Comment

Unions as Title VII Plaintiff Class Representatives: A Potential Conflict of Roles and a Possible Solution

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The author examines the recurring judicial presumption that unions are inadequate class representatives in Title VII actions. She argues that the duty of fair representation and the purposes of Title VII obligate unions to fight discrimination, and the judicial presumption that unions are inadequate class representatives frustrates these policies. She suggests that certain provisions of the Federal Rules of Civil Procedure be utilized to protect individual class members' interests and insure the adequacy of union class representation.

INTRODUCTION

In the years since the enactment of Title VII of the Civil Rights Act of 1964,1 the court's view of the role of unions in the national commitment to the elimination of employment discrimination has been inconsistent. Long before Title VII, the Supreme Court had made it clear that a union, as the exclusive bargaining representative of its members, has a statutory obligation to represent all segments of its membership fairly.2 The NLRB has held unions guilty of an unfair labor practice if they discriminatorily fail to process grievances.3 Although they are the statutory representatives of their members, unions have often been named as joint defendants in Title VII actions against employers and have increasingly been held liable for large back pay awards to Title VII plaintiffs. In each of these contexts, courts have stressed that unions have an obligation to work affirmatively to eliminate employment discrimination. As the Supreme Court observed in Albemarle Paper Co. v. Moody,4

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It is the reasonably certain prospect of a backpay award that "provide[s] the spur or catalyst which causes . . . unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history."  

Despite these frequent admonitions, courts have often denied class representative status to unions which have filed Title VII employment discrimination actions on behalf of their members.\(^6\) The reluctance of courts to allow a union to represent some or all of its members in a class action stems from a recurring presumption that a union plaintiff class representative would be subject to a "sense of divided loyalty or dual purpose."\(^7\) This presumption may result from conflicts in the union's duties to the class members and to the other members of the union or the bargaining unit, or from its potential liability as a signatory to what may prove to be a discriminatory collective bargaining agreement. More fundamentally, courts seem to recognize a potential conflict between a union's role as the exclusive bargaining representative with a duty to advance the collective good and the union's representation of Title VII claimants who may have a right to be made whole for their injuries, regardless of the effects such restitution may have on other employees. 

This Comment will analyze this conflict between a union's roles and examine possible resolutions of the dilemma. The thesis of this Comment is that the nearly irrebuttable presumption which has led courts to deny union plaintiffs class representative status is unnecessarily rigid and that its implementation frustrates the purpose of Title VII to eliminate discrimination in employment.

The interests of individuals in remedying unlawful employment discrimination are of the greatest importance and courts should act with caution in any situation which might compromise those interests. However, courts have overreacted to the possibility of prejudice in a Title VII class action. The fundamental question for the courts, when considering whether to permit a union to act as class representative, is whether the union is able and motivated to represent vigorously the interests of members who have suffered discrimination. Unions should be treated like other would-be class representatives, and should not be presumed inadequate representatives. In many cases procedural safeguards exist which can be utilized by the courts.

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5. Id. at 417-18 (footnote omitted).


7. Social Services Local 535 v. County of Santa Clara, 12 FEP Cases 570, 572-73 (N.D. Cal. 1975).
to protect individual interests while allowing suits to be litigated by unions, which have the duty to protect the employment rights of their members throughout most facets of the employment relationship and the competence and motivation to continue such protection through the Title VII lawsuit.

I

THE IMPORTANCE OF UNION CLASS PARTICIPATION

Because of the conflict of roles mentioned above and the potential back pay liability of unions in many Title VII actions, their participation as plaintiff class representatives is problematic and may sometimes threaten the individual interests of discrimination victims. Moreover, there are often members of the class who could act as class representatives. It is thus necessary at the outset to consider why it is important that qualified unions have the opportunity to act as Title VII plaintiff class representatives.

On the broadest level, such opportunity is critical to the vitality of unions as exclusive bargaining representatives in contemporary society. In recent years, many aspects of the employment relationship, previously governed by private rules of the collective bargaining mechanism, have become subject to statutory law. This development reflects a growing recognition of the rights of the individual, particularly the minority worker. The significance of the union role as the representative of its membership must correspondingly decline in the face of this development if unions remain stolidly in their original function as only and always the proponents of the majority. If unions are to remain a vital force as bargaining representatives, they must recognize that representing the interests of their female and minority members is essential for the collective good.

The Title VII suit is one of the most effective and comprehensive means of redressing injuries suffered by minority workers. When it precludes a union from initiating a Title VII action on behalf of its members, a court prevents the union from providing its minority members with the representation it must provide, if it is not to become anachronistic and impotent. If one accepts the premise that collective organization is to be preserved, it follows that the representative functions of unions must not automatically be limited by unjustified presumptions.

The participation of unions can also further the ultimate goal of the elimination of employment discrimination and its effects in a way that


individual class representatives often cannot. In industries operating under a master agreement, unions as class representatives can negotiate industry-wide consent decrees far broader in effect than would be possible in plant-by-plant actions brought by individuals. In the basic steel industry, for example, negotiations between unions, employers, and federal agencies resulted in consent decrees correcting discriminatory practices at 240 steel-related facilities throughout the United States. The decrees covered almost all aspects of the employment relationship, including seniority, transfers, layoffs, back pay, training programs and recruitment.10

Union class representatives can influence the comprehensiveness of an action in another way. In Thompson v. Board of Education,11 the district court defined both plaintiff and defendant classes in terms of the union class representatives. The case involved a class action brought by individual women teachers and two teachers' unions, the Michigan Education Association and the Warren Education Association, against various school districts in Michigan, alleging sex discrimination in pregnancy-sick leave policies. The defendants argued that the scope of the defendant class was too broad, citing authority which held that a plaintiff "cannot represent those having causes of action against other defendants against whom the plaintiff has no cause of action and from whose hands he suffered no injury."12 In response to this objection, the Thompson court took the following steps:

I will, as an exercise of sound discretion, limit the classes in such a manner as will give more certainty to the class action resolution. Rather than a plaintiff's class of all female teachers and a defendant's class of all school boards in Michigan, I have limited the definition of the defendant's class to include only those entities which are more closely connected with the MEA. Plaintiff's class is similarly limited to female employees of such districts.

As limited, maintaining this case as a class action does not violate the principles of LaMar, regardless of the soundness of those principles. The MEA, having female members subject to each defendant's allegedly discriminatory policy, has sufficient standing against each defendant and

The appellant Federation is recognized by the Post Office Department as the exclusive representative of Departmental employees. . . . There is no reason to doubt that, as regards the matter at bar, it fully and effectively represents the interests of at least large numbers of its members. In the circumstances of this case, we think it artificial and pointless to cut off its representative functions at the courthouse door.

Id. at 470. For a discussion of the importance of union participation in obtaining equal employment, see Youngdahl, Equal Employment and Affirmative Action: The Union Role, in 27 NYU ANN. Conf. Lab. 163 (1975).

10. For a discussion of the steel industry consent decrees, see Kleiman & Frankel, Seniority Remedies Under Title VII: The Steel Consent Decree—A Union Perspective, in 28 NYU ANN. Conf. Lab. 177 (1976). See also United States v. Allegheny-Ludlum Indus., Inc., 63 F.R.D. 1 (N.D. Ala. 1974), aff'd, 517 F.2d 826 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976), in which the court held that such consent decrees were not illegal.


12. Id. at 1708, citing LaMar v. H. & B. Novelty & Loan Co., 489 F.2d 461, 462 (9th Cir. 1973).
meets the requirements of 23(a)(2) and (3), as construed in LaMar. In addition, the restrictions I have imposed are not undue limitations on the classes, since substantially all of the significant evidence presented by plaintiffs pertained only to school districts which have contracts with MEA affiliates and all of the individually named plaintiffs fall within the now limited class. Thus in this case the union class representative was able to implicate a broader defendant class than an individual class representative could have, and at the same time provided a defined structure to the lawsuit which would result in a more orderly disposition.

The union class representative can potentially be a more formidable and successful opponent of the discriminatory employer than could an individual class representative. Even though section 706(f)(1) of Title VII provides for the appointment of counsel and section 706(k) provides for attorney’s fees for the successful Title VII plaintiff, the required expertise and financial burdens of complex and protracted Title VII litigation are enormous, and many private attorneys “are not eager to enter the fray in behalf of a person who is seeking redress under Title VII.” Unions often have greater access to the resources and accumulated legal expertise necessary for such litigation. Further, unions often have a continuity of interest and involvement in a particular employment situation which an individual might not have. Finally, a defendant employer may be less likely to engage in expensive and time consuming “stalling” tactics when faced with a union opponent than with an individual plaintiff, due to the ongoing nature of the relationship between the employer and the union and the greater likelihood of eventual resolution.

The Equal Employment Opportunity Commission (EEOC) has urged that it is important for the elimination of discrimination that unions be permitted to be Title VII plaintiff class representatives. In its amicus curiae brief seeking reversal of the district court’s denial of union certification as class representative in Social Services Local 535 v. County of Santa Clara, the EEOC cited its enormous backlog of Title VII cases and the scarcity of private attorneys to litigate Title VII suits. It concluded that “the lower court’s ruling, if affirmed, may eliminate a significant resource in the national effort to eliminate discrimination.”

Denying a union the opportunity to bring a class action on behalf of its members places it in a serious practical dilemma. The union has few options.

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13. 12 FEP Cases at 1710.
16. H. Kessler & Co. v. EEOC, 472 F.2d 1147, 1152 (5th Cir. 1973) (en banc).
17. 12 FEP Cases 570 (N.D. Cal. 1975).
18. See id.
if in contract negotiations it unsuccessfully attempts to eliminate certain illegal discriminatory provisions, or if legal evolution of the interpretation of Title VII makes it clear that certain provisions are discriminatory, or if an employer imposes discriminatory policies independent of the collective agreement. The union can affirmatively seek to modify those practices through negotiation or, if necessary, Title VII action. Otherwise it must wait until an individual employee recognizes the violation, organizes the resources to challenge it and finally brings suit, possibly joining the union as codefendant. This latter option not only delays cessation of the discrimination, contrary to the goals of Title VII, but also may result in increased potential union liability in the event of a back pay award. Union initiation of legal action, on the other hand, would provide more rapid redress of discrimination grievances.

For all of the above reasons, it is important that unions be permitted, in some instances, to bring Title VII actions on behalf of their members who are victims of unlawful employment discrimination and that they not be presumed in all cases to be inadequate representatives. In the sections that follow, the difficulties inherent in such participation will be discussed and the treatment by the courts will be analyzed.

II
UNION AS PLAINTIFF

An initial step in discussing the possibility of a union acting as a Title VII class representative is to consider a union's standing as a Title VII plaintiff. Courts have had little difficulty in finding such standing.

Section 706(f)(1) of Title VII provides that a "person claiming to be aggrieved" who has filed a charge and received a notice of her or his right to sue from the EEOC, has standing to seek redress in court for alleged employment discrimination. The section 701 definition of "person" specifically encompasses labor unions. Thus the determination of a union's standing to be a Title VII plaintiff must rest on whether it is sufficiently aggrieved by the discrimination its members suffer so as to fall within the statutory authorization.

The legislative history of the 1972 amendments to section 706(b), which permit charges to be filed with the EEOC "by or on behalf of a person claiming to be aggrieved," refutes the contention that Congress did not intend to permit unions to file suit on behalf of their members. The discussion in the Senate Labor Committee Report of the EEOC's authority to file charges contains the following language:

This section is not intended in any way to restrict the filing of class com-
plaints. The committee agrees with the courts 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.²³

A footnote in that discussion points out, "Similarly, labor organizations may also petition on behalf of their members."²⁴

The two cases cited with approval in the Senate Report are instructive because in each, a union was permitted to act as plaintiff. In Chemical Workers Union v. Planters Manufacturing Co.,²⁵ first the union, then several individual employees, filed charges with the EEOC, alleging that Planters had committed certain unlawful employment practices in violation of section 703(a) of Title VII.²⁶ The union was originally informed that its charges would not be considered, as it was not a "person aggrieved" within the meaning of sections 706(a) and (e), but the EEOC General Counsel thereafter reversed this ruling, stating:

[A] collective bargaining representative is hardly a volunteer with respect to its assertion of the rights of the members of the bargaining unit to be free of racial and other invidious discrimination in their employment. On the contrary, the duty of fair representation in effect forbids neutrality and compels the union to exert its bargaining efforts in behalf of the victims of discrimination.²⁷

When the union and the employees then filed suit under Title VII, Planters moved to dismiss the complaint as to the union for lack of standing. Relying primarily on the doctrine of deference to the interpretation of a statute by the administrative agency charged with its enforcement, the court denied Planters’ motion.²⁸ It is interesting to note that this precedential case was decided on the basis of an administrative interpretation not so much of Title VII, but of the doctrine of the duty of fair representation,²⁹ and further, an interpreta-

²⁷. 259 F. Supp. at 368.
²⁸. The court also relied on court decisions which recognized the standing of group plaintiffs as a "person aggrieved" where the group, qua group, has an interest in the outcome of the administrative agency’s determination although it might, incidentally, represent broader community interests as well. See Scenic Hudson Preservation Conference v. F.P.C., 354 F.2d 608 (2d Cir. 1965), cert. denied sub nom., Consolidated Edison Corp. v. Scenic Hudson Preservation Conf. 384 U.S. 941 (1966) (conference of conservationist organization "aggrieved party" under the Federal Power Act, entitled to challenge approval of power plant site); Office of Communication of United Church of Christ v. F.C.C., 359 F.2d 994 (D.C. Cir. 1966) (church group’s interest as "audience" sufficient to make it "person aggrieved" under Communication Act to permit challenge to approval of radio license renewal).
²⁹. Generally, administrative interpretations are accorded deference because of the peculiar
tion of that doctrine far more stringent than the definitions set forth in the seminal duty of fair representation cases such as Steele v. Louisville & Nashville Railroad, Ste, Vaca v. Sipes, and Ford Motor Co. v. Huffman.32

Despite the tenuous basis for its decision, Planters has often been relied upon to justify allowing a union to be a party plaintiff in Title VII actions. In Pulp Mill Workers Local 186 v. Minnesota Mining & Manufacturing Co., the union, which had filed a charge with the EEOC on behalf of one female employee, brought a Title VII action on behalf of all the female employees of the company alleging class sex discrimination. The defendant moved to dismiss the complaint insofar as it sought relief for employees who had not filed charges before the EEOC. After holding that all members of a class need not file identical charges with the EEOC, the court held that additional support for its jurisdiction of the class action was to be found in the "fact that the plaintiff labor union is bringing this action not only as a representative of a class but also as an individually 'aggrieved person' under [sections 701 and 706]. As such, it clearly has standing to bring such an action."33

Subsequent cases have generally affirmed the idea that a union may be a Title VII plaintiff.36 Such a construction of the statutory language is consistent with the source of a union's standing to be a Title VII plaintiff and with judicial interpretation of standing in other statutes. A union may be acting in one of several capacities when bringing suit under Title VII, and thus its "aggrievement" may have several sources. The union as an entity may be vindicating the entity interests of the union qua union. For instance, the union itself is arguably affected by discriminatory actions of an employer with which it has a collective bargaining agreement in that as long as the discrimination continues unchallenged, damages for which the union may become liable increase. If the alleged discrimination affects the amount of dues which the union is able to collect, the union certainly suffers injury cognizable by the courts. Further, the discrimination injures the union itself

32. 345 U.S. 330 (1953).
35. 304 F. Supp. at 1294. The court also alluded to "the general duty of a labor union to fairly represent all of its members and the union's duty, therefore, to seek relief in its complaint, pursuant to its duty of fair representation, for all members of the union who have been the victims of illegal discrimination." 304 F. Supp. at 1294 (emphasis added), thus echoing the General Counsel's observations in Planters.
36. See, e.g., Air Line Stewards Local 550 v. American Airlines, Inc., 490 F.2d 636 (7th Cir. 1973), cert. denied, 416 U.S. 993 (1974); Rosen v. Public Serv. Elec. & Gas Co., 477 F.2d 90 (3d Cir. 1973); Federation of Teachers v. Oakland School Dist., 10 FEP Cases 836 (N.D. Cal. 1975); Air Line Pilots v. Ozark Airlines, 10 FEP Cases 463 (N.D. Ill. 1975); United States v. Detroit Edi-
in that it places the union under the burdensome duty of challenging the discrimination through the grievance procedures of the collective agreement.

In general, however, injury to the union entity will be speculative or minor. It is most consistent with the nature of a union\(^{37}\) and its function to view the union as seeking to sue in its representative capacity to vindicate the rights of its members, even if the union itself is not adversely affected by the disputed acts of the defendants. As the Sixth Circuit observed in discussing the standing of a union to sue under section 1983,\(^{38}\)

Since a union can act only through its members, actions by state or local officials which allegedly deny the constitutional rights of its members impede equally the rights of the union.\(^{39}\)

The standing of a union to represent the interests of its members in the absence of statutory authorization was discussed in *United Federation of Postal Clerks v. Watson*,\(^{40}\) where the Court of Appeals for the District of Columbia held that the plaintiff union, the exclusive representative of the Post Office employees, had standing to bring an action for declaratory and injunctive relief challenging an action of the Post Office as violative of the Federal Employees Salary Act of 1965.\(^{41}\) The disputed action allegedly altered employees' work schedules arbitrarily in order to reduce their entitlement to overtime pay. The defendant moved to dismiss the complaint as to the union for lack of standing to sue on behalf of its members. The district court granted the motion, but the District of Columbia Circuit reversed. After citing support for the proposition that an association may, in some circumstances, raise the rights of its members,\(^{42}\) particularly when the association is organized to promote these interests for its individual members,\(^{43}\) the court concluded that as the exclusive bargaining representative of the employees, the union is

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37. A union is an unincorporated association and is, in a sense, but a name substituted for the names of all of its members. This aspect of the nature of a union was explored in *United Steelworkers v. Bouligny*, 382 U.S. 145 (1965). Petitioner union in that case contended that for diversity purposes a union should be treated as an entity and, as such, a citizen only of the state where its principal place of business is located, rather than of all states in which its members reside. The Supreme Court disagreed, reasoning that it was for Congress to extend the benefits of diversity jurisdiction, and affirmed that a labor organization is the aggregate of its members.


43. Citizens Ass'n v. Simonson, 403 F.2d 175 (D.C. Cir. 1968), cert. denied, 394 U.S. 975
charged with representing the interests of all postal employees without
discrimination and, in particular, with processing their grievances arising
under the Salary Act through all stages of internal administrative re-
view. . . . There is no reason to doubt that, as regards the matter at bar, it
fully and effectively represents the interests of at least large numbers of its
members. In the circumstances of this case, we think it artificial and point-
less to cut off its representative functions at the courthouse door. 44

The court specifically noted that the union's standing does not depend on
any unanimity of interest in the matter at bar on the part of all its members. 45

In determining the standing of an organization as a "person aggrieved"
which may invoke judicial review of federal agency actions, the Supreme
Court has applied a doctrine of "vicarious aggrievement." In United States
v. Students Challenging Regulatory Agency Procedures, 46 various environ-
mental groups challenged an action of the Interstate Commerce Commis-
sion, alleging that the action would cause specified harm to their members.
The Court upheld the sufficiency of those allegations to establish standing of
the organizations as persons aggrieved under the Administrative Procedure
Act. 47 The same doctrine should apply to unions which seek to eradicate
discrimination against their members, and thus allegations of injury to its
members should be sufficient to qualify a union as a person aggrieved under
section 706(f). 48

It could be argued that the principles of union standing enunciated in
Watson and the concept of vicarious aggrievement underlying SCRAP are
not properly applied to an attempt by a union to sue as a person aggrieved
under Title VII. A union's membership is not homogeneous or unified with
respect to employment discrimination, since some union members may
ideologically endorse or even economically benefit from discrimination, or
may at least be disadvantaged by its elimination. 49 Further, although some
or even all of its members may be aggrieved by a particular discriminatory
employment practice, a union may be adversely affected by a judgment
unfavorable to the employer because of an employer's right to seek contribu-
tion from a union under some circumstances. 50

44. 409 F.2d at 470 (footnotes omitted).
45. Id. at 470 n.30. The Supreme Court has also touched upon the standing of unions to vin-
dicate rights of its members in United Auto Workers v. Hoosier Cardinal Corp., 383 U.S. 696
(1966). That case concerned a suit for a violation of a collective bargaining agreement brought by the
union under section 301 of the Labor Management Relations Act, which specifically provides that a
union may sue "as an entity and on behalf of the employees whom it represents." Section 301(b),
29 U.S.C. § 185(b) (1970). The Court observed that "the union's standing to vindicate employee
rights under § 301 implements no more than the established doctrine that the union's role in the
collective bargaining process does not end with the making of the contract." 383 U.S. at 700.
49. See Rosario v. New York Times Co., 74 Civ. 4457 (S.D.N.Y., order entered Oct. 9,
1975) at 3.
When these arguments were raised in opposition to the union's motion to realign as plaintiff in *EEOC v. Allied Chemical Corp.*, the court answered that the union would face a conflict between its duties towards its male and female members and possible liability for an adverse judgment against the employer, no matter whether it was aligned as plaintiff or defendant. What the court considered important in allowing the union to realign as plaintiff was that the union had asked the employer to abrogate the challenged provisions of the agreement, which had been the result of earlier negotiations. In *EEOC v. Chrysler Corp.*, the court again looked to the specific facts of the case and found that the real interest of the union coincided with those of the plaintiffs, as the union had "expressed a desire to end any participation in the allegedly unlawful practices." 

Courts should not presume that differences within union membership or possible union implication in the alleged discrimination render a union unable to represent the best interests of a segment of its membership. Rather, they should look to see whether, in the face of these problems, the union whose standing is challenged is sufficiently aggrieved by the alleged discrimination, either in its own right as an entity or because of injuries to the individuals whose representation is its "raison d'être," to pursue the litigation adequately.

III

Union as Class Representative

It is important that in most instances a union may be a "person aggrieved" under section 706(f) and thus authorized to act as an individual Title VII plaintiff. However, because of the full panoply of remedies available in the Title VII class action, it is of great importance to the process of eliminating unlawful discrimination and compensating its victims that unions also be permitted to participate as class representatives in Title VII suits. In readily granting unions standing to act as Title VII plaintiffs, courts have implicitly recognized the interest, ability and motivation of unions to seek the elimination of employment discrimination. This standing derives fundamentally from unions' vicarious aggrievement as the exclusive bargaining representatives of their members who have suffered discrimination. Despite their recognition of union aggrievement, many courts have strenuously objected to union participation as class representatives.

There are two distinctions between cases in which the union acts as individual plaintiff and those in which it acts as plaintiff class representative which perhaps account for the difference in the attitudes of courts toward union participation in each. The first is the collateral estoppel effect of any

52. Id. at 63.
53. 8 FEP Cases 343 (S.D. Ohio 1974).
54. Id. at 344.
judgment rendered in an action by the union against the employer. If a union is suing as individual plaintiff, even if its standing derives from discrimination suffered by its members, any judgment obtained will generally not be binding on the individual union members. Since the individuals nominally were not parties to the first action, an employer seeking to use collateral estoppel as a shield in a subsequent suit would have to show that the employees were in privity with the union at the time of the earlier action or that the union was properly acting on their behalf in that action. It seems likely, however, that an individual employee seeking to bring suit would not be barred by a previous unsuccessful suit against the employer if she/he could show that the union’s conflicts of interest were such that it was not able to act properly on behalf of the individual employees.

In a class action, on the other hand, all members of the class will be bound by the judgment rendered for or against the class representative unless the action is brought under Rule 23(b)(3) and the individual employees who subsequently seek to bring suit choose to opt out of the class. It is perhaps for this reason that courts have been reluctant to allow unions to be class representatives. If this is their concern, however, the protections of

57. Id. § 85.
59. FED. R. CIV. P. 23(a), (b) 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.

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

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

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

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

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy 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.
Rule 23(b)(3) seem sufficient to allay their fears. The courts need not presume such a dissatisfaction on the part of the individual employees as to preclude the union from any class participation.

A second possible explanation for the courts' distinction between unions as individual plaintiffs and unions as class representatives lies in the different remedies sought. If the union is suing as an individual plaintiff, then it may seek relief only from injuries to itself, generally declaratory or injunctive relief, and may not present individual claims for back pay, reinstatement, or altered seniority for particular employees. Perhaps courts are less trusting of unions' ability or motivation to pursue individual claims, which may displease other segments of union membership or which may result in greater union liability, than to sue to establish liability on the part of the employer and to stop discriminatory practices.

According to this explanation, courts are concerned about the ability of unions to fashion and pursue remedies in the best interests of the victims of the discrimination. Here again, however, options other than the total exclusion of the unions as class representatives are available and should be considered before denying unions class representative status.

A recent decision of the District Court for the Northern District of California presents most of the obstacles which a union might face in its attempts to represent a class of a segment of its membership. Social Services Locals 535 and 715 brought suit against the County of Santa Clara on behalf of all of the employees of the county who worked in a particular, predominantly female, job classification. The unions alleged that employees in the predominantly female job classification were paid less than employees in predominantly male job classifications who performed essentially the same work, in violation of Title VII. Plaintiffs' motion to certify the class was denied. The court concluded that the party opposing the class, the county, had acted or refused to act on grounds generally applicable to the class as required by Rule 23(b)(2), and that 1) the class was so numerous that joinder of all members was impracticable, 2) there were questions of law or fact common to the class, and 3) the claims of the representative parties were typical of those of the class.

The court found, however, that the fourth requirement of Rule 23(a), that the representative be able fairly and adequately to protect the interests of the class, was "the requirement which proves fatal to certification." After taking notice of 1) the unions' status as the bargaining representatives of "both male and female employees whose interests may differ depending upon the remedies sought if plaintiffs' claims are sustained," 2) the fact that the unions had negotiated collective bargaining agreements which were

61. Social Services Local 535 v. County of Santa Clara, 12 FEP Cases 570 (N.D. Cal. 1975).
62. Id. at 572.
63. Id.
potentially inconsistent with the claims made by the plaintiffs, and 3) the possible detrimental future impact on some union members if the coffers of the defendant employer from which their salaries were drawn were depleted by an adverse judgment, the court concluded that

individual members of the proposed classes could better prosecute such an action, free of any sense of divided loyalty or dual purpose. Should the employees decide to prosecute such an action, counsel independent of the union should be retained for that purpose. Since the court finds that the representative allegations in the complaint must be stricken, and since the unions have not alleged any injury to the unions, the effect of denial of the motion for certification necessarily is dismissal of the action.

Another argument often made in opposition to a class certification motion is that since the union may be potentially liable for its participation in the alleged discrimination, it might not vigorously pursue the claims of the alleged victims of the discrimination. This argument is related to the court’s point in Social Services Local 535 that there is a potential inconsistency between the collective bargaining agreements negotiated by the unions and the individual plaintiff claims.

The balance of this Comment will consider the validity of these concerns, analyze the objections of courts in particular cases, and suggest alternative means of safeguarding the interests of individual Title VII class members.

IV

UNION AS A MEMBER OF THE CLASS

A preliminary question is whether irrespective of any alleged conflict, a union may sue on behalf of a class under the basic provision of Rule 23(a) that a member of a class may sue on behalf of that class if certain conditions are met. Is the union a member of the class it seeks to represent?

The Eighth Circuit was presented with precisely this question in Arkansas Education Association v. Board of Education. The plaintiff, an association of black school teachers, brought a class action under section 1983 alleging racial discrimination in the payment of salaries and the recruitment, assignment and utilization of teachers. The district court held that although the association had standing to bring this action on behalf of its members for injunctive relief under Rule 17(a), it was not an individual member of the class and not a proper party to bring the suit as a class action under Rule

64.  Id.
65.  Id.
66.  Id. at 572-73.
68.  FED. R. CIV. P. 23(a).
69.  446 F.2d 763 (8th Cir. 1971).
23(a). 71 Citing an earlier Eighth Circuit opinion of then Circuit Judge Blackmun, *Smith v. Board of Education*, 72 the Eighth Circuit reversed, reasoning that since AEA had standing to sue, "such standing should not be defeated because it is not, technically, an individual member of the class of teachers it represents," 73 especially because retention of AEA as a class representative "will serve to facilitate the contacts with former teachers which must be made in carrying out the decision of this Court." 74

In discussing whether an individual black employee whom the district court had found not to be a member of the class of blacks allegedly discriminated against by the defendant company could remain the sole class representative in an action protesting the discrimination, the Fifth Circuit held in *Huff v. N.D. Cass Co.* 75 that the standard should be whether the named plaintiff has "the nexus with the class and its interests and claims which is embraced in the various requirements of 23(a) and (b)." 76 Certainly a union, whose "*raison d'être* is to represent the interests of [the] class," 77 has a nexus with the class and its claims sufficient to enable the union to pursue actions on behalf of the class. Such a conclusion is consistent with what must be the purpose of the 23(a) requirement—to provide threshold assurance that the questions will be litigated by the real party in interest. 78 If the class representative were so dissociated from the class as to make it a disinterested party, there is little assurance that it would not be an uninterested party as well.

V

**THE ADEQUACY OF UNION REPRESENTATION**

More difficult is the question of whether as a representative of the class, a union can fairly and adequately represent the interests of a segment of its membership. In an early phase of the extended litigation in *Eisen v. Carlisle & Jacquelin*, 79 Judge Medina of the Second Circuit wrote:

> What are the ingredients that enable one to be termed "an adequate representative of the class?" To be sure, an 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

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72. 365 F.2d 770 (8th Cir. 1966).
73. 446 F.2d at 766.
74. *Id.* See also Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 (2d Cir. 1968); Undergraduate Ass'n v. Peltason, 359 F. Supp. 320 (N.D. Ill. 1973).
75. 485 F.2d 710 (5th Cir. 1972).
76. *Id.* at 714.
78. See *Smith v. Board of Educ.*, 365 F.2d 770 (8th Cir. 1966); see also 3B J. Moore, Federal Practice ¶ 23.04, at 23-256 (2d ed. 1976).
79. 391 F.2d 555 (2d Cir. 1968).
involved in a collusive suit or that the plaintiff has interests antagonistic to those of the remainder of the class.\textsuperscript{80}

He further cautioned that "the dismissal \textit{in limine} of a particular proceeding as not a proper class action is justified only by a clear showing to that effect and after a proper appraisal of all the factors enumerated on the face of the rule itself."\textsuperscript{81}

The experience and quality of union counsel has not been questioned in these cases. Indeed, the particular competence of union counsel in general to litigate Title VII actions is one factor which should be weighed in favor of union participation as class representatives.

It is the possibility that unions may have interests antagonistic to those of the remainder of the class which has led many courts to presume unions to be inadequate class representatives.\textsuperscript{82} It is true that the union class representative differs from the usual class representative in that its primary function is to represent the collective good of its membership. The presumption drawn by the courts from this fundamental truth, however, seems based on several fallacious assumptions: 1) that a majority class of employees has no interest in eliminating discrimination against a minority class of employees; 2) that to determine the collective good, unions look only to the will of the majority; 3) that a Title VII remedy disregards absolutely any factors except making whole the victim of discrimination; and 4) that the only way to assure absolute protection to the individual Title VII plaintiff is to disqualify unions as class representatives. These are unproven generalizations which have exceptions perhaps superseding the assumptions themselves. Despite their tenuous bases, several courts have utilized them in decisions dismissing unions as class representatives.

Courts' decisions to dismiss unions as Title VII class representatives are often based on the assumption that if discrimination exists against one sex, race, or other union subgroup in favor of another subgroup, the interests of the two are antagonistic. In short, the courts presume that immediate economic self-interest will always prevail over a sense of justice, legality, or union solidarity.

In \textit{Lynch v. Sperry Rand Corp.},\textsuperscript{83} the district court dismissed the unions as class representatives, although permitting them to remain as plaintiffs, and refused to allow the union attorneys to continue to represent both the union plaintiffs and the individual class plaintiffs. The unions and the individual plaintiffs had brought suit under Title VII on behalf of all male non-supervisory employees of Sperry Rand, alleging that the defendant's pension plan discriminated against men in providing for an earlier retirement.

\begin{itemize}
\item \textsuperscript{80} Id. at 562.
\item \textsuperscript{81} Id. at 563.
\item \textsuperscript{82} E.g., Air Line Stewards Local 550 \textit{v.} American Airlines, Inc., 490 F.2d 636 (7th Cir. 1973), \textit{cert. denied}, 416 U.S. 993 (1974).
\item \textsuperscript{83} 62 F.R.D. 78 (S.D.N.Y. 1973).
\end{itemize}
age for women than for men. Defendant objected to the class certification on the ground, *inter alia*, that there was a serious potential conflict between the unions and the class they sought to represent, and between the duty of the plaintiff unions to their male employee members and their duty to female employee members. The court agreed that the potential conflict was serious enough when viewed in combination with the employer's other contentions that the unions should not be retained as class representatives.\(^4\)

The conflict in the union's roles as class representative of its male members in a Title VII action and as bargaining representative of its female and male members envisioned by the court in *Lynch* is not clear. Perhaps *Lynch* was positing that in order adequately to represent the male plaintiff class in this suit, the union would have to argue that women should not be permitted to retire as early as provided for in the collective agreement. This argument ignores the probability that a union, either as collective bargaining representative or Title VII class representative, would vigorously argue that men as well as women should be permitted full retirement at 60 rather than 65. Even if the possibility loomed that eventually a collective bargaining package would have to accommodate the increased pension costs by reducing the availability of other benefits, it is unlikely that a union class representative would dilute the vigor of its litigation on behalf of the male employees in light of that eventuality. At least it is clear that the union's duty to its female members would not prohibit it from seeking lower retirement for its male members.

A more difficult variation of the problem of a union's ability fairly and adequately to represent a class is presented when remedying the discrimination involves an immediate compromise of interests such as promotion, discharge, or "cents per hour" pensions. In *Air Line Stewards Local 550 v. American Airlines, Inc.*\(^5\) the union and individual stewardesses who had lost their jobs because of an airline policy terminating any stewardess who became pregnant brought a Title VII action challenging that policy. The complaint asserted that the action was within Rule 23(b)(2) and that the class consisted of "all present and former American Airline stewardesses employed at any time since July 2, 1965, the effective date of the Civil Rights Act of 1964, who had been, desired to be, or would in the future desire to be, pregnant."\(^6\) The plaintiffs sought declaratory, injunctive and monetary relief, including reinstatement and back pay.

Soon thereafter, the union and the employer negotiated a collective bargaining agreement which eliminated the practice prospectively. At that point, the currently employed stewardesses had effectively received the relief they had sought. Accordingly, for purposes of the remainder of the Title VII action, the class consisted of those stewardesses who had been

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84. Id. at 83-84.
86. Id. at 638.
injured by the practice while it was in effect, *i.e.*, those who had been discharged.87

The union and the employer reached a proposed settlement which provided that a stewardess discharged because of pregnancy would be placed on a hiring list according to her seniority at the time of her discharge, and as vacancies occurred, a stewardess on the preferential list would be given ten days to accept reemployment on condition that she meet weight and other restrictions in effect at the time of her discharge. After notice of the proposed settlement was mailed to class members, several individual members of the class of stewardesses who had been discharged objected to the settlement in that it did not provide for immediate reinstatement with full seniority and back pay. Despite the objections, the district court entered judgment approving the settlement, ordering its implementation and dismissing the action. The objecting plaintiffs appealed, and one initiated a new class action against the employer and the union, predicated upon the claims of sex discrimination raised in the earlier action and a claim that the union had breached its duty of fair representation. The district court dismissed this suit on the ground that both claims had been adjudicated by the prior negotiated settlement and judgment. This decision was also appealed.

The Seventh Circuit reversed and protected the rights of the discharged stewardesses who had objected to the settlement by: 1) removing the union as class representative; 2) allowing for subclasses, each with its own representative; and 3) directing the district court to proceed with the action as a Rule 23(b)(3) action, so that each potential member of the class would have notice and an opportunity to opt out of the class.88

It is difficult to discover precisely how and why the court reached its conclusion. In an earlier decision, the court had found that notice of the settlement hearing was sufficient and that counsel negotiating the settlement was adequate.89 It never found that the settlement was unfair or unreasonable, but rather seemed to presume it to be so because it had been negotiated by the union and was a result of compromise. The court found that the union was not a fair and adequate class representative because it was not a member of the class90 and because it had obligations to the employed stewardesses whose interests were antagonistic to the discharged stewardesses who made up the class.91 The court apparently invalidated the settlement because of its observation that the union "admittedly considered and to some extent pro-

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87. Thus, as discussed in text accompanying note 82 supra, the *American Airlines* court analyzed the case as if it were similar to *Sperry Rand*, in that it viewed the union as more responsive to the needs of the majority of the union, to the detriment of the class it purported to represent. 490 F.2d at 640.

88. 490 F.2d 636, 643 (7th Cir. 1973).


90. 490 F.2d 636, 640 (7th Cir. 1973).

91. *Id.*
tected the interests of the currently employed stewardesses in working out the settlement.\textsuperscript{92}

The union conceded that it had agreed to compromises in reaching the proposed settlement and that it had obligations to groups with conflicting interests.\textsuperscript{93} For instance, even though the claims of many discharged employees would have been barred by the statute of limitations, some employees had voluntarily resigned, and others had been discharged for concealing pregnancy in violation of company policy, all would have a chance to be reemployed. Also, if back pay claims were litigated, the proceedings would have continued for years. The settlement offered the class of discharged stewardesses an immediate but partial remedy, instead of the chance of a full remedy in the future.\textsuperscript{94}

The union justified the compromise by invoking its authority as the exclusive bargaining representative to balance competing interests, subject to its duty of fair representation, citing \textit{Vaca},\textsuperscript{95} \textit{Steele},\textsuperscript{96} and \textit{Humphrey v. Moore}.\textsuperscript{97} The court interpreted the union's argument to be that a union has the power in Title VII litigation to accommodate and adjust the rights of [adverse segments of its membership], subject only to its obligation of fair representation. If this position were adopted, it would need only be shown that [the union] acted in good faith and in a manner which could be deemed fair, in making the choices involved in the settlement. Approval of the settlement could then be set aside only if the findings of good faith and fairness were found clearly erroneous.\textsuperscript{98}

Skeptical of the settlement because of the dominance in the union of the employed stewardesses who came out ahead, the court observed that

Title VII, unlike the National Labor Relations Act and the Railway Labor Act, does not create nor necessarily recognize powers of exclusive representation. . . . The situation is not parallel, and it does not seem to us that policy reasons militate in favor of similar status for the bargaining representative. An individual who claims to have been the victim of unlawful discrimination has the right to redress individually, whether the discrimination was an isolated act or a general practice.

"'The real party in interest in conciliation endeavors is the employee alleged to have been discriminatorily treated. He is completely free to accept or reject the proposals of union or employer as well as the position taken by the [EEOC].'"\textsuperscript{99}

\begin{itemize}
  \item \textsuperscript{92} \textit{Id.}
  \item \textsuperscript{93} \textit{Id.}
  \item \textsuperscript{94} \textit{Id.} at 640.
  \item \textsuperscript{95} 386 U.S. 171 (1967).
  \item \textsuperscript{96} 323 U.S. 192 (1944).
  \item \textsuperscript{97} 375 U.S. 335 (1963).
  \item \textsuperscript{98} 490 F.2d at 641.
  \item \textsuperscript{99} \textit{Id.} at 641-42 (quoting Air Line Stewards Local 550 v. American Airlines, Inc., 455 F.2d 101, 106 (7th Cir. 1972)).
\end{itemize}
Having rejected the union's plea that its settlement proposal be awarded special status because of its role as exclusive bargaining representative, the court held, somewhat ambiguously, that the authority of a union to compromise the rights of its members in a Title VII action is to be "tested and judged in the ordinary way."\textsuperscript{100} Presumably this phrase invokes case law which has interpreted a court's responsibility under Rule 23(e) to approve the compromise of a class action only if the "proposed settlement is fair and adequate to all concerned."\textsuperscript{101} Some factors to be taken into account by the court in determining the fairness and reasonableness of a settlement are the interests of the absent class members,\textsuperscript{102} the absence of fraud, misrepresentation or collusion on the part of the representative,\textsuperscript{103} and the "likelihood of plaintiffs' victory at trial balanced against the concrete present and future benefits held forth by the settlement without the expense and delay of a trial."\textsuperscript{104} Instead of applying these ordinary standards for judging a settlement, the American Airlines court remanded the cases with no examination of the reasonableness of the settlement.

The court cited three cases in the footnote to its proposition that a union settlement is to be judged in "the ordinary way":\textsuperscript{105} Mungin v. Florida East Coast Railway,\textsuperscript{106} Amalgamated Meat Cutters v. Safeway Stores, Inc.\textsuperscript{107} and Cook County Teachers v. Byrd.\textsuperscript{108} Mungin is particularly interesting in that although it was cited with approval in American Airlines, it upheld the right of the plaintiff union to negotiate an agreement with the defendant employer which became part of the settlement of a class action, even though that agreement compromised the interests of some of the class. The court said,

\begin{quote}
[I]t appears on this record that [the union] has only exercised its recognized discretion in bargaining for all whom it represents, making such compromises as to it appeared to be in the best interests of all. The complete satisfaction of every member of the . . . class is scarcely to be expected, especially on such an issue as this one.\textsuperscript{109}
\end{quote}

The court held that not only was the union an adequate representative, but that the entire settlement was adequate, arrived at in "good-faith, arms-length negotiations between adversaries," particularly in light of the uncertainties of the merits of the potential litigation.\textsuperscript{110}

\begin{enumerate}
\item 100. Id. at 642.
\item 105. 490 F.2d at 642 & n.5.
\item 106. 318 F. Supp. 720 (M.D. Fla. 1970), aff'd per curiam, 441 F.2d 728 (5th Cir.), cert. denied, 404 U.S. 897 (1971).
\item 107. 52 F.R.D. 373 (D. Kan. 1971).
\item 108. 456 F.2d 882 (7th Cir. 1972), cert. denied, 409 U.S. 848 (1972).
\item 109. Id. at 731.
\item 110. Id. at 737-38.
\end{enumerate}
In *Safeway Stores*, a Title VII settlement proposal negotiated by counsel representing the plaintiff union and the named plaintiffs was rejected by the district court on several grounds: 1) at least 22 out of 85 possible class members objected to the compromise as "grossly unfair"; 2) consideration of overtime pay was not included in the computations during the settlement discussions concerning back pay; 3) the lawsuit was being used as a lever or pressure tool to procure a new contract containing equal pay provisions; 4) counsel for the plaintiffs represented both the union and the class members between whom there was an unspecified conflict of interest; and 5) the questions of fact and law before the court were not as involved or difficult to resolve as may have been indicated by the proponents of the compromise and settlement. Only after considering all of these factors did the court reject the settlement and appoint independent counsel to represent the dissenting members of the class.

*Cook County Teachers* contains little that is relevant to the *American Airlines* problem. The union and the individual plaintiffs were appealing the district court's decision to dismiss the class action brought by the union under section 1983 to strike the union as party plaintiff, and to resolve the case on the merits in favor of the defendants. The Seventh Circuit affirmed the dismissal of the class action and the union as plaintiff finding that the union did not allege facts sufficient to bring the action within the requirements of Rule 23. The court held that where the proper class consisted of only nine faculty members, the class was not too large to have made joinder impracticable.

In attempting to learn what constitutes the "ordinary way" of judging Title VII settlement proposals, it is illuminating to compare the Seventh Circuit's review of the *American Airlines* settlement with the Third Circuit's review of a challenged Title VII settlement in *Bryan v. Pittsburgh Plate Glass Co.* In the latter case, the appellate court substantively reviewed each of the allegations of the objecting class members as to the unfairness and unreasonableness of the settlement, and concluded that the trial court had not abused its discretion in approving the settlement for a low proportion of plaintiffs' asserted loss because the plaintiffs' case was relatively weak.

The appellants in that case also contended that the settlement proposal should have been rejected because more than twenty percent of the class plaintiffs objected to it. They argued that because the right to be free from discrimination is personal, litigants should not be forced to abandon such rights without a judicial decision on the merits, and thus class repre-

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111. 52 F.R.D. 373, 374-75 (D. Kan. 1971).
113. In determining the union to be an inadequate class representative, the Court found it "particularly significant that the Union is not recognized as the collective bargaining agent for any of the faculty."
sentatives should not be able to bind unconsenting plaintiffs. The Third Circuit rejected this argument, holding that the class representative is prevented from binding dissenting plaintiffs by the prerequisites of Rule 23(a) and by the fact that it is the court rather than the class representative which determines whether the settlement is fair and reasonable.\footnote{494 F.2d at 803.}

An examination of Mungin, Safeway Stores, Cook County Teachers and Bryan indicates that the American Airlines court did not follow its own directive to test the union settlement in the ordinary way. The court did not find the settlement to be unfair or unreasonable and did not find that the district court abused its discretion in approving the settlement.

Even assuming arguendo that the settlement was unfair and that the result in American Airlines was correct, the reasoning by the court is misdirected and overanxious and its conclusions correspondingly overbroad. If, as the court saw it, the class remaining in the action consisted only of the pregnancy-discharged stewardesses and if these women were no longer members of the union, the union should have been dismissed as a plaintiff because its membership and the class were discrete groups, and the union had no substantial interest in the balance of the litigation and settlement. If the court found that the union did not negotiate the settlement in good faith, motivated by the best interests of the members of the class it purported to represent, then the settlement should have been rejected on that ground. If the court was troubled by the heterogeneity of the class, then rendering the action a Rule 23(b)(3) class action for the remedy phase or creating subclasses with separate counsel would have been sufficient to protect the stewardesses dissatisfied with the union settlement. Instead, the court presumed the union to be an inadequate representative, deprived some class members of the representative of their choice and overly protected others against some nonspecific danger to their interests.

It is not disputed that the union's ability to represent and perhaps compromise the rights of the class members in a Title VII action should be "tested and judged in the ordinary way." As evidenced in American Airlines, however, the courts are not following this dictum, but rather are presuming that if an imaginable conflict might exist between the interests of the class the union purports to represent in the Title VII action and the interests of the opposing union membership bloc, the union will make its decisions about the direction and vigor of its representation and settlement negotiations in a political manner, antagonistic to the policies of Title VII. This presumption stems from the assumptions, noted above, that to determine the collective good unions look only to the will of the majority, and that any consideration of interests other than those particular to the class members is impermissible under Title VII.

The assumption that unions respond only to the will of the majority is
theoretically and empirically inconsistent with the realities of union representation. Unions, through their officers and legal staff, can recognize the long range implications of certain union and employer actions in a way that their memberships often cannot. The prospect of debilitating potential back pay awards, minority dissatisfaction and unrest, or diminishing union status in the employment relationship and the recognition of union responsibility to protect the rights of all its members can prompt union leadership to act against the apparent self-interest of some union members. Every day unions process grievances or make other kinds of decisions which displease or even displace a large number of their members in order that justice be done for one. If, for example, a union member were unjustly discharged, the union would be likely to file a grievance on her or his behalf seeking reinstatement with full seniority although every union member hired after the original date of hire of the grievant would be adversely affected. In Ford Motor Co. v. Huffman, a class of about 275 union members, disgruntled by a union decision favoring a particular class of returning veterans, challenged the union decision. In upholding the union's actions the Supreme Court acknowledged that

[i]nevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion. Indeed, the duty of fair representation created as a result of a union's status as exclusive bargaining representative would prevent a union from arbitrarily ignoring the interests of a minority of its membership. A union does not have an affirmative duty, derived from its duty of fair representation, to bring suit on behalf of its members who are victims of unlawful discrimination. However, once it does so, a union has not only a fiduciary obligation but a peculiar competence to balance the competing interests of its membership without compromising the right of any employee to be free from unlawful discrimination and to act without hostility to the class which it seeks to represent. Although a court need not defer to the

117. 345 U.S. 330 (1953).
118. Id. at 338.
120. By analogy to the duty of fair representation, it could be said that, when a union acts as a class representative, particularly in a Rule 23(b)(2) action, it is the exclusive representative of the class members and as such has an obligation to them similar to the obligation it has to all members of the unit in the collective bargaining context.
union's judgment, it should take that competence into account when reviewing a settlement proposal negotiated by a union. 121 Courts should not preclude a union from attempting to integrate its functions as exclusive bargaining representative and Title VII class representative by using its expertise to reach a just and workable settlement, and courts must consider just the factors that were ignored by the *American Airlines* court when examining settlement proposals negotiated by unions. 122

The difficulty with such a proposition lies in the particularly individual orientation of Title VII as most recently affirmed in the Supreme Court's decision in *Franks v. Bowman Transportation Co.* 123 That decision seems to reinforce the third assumption underlying courts' presumption of the inappropriateness of union plaintiff class representation, *i.e.*, that a Title VII remedy is concerned solely with making whole the victims of discrimination. In reversing the Fifth Circuit's denial of retroactive seniority relief to victims of an illegal discriminatory refusal to hire, the Court rejected the employer's argument that an award of retroactive seniority to the class of discriminatees should be denied because it would diminish the expectations of other arguably innocent Bowman employees. Rather, the Court focused on the emphasis in the legislative history of Title VII on the make-whole relief available to victims of discrimination:

> [T]he Act is intended to make the victims of unlawful employment discrimination whole and . . . the attainment of this objective . . . requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination. 124

However, the *Franks* decision also demonstrates exceptions to the second and third assumptions introduced above. 125 The conduct of the nominal respondent union, the United Steelworkers, rebuts the assumption that unions respond only to the will of the majority. The union favored granting

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121. The courts have obliquely recognized that competence. In *Fair v. Southern Bell Tel. & Tel. Co.*, 51 F.R.D. 543 (N.D. Ga. 1971), the Communications Workers and an individual plaintiff brought a Title VII class action on behalf of all male non-supervisory employees of the defendant. The district court stayed the proceeding, pending collective bargaining between the parties on the disputed pension plan. Thus, while expressing doubt as to the union's ability to represent the interests of men in the Title VII action because of the union’s fiduciary duty to both its male and female members, the court seemed to accept the union's ability and willingness to represent those interests at the bargaining table. A union's competence and obligation to represent the interests of its members to be free from unlawful discrimination is also recognized in cases dealing with a union's obligation to process grievances of discrimination. *E.g.*, *Conley v. Gibson*, 355 U.S. 41 (1957); *Rubber Workers Local 12 v. NLRB*, 368 F.2d 12 (5th Cir. 1966).


retroactive seniority although such a grant would be detrimental to the interests of the majority of its membership.

The Court’s decision itself rebuts the assumption that Title VII remedies disregard any factors except making whole the victim of discrimination. Although focusing on the individual nature of Title VII relief, the Court acknowledged that “in no way can the remedy established as presumptively necessary be characterized as ‘total restitution’ . . . or as deriving from an ‘absolutist conce[ption]’ of make-whole relief,” because competitive status benefits would have to be shared with non-discriminatee employees holding positions they would not have obtained but for the illegal discrimination. Further, the Court was only faced with a question of granting retroactive seniority to those victims of discrimination who had been or would be hired from a priority hiring list as vacancies occurred; direct displacement of incumbents (“bumping”) was not a remedy at issue. Although bumping has been allowed in other areas of labor relations, courts have consistently refused such relief in the Title VII context.

Unions are particularly competent because of their role as bargaining representative to negotiate settlements which may accommodate the interests of non-discriminatee employees if certain safeguards are present to insure a fair integration of that role into their role as Title VII plaintiff class representatives. It cannot be gainsaid that the Title VII rights of an individual to be free from employment discrimination must receive the greatest protection. In the name of this protection, courts in these cases have reacted to any potential conflict within the union which might affect the adequacy of its class representation by excluding the union from such representation altogether, thereby often making the individual vindication of Title VII rights more difficult. A thorough evidentiary hearing on the adequacy of the union representative and the safeguards contained in Rule 23 can be used effectively to protect the interests of Title VII class members represented by their union.

The evidentiary hearing should be factual, presenting the court with

126. Id. at 777 n.37.

Three basic theories of remedy have developed in this area—theories of “status quo,” “rightful place,” and “freedom now.” See Note, Title VII, Seniority Discrimination, and the Incumbent Negro, 80 Harv. L. Rev. 1260 (1967). The status quo theory, uniformly rejected by the courts, requires only that the employer cease discriminating in the future. The rightful place theory, noted with approval in Franks, mandates that when Victims of prior discrimination are hired, usually from a preferred hiring list, they be given such seniority as would have accrued had they been hired when they should have been. See 424 U.S. at 764-65. This theory of relief is distinct from the total restitution “freedom now” theory which would permit bumping. The rejection of this latter remedy stems from a recognition by the courts that certain expectations of non-discriminatee employees must be fulfilled to preserve industrial harmony.

material sufficient to determine if the particular union should be disqualified because of real conflicts which are "apparent, imminent and on an issue at the very heart of the suit." The court should consider evidence about the nature of the union membership, the past actions of the union vis-à-vis the discrimination, the degree of dissension within the union, the potential detrimental effects of the litigation on union members not within the class, and the dissatisfaction, if any, expressed by class members about the union representation.

Additional protection of individual interests is provided by Rule 23 itself. Most of the Title VII class actions are brought as Rule 23(b)(2) actions, i.e., actions in which "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Indeed, the drafters of Rule 23 specifically contemplated that suits challenging discriminatory employment practices would be appropriately maintained under Rule 23(b)(2). The fact that monetary as well as equitable relief is sought does not defeat the use of 23(b)(2). Under 23(b)(2), all members of the class as defined by the court are bound by any judgment. Perhaps it is this aspect of the class action mechanism which has made courts so zealous in their scrutiny of union class representatives. The courts may mitigate the potential dangers, however, by using Rule 23(b)(3), (c), (d) and (e). In many of these cases, it is clear that questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

A court may therefore order that the action be maintained at least in part as a 23(b)(3) action. Since most of the problems concerning the adequacy of union representation arise with the issue of remedy, the safeguards of Rule 23(b)(3) could be invoked for the remedy phase of the litigation if the initial determination of liability is made in favor of plaintiffs.
If the action is so maintained, under Rule 23(c) all class members must be notified of the action and given an opportunity to exclude themselves or to enter appearances through separate counsel. A judgment in a 23(b)(3) class action is binding only on those class members to whom notice was given and who did not request exclusion. Such an action provides specific protection for those who feel that they will not be equally represented, since union members distrustful of union motives or good faith could choose to opt out of the class. If the union clearly does not represent the best interests of the class, the court in its supervisory capacity could at some later point decertify the class, disqualify the union as class representative, or appoint additional representatives. Although the courts have generally held that an action maintainable both under 23(b)(2) and 23(b)(3) should be conducted as a 23(b)(2) action "to enjoy its superior res judicata effect and to eliminate the procedural complications of (b)(3) which serve no useful purpose under (b)(2)," if the court feels that there is sufficient conflict within the union to require the protections of 23(b)(3), the action should be treated as such.

Other protections, including notice to the class members, an opportunity to signify whether they consider the representation fair and adequate, and permission to participate in the action by presenting additional claims, may be ordered by a court under 23(d), regardless of whether the action is maintained under 23(b)(2) or 23(b)(3). Such orders would further protect class members.

Finally, Rule 23(e) requires that the court approve any proposed settlement of a class action and that notice of the proposed settlement be given to all members. Such notice should be directed to advise the class members not only of the terms of the settlement, but of their opportunity to object to the settlement through their own counsel. Once again, members of the class who claimed they were not being satisfactorily represented by the union plaintiff could be heard. If necessary, independent counsel could be appointed to represent the dissenting members either in the settlement hearings or, if the settlement was rejected by the court, in the proceedings on remand. The court could require an evidentiary hearing on the proposed settlement to expose the factual bases for the settlement.

One theme which runs throughout the cases in which a union has attempted, as a Title VII class representative, to vindicate the Title VII...

which unsuccessful plaintiffs will not be reimbursed may often be so burdensome as to block the action from the outset.

139. Id. at 253.
interests of a segment of its membership, is that a union is presumed to have
a conflict of roles which would inhibit its representation of the class. Some
courts have excluded or severely restricted the union participation at the
point of class certification, others at the settlement phase. Some have
further presumed the union attorney also to have such a conflict of interest
and have excluded her or him. One court dismissed the union as plaintiff,
but permitted the union attorney to represent the individual plaintiffs.
Where the union was the sole named plaintiff, some courts have dismissed
the case, but would permit the union to litigate the entity interests if injury to
the entity were pleaded.

The adequacy of union representation should be "tested and judged in
the ordinary way," and a union should not be presumed to be unable to
represent a class of its members in Title VII litigation. Procedural safeguards
including a thorough evidentiary hearing and the right to opt out of the
remedy determination under Rule 23(b)(3) and (c), the opportunity to object
to the adequacy of union representation and enter the action by presenting
individual claims under Rule 23(d), and the required notice apprizing the
class of the options open to dissenting class members under Rule 23(e), are
available to insure fair and adequate representation to all class members.
The courts should choose these alternatives rather than presumptively dis-
missing unions as class representatives.

VI
UNION'S POTENTIAL LIABILITY

The second serious impediment to union class participation lies in the
potential liability of the union as a perpetrator of the employment discrimi-
nation which it now challenges. This problem arises either through judi-
cicial conjecture about possible union implication in the discrimination or
through the filing of a counterclaim by the employer, seeking contribution
from the union in the event of an adverse judgment. Often liability is based
on the inclusion of the allegedly discriminatory policy or practice in the


E.g., Social Services Local 535 v. County of Santa Clara, 12 FEP Cases 570 (N.D. Cal. 1975).

collective bargaining agreement negotiated by the union and the employer.\textsuperscript{148}

This problem, while less complex than the issue of the possible conflict of union roles, is more serious. If a successful action against the employer would result in monetary liability of the union, there exists a clear disincentive to litigate aggressively on behalf of the class, particularly on the issue of damages. Here again it is important that courts not presume the existence of such a disincentive, but rather examine the circumstances of the particular cases before them and look first to procedural safeguards which may adequately protect the interests of the class members.

In many instances, there is little possibility that a union will be held liable and this problem does not arise. For example, where the discriminatory practices are enacted within management discretion, independent of the provisions of the collective agreement, unions will not be subject to back pay liability. There may also be situations where a union will be excused from liability for joining in a discriminatory agreement because of the nature of the negotiations which resulted in the agreement. The process of collective bargaining is a process of mutual compromise or even coercion, resulting in an agreement of complete satisfaction to neither party. A union could be faced with the options of agreeing to a provision which it suspects to be violative of Title VII and filing Title VII charges or an unfair labor practice charge under section 8(a)(5) of the National Labor Relations Act\textsuperscript{149} alleging the employer’s refusal to bargain,\textsuperscript{150} or going on strike. In some such situations, a union, particularly one unable to sustain such a strike, might not be

\textsuperscript{148} That the allegedly discriminatory practice is contained in the collective bargaining agreement seemingly has two other related, yet distinct implications to courts in this area. First, a sort of waiver/estoppel theory seems to be in operation. Sperry Rand contended that the union should not be permitted to act as class representative, on the ground that:

Plaintiff unions, in collective bargaining negotiations concerning pension rights of men and women employees since the effective date of Title VII in 1964, have taken positions inconsistent with the positions which they take in the present action.

62 F.R.D. at 83. See also Communications Workers Union v. New York Tel. Co., 8 FEP Cases 509 (S.D.N.Y. 1974); Social Services Local 535 v. County of Santa Clara, 12 FEP Cases 570 (N.D. Cal. 1975). Apparently, Sperry Rand was contending that the union was estopped from presenting in court a position different from what it presented at the collective bargaining table when the agreement was negotiated.

The other possible implication is that the participation of the union in the negotiation of the disputed provisions sheds doubt on its good faith in bringing the Title VII suit. Illustrative is the allusion in Sperry Rand to defendant’s allegations that the

unions are using this suit as a tactical weapon in collective bargaining negotiations going beyond the scope of the issues here and dealing with extraneous matters, having little to do with the interests of the individual class members.

62 F.R.D. at 83 n.4. Inherent in these obstacles to union participation as a Title VII plaintiff is an assumption that a union cannot have in good faith changed its position. This is an unduly harsh assumption. See EEOC v. Chrysler Corp., 8 FEP Cases 343 (S.D. Ohio 1974).


found liable under Title VII for participation in the alleged discrimination. 151

A union might also be held blameless, although a signatory to a discriminatory agreement, because of changes in the law since the signing of the agreement. In Gilbert v. General Electric Co. 152 the union sought to dismiss the employer’s counterclaim against it on the grounds that after the EEOC issued a decision which held that special treatment of pregnancy-related disabilities constituted sex discrimination, the union had attempted to recover sickness and accident benefits for pregnant employees and to alter the contract provisions in question. 153 The district court observed that, in determining the validity of a counterclaim by the employer against the union,

the proper issue . . . is whether or not the union sought to gain for its members relief from the disputed pregnancy benefits at the time the law became clear. . . . In so stating, the Court is aware that the law under Title VII has been quickly evolving. 154

Bowe v. Colgate-Palmolive Co., 155 relied on by the Gilbert court, implied that while a union freely a party to a negotiated contract with illegal provisions might potentially be held liable upon a counterclaim as a joint tortfeasor, a union which from the time the provisions became illegal assiduously sought to protect the rights of victims of the discriminatory provisions might be free from liability. 156

Further, although good faith is not a defense to back pay liability, 157 the degree to which a union has actively attempted to eliminate the discrimination has been held relevant to a determination of allocation of damages between the union and the defendant employer. 158

In light of the above possibilities, courts should not as a matter of course deny a union class representative status because the union is signatory to a collective agreement containing the disputed provision. Rather, if the court doubts the union’s good faith in protesting discrimination because of its participation in collective bargaining, the court can require the union to present evidence of the coercive context in which it agreed to the discriminatory provisions, or of its efforts to alter the agreement provisions. On this basis, the court could determine whether the union’s self-interest would hinder its attempts to represent the class.

Increasingly, courts are finding unions liable for back pay awards even when their participation in the discrimination was minimal. When an eviden-

151. See EEOC Decision No. 70-112, Sept. 5, 1969, 2 FEP Cases 410.
153. Id. at 270–71.
154. Id. at 270 (citation omitted).
156. Id. at 358.
A theoretical basis for such a separation of issues is found in many of the decisions on Title VII class actions. Courts have often stated that such an action requires two separate determinations, one of discrimination against the class and one of individual damages, with the plaintiff bearing the burden of proof as to the former, and the defendant bearing the burden as to the latter. Although in a sense the union would be arguing for its own potential liability, in some instances a union has an interest in doing so. If the union as class representative does not litigate the question in the best interests of the class, any judgment obtained is open to future attack and any potential union back pay liability would ultimately be greater. Particularly where union participation in the discrimination has been minimal, therefore,

159. Such a division was proposed by the plaintiff class representative in Communications Workers Union v. New York Tel. Co., 8 FEP Cases 509 (S.D.N.Y. 1974). The court denied plaintiffs' motion for separate trials on the issues of liability, damages, and liability on the counterclaim, finding that "[t]o say the least, no persuasive reasons are advanced for such unusual relief at this early stage; indeed, such separation of issues would almost certainly be confusing and unnecessarily time consuming," 8 FEP Cases at 514. The alternative chosen by the court, to exclude the union from participation as class representative, is actually a very persuasive reason for utilizing this procedure.

160. Ironically, the continuation of the litigation in American Airlines presents an analogous situation. 12 FEP Cases 1463 (N.D. Ill. 1976). On remand, the individual class representatives and the union as individual plaintiff were granted summary judgment on the issue of liability and the court deferred decision on their request for the appointment of a master to facilitate fashioning the remedy. 12 FEP Cases at 1465.

unions should be given the opportunity to initiate a class action to challenge the discrimination so as to stop the accumulation of back pay liability.

Where union culpability is great, however, it is difficult to imagine that the union could conduct even the first part of the litigation in good faith. Where the preliminary evidentiary hearing reveals this to be the case, the importance of union participation is outweighed by the threat to the interests of the individual class members and the union should be disqualified, or at least additional representatives should be appointed.

CONCLUSION

The problems sometimes faced by a union seeking to be a class representative in a Title VII lawsuit have been presented and analyzed above. The problems were introduced in a discussion of the case of Social Services Local 535 v. County of Santa Clara.2 A deeper look at that case will illustrate the nature of a union's dilemma.

Local 535 brought the suit to protest the salary inequality between predominantly female and predominantly male job classifications entailing similar work. The union, which was 70-80% female, had repeatedly attempted to eradicate the discrimination by proposing salary realignments during collective bargaining. According to the uncontradicted affidavits presented by the union, the attempts had always failed; the county had continually refused to implement any equal pay proposals.

Because the union represented public employees, it could not take economic action to attempt to force the county to realign the salaries.163 Thus, denied the right to bring a lawsuit on behalf of its employees who suffer discrimination, the union was totally stymied in its attempts to represent the interests of its members. It had no choice but to stand by while the discrimination continued, and perhaps later to become, anomalously, a codefendant with the employer in a suit brought by individual employees.

The court dismissed the complaint, finding that the union could not fairly and adequately represent the class. The finding rested on the presumption, unsupported by evidence, that the union had a dual purpose and divided loyalty in bringing the suit. That finding and the court's consequent dismissal of the action were unwarranted. First, it appears unlikely that the union had any conflict of interest. Even assuming that raising the salary levels of the predominantly female job classifications would eventually result in smaller overall salary increases, the union had shown its unequivocal commitment to eradicating discrimination. There was no evidence that it would not singlemindedly seek to realign the salaries and to compensate the victims of the past discrimination.164

163. CAL. GOV'T CODE § 3509 (West 1966).
164. The county apparently did not contend that the union's conflict of interest stemmed from
Second, even if an evidentiary hearing were to disclose that there was such a conflict and that the union would resolve the conflict by compromising the interests of the class, other alternatives were open which would not thwart an attempt to eradicate employment discrimination. The court could have ordered the action maintained as a Rule 23(b)(3) action, providing an opportunity for dissatisfied class members to opt out of the class. It could have ordered notice and an opportunity to participate in the action at various points in the proceeding. If the court was concerned about the union’s ability or motivation to pursue adequate remedies without favoring its male constituency or its own self-interest, the court could have scrutinized any proposed settlement rigorously and ordered a settlement hearing to insure that the class interests were adequately represented. If the court did not consider that precaution sufficient, it could have ordered the action conducted in three parts so that the union would act as class representative only on the issue of liability.

Rule 23, Rule 42 and Title VII itself allow and indeed require a great deal of judicial inventiveness and flexibility. It is essential that the courts accept the responsibility of judging union representation according to principles applicable to ordinary class representatives. Courts should moderate their approach, holding evidentiary hearings to discover what specific dangers, if any, to the class interests exist with the union as class representative and then fashioning protection to meet those dangers.

Not only is such an approach consistent with judicial aversion to juristic overbreadth and presumptions, but it is essential to effect the purpose of Title VII, to eradicate employment discrimination as quickly and thoroughly as possible.

When courts examine the adequacy of unions as class representatives, they should follow the reasoning and result of the decision in Stuppiello v. ITT Avionics Division, where the court concluded,

Finally, this Court believes the Unions have an obligation to fight discrimination. To estop the Unions from challenging the alleged discrimination would aid the perpetuation of that discrimination. This Court is unwilling to do so.

the possibility that the union might ultimately be held jointly liable for the discrimination, so the court’s finding of conflict did not rest on the potential liability.


168. Id. at 642.