the district court refused to allow Falcon to represent the class.

III. Analysis

Although a superficial analysis would indicate that class certifications must be virtually eliminated, this does not necessarily follow. Some courts, including the Supreme Court in Falcon, do not assign separate meanings to the typicality, commonality, and adequacy of representation requirements of Rule 23(a). It is clear, however, that if these

99. Id. at 717-18. The court, however, did give class members a chance to intervene, although it noted that in any but this case intervention would be improper under the newly developed law of the Circuit. Id. at 718-20.
100. The commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence. Those requirements therefore also tend to merge with the adequacy-of-representation requirement, although the latter requirement also raises concerns about the competency of class counsel and conflicts of interest.
requirements necessitate that all class members have virtually identical claims, lack of numerosity will dispose of the class certification question. This result serves the goals of neither Title VII nor Rule 23.

At this point the article will review specifically how the courts are dealing with the requirements of Rule 23 after Falcon "cast cold water" on across-the-board certifications. It will then explore alternative approaches which allow Title VII class actions to continue and satisfy the policies of both Rule 23 and of Title VII.

A. The Requirements of Commonality and Typicality: How Courts are Dealing with These Requirements and How They Should Be Dealing With Them

1. Rationale of Commonality and Typicality and Relationship to Adequacy of Representation

The principal concern of Rule 23 is to assure that the class is adequately represented. Although Rule 23(a)(4) specifically requires that the representation be adequate, the Rule 23(a)(3) requirement that the claims of the representative be typical of the class claims is an essential concomitant of adequate representation. Similarly, the requirement of common questions of law or fact is so closely related to typicality, that it, too, is essential to the analysis of adequate representation.

The core of the conflict between the proponents of liberal and restrictive certification lies in how closely the plaintiff's claim must be related to claims of the class in order to assure adequate representation. It is appropriate, then, to begin with Rule 23(a)(3), typicality, about which much confusion exists.

102. See infra text accompanying notes 213-17.
103. Wilkins v. University of Houston, 695 F.2d 134, 135 (5th Cir. 1983).
104. See supra text accompanying note 23.

The requirement of typical claims, while somewhat ill defined, seems intended to reinforce the adequacy requirement by ensuring that the named plaintiffs' interests are sufficiently aligned with those of class members to assure that they not only can but will press each such claim to a full and equal extent. Wofford v. Safeway Stores, 78 F.R.D. 460, 475 (N.D. Cal. 1978). See also Firefighters Local 1590 v. City of Wilmington, 40 Fair Empl. Prac. Cas. (BNA) 1073 (D. Del. 1985) (Only after a determination of typicality and commonality does the court reach the question of adequacy of representation.).
The rationale behind typicality is that if the plaintiff's claims are typical, then he or she has the impetus provided by self-interest to advance the class claims along with his or her own.\textsuperscript{107} This does not mean, however, that the claims of the class representative and the class must be identical. As one court has stated,

the class should be limited to those employees whose interests the named plaintiff is likely to press with substantially equal vigor and ability. Any other interpretation could permit a well-intentioned plaintiff, who could ably represent a limited class, to bind a broad class of employees whose real interests he may have misinterpreted or unconsciously subordinated to his own, to a losing judgment or an unfavorable settlement.\textsuperscript{108}

Defendants have, however, argued for a more restrictive reading of typicality to serve a divide and conquer strategy. Such an approach is equally inconsistent with the policies of Title VII and Rule 23. Defendant invites the Court to find as a matter of law that a class can only include those other persons of the same minority group, holding the same type of job, working in the same facility, members of the same union local, and presenting the same type of claim as a named plaintiff. Using these criteria to narrow the proposed class to a small subclass for each individual plaintiff, defendant concludes that there are substantial questions as to numerosity. This approach would of course soon reduce Rule 23 to a nullity.\textsuperscript{109}

\textsuperscript{107} Hansberry v. Lee, 311 U.S. 32, 44-45 (1940) (In order to be an adequate representative, the plaintiff must be united in interest with, and be a member of, the class.).

\textsuperscript{108} Wofford, 78 F.R.D. at 474. The Court also said that "[g]iven the subtle influence the representative plaintiff's viewpoint may have in shifting the focus of discovery and trial preparation, it is doubtful that a court could compensate for this effect even at trial." \textit{Id.}

\textsuperscript{109} \textit{Id.} at 474-75. Although it is an essential concommitant of representation, typicality is a separate requirement embodied in Rule 23(a)(2). By the time adequacy of representation under Rule 23(a)(4) is considered, typicality should have been met, so it is unnecessary that typicality be considered again in Rule 23(a)(4). See Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 562-63 (2d Cir. 1968), \textit{vacated and remanded}, 417 U.S. 156 (1974) (on other grounds). \textit{See supra} text accompanying notes 31-35 regarding overlap between Rule 23(a)(3) and (4).
Typicality is closely related to whether common questions of law or fact exist. If the court decides that the plaintiff's claims are typical of those of the class, then inherent in this is the finding that there are questions of law or fact common to the class. The two requirements, however, proceed from different perspectives.\(^\text{1}\) Common questions of law or fact define the claims of the class, while typicality relates the claims of the representative to those common questions.\(^\text{11}\)

2. Analysis of Commonality and Typicality Requirements in *Rodriguez* and *Falcon*

The across-the-board theory oversimplified these issues by declaring that the common question is discrimination, and that the plaintiff's claim is typical if he is alleging discrimination. *Rodriguez* cast doubt on this analysis. *Falcon* obliterated it.\(^\text{112}\) The courts after *Falcon* are not in agreement but many are using the commonality and typicality requirements to deny certification if the claim of the plaintiff is not virtually identical to the claims of the class.\(^\text{113}\)

In *Rodriguez*, the Court said that the named plaintiffs were not members of the class, because they did not possess the same interest or suffer the same injury.\(^\text{114}\) If the Court meant this to be an additional requirement to Rule 23(a), it rendered Rules 23(a)(2) and (3) superfluous. Commonality should define the interest and injury of the class, while typicality should define the interest and injury of the class representative. Commonality and typicality are both in turn necessary to adequate representation in the broad sense.\(^\text{115}\)

---

Rule 23(a)(2) requires that some questions of law or fact be common, not that *all* questions of law *and* fact be shared among class members. In fact, commonality can be satisfied if a single question of law or fact exists. The "Damoclean threat" of racial discrimination, Hall v. Werthan Bag Corp., 251 F. Supp. 184, 186 (M.D. Tenn. 1966), is a common question of law or fact, but, unlike in the past, it is no longer enough to meet the commonality requirement of Rule 23(a)(2).
115. *See supra* note 106 and text accompanying notes 31-34.
The Rodriguez holding can, however, be interpreted differently. In Rodriguez, the named plaintiffs were not objectively qualified for the jobs they sought, nor were they discriminated against otherwise. Having suffered no injury at all they had no standing to raise claims\(^{16}\) for those who had been injured. Thus, it can be argued that the Rodriguez plaintiffs failed on Rule 23’s introductory requirement that “one or more members of a class may sue or be sued as representative parties . . . .”\(^{17}\)

The plaintiff who has suffered no injury at all, as in Rodriguez, should be contrasted with the plaintiff who has suffered an injury which is atypical of the interest and injury of the class members. While it is true that the Court in Rodriguez used interest and injury in the context of whether the plaintiff has standing to sue, the precise analysis used in the case is appropriate only in cases such as Rodriguez in which the plaintiff has not been injured at all. The commonality and typicality requirements of Rule 23 are irrelevant in such a case, since they ensure that the plaintiff’s interest and injury are typical of the class once the interest and injury of the plaintiff are ascertained.\(^{18}\)

\(^{16}\) See supra note 36.

\(^{17}\) FED. R. Civ. P. 23 (emphasis added).

\(^{18}\) See Vuyanich v. Republic Nat’l Bank, 82 F.R.D. 420, 426-30 (N.D. Tex. 1979) (A court should determine first whether the plaintiff has standing to assert his or her individual claim. Whether he or she can represent the class is then determined by Rule 23.); Abron v. Black & Decker (U.S.), 654 F.2d 951 (4th Cir. 1981) (Murnaghan, J., dissenting) (Loss of benefits from interracial association is alone sufficient to confer standing as is the right to work in an atmosphere free of discrimination.); Hansen v. Webster, 41 Fair Empl. Prac. Cas. (BNA) 214, 223-24 (D.D.C. 1986) (The plaintiff’s success in overcoming discrimination did “not disqualify her from serving as a class agent provided there [was] ‘significant proof that an employer operated under a policy of discrimination.’ “).

It is difficult to reconcile Falcon with cases in which the plaintiffs retained standing to represent a class, despite the fact that they had no live claim at all, if the Court in Falcon intended to limit standing to persons injured by identical employment practices. See Deposit Guaranty Nat’l Bank v. Roper, 445 U.S. 326 (1980); United States Parole Comm’n v. Geraghty, 445 U.S. 388 (1980). See Strickler, supra note 27, at 133-37. Furthermore, it should be pointed out that Falcon’s footnote 15 did not require a class representative to allege injury in hiring to represent persons so injured as long as the other requirements of Rule 23 were met. See Willborn, Personal Stake, Rule 23, and the Employment Discrimination Class Action, 22 B.C.L. REV. 1 (1980); Bridgesmith, supra note 69, at 1426-28; Shawe, Processing the Explosion in Title VII Class Action Suits: Achieving Increased Compliance with Federal Rule of Civil Procedure 23(a), 19 WM. & MARY L. REV. 469, 496-98 (1978).
The Court in *Falcon* made it clear that the "same interest and injury" test enunciated in *Rodriguez* generally would be met only by employees complaining of the same employment practice. That is, commonality would be met by all employees complaining of discrimination in promotion, and typicality by a class representative who alleged discrimination in promotions. The Court, however, left open the possibility of broader based class actions in footnote 15:

If [the employer] used a biased testing procedure to evaluate both applicants for employment and incumbent employees, a class action on behalf of every applicant or employee who might have been prejudiced by the test clearly would satisfy the commonality and typicality requirements of Rule 23(a). Significant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decision-making processes. In this regard it is noteworthy that Title VII prohibits discriminatory employment practices, not an abstract policy of discrimination. The mere fact that an aggrieved private plaintiff is a member of an identifiable class of persons of the same race or national origin is insufficient to establish his standing to litigate on their behalf all possible claims of discrimination against a common employer.

3. Interpretations of *Falcon's* Footnote 15 in Broad-Based Class Actions

The argument can be made that *Falcon*, in which Justices Brennan and Marshall joined, was intended not to eliminate class actions altogether, but to ensure that courts not apply the requirements of Rule 23 superficially. Footnote 15, if properly applied, can serve as a vehicle to continue broad-based class certifications in legitimate cases. Indeed, although some courts interpret footnote 15 narrowly, others have led the way in interpreting it broadly.

A look at some cases that used footnote 15 shows how it can be interpreted. Some courts have avoided a restrictive outcome based on the footnote by distinguishing *Falcon* altogether. The distinctions have been based on the fact that the plaintiff in that case did not show that the employment practices were interdependent. In cases distinguishing *Falcon*, the plaintiffs have established a link among the employment practices, and, in addition, have shown subjective decisionmaking to be the vehicle of the discrimination.

In one such case, *Richardson v. Byrd*, a sex discrimination case involving a sheriff’s department, the Fifth Circuit utilized footnote 15. It found a nexus between applicants and employees, because the sheriff assigned all new female deputies to the jail and restricted their transfer to more desirable areas. Since the female section of the jail was smaller

---

121. In a similar case, *Johnson v. Montgomery County Sheriff’s Dept.*, 99 F.R.D. 562 (M.D. Ala. 1983), the court found a connection between applicants and employees based on a reciprocal relationship between hiring opportunities on the one hand, and transfer and promotion opportunities on the other hand. This finding was based on the fact that female applicants could not be hired unless vacancies occurred in jail positions held by women. Similarly female deputies could not move up and out of jail jobs unless female applicants were hired. 99 F.R.D. at 565. These factual findings, in addition to findings of subjective decisionmaking, fulfilled footnote 15’s requirements of commonality and typicality.

See also *Kraszewski v. State Farm Ins. Co.*, 36 Fair Empl. Prac. Cas. (BNA) 1352 (N.D. Cal. 1982). In this case the plaintiffs sought to represent a class of applicants and deterred applicants discriminated against on the basis of sex in recruitment, hiring, and training. The district court upheld certification of the class and distinguished *Falcon* on three grounds: 1) the suit involved one job position, that of a trainee agent, 2) the types of evidence required to prove all class claims were interrelated so that the plaintiff satisfied commonality and typicality, and 3) instead of alleging a “loose mix of discrimination in promotion and discrimination in hiring,” plaintiffs alleged discrimination in three “interrelated steps on the way to becoming a [trainee agent].” 36 Fair Empl. Prac. Cas. (BNA) 1352, 1353. The court held that footnote 15 justified certifying a class of applicants, deterred applicants, and employees based on plaintiffs’ allegation of a general policy of discrimination manifested in entirely subjective decisionmaking processes.

Similarly, in *Brown v. Eckerd Drugs*, 564 F. Supp. 1440 (W.D.N.C. 1983), the district court said that the named plaintiffs’ demotion and discharge claims and the class’s promotion and transfer claims presented sufficient common questions of law and fact. Even though the injuries were different, the discrimination manifested itself in the same fashion — through an entirely subjective decisionmaking process in the hands of an overwhelmingly white management work force. 564 F. Supp. at 1446.

than the male section, this difference limited the number of female employees the department could employ, a practice which affected both applicants and employees. In addition, the sheriff made decisions based on subjective, rather than objective, factors, and this subjective decisionmaking pervaded all practices. The Court said that the plaintiff in Falcon had failed to provide a basis for the trial court’s conclusion that his promotion discrimination claim would involve questions of law or fact common to hiring discrimination claims. The plaintiff in the Richardson case, in contrast, showed that common questions of law or fact existed in that the assignment practices and subjective decisionmaking affected female employees and applicants.

In other cases, the courts have avoided a restrictive outcome by using statistical evidence and showing that the vehicle for the discrimination was subjective decisionmaking. In Carpenter v. Stephen F. Austin State University, for instance, the plaintiffs claimed that the defendant unlawfully channeled blacks and women into lower paying jobs through its hiring and initial assignment policies. The case was prosecuted as an across-the-board class action on the basis that these policies were maintained by discriminatory promotions, transfers, pay, termination, and retirement programs. The defendant contended that the court erred in allowing the plaintiffs, all former custodial workers, to represent clerical employees. In response, the Fifth Circuit reasoned that the crucial inquiry was whether adjudication of the class representatives’ claim of channeling into lower paying jobs involved issues of law or fact common to clerical employees, who had also been channeled into similarly lower paying jobs. The court said that statistical proof of channeling in both classifications and anecdotal testimony of clerical employees satisfied footnote 15. The evidence set forth common issues of law or fact regarding the defendant’s subjective job assignments that resulted in channeling of blacks and females into lower paying jobs.

Similarly, in Rossini v. Ogilvy & Mather, the Second Circuit interpreted the primary meaning of Falcon to be that the requirements of Rule 23 may not be presumed. In the Rossini case, the plaintiff had been denied a transfer and sought to represent women who had been denied transfers, promotions, and training. She attempted to show that the defendant had limited opportunities for women in these practices.

by using subjective evaluation systems and that the same central group of people made such decisions. The court found that the requirements of footnote 15 were met; the plaintiff should have been allowed to represent the class of persons described, since the defendant discriminated against the entire class in the same general fashion.

These cases show reliance by courts on footnote 15 to allow representation by plaintiffs harmed in a way typical of, but not identical with, the harm suffered by other class members, despite the *Falcon* outcome. Thus, more than a vestige of liberal certification survives. Courts can apply footnote 15 in a common sense way that accommodate both the policy and requirements of Rule 23 and of Title VII.

In contrast, courts which ignore this possibility and apply the requirements of Rule 23(a) in an excessively restrictive fashion defeat the policy of Title VII and the remedial purposes of Rule 23. The defendants litigating in such courts are aware that they can defeat class actions by focusing on the differences between named plaintiffs and the class. By requiring such an identical interest between plaintiffs and the class, no class can be certified, because it will always fail for lack of numerosity.

In a compelling dissent to a pre-*Falcon* reversal of class certification, Judge Murnaghan of the Fourth Circuit observed:

Should Title VII suits ever come into general judicial disfavor, no doubt defendants will be quick to emphasize even trivial dissimilarities. By focusing on the slightest factual variations of, or the particular label attached to, each area of management decision, the majority’s theory of ‘same interest, same injury’ can be applied to reduce all employment discrimination classes into a class of one.\(^{125}\)

---

125. *See, e.g.*, Abron v. Black & Decker (U.S.), 654 F.2d 951, 961 (4th Cir. 1981) (Murnaghan, J., dissenting). In *Abron* “[p]roof at trial exposed an extensive, plant-wide pattern of discrimination . . . .” Out of 2500 employees, thirteen percent were black, despite the fact that twenty-two percent of the experienced labor force in the area was black. There was a clear picture of discriminatory hiring. Discriminatory job assignment and promotion were also shown. In short, there was “[a]n extensive, cohesive pattern of racially discriminatory employment practices . . . .” *Id.* at 956-57 (Murnaghan, J., dissenting). Even so, the Court of Appeals held in a per curiam opinion that, since the plaintiff had suffered no injury other than denial of temporary transfer to light work, she had not suffered the same injury as the class she purported to represent.

As the dissent points out, “[r]ule 23 and Title VII direct courts to focus on the
This prediction came true as many courts after *Rodriguez* and *Falcon* accepted the arguments of the proponents of the divide-and-conquer theory that claims of the class representative must be identical to those of the class. As discussed earlier,\(^{126}\) the Fifth Circuit also interpreted *Falcon* in *Vuyanich v. Republic National Bank of Dallas*\(^ {127}\). In *Vuyanich* the court of appeals held that footnote 15 did not apply, because there was not a sufficient showing of a pattern or practice of discrimination.\(^ {128}\) Thus, the two plaintiffs did not satisfy commonality and typicality, the court said, and Vuyanich’s claims should have been limited to race discrimination in termination of non-exempt employees while Johnson’s claim should have been limited to sex discrimination in hiring exempt employees. Since the two plaintiffs could only allege injury based on hiring and termination, they did not have standing to assert class claims arising from other employment practices.

The decision in *Vuyanich* is an example of overly restrictive interpretation of footnote 15. The lower court had found that there was sufficient statistical evidence to conclude that common questions existed in the form of discriminatory animus cutting across a number of different practices. With regard to typicality, the district court in *Vuyanich* said that typicality does not require identical harm resulting from the same type of practice. The practices attacked were hiring, promotion, pay, training, testing, transfer, job assignment and classification, job content, and constructive discharge. The court created a subclass of applicants. It noted that the plaintiff and intervenor contended they were personally injured by most of the other practices, all of which were intertwined. “A denial of training, for example, will affect promotion; testing may affect transfer; a variety of discriminatory practices may drive a person to resign.”\(^ {129}\) It is clear that the lower court did not abuse its discretion.

---

\(^{126}\) See supra text accompanying notes 96-98.


\(^{128}\) 723 F.2d at 1199-1200. See supra text accompanying note 96. In cases alleging a pattern or practice of discrimination, the plaintiff must prove that the discriminatory practice is the employer’s standard operating procedure. See B. SCHLEI & P. GROSSMAN, supra note 10, at 1288-89.

Its finding of a pattern and practice of discrimination, in addition to subjective decisionmaking, should have been enough to satisfy footnote 15.

In general, in narrow class actions, if a named plaintiff's claims relate to the same employment practices as the claims of the class, *Falcon* itself teaches that commonality and typicality can be met. The problem identified by *Falcon* arises when the plaintiff must meet commonality and typicality requirements in cases where he or she wishes to represent persons injured by employment practices different from the ones which allegedly injured him or her. In these broader-based class actions, commonality and typicality may still be met following footnote 15 if some common question — other than discrimination in the broad sense — cuts across the practices alleged. The *Falcon* Court gave the example of a testing procedure used for hiring and promotion which affects a protected group disparately. Where such a testing procedure is alleged, the common question would be whether the test is discriminatory. The plaintiff's claim would be typical if he or she alleged injury based on the biased testing procedure.

In cases where a circumscribed practice, such as a biased testing procedure, is involved, the *Falcon* Court did not require proof of discrimination. Where a more nebulos vehicle for discrimination is alleged, however, such as subjective decisionmaking in general, the Court required significant proof of a pattern or practice of discrimination. Thus, in order to satisfy commonality, the plaintiff must show by statistical evidence or significant anecdotal evidence that widespread discrimination exists and that a vehicle, such as subjective decisionmaking, exists for that discrimination. Typicality would be satisfied by the plaintiff's allegation of injury based on the subjective decisionmaking.

The vehicle for discrimination will generally relate to how the employer makes decisions. Decisionmaking can be based on subjective factors, such as attitude and appearance, objective factors, such as a typing test, or a combination of both. If evidence of a pattern or practice of discrimination can be shown, if the decisionmaking in question

---

130. See infra text accompanying notes 145-57 regarding other obstacles, such as different jobs, to satisfying commonality and typicality.


132. Several courts have decided that footnote 15 is satisfied if the employment practices are linked in some way, and there is subjective decisionmaking. See supra text accompanying notes 121-22.
is entirely subjective, and if the plaintiff and the class have also been injured by such decisionmaking, then footnote 15 is satisfied. Similarly, if objective decisionmaking has caused the discrimination, then the specific objective criterion, such as a written test, should be identified. Accordingly, the class should be limited to members who have been injured by the test. Obviously, this showing fulfills the requirements of footnote 15; the plaintiff has shown a pattern or practice of discrimination. That footnote 15 would be met in such a case is indicated by the Falcon Court’s specific example of the biased test.

The problem arises usually in the case in which decisionmaking combines objective and subjective factors. In the Vuyanich case, the Fifth Circuit said that the fact that the defendant relied on two objective criteria — education and experience — in its “necessarily subjective hiring practices” precluded reliance on footnote 15.133 This is an unnecessarily grudging interpretation of footnote 15.

While footnote 15 addresses situations involving entirely subjective or objective decisionmaking, nevertheless, when the plaintiff and the class are alleging injury based on decisionmaking which combines both subjective and objective factors the fact that no particular factor emerges as the culprit should not bar the class action.134

Similarly, if all of the class is alleging injury based on subjective decisionmaking, the fact that the employer uses objective factors for some employment decisions and not for others should not bar the class action, since subjective decisionmaking is itself a common question of fact. The key in these situations, as in the case of entirely subjective decisionmaking, is whether an inference of a pattern or practice of discrimination can be drawn. If so, the defendant should be required to explain it, not the plaintiff. Thus, the requirements of footnote 15 should be met

---


134. In the usual case, the employer uses both objective and subjective factors; however, he or she may apply the objective factors in a subjective manner to make the ultimate decision. For example, the employer may use subjective criteria, such as attitude and appearance, and also require prior work experience, which is objective. However, the final decision is based on an overall evaluation of all three criteria. If the class and the plaintiff can show they were discriminated against based on the overall subjective evaluation, class treatment is appropriate. Those members of the class who have no prior work experience have not been injured by subjective decisionmaking and should be excluded. See, e.g., Griffin v. Dugger, 823 F.2d 1476 (11th Cir. 1987).
in most situations, as long as the Court can draw the requisite inference of a pattern or practice of discrimination.\footnote{135}

Not all courts agree with this analysis. For example, in \textit{Lilly v. Harris-Teeter Supermarkets}, the court said that as to commonality the complaint contained allegations of disparate treatment in the exercise of unbridled discretion by the white supervisory workforce.\footnote{136} The question was, however, whether the named plaintiff's claims of discriminatory termination and retaliation were typical of the unpromoted employee's claims. The court said that the proof overlapped on several important points: the absence of written objective criteria for promotions and terminations, the absence of regular job evaluations, and the overwhelmingly white supervisory workforce. The court found, however, that some issues involved in promotion raised significant issues of proof separate from the termination claim. The defendant allegedly limited supervisory discretion by giving substantial weight to prior work experience, an objective criterion, and treating blacks and whites differently in terms of utilizing this information. In addition, the defendant limited supervisory discretion in promotion decisions by using a "same department/same shift" policy allegedly enforced only against blacks. Thus, the court decided that the named plaintiff's claim was not typical of the claims of the class.

This result is incorrect in that Rule 23(a)(3) requires only that some questions of law or fact be common, while Rule 23(a)(2) requires only that the named plaintiff's claim be typical, not identical. Furthermore, footnote 15 allows a plaintiff suffering from discrimination in one employment practice to represent a class suffering from discrimination in other practices if significant proof of a pattern or practice of discrimination which manifests itself in the "same general fashion" is shown. Since the supervisory workforce was overwhelmingly white, and decisionmaking was almost totally subjective, these facts should have been enough to allow the plaintiff to represent persons who were not promoted. In any event, although the employer utilized objective criteria, the criteria were applied subjectively. Apparently the Fourth Circuit took the Supreme

\footnote{135. \textit{See infra} text accompanying notes 162-73.}
\footnote{136. \textit{Lilly v. Harris-Teeter Supermarket}, 720 F.2d 326, 333-34 (4th Cir. 1983), \textit{cert. denied}, 466 U.S. 951 (1984). The named plaintiff had alleged discriminatory termination and retaliation and sought to represent a class of persons discriminated against in hiring, promotion, interviewing, termination, supervision, and discipline. In support of the motion, the plaintiff presented statistical evidence purporting to show disparities and cited specific examples of discrimination. Twenty persons intervened and, together with the named plaintiff, were allowed to represent the class. \textit{Id.} at 329.}
Court's example in footnote 15 literally, as applying only to entirely subjective decisionmaking processes. Alternatively, the Circuit interpreted footnote 15 as requiring that all questions of fact be common and that the named plaintiff's claim be typical of all such claims.137

4. Interpretations of Falcon Not Involving Footnote 15

After Rodriguez and Falcon, there has been a marked tendency in those courts which do not use footnote 15 to follow the divide-and-conquer rationale to defeat class certification. Some courts have even said that typicality and commonality are frequently lacking in disparate treatment cases, thus eliminating the most common theory of discrimination.138 These courts consider disparate treatment to be so individualized that class treatment is frequently inappropriate.

In a typical situation, the plaintiff was an assistant manager; the court did not allow him to represent non-management employees. The court, however, also held that even if the class were narrowed to include only assistant managers, the plaintiff's claims were too individualized to meet the typicality requirement. Since he was complaining of incidents which occurred at several different stores, the plaintiff's claims would be subject to unique defenses.139

Similarly, in Batesville Casket Co. EEO Litigation, the plaintiff asserted that the company segregated its sales territory, and that the segregation affected all of its eleven black sales representatives throughout the country.140 The court said that since many of the facts to be developed would clearly relate to individual performances, typicality and commonality requirements were not met.141

141. See Merrill v. Southern Methodist Univ., 806 F.2d 600 (5th Cir. 1986) (In an academic setting, commonality and typicality are difficult to find, and denial of tenure turns on unique facts; therefore, the plaintiff’s class action would have "[q]uickly disintegrated into a plethora of individual claims." 806 F.2d at 608.). See also Hall v. American Bosch Div., 40 Fair Empl. Prac. Cas. (BNA) 853 (D. Mass. 1986); Berggren v. Sunbeam Corp., 108 F.R.D. 410 (N.D. Ill. 1985); Gray v. Walgreen Co., 33 Fair Empl. Prac. Cas. (BNA) 835 (N.D. Ill. 1983); Moses v. Avco Corp., 97 F.R.D. 20 (D. Conn. 1982); Patterson v. General Motors, 631 F.2d 476, 481 (7th Cir. 1980) (because plaintiff's claims are so personal, it is predictable that a major focus of the litigation will be defenses unique to the plaintiff), cert. denied, 451 U.S. 914 (1980).
These courts ignore the reality of the employment situation. "[T]he named plaintiffs' claims will always have the initial appearance of individualized grievances. But that does not preclude the maintenance of a class action . . . . If broadbased discrimination is in fact proved at trial on the merits, the individual considerations will be handled in the subsequent phase of the proceedings."\(^{142}\)

In contrast, several courts have recognized that employee grievances will necessarily appear to be individualized.\(^{143}\) For example, one court opined that neither typicality nor commonality was vitiated when "discriminatory promotion procedures . . . affect individual employees in different ways, because of their diverse qualifications and ambitions. These factual variations are not sufficient to deny class treatment to the claims that have a common thread of discrimination."\(^{144}\)

Employers also argue that different or unique jobs should preclude certification. In *Meyer v. MacMillan Publishing Co.*, the defendant argued that the jobs performed by the plaintiffs were essentially unique, and thus that commonality and typicality were lacking.\(^{145}\) The court disagreed, saying that if this barred the plaintiffs from being class representatives, no class of professional employees could ever be certified. Furthermore, affidavits indicated that clerical employees shared the same grievances.

---


\(^{143}\) In Holsey v. Armour & Co., 743 F.2d 199 (4th Cir. 1984), the Fourth Circuit refused to accept the employer's contention that harassment and retaliation claims are not susceptible to class treatment, because they are too individualized. Even though there were individual fact questions, the plaintiffs had established a pattern of retaliation, which was a common question of law sufficient to satisfy commonality. *Id.* at 217.


and since movement from one classification to another was not uncom-
mon, commonality and typicality would be satisfied in this regard as well.\textsuperscript{146}

If the plaintiff presents evidence that a discriminatory policy exists in certain job classifications, then this evidence presents questions of fact common to all employees in the protected class regardless of differences among jobs.\textsuperscript{147} The courts, however, do not uniformly hold this view. In fact, some courts are likely to consider different job classifications as automatically precluding commonality and typicality.\textsuperscript{148} For example, in \textit{Sobel v. Yeshiva University}, the plaintiffs were not allowed to repre-
sent all female professors holding either an M.D. or Ph.D.\textsuperscript{149} The court considered commonality and typicality to be lacking because M.D.s were paid more than Ph.D.s, and because M.D.s taught clinical courses while Ph.D.s taught theoretical courses.\textsuperscript{150} The court reached this conclusion even though it admits that sex discrimination may manifest itself in the same way in the two classes.\textsuperscript{151}

In \textit{Cook v. Boorstin}, the district court found that the plaintiffs lacked typicality under \textit{Falcon} to represent all professionals because they were not qualified for all professional positions.\textsuperscript{152} The court of appeals reversed on the ground that the district court had improperly denied a motion to intervene.\textsuperscript{153} The court suggested, however, that the lower court had applied an overly restrictive view of the prerequisites of Rule 23(a), and that the case might best go forward as a class action. In the appellate court’s view, the plaintiffs had met the typicality requirement by pre-
senting affidavits and memoranda suggesting that the employer’s sub-

\begin{itemize}
\item \textsuperscript{146} \textit{Id.} at 413-14.
\item \textsuperscript{149} Sobel v. Yeshiva Univ., 85 F.R.D. 322 (S.D.N.Y. 1980).
\item \textsuperscript{150} \textit{Id.} at 323-24.
\item \textsuperscript{151} \textit{Id.} at 325.
\item \textsuperscript{152} Cook v. Boorstin, 37 Fair Empl. Prac. Cas. (BNA) 1771 (D.D.C. 1983).
\item \textsuperscript{153} Cook v. Boorstin, 763 F.2d 1462, 1472 (D.C. Cir. 1985).
\end{itemize}
jective standards had resulted in systemic discrimination against blacks and other minorities. The appellate court felt that this presumption was sufficient under footnote 15 of Falcon. As the court aptly said, "[i]f our nation is to move with speed toward genuine equality of opportunity, employers . . . cannot be allowed to escape the requirements of Title VII by a litigation strategy of divide and conquer."

Courts also have held that, even when there is a statistical showing of underrepresentation, if centralized personnel departments do not make the decisions, commonality and typicality are lacking. This analysis is incorrect. If a company-wide pattern of discrimination is evidenced, then, regardless of the proof of decentralized decisionmaking, the employer should bear the burden of explaining the disparity and should not be excused from doing so by capitalizing on a technical separation of functions.

In Coates v. Johnson & Johnson, the court summarized the opposing views held by employees and employers in Title VII litigation.

It has often been observed that individual instances of racial discrimination, by definition, frequently reflect a pattern or policy

---

154. Id. at 1471-72.
155. Id. at 1472. In Wester v. Special School District No. 1, 35 Fair Empl. Prac. Cas. (BNA) 199 (D. Minn. 1984), the plaintiffs were rejected for assistant principal positions. They were attempting to represent all past and future women and American Indian applicants for administrative positions. The defendant argued that the selection methodology for other certified positions varied and that common questions were lacking. The court said that the commonality requirement "does not require that every question of law or fact be common"; "class certification is not defeated due to the varying qualifications and ambitions of the individual class members." Id. at 203.


157. See Wofford v. Safeway Stores, 78 F.R.D. 460, 479 (N.D. Cal. 1978). In Kuenz v. Goodyear Tire & Rubber Co., 104 F.R.D. 474 (E.D. Mo. 1985), such contentions were overcome in a sex discrimination case by a showing that national personnel were responsible for implementing local personnel policies which were "largely subjective and therefore dependent on decisions from an all-male hierarchy." Id. at 477. Additionally, the plaintiffs alleged that the defendant had never employed a woman at a level higher than store manager. Id. at 476.

affecting more than just a given individual victim . . . . The employee thus focuses on the general policies of the employer, as evidenced by how similarly situated employees have been treated.

Employers, on the other hand, contending that they do not unlawfully discriminate, suggest that any given instance of differential treatment can be explained and must be viewed based on its particular, allegedly unique, circumstances.¹⁵⁹

Courts are tending to adopt the employer's view over the previously-accepted employee's view. This conclusion is not unreasonable considering that Title VII has been the law for more than twenty years. When a court is presented with statistical or anecdotal evidence from which an inference of a pattern or practice of discrimination can be drawn, however, the court should look with favor on the class action and construe Rule 23(a) liberally. Falcon does not preclude this.¹⁶⁰ The general rule is that Rule 23 should be liberally construed.¹⁶¹ The employment discrimination context does not then require that Rule 23 be narrowly construed.

5. How much proof should be required at the class certification hearing to satisfy commonality and typicality?

Virtually all courts acknowledge the proposition expressed in Eisen v. Carlisle & Jacquelin that an inquiry into the merits of the suit is inappropriate at the class certification stage.¹⁶² Some courts strictly adhere to the Eisen approach, stating for instance that "[f]or purposes of determining class certification, the allegations are taken as true and the merits of the complaint are not examined."¹⁶³ Most courts, however, require something more than mere allegations to support a decision that Rule 23 prerequisites are satisfied.¹⁶⁴ Although it is unusual to require a mini-

¹⁵⁹. Id. at 423.
¹⁶⁰. See supra text accompanying notes 83-89.
¹⁶¹. Moore, supra note 23, at ¶ 23.02[4].
hearing on the merits, some proof is generally required with regard to the merits.\textsuperscript{165}

In the case of class actions attacking more than one employment practice, except in objective criteria cases, the commonly cited language in \textit{Eisen} must be reconciled with the Supreme Court's pronouncement in \textit{Falcon} that there must be significant proof of a policy of discrimination which manifests itself in the same way.\textsuperscript{166} Thus in broad-based class actions, the question is no longer whether proof of the merits will be required, but how much.\textsuperscript{167}

The plaintiff can satisfy commonality, inter alia, by putting forth some proof of a pattern or practice of discrimination either using statistics or affidavits.\textsuperscript{168} One court found that the defendant's own study indicating a "statistically significant relationship between being black and being promoted" was sufficient.\textsuperscript{169} This court said it is not necessary for the plaintiff to make a prima facie showing of liability at that stage.\textsuperscript{170}

Typicality can be satisfied by affidavits showing that other members of the class have grievances similar to those of the plaintiff.\textsuperscript{171} However, some recent cases indicate that courts are delving into the merits of the grievances, and actually making preliminary findings of fact which facilitate denial of certification.\textsuperscript{172}


\textsuperscript{166} See \textit{General Tel. Co. v. Falcon}, 457 U.S. 147, 159 n.15 (1982).

\textsuperscript{167} See \textit{Meyer}, 95 F.R.D. at 413-14.

\textsuperscript{168} See \textit{Carpenter v. Stephen F. Austin State Univ.}, 706 F.2d 608, 617 (5th Cir. 1983); \textit{Meyer}, 95 F.R.D. at 414-15; \textit{Moses v. Avco Corp.}, 97 F.R.D. 20, 23 (D. Conn. 1982).


\textsuperscript{170} Id.


\textsuperscript{172} In \textit{Stalvey v. City of Waycross}, 37 Fair Empl. Prac. Cas. (BNA) 987 (S.D. Ga. 1985), the court said that an examination of the merits was ordinarily inappropriate. In this case, however, the court decided that the determination of the prerequisites of Rule 23, required some preliminary findings of fact, \textit{id.} at 989, and found, inter alia, that the defendant showed that the court that the plaintiff was terminated in accordance with the rules and not in a discriminatory manner as she contended. Similarly in \textit{Grant v. Morgan Guaranty Trust}, 548 F. Supp. 1189 (S.D.N.Y. 1982), the court said the plaintiff would not be an adequate representative of a class, because the defendant had
Since the plaintiff's initial proof at trial will include making a prima facie case, requiring such a showing at the class certification hearing may be requiring too much. Courts should, therefore, require only enough proof to establish a genuine issue of material fact regarding commonality and typicality, the proof required to withstand a motion for summary judgment. 173

B. Rule 23(b)(4), the Remaining Criterion for Adequacy of Representation: What Proof the Courts Should Require

After a determination of commonality and typicality, the court should consider the final factor of adequate representation, adequacy of representation. The Second Circuit articulated in Eisen v. Carlisle & Jacquelin the frequently cited requirements for Rule 23(a)(4). 174

[A]n essential concomitant of adequate representation is that the party's attorney be qualified, experienced and generally able to conduct the proposed litigation. Additionally, it is necessary to eliminate so far as possible the likelihood that the litigants are involved in a collusive suit or that plaintiff has interests antagonistic to those of the remainder of the class. 175

Implicit in the requirement that no antagonism exist is that the court must be assured that the representative will vigorously pursue the class interests. 176 Thus, the determination should focus on the class representa-

raised substantial issues relating to her poor job performance. Id. at 1193.

In Caston v. Duke Univ., 34 Fair Empl. Prac. Cas. (BNA) 102 (M.D.N.C. 1983), the court required a substantial showing of the merits at the class certification hearing. The court found the plaintiff's statistics to be "hopelessly flawed," and the nonstatistical evidence was insufficient to sustain the plaintiff's burden of proof. Id. at 110-12.

In Ray v. Phelps Dodge Brass Co., 35 Fair Empl. Prac. Cas. (BNA) 997 (N.D. Ala. 1983), the court struck a balance between Eisen (no examination of the merits) and Falcon (significant proof of a discriminatory policy). It required prima facie proof that there was a nexus between the plaintiff's claim and the disparate impact of the policy or practice in the categories affected. With regard to numerosity, the Ray court required proof that the employer had subjected at least twenty putative class members to similar treatment. Id. at 1000.

175. 391 F.2d at 562.
176. See Moore, supra note 23, ¶ 23.07[1]; 1 H. Newberg, supra note 110, § 3.22.
tative’s motivation, vigor of his or her representation, his or her class
counsel’s performance, and whether any antagonism exists between the
claims of the plaintiff and those of the class.

With regard to class counsel, "'[c]ourts may take into account any
prior failure to proceed in the best interest of the putative class . . .
as well as counsel’s general qualifications.'"177 Alternatively, courts have
evidently found it difficult to declare class counsel incompetent, based
on lack of experience or ability, to represent the class. Thus, the courts
still look mainly at counsel’s performance. In recent cases in which courts
have found class counsel to be incompetent to represent the class, counsel
has not been diligent in prosecuting the suit,178 filing the motion for
class certification,179 or taking discovery.180

The other element of adequate representation focuses on the named
plaintiffs themselves. There must be no evidence of collusion or conflict
of interest between the named plaintiff and members of the class.181 In
addition

a named plaintiff must display some minimal level of interest
in the action, familiarity with the practices challenged, and ability
to assist in decisionmaking as to the conduct of the litigation
. . . [A] court can and should insist on a named plaintiff who
takes some active interest and has some ability to contribute
to the action.182

Thus, in addition to having no active conflict with the class, the plaintiff
must be willing to act for the class and not just in his or her own self

179. See, e.g., Minority Police Officers Ass’n v. South Bend, 555 F. Supp. 921
(N.D. Ind. 1983), modified, 721 F.2d 197 (7th Cir. 1983).
180. See, e.g., Andrews, 780 F.2d at 124.
181. See Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 562-63 (2d Cir. 1968), vacated
and remanded, 417 U.S. 156 (1974). In one case, the Court of Appeals in affirming decer-
tification of the class noted that representatives of the various subclasses fought among
themselves, stipulated a definition of the class which excluded one of the subclass represen-
tatives, and produced completely inadequate class proof at trial. Hervey v. City of Little
Rock, 787 F.2d 1223, 1227-28 (8th Cir. 1986).
interest. The plaintiff should have "a sense of identity with and an emotional tie to the class which he alleges is the subject of discrimination. In many cases he may be motivated by a personal drive to eradicate general injustice against his class."183

Although the considerations which the court should review in making a determination regarding adequacy of representation should be limited to counsel’s performance and the class representative’s motives, all too frequently courts inject the issues of commonality and typicality into such a determination. While these considerations are vital to an overall determination of adequacy of representation, if Rule 23(a)(2), (commonality) and (3) (typicality) have been met, then these issues should not be completely re-examined for Rule 23(a)(4) purposes. Indeed, it is unfortunate that the Rule 23(a)(4) requirement is termed "adequate representation," when Rule 23(a)(2) and (3) are necessary concomitants to the overall finding of adequate representation.184

As the Second Circuit said in Eisen v. Carlisle & Jacquelin, along with the assurance that counsel is competent to conduct the litigation and that plaintiffs have no conflicts of interest with the class, "[c]ourts, on occasion have also required that the interest of the representative party be co-extensive with the interest of the entire class . . . . [T]his amounts to little more than an alternative way of stating that the plaintiff’s claim must be typical of those of the entire class . . . ."185

The relationship of the plaintiff’s claim to the remainder of the class should be analyzed under Rule 23(a)(4) only insofar as it bears on the plaintiff’s interest in being a standard bearer for a class of persons whose claims are not identical to his own. The judge should determine whether the class representative is interested enough in the class to be an adequate representative. The less typical the plaintiff’s claim is of the class claims, the more important his personal motivations and attributes become. Thus, even if the plaintiff’s claim is not identical to those of the class, the adequacy of representation requirement should be met if he is a vigorous representative.186

183. Smalls, supra note 23, at 842.
184. See supra text accompanying note 106.
186. For example, in Falcon the plaintiff was found to be an inadequate representative of a class of persons not hired, since he had been hired and his claim was limited to promotion. Because of Falcon’s vigorous representation, however, the class was awarded $39,000 by the trial court. General Tel. Co. v. Falcon, 457 U.S. 147, 153 (1983).
If the plaintiff has the will and the ability to inform himself of the present practices of the defendant, to amass testimony and to inform himself as to all matters within the scope of the complaint, then the fact that his claim and defenses are not identical with those of every member of the class should be of little moment.\textsuperscript{187}

The trial judge is perfectly capable of making this determination, and the Rules give him considerable discretion in making these determinations and managing the class. In cases in which the plaintiff is indifferent to the claims of the class, obviously he or she is not an adequate representative.\textsuperscript{188} Under this rubric, however, courts have added cases which they characterize as so highly individualized that the plaintiff is disqualified from representing a class.\textsuperscript{189} This characteristic should be determined under Rule 23(a)(3) (typicality), not Rule 23(a)(4).

Since the courts are reluctant to declare counsel incompetent, the principal concern under Rule 23(a)(4) has been whether antagonism exists between the interests of the named plaintiff and the class. In this context the court should concentrate on whether, even though the plaintiff's claim is typical of those in the class and common issues exist, the plaintiff's interests conflict with those of a significant number of the class members.\textsuperscript{190}

In order to be typical, the claims of the plaintiff need not be coextensive with the claims of the class. That is, they need not be the same as all the claims of the class. If, however, some of the claims of the class conflict with the claims of the plaintiff, then Rule 23(a)(4) is called into question, despite the fact that Rule 23(a)(3) may have been satisfied.\textsuperscript{191}

Especially since \textit{Falcon}, courts have found antagonism in anomalous situations.\textsuperscript{192} In such cases, however, the conflicts are potential conflicts.

\textsuperscript{187} Smalls, \textit{supra} note 23, at 836.

\textsuperscript{188} See Andrews v. Bechtel Power Corp., 780 F.2d 124 (1st Cir. 1985).

\textsuperscript{189} See, e.g., Patterson v. General Motors, 631 F.2d 476 (7th Cir. 1980), cert. denied, 451 U.S. 9140 (1981).

\textsuperscript{190} See Floyd, \textit{Civil Rights Class Actions in the 1980's: The Burger Court's Pragmatic Approach to Problems of Adequate Representation and Justiciability}, 1984 B.Y.U.L. REV. 1 for an excellent discussion of how the problem of class dissidence should be resolved.

\textsuperscript{191} See 4 H. \textsc{Newberg}, \textit{supra} note 110, § 24.30.

\textsuperscript{192} For example, in Freeman v. Motor Convoy, 700 F.2d 1339, 1345 (11th Cir. 1983), the court said antagonism existed between an employee and applicants, because the latter might be entitled to retroactive seniority. In Maddox v. Claytor, 38 Fair Empl.
If potential conflicts are made the basis for invalidating a class representative, then no representative will be able to qualify, since all class members compete with each other at some point for promotions, better pay, or other forms of job advancement. The better view is that Rule 23(a)(4) addresses actual, not speculative, conflicts.\textsuperscript{193}

Some courts have found conflicts by focusing on attorneys representing the class. For example, one court found antagonism in the fact that attorneys representing various classes fought among themselves.\textsuperscript{194} Another court found correctly that the plaintiff became "of counsel" for the attorney handling the case and had previously investigated the claims of the class member as a fair employment compliance officer of the defendant. The court decided that the plaintiff's interest in attorneys'

---


In an interesting development, one court cited the vigorous class representation by the union's attorneys as one factor which belied the defendant's contention that a conflict could arise between the unions members who were not members of the class and those who were. American Fed'n of State, County and Mun. Employees, 578 F. Supp. at 849.

Courts also have difficulty with whether a plaintiff who is in two protected groups, such as a black female, can represent persons in both groups. Some courts say that this is a conflict and that the plaintiff can represent one or the other, but not both. See Moore v. National Assoc. of Secur. Dealers, 37 Fair Empl. Prac. Cas. (BNA) 1738, 1743-44 (D.D.C. 1982). Others allow the plaintiff to represent both protected groups in one class. Int'l Woodworkers v. Chesapeake Bay Plywood Corp., 659 F.2d 1259 (4th Cir. 1981).

\textsuperscript{194} Hervey v. City of Little Rock, 787 F.2d 1223, 1227 (8th Cir. 1986).
fees conflicted with her interest in the class, and that as a compliance officer she had discussed defense strategy with the defendant. Thus, she could not serve as class representative.\textsuperscript{195}

Courts have been presented with a variety of other objections to the class representative,\textsuperscript{196} such as the defendant’s contention that the plaintiff was not discriminated against. In response to this claim, some courts have improperly examined the merits of the plaintiff’s claim, found it to be lacking, and consequently held that the plaintiff is an inadequate representative.\textsuperscript{197} For example, a court held that because an employer had raised a substantial issue regarding the employee’s poor job performance, it precluded plaintiff from being an adequate representative of the class.\textsuperscript{198}

Courts which engage in pretrial examination of the merits of the named plaintiff’s claim defeat the policy of Rule 23. They stretch the limits of the Rule 23(a)(4) requirement by speculating about remotely possible antagonism and basing their decision on such speculation.\textsuperscript{199}

There are, of course, cases in which the plaintiff clearly is an inadequate class representative. This is illustrated well by the Rodriguez case.\textsuperscript{200} The defendant demonstrated that antagonism existed between a significant number of the class members and the named plaintiffs; many


\textsuperscript{196}For example, courts have struggled with the plaintiff’s inability to pay the costs of the litigation. See EEOC v. Printing Indus. of Metro. Washington, D.C., 92 F.R.D. 51, 54 (D.D.C. 1981). If this is a seminal criterion, no poor person could sue and the public policy of Title VII could not be vindicated. See Allen v. Isaac, 99 F.R.D. 45, 53 (N.D. Ill. 1983). This is a frequently cited criterion for adequacy of representation. See, e.g., Coates v. Johnson & Johnson, 37 Fair Empl. Prac. Cas. (BNA) 421, 422 (N.D. Ill. 1981) (one of the reasons plaintiff was an adequate representative was his lack of necessary resources). However, it is clearly a sensitive area and courts rarely deny class certification on this ground alone. See Wilmington Firefighters Local 1590 v. City of Wilmington, 109 F.R.D. 89, 94 (D. Del. 1985); 4 H. Newberg, supra note 110, § 24.35.

\textsuperscript{197}See supra note 172.

\textsuperscript{198}Grant v. Morgan Guaranty Trust, 548 F. Supp. 1189, 1193 (S.D.N.Y. 1982).

\textsuperscript{199}See supra note 192. Still other courts have considered whether the plaintiff’s length of absence from the job affected his ability to represent the class. See, e.g., Boykin v. Georgia-Pacific Corp., 706 F.2d 1384, 1387 (5th Cir. 1983), cert. denied, 465 U.S. 1006 (1984) (Length of absence from the job was determined not to be the question. The willingness and ability of plaintiffs to represent the class were at issue.).

of the class members had indicated that they did not want some of the relief requested by the named plaintiffs. In addition, the named plaintiffs were obviously not vigorous class representatives, since they failed to move for class certification and stipulated away the class claim.

In short, the courts should examine real rather than speculative conflicts, the competence of class counsel, and the characteristics of the named plaintiff in making a determination of adequacy of representation. These considerations should then be applied against a background of the already settled issues of typicality and commonality to determine whether the named plaintiff is an adequate representative of the class.

Before automatically denying certification, the court should examine the possibility of whether subclassing or redefining the class will eliminate the conflict. For example, when the court discerns a possible conflict between the interests of black females and white females, subclassing can relieve the conflict. Allowing an appropriate representative to intervene is another possibility. In any event, the court can always modify the class if conflicts emerge and cannot be avoided.

In a narrowly defined class action, conflicts of interest will be easier to discern. In a broader based class action, court monitoring of such conflicts becomes more important. The more people the plaintiff represents who are not in his or her exact situation, the more likely conflicts are to occur. Thus, the court should satisfy itself that the plaintiff and class counsel will vigorously represent the interests of the class and not subvert such interests to their own. Similarly, in a broader based class action, the court must assure itself that class counsel is representing the interests of the class, not just counsel’s or the plaintiff’s own interest. The fact that broader based class actions may require more monitoring on the part of the court does not mean that such classes should be eliminated.

201. See Horton v. Goose Creek Indep. School Dist., 690 F.2d 470 (5th Cir. 1982), cert. denied, 463 U.S. 1207 (1983). (Trial court denied class certification, because some students could have been in favor of the practice of allowing dog sniffs in school which was the subject of the suit. The Fifth Circuit reversed, holding that the defendant school district could present to the court arguments in support of the contention that sniffing is not an unconstitutional search.)


203. See Fed. R. Civ. P. 23(c); 1 Newberg, supra note 110, § 3.25.

204. See Vuyanich v. Republic Nat’l Bank, 723 F.2d 1195, 1198 (5th Cir. 1984).

205. See 1 H. Newberg, supra note 110, § 3.25.

Courts should simply be willing to accept responsibility for managing class actions. Such responsibility would include overseeing vigorous representation, competence of class counsel, and lack of real conflicts.

C. Numerosity

Although numerosity is listed as the first requirement of Rule 23, it cannot be determined until the class has been found to meet the other three requirements.207 The class representative need not identify all class members or their exact numbers, but he or she must define the class so that the court can determine whether the class is sufficiently numerous and whether a particular person is truly a member of it.208

Although it may not be necessary to determine exact number, the plaintiff must raise a presumption of numerosity.209 In order to show impracticability of joinder, courts generally require some concrete proof that more than a minimal number of persons have been affected.210

Some courts do not apply the numerosity requirement as strictly in cases in which the plaintiff seeks injunctive relief on behalf of future class members, that is, where the emphasis is less on damages and more on future compliance.211 Finally, when qualifying under the numerosity requirement is a close question, the court should strike the balance in favor of satisfaction of numerosity and decertify the class later if necessary.212


208. See Meyers, Title VII Class Action: Promises and Pitfalls, 8 Loy. U. Chi. L.J. 767, 776-77 (1977); 7A Wright, Miller & Kane, supra note 23, at § 1760.


211. See Wester v. Special School District No. 1, 35 Fair Empl. Prac. Cas. (BNA) 199, 202 (D. Minn. 1984). Courts have granted class status to classes with as few as 13 members and denied such status to classes as large as 300. 1 H. Newberg, supra note 110, § 3.03. The Supreme Court has indicated that a class of fewer than fifteen would be too small. General Tel. Co. v. EEOC, 446 U.S. 318, 330 (1980).

Class status is frequently denied by courts which require the "interest or injury" of the plaintiff and class to be virtually identical. The requirement of identical "interest or injury" means that classes will be small and, therefore, the numerosity requirement will not be met. For example, in Everitt v. City of Marshall, the court said that, although the plaintiff presented an impressive argument that the racially discriminatory practices were common to both civil service and unclassified employees, their claims were not common. The plaintiff was allowed to represent only eight black employees in civil service departments. The class failed for numerosity. As Judge Murnaghan predicted in his dissent, by focusing on dissimilarities, courts are applying "same interest, same injury" to reduce many employment discrimination classes into classes of one.

This is in fact the tendency of many courts after Falcon and Rodriguez. For example, in upholding a post-trial decertification in Roby v. St. Louis Southwestern Rwy. Co., the court said that the plaintiffs could represent only those black persons who failed to "take service" in another job within fifteen days after furlough and those black persons who failed the forced engineer's examination. Since there were only four possible members of such a class, the numerosity requirement was not met. Certification will almost always fail where classes are defined as narrowly as possible.

In another case, the plaintiff had attempted to prosecute a broad-based class action. The court defined the class, however, not as all persons denied promotion, but as employees who were qualified for promotion, sought promotion to a specific opening, and were not promoted. The court reasoned that it was not known, inter alia, whether potential class members had been denied promotion because they were actually less qualified. As a result of such reasoning, only between twenty and thirty black women qualified as class members. Since the class was less than thirty, the court decided that numerosity was not present. Thus,

by limiting the class and by improperly requiring proof of the merits of the class claims, class certification failed for lack of numerosity.

Other courts, although defining a large broad-based class, have simply found that joinder of large numbers is practicable. They have interpreted the practicability requirement in a flexible manner.218

Many courts apply the numerosity requirement purely as a matter of numbers. For example, in Batesville Casket Co. EEO Litigation, after whittling down the class to currently employed black salesmen, the court found that there were only eleven class members. The court admitted that because of the geographic dispersion, joinder would not be easy, but decided that the class was not so numerous that joinder was impracticable.219

However, courts usually recognize that impracticability of joinder should not be decided by numbers alone. Rather "the nature of the relief sought, the ability of the individuals to press their own claims, the practicability of forcing relitigation of a common core of issues, and administrative difficulties involved in interpretation and joinder"220 should also be considered.

218. In Lucky v. Board of Regents, 34 Fair Empl. Prac. Cas. (BNA) 986 (S.D. Fla. 1981), the court found that the maximum number in the class was 100. Since all 100 were current employees and easily identifiable, the court held joinder was not impracticable. Similarly, in Andrews v. Bechtel Power Corp., 780 F.2d 124 (1st Cir. 1985), cert. denied, 106 S. Ct. 2896 (1986), the Court of Appeals affirmed the lower court, which had honed the class down to a maximum size of forty-nine. Since the plaintiffs were all easily identified and in the same geographical area, the court decided that joinder was not impracticable.

As expressed in Wright, Miller & Kane, "'Impracticable' does not mean 'impossible.' The representatives only need show that it is extremely difficult or inconvenient to join all the members of the class." WRIGHT, MILLER & KANE, supra note 23, § 1762.


220. Rosario v. Cook County, 33 Fair Empl. Prac. Cas. (BNA) 905 (N.D. Ill. 1983). In Rosario, all of these factors weighed in favor of finding numerosity for a class of twenty. The court relied especially on the nature of the relief sought, which was elimination of performance evaluations and written examination as promotion criteria. Such factors would affect all future applicants for promotion. Id. at 906.
Thus, in *Allen v. Isaac*, the class consisted of at least seventeen people, and joinder was impracticable due to geographic dispersion.\(^{221}\) The court noted that when a class is large, numbers alone are dispositive of impracticability of joinder. When, as here, the numbers are small, other factors, such as geographic dispersion and the ability of the individuals to press their own claims, are important to test impracticability. On the latter point, the court said that "[c]omplicating an employee's ability to pursue his own claim, is the fear that his job will be jeopardized by bringing his employer to court."\(^{222}\)

Some courts seize upon the failure of enough persons' coming forward and admitting to having claims against the employer as evidence of lack typicality.\(^{223}\) Other courts, however, recognize that

[t]here can be judicial notice that employees are apprehensive concerning loss of jobs and the welfare of their families. They are frequently unwilling to pioneer an undertaking of this kind since they are unsure as to whether the court will support them. Even if they do prevail, they are apprehensive about offending the employer as a result of taking a stand. These are all factors that enter into the impracticability issue . . . [which is] dependent not on any arbitrary limit but upon the circumstances surrounding the case.\(^{224}\)

The requirement of impracticability of joinder should be more flexible in an employment suit, since "most, if not all, of the current employees will be hesitant to join."\(^{225}\) Despite the anti-retaliatory provision of Title VII,\(^{226}\) employers may be able to get away with retaliating. It is up to the employee to prove that whatever action the employer

---

222. 99 F.R.D. at 53. The court also found that the relitigation of common issues increases the cost of litigation and that pursuing the claims singly is not economical.
took was in retaliation for the employee's charge or testimony against the employer.\textsuperscript{227}

Thus, courts in analyzing the numerosity requirement in an employment discrimination suit, should take into account that fear of retaliation will prevent the vast majority of employees from joining a suit, thereby making joinder impracticable. If any significant number of employees are potential class members, numerosity should be satisfied.

D. Other Obstacles Encountered by Plaintiffs Seeking to Represent a Class

The would be class representative faces a number of obstacles to successful prosecution of a Title VII class action in addition to restrictive application of Rule 23(a) requirements. The scope of this article does not permit coverage of all of these. Nevertheless, in order to put in perspective the point that the courts have raised barriers to fulfillment of Title VII's goal in the area of class actions, a reference to other developments which have an impact on class actions is appropriate.

While all of the developments in the Title VII area have not been negative,\textsuperscript{228} several Supreme Court cases, in addition to \textit{Rodriguez} and \textit{Falcon}, have had a negative impact on the ability of Title VII plaintiffs to succeed on a class basis.\textsuperscript{229} In \textit{United Airlines v. Evans},\textsuperscript{230} the Court effectively eliminated the theory that if past discrimination has present effects then it is a continuing violation and is not barred by the statute of limitations. Thus, after \textit{Evans} the plaintiff must file a charge within 180 days, or in some circumstances within 300 days, of the alleged discriminatory act, regardless of whether the act has continuing conse-

\begin{itemize}
  \item \textsuperscript{227} Lewis v. NLRB, 750 F.2d 1266 (5th Cir. 1985).
  \item \textsuperscript{228} See, \textit{e.g.}, Cooper v. Federal Reserve Bank, 467 U.S. 867 (1984) (Individual claims not barred by judgment on class action); General Tel. Co. v. EEOC, 446 U.S. 318 (1980) (under Title VII, Rule 23 is not applicable to an enforcement action brought by the EEOC); Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326 (1980) (putative class member may intervene to appeal denial of class certification).
  \item \textsuperscript{229} Other decisions have had a negative impact on the ability of the individual Title VII plaintiff to succeed. See, \textit{e.g.}, Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981) (in a disparate treatment case, the defendant must only articulate and need not prove nondiscriminatory reasons for its actions); Pullman-Standard v. Swint, 456 U.S. 273 (1982) (the finding of discriminatory intent is a finding of fact which is subject to the clearly erroneous standard).
  \item \textsuperscript{230} United Airlines v. Evans, 431 U.S. 553 (1977).
\end{itemize}
quences. The impact for class actions is that the only persons who can become members of the class are those who have filed charges or who have had claims within 180 days (in some cases 300 days)\textsuperscript{231} of the time the earliest charge was filed.\textsuperscript{232} It is clear that this has a substantial effect on the number of persons eligible to be considered as class members.

A further limitation on class actions is the questionable ability of a class representative whose claims are moot to continue representing the class. Although the Supreme Court has left the door open for such representation,\textsuperscript{233} this holding will be useful only in limited cases. Indeed, the question arises as to how a person with a moot claim can adequately represent a class applying \textit{Falcon} and \textit{Rodriguez}.\textsuperscript{234}

In addition, although a disqualified class representative may be replaced by another class member, many courts have effectively limited intervention to those who have filed charges on the issues the original representative sought to raise.\textsuperscript{235} In the usual case, however, when a class representative is disqualified on the basis of \textit{Falcon}, it is because he lacks the same interest as the class. Therefore, other class members will not qualify as intervenors.\textsuperscript{236} The basis for such decisions is that the EEOC has not had an opportunity to settle or reconcile the non-charged issue with the employer.\textsuperscript{237}

In general, the allegations of the complaint must be similar or related to the allegations of the charge or growing out of the investigation. In

\begin{itemize}
  \item \textsuperscript{231} See, \textit{e.g.}, Domingo v. New England Fish Co., 727 F.2d 1429, 1442 (9th Cir. 1984), \textit{modified}, 742 F.2d 520 (1984).
  \item \textsuperscript{233} United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980).
  \item \textsuperscript{234} See \textit{Floyd}, \textit{supra} note 190, at 44-51.
  \item \textsuperscript{235} Carpenter v. Stephen F. Austin State Univ., 706 F.2d 608 (5th Cir. 1983).
  \item \textsuperscript{236} See, \textit{e.g.}, Vuyanich v. Republic Nat'l Bank of Dallas, 723 F.2d 1195, 1201 (5th Cir. 1984). The court said the proposed intervenor who has not filed a charge can only attack practices which the named plaintiff could attack. \textit{See also} \textit{Falcon} v. General Tel. Co., 457 U.S. 147 (1985).
  \item \textsuperscript{237} Id. \textit{See also} \textit{supra} note 16. As a counterbalance to the restrictive view of who can intervene, the court in Lilly v. Harris-Teeter Supermarket, 720 F.2d 326 (4th Cir. 1983), \textit{cert. denied}, 466 U.S. 951 (1984), allowed intervention based on the futility of first exhausting administrative remedies. Although the claims were not the same, the court held they were sufficiently similar — promotion as opposed to termination, demotions and hiring. Thus, the court held it was not necessary for the intervenor to exhaust administrative remedies for the promotion claim, since the EEOC had been unable to conciliate the demotion, termination, and hiring claims. 720 F.2d at 335.
\end{itemize}
the past, courts have liberally construed this rule. Recently, however, some courts have narrowed interpretation of the rule.

Requiring non-charge filing intervenors to raise only issues which the plaintiff raised in his charge and allowing only claims raised in the charge to be alleged in the complaint creates still further obstacles for class actions. These obstacles are enhanced by the fact that since its 1977 reorganization, the EEOC has encouraged narrowly defined individual charges and limited investigations. In addition, many complainants are not represented by counsel at this phase.

Another problem which surfaced before *Falcon*, but which has been further stimulated by that case, is the type of proof necessary in class action suits. In employment discrimination cases, there are two theories of discrimination, disparate treatment and disparate impact. The disparate treatment theory of discrimination involves different treatment of persons based on a protected characteristic such as race. The disparate impact theory is based on the existence of a policy or practice which has an adverse impact on a protected group as compared to another group. The proof required to show disparate impact is generally statistical analysis proving that the policy falls more heavily on a protected class than on other groups. Unlike the disparate impact theory, the disparate treatment theory requires proof of the employer’s intent to discriminate.


239. See *Evans v. United States Pipe & Foundry Co.*, 696 F.2d 925 (11th Cir. 1983). See also *Ekanem v. Health and Hospital Corp.*, 724 F.2d 563 (7th Cir. 1983), cert. denied, 469 U.S. 821 (1984). The court limited the claims to those falling within the scope of the charge. The court said the fact that the EEOC expanded its investigation and issued its determination on a broader basis was irrelevant. 724 F.2d at 573.


241. Other problems confronted by class plaintiffs include defendants who attempt to limit discovery at the outset based on *Falcon*. See, e.g., *Velasquez v. Faurer*, 101 F.R.D. 8 (D. Md. 1983). Also, many jurisdictions have local rules governing the amount of time the plaintiff has to file a motion for class certification, some of which are unrealistically short. See, e.g., *Jones v. Flagship Int’l*, 36 Fair Empl. Prac. Cas. (BNA) 1679 (N.D. Tex. 1983) (The local rule required the motion to be filed ninety days after the complaint was filed. Although the plaintiff had moved for two extensions, the court cited her motion as being six months late under the local rule.).

242. Proof of disparate impact is used to attack employment criteria such as tests and educational requirements, which impact more harshly on a protected class. See *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977); *Rowe v. Prudential Property Ins. Co.*, 37 Fair Empl. Prac. Cas. (BNA) 762 (N.D. Ga. 1983).
A racial imbalance is not sufficient to show intent.243 Gross statistical disparities, however, or significant other evidence of intentional discrimination have been held to be sufficient.244 Isolated instances of discrimination are insufficient to establish a pattern or practice of discrimination.245 However, employees are as reluctant to testify regarding discriminatory acts as they are to file charges and join the suit in the first place.246 Thus, many employees will not testify.

The Court in *Falcon* pointed out another reason the plaintiff's claim was atypical. He was attempting to prove his claim using proof of disparate treatment, while the class proof was based on the disparate impact theory and included statistical analysis.247 Thus, since the usual method of proving individual claims is by using the disparate treatment theory,248 class claims must be proven the same way. Since disparate treatment cases require more proof than disparate impact cases, the Court has raised yet another obstacle for the Title VII class claimant.

Furthermore, in *Pouncy v. Prudential Insurance Co. of America*, the Fifth Circuit reasoned that subjective employment decisions resulting in discrimination were evidence of intentional discrimination and could not be analyzed under the disparate impact theory.249 Rather the proper method of proof was the disparate treatment model.250

The Eleventh Circuit rejected the *Pouncy* rationale in *Griffin v. Carlin*, stating that "'Title VII requires the elimination of 'artificial, arbitrary, and unnecessary barriers to employment.' "251 The Supreme Court in

247. *See supra* text accompanying note 85.
249. 668 F.2d 795 (5th Cir. 1982).
251. *Griffin v. Carlin*, 755 F.2d 1516, 1525 (11th Cir. 1985). The court also stated that "[e]xclusion of such subjective practices from the reach of the disparate impact model of analysis is likely to encourage employers to use subjective, rather than objective, selection criteria." *Id.*
Griggs v. Duke Power Co., which originated the disparate impact analysis, did not distinguish between objective and subjective criteria as Pouncy had.

Thus, strict construction of Rule 23 in employment discrimination class actions is only one obstacle among many for the Title VII plaintiff. The conclusion is inescapable that the courts have indeed rebuilt the barriers Title VII was enacted to eliminate.

IV. Conclusion

The argument that Rule 23 requirements must be strictly and narrowly applied is based on the fact that, if the plaintiff is not an adequate representative, the class will be injured because of the res judicata effect of an adverse judgment. However, few employees are willing to risk suing their employer — the ultimate act of disloyalty in a country of employers who demand loyalty from their employees.

It takes a brave, if not foolhardy, soul to sue his or her employer — whether potential, prospective, present, or former. Even with the protection of the anti-retaliation provisions of the Act, no employee has such a perfect record that the employer cannot manufacture and support a reason to discipline or discharge him. Naturally, employees are not rushing to join a class or testify against their employer at a class certification hearing. Furthermore, it often takes the disgruntled, rebellious, less-than-perfect employee to raise the claim for the class. The courts expect the perfect class representative, the model employee who,

253. 755 F.2d at 1524. See Watson v. Fort Worth Bank & Trust, 798 F.2d 791, 815 (5th Cir. 1986) (Wisdom, J., dissenting), cert. granted, 107 S. Ct. 3227 (1987). During the production of this article, the Court vacated and remanded Watson, deciding that subjective decision-making should be susceptible to proof using the disparate impact theory. A plurality of the Court, however, while agreeing that the disparate impact theory was appropriate, interpreted the allocation of burdens of proof in such cases to be essentially the same as it is in disparate treatment cases. Therefore, under the plurality's interpretation, the plaintiff would bear the heavier burden, regardless of which theory was used. Watson v. Fort Worth Bank & Trust, ___ U.S. ___, 108 S. Ct. 2777 (1988).
255. "There is no more elemental cause for discharge of an employee than disloyalty to his employer." NLRB v. Local 1229, 346 U.S. 464, 472 (1953).
257. This is not to say that employers are all acting in bad faith to circumvent the Act. However, the employer's attitude toward the employee often changes and the perception of that employee's performance cannot but be affected.
despite his or her exemplary conduct and work record, is blatantly discriminated against in every aspect of employment (within six months of filing a charge). Such a fact pattern may be necessary at present to allow him or her to claim the same interest or injury as a class of employees. These employees no doubt all suffer quietly and hope for vindication by a bolder class representative.

Thus, the employees who step forward may not be the best class representatives. The class will, however, not be represented otherwise, and the claims of the class will not be vindicated. The Falcon case illustrates this point. Although Falcon had no live hiring claim, he represented such a class to the Supreme Court. The $39,000 award he had won for the class was reversed, and Falcon himself was ordered to pay $7,000 in appeals costs. The message to class members and potential plaintiffs is: proceed at your peril.259

In addition to the fact that individual cases are less likely to be brought and are difficult to prove, they are frequently not worth the amount of money involved.259 Furthermore, it is difficult to attract competent counsel to an individual suit, because there is less chance of settlement and greater chance of loss.260 In addition, even if an individual is successful, it is doubtful whether injunctive relief which covers anyone other than the plaintiff will result from litigation.261

The threat of individual suits offers little incentive to employers to avoid discrimination, while the threat of class action suits is very effective in forcing employers to eliminate even the subtlest forms of discrimination. This does not mean that most employers intentionally discriminate, although those that do will be able to continue to do so with relative impunity. Rather the problem is that those employers formerly concerned with affirmative action and zealous supervision to insure the elimination of subtle forms of discrimination no longer have the incentive to pursue these concerns. Such supervision takes time, energy, and money. It is not cost effective if the threat of consequences is remote.

Other arguments in favor of class actions in employment discrimination suits are ones justifying the class action generally. For instance, unitary resolution of claims avoids the cost of duplicative litigation.262

259. See Comment, supra note 258.
261. Id.
262. Id.
Such resolution is thus more economical and avoids subjecting the defendant to inconsistent orders and prevents unfair treatment of claims of unrepresented absent members.\(^{263}\)

In employment discrimination actions, however, avoiding inconsistent orders is usually a hypothetical consideration. In fact, only a few persons with a claim will come forward. Paradoxically, since individuals are reluctant to come forward out of fear of retaliation, Title VII class actions should be favored, rather than discouraged.

Furthermore, the principal argument for restrictive certifications, the res judicata effect of an adverse determination, is also largely academic. In *Cooper v. Federal Reserve Bank*, the Supreme Court made it clear that, although further litigation regarding class issues is precluded by an adverse judgment on class issues, individual plaintiffs still have a live cause of action in most cases regarding their individual claims of discrimination.\(^{264}\)

If it should later appear that the plaintiff was an inadequate representative, the Court has also left open the possibility that a plaintiff without a live claim can continue to represent the class or can be replaced by an intervenor.\(^{265}\) In addition, if at any time it appears that the plaintiff is an inadequate representative, then even after trial, the class can be decertified.\(^{266}\) Thus, the detrimental effect of an adverse judgment on the class also appears to be largely illusory.

Certainly not all individual claims should automatically become class actions. However, certain individual claims are appropriate for class treatment. *Rodriguez* and *Falcon* require that all of the requirements of Rule 23 be met. There should be no quarrel with this holding. The courts which interpret the requirements too restrictively are, however, as predicted, draining the life out of Title VII.\(^{267}\) "Pointedly, the vitality of across-the-board suits ought not be decided in the milieu of prudential limitation. Instead it ought to be decided in the context of congres--


\(^{267}\) Johnson v. Georgia Highway Express, 417 F.2d 1122, 1126 (Godbold, J., concurring).
sional objective; particularly so when those objectives are broadly stated and the means of achieving them are largely left to the courts."

If a class can rarely be certified in the first place, making allowances at later stages is ineffectual. The Supreme Court has recently announced that the EEOC does not have to comply with Rule 23. However, allowing the EEOC to avoid the requirements of Rule 23 on the theory that EEOC actions alone can enforce Title VII is ludicrous. The most effective enforcement tool is the private class action, and such actions should not be virtually eliminated by the courts.

There is no question that the days of wholesale class actions filed for the sake of winning a large undeserved settlement based on a frivolous individual claim were reprehensible. The answer, however, does not lie in forbidding all such actions, but rather in ensuring that there is a good faith motivation for the class suit. Rule 23(a)(4) in large measure provides a test for making such distinctions.

The plaintiff should be required to make a strong showing that he or she can meet the Rule 23(a)(4) requirement of adequate representation; he or she must show that the counsel is competent, that he or she will be a vigorous representative for the class, and that no true antagonism exists. Then the other three requirements should be less strictly applied. The courts should not require that the plaintiff's claims be identical to those of the class. They should also be willing to certify smaller classes in employment discrimination cases.

The court is required to oversee the class action and should be able to assess, as the litigation progresses, whether Rule 23(a)(4) is met. If it is not, the class should be decertified. If there is any conflict between the plaintiff and the class, the defendant will generally bring to the court's attention that conflict or any other failure bearing on adequate representation.


270. See Watson v. Fort Worth Bank & Trust, 798 F.2d 791, 800 (5th Cir. 1986) (Goldberg, J., dissenting), cert. granted, 107 S.Ct. 3227 (1987) [see supra note 253 for discussion of Watson]; see also supra text accompanying notes 22-23.


272. Since Title VII relief is equitable in nature, the plaintiffs are not entitled to a jury trial. It has been argued that, since they have given up a jury trial, they should have the right to have their case heard effectively. Effective hearing cannot always be accomplished through an individual action. Liberal construction of Rule 23 is therefore
"The class action has been the greatest instrument in enforcing Title VII's promise that invidious race discrimination shall have no role in the workplace. Without the efficiency and economy of this procedural tool, it is safe to say that the injury of thousands would have remained both undiscovered and unredressed."\(^{273}\) In addition to unredressed claims, probably the biggest threat is to future compliance with Title VII. Because class actions have such a strong deterrent effect, if they are emasculated, the result will be that employers will find compliance with Title VII prohibitively burdensome. The pre-Title VII era is not so remote that one can disregard its possible recurrence.

---

\(^{273}\) Watson, 798 F.2d at 815 (Wisdom, J., dissenting) [see supra note 253 for discussion of Watson].