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Organizational Representation Suits: Labor Unions May Attack Employment Discrimination Without Having to Meet Rule 23 Requirements

In recent years, unions have begun to undertake prosecution of employment discrimination suits as class actions. However, a major obstacle encountered by labor unions in attempting to serve as class representative for those members alleged to be victims of employment discrimination is their failure to qualify under rule 23 of the Federal Rules of Civil Procedure.[1] The inability adequately to protect the competing interests of class members has proven to be the most frequently fatal element halting the union from being certified as the class representative under rule 23.[2]

In the recent case of *Local 194, Retail, Wholesale and Department Store Union v. Standard Brands, Inc.*,[3] the Court of Appeals for the Seventh Circuit, devised a method which will allow labor unions standing to sue under Title VII of the Civil Rights Act of 1964[4] without first meeting the requirements of Rule 23. Basing its opinion upon the Supreme Court's decision in *Warth v. Seldin*,[5] the Seventh Circuit held that labor unions have standing

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[1]Rule 23(a) specifies four criteria which must be satisfied before either the suit may be certified as a class action or the plaintiff filing suit may be certified as the class representative:

(1) The class must be so numerous that joinder of all members is impracticable.

(2) There must be questions of law or fact common to the class.

(3) The claims or defenses of the representative parties must be typical of the claims and defenses of the class.

(4) The representative parties must fairly and adequately protet the interests of the class.

Specifically, under rule 23(a)(4), a class representative must "fairly and adequately protect the interest of the class." Without this requirement, an unrepresentative plaintiff could obtain class action certification, proceed to trial on the merits, obtain an inadequate result and bind, by res judicata, the unnamed class members. In short, the class members would be unprotected.

[2]*See, e.g.*, Social Serv. Union v. County of Santa Clara, 12 F.E.P. Cases 570 (N.D. Cal. 1975); Air Line Stewards & Stewardesses Ass'n, Local 550 v. American Airlines, Inc., 490 F.2d 636 (7th Cir. 1973), *cert. denied*, 416 U.S. 993 (1974); State *ex rel.* Overton v. New Mexico State Tax Comm'n, 81 N.M. 28, 462 P.2d 613, 617 (1970); Associated Orchestra Leaders v. Philadelphia Musical Soc'y, Local 77, 203 F. Supp. 755, 757 (E.D. Pa. 1962).

[3]540 F.2d 864 (7th Cir. 1976) [hereinafter referred to as *Local 194*].

[4]42 U.S.C. §§ 2000e-5 to -17 (1970 & Supp. V 1975).

[5]422 U.S. 490 (1975). Plaintiffs in *Warth* consisted of eight individual low-income minority members who sought housing in Penfield, N.Y., a suburb of Rochester. Other plaintiffs included Metro-Act, a non-profit corporation primarily involved in efforts to alleviate the housing shortage for low and moderate income persons, and various housing developers who had attempted to obtain a variance to rezone certain land to allow construction of subsidized cooperative housing units that could be purchased by persons of moderate income.

The Penfield community had a land-use ordinance which allocated ninety-eight percent of the town's vacant land to single-family detached housing. Only three-tenths of one percent of the land available for residential construction was zoned for multi-family dwellings.

Plaintiffs brought a class action in the federal court for the Western District of New York challenging Penfield's ordinance and its administration during a fifteen year period by the zoning

to file employment discrimination suits on behalf of those members alleged to be victims of discrimination, who are willing to be represented by the union. The union's standing is based on an organizational representation theory rather than a more rigid class action theory.[6]

Although under this approach labor unions can be granted standing to sue only for injunctive and declaratory relief for their members, this still allows unions to continue to take an active role in attacking Title VII violations. At present, unions which are adjudged to be inadequate class representatives because of their members' conflicting interests are relieved of a major portion of the responsibility to pursue actively their members' statutory claims under Title VII.[7] The decision in *Local 194* has the effect of placing the responsibility back onto the union to pursue both contractual and statutory claims of discrimination, albeit in a more limited capacity.

Before *Local 194* is accepted as a panacea to the unions' problems of representing their members, some crucial questions need to be asked. The decision brings into question whether organizational representation suits

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and planning boards and the city council as "racially discriminatory and exclusionary." In support of this allegation, they claimed that they searched for housing in Penfield but were excluded due to defendant's policies and practices and were therefore injured, having been forced to live in a community with inferior housing and schools, reduced job opportunities and increased expense and inconvenience in commuting long distances to work.

The district court dismissed the complaint stating that plaintiffs lacked the requisite standing and had failed to state a claim upon which relief could be granted. The Court of Appeals for the Second Circuit affirmed the lower court on the sole ground that the plaintiffs lacked standing. The Supreme Court ruled that the non-resident, low-income minority plaintiffs lacked standing. As to the various associations, the Court ruled that although associations may have standing to sue for injunctive and declaratory relief on behalf of their members, in this case, no allegations pertaining to the viability of the project at the time the complaint was filed, nor any allegations referring to obstruction of a then-current project. For a discussion of *Warth*, see Blum, *The New Criteria For Standing in Exclusionary Zoning Litigation*, 11 SUFFOLK U.L. REV. 1 (1976).

[6]See note 3 *supra*.

[7]The union is bound to pursue charges of employment discrimination which arise out of the members' contractual right under the collective-bargaining agreement. "In submitting his grievance to arbitration, an employee seeks to vindicate his contractual rights under a collective bargaining agreement. By contrast, in filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress." Alexander v. Gardner Denver Co., 415 U.S. 49-50 (1974).

> There is an important distinction to be made between a grievance complaint and a Title VII claim: the former is a contractual claim subject to the grievance machinery of a collective bargain, while the latter is a statutory claim completely independent of the grievance-arbitration procedures of a collective bargain contract. Although an employment practice forbidden by Title VII may be treated as an unfair labor practice and aired through contractual procedures, if it is brought to arbitration, and the claim of discrimination is ultimately rejected by the arbitrator, the arbitrator's resolution of the contractual right to be free from discrimination is not dispositive of the statutory right to be free from discrimination. . . . It is clear [however] that a union's status as a certified collective bargaining agent gives it no special role to play in Title VII disputes.

See Note, *Title VII—Class Actions—Adequacy of Representation—Stewards v. American Airlines, Inc.*, 15 B.C. INDUS. & COM. L. REV. 1332 (1974).

undercut what appears to be a clear preference by Congress for the filing of class actions to attack employment discrimination.[8] Also, consideration needs to be given to the effect of organizational representation suits upon the duty of fair representation,[9] especially since they can place unions on one side of a conflict involving various factions of their members. Finally, some analysis of the substantive differences between organizational representation suits and class actions should be explored.

The purpose of this note is to examine the characteristics and ramifications of allowing labor unions to file employment discrimination suits under Title VII using an organizational representation approach. This will include a survey of the history of associational standing to sue; an examination into the issue of whether organizational suits circumvent congressional preference for using class actions to rectify cases of employment discrimination; and an attempt to articulate some existing guidelines set for unions which sue on behalf of their members in the future.

HISTORY OF ASSOCIATIONS' STANDING TO SUE

The disputes surrounding the question of associations' ability to be sued and to sue on behalf of their members culminated after years of uncertainty[10]

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[8]See text accompanying notes 58-60 *infra*.

[9]Under this doctrine, the union, as the exclusive bargaining agent of its members, has a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct. *See, e.g.*, Humphrey v. Moore, 375 U.S. 335, 342 (1964); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953); Syres v. Oil Workers Int'l Union, 350 U.S. 892 (1955); Steele v. Louisville & N. R.R., 323 U.S. 192 (1944).

The doctrine of fair representation was first enunciated by the Supreme Court in Steele v. Louisville & N. R.R., 323 U.S. 192 (1944). This was a suit by black railroad employees against their union to enjoin implementation of a union-negotiated agreement, the provisions of which restricted hiring and tenure opportunities for blacks as locomotive firemen. The Court ruled that because § 2(4) of the Railway Labor Act explicitly empowered a union elected by a majority of the employees to exclusively represent them in all collective bargaining agreements, the hostility displayed by the union toward black employees clearly breached this statutorily-implied duty. Note, *Fair Representation and Breach of Contract in Section 301 Employee-Union Suits: Who's Watching the Back Door?*, 122 U. PA. L. REV. 714, 724 (1974).

> While the duty of fair representation affords important protection for worker interests, it must be noted that its protection is neither all-embracing nor all-powerful. It is not all embracing because the duty does not ordinarily extend to union conduct unrelated to the negotiation or administration of a collective bargaining agreement. It is hardly all powerful, even within its proper domain, because it accords a union extraordinarily broad discretion in the discharge of its representation function.

Id. at 725-26.

[10]At common law, an unincorporated association of persons was not recognized as having any other character than a partnership in whatever was done, and it could only sue or be sued in the names of its members, and their liability had to be enforced against each member. *See* Pickett v. Walsh, 192 Mass. 572 (1906); Karges Furniture Co. v. Amalgamated Woodworkers Local Union, 165 Ind. 421 (1905); Baskins v. UMW, 150 Ark. 398, 234 S.W. 464 (1921).

In the case of UMW v. Coronado Co., 259 U.S. 344 (1922), the Supreme Court ruled that unincorporated labor unions, such as the United Mine Workers of America, and its district, and

in the case of *National Motor Freight Traffic Association, Inc. v. United States.*[11] In *National Motor Freight,* the lower court had held that the plaintiffs, motor carrier associations whose members were affected by an ICC decision which they wished to challenge, lacked standing to represent their members' interests.[12] Although it affirmed the lower court on the merits, the Supreme Court held that the associations were "proper representatives of the interests of their members."[13] Over the next decade, numerous types of organizations were able to establish standing to sue on behalf of their members.[14] This was particularly true of environmental groups,[15] civil rights groups,[16] property owner associations,[17] and public employee unions.[18]

The most significant broadening[19] of the requirements for associations to meet the criteria for federal standing occurred in the case of *Warth v. Seldin.*[20] In the final section of his opinion, Justice Powell addressed the petitioner associations' standing to sue. He held that an association can have standing to sue either in its own right or as the representative of its

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local branches were recognized as distinct entities by numerous acts of Congress, as well as by the laws and decisions of many states, and are suable as such in the federal courts.

For organizational representation suits, the distinction between the incorporated and unincorporated organizations is now primarily of historical significance. The current case law does not distinguish between incorporated and unincorporated organizations.

[11]372 U.S. 246 (1963). Subsequent cases which have recognized organizational representation theories inlude: Environmental Defense Fund, Inc. v. Hardin, 428 F.2d 1093 (D.C. Cir. 1970); Lodge 1858, American Fed'n of Gov't Employees v. Paine, 436 F.2d 882 (D.C. Cir. 1970); Curran v. Land, 420 F.2d 122 (D.C. Cir. 1969) (en banc); United Fed'n of Postal Clerks v. Watson, 409 F.2d 462 (D.C. Cir.), *cert. denied,* 396 U.S. 902 (1969).

[12]205 F. Supp. 592, 593-94 (D.D.C. 1962).

[13]372 U.S. at 247 (1963).

[14]*See, e.g.,* National Tenants Organization, Inc. v. HUD, 358 F. Supp. 312 (D.D.C. 1973); Crescent Park Tenants Ass'n v. Realty Equities Corp., 58 N.J. 98, 275 A.2d 433 (1971). *See* Note, *From Net to Sword: Organizational Representatives Litigating Their Members' Claims,* 1974 U. ILL. L.F. 663.

[15]*See, e.g.,* United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669 (1973); Life of the Land v. Brinegar, 485 F.2d 460, 463 n.2 (9th Cir. 1973), *cert. denied,* 414 U.S. 1052 (1974); Alameda Conservation Ass'n v. California, 437 F.2d 1087 (9th Cir. 1971), *cert. denied,* 402 U.S. 908 (1971).

[16]*See, e.g.,* Southern Alameda Spanish Speaking Organization v. Union City, 424 F.2d 291 (9th Cir. 1970); Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 (2d Cir. 1968); ACLU v. Albert Gallatin Area School Dist., 307 F. Supp. 637 (W.D. Pa. 1969).

[17]*See, e.g.,* Save Sand Key, Inc. v. U.S. Steel Corp., 281 So.2d 572, 575-77 (Fla. App. 1973); White Lake Improvement Ass'n v. City of Whitehall, 22 Mich. App. 262, 271-74, 177 N.W.2d 473, 476-78 (1970); Douglaston Civil Ass'n v. Gavin, 69 Misc. 2d 686, 330 N.Y.S.2d 810 (Sup. Ct. 1972).

[18]*See, e.g.,* Council 34 AFSCME v. Ogilvie, 465 F.2d 221 (7th Cir. 1972); United Fed'n of Postal Clerks v. Watson, 409 F.2d 462 (D.C. Cir. 1969); Smith v. Board of Educ., 365 F.2d 770 (8th Cir. 1966); California Fed'n of Teachers v. Oxnard Elementary Schools, 272 Cal. App. 2d 514, 77 Cal. Rptr. 497 (1969).

[19]The opinion in *Warth* is considered "broadening" because of its clarification of the circumstances under which associations may either represent itself or its members in an action to protect their rights. Prior to this opinion, there existed some uncertainty as to the scope of associations standing to sue on behalf of its members.

[20]422 U.S. 490 (1975).

members.[21] The association, however, must allege concrete injury to itself or to one or more members.[22] The *Warth* decision formed the basis for the Seventh Circuit's holding in *Local 194.*

Local 194

Local 194 involved a union and certain other named plaintiffs who filed suit under Title VII[23] and section 1981 of the Civil Rights Act of 1866[24] against Standard Brands, Inc. The plaintiffs sued both on their own behalf and as representatives of a class consisting of all blacks, Spanish-surnamed persons and women against whom defendant had allegedly practiced discrimination in hiring and promotion.[25] The district court dismissed the union as plaintiff based upon its failure "to allege sufficient injury in fact to confer standing pursuant to either Title VII or Sec. 1981."[26]

In overruling the district court's dismissal of the union's action, the court of appeals relied primarily upon the holding in *Warth v. Seldin.*[27] In *Warth,* the Supreme Court stated that an organization, even though it has suffered no injury to itself, has standing to represent any of its members who are "suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit."[28]

The Supreme Court qualified the organization's standing to sue by stating that the organization may only seek injunctive and declaratory relief on behalf of its members. An organization which has suffered "no monetary injury to itself, nor [received] any assignment of the damages claims of its members" cannot recover damages for individual members. When damage claims are not "common to the entire membership, nor shared by all in equal degrees, but are peculiar to the individual member concerned, each member

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[21]Citing *National Motor Freight.* See note 11 *supra.*

[22]*See* Note, *Federal Standing: 1976* 4 HOFSTRA L. REV. 383, 402 (1976), citing Warth v. Seldin, 422 U.S. 490.

[23]42 U.S.C. § 2000e-5 to -17 (1970 & Supp. V 1975).

[24]42 U.S.C. § 1981 (1970).

> The basis for standing to bring a Title VII (1964 Act) action is different from that applying to an 1866 Act suit. The 1964 statute specifically permits only an "aggrieved" person to bring a court action. The 1866 Act (42 U.S.C. § 1981) has no such specific provision. Under that statute, standing to sue derives from the Federal Rule 23 which requires the party bringing a class action to suffer an injury "typical" of that suffered by the other members of the class it seeks to represent. In practice, courts have applied the same standing rules to both statutes equating the requirement to be "aggrieved" under Title VII with the necessary "injury" under the 1866 Act.

Reply Brief of Appellee at 9, 10, Local 194 v. Standard Brands, Inc., 540 F.2d 864 (7th Cir. 1976); Rosario v. New York Times Co., 10 E.P.D. 5944 (S.D.N.Y. 1975).

[25]540 F.2d 864, 865 (7th Cir. 1976).

[26]Local 194 v. Standard Brands, Inc., 13 F.E.P. Cases 497, 498 (N.D. Ill. 1975).

[27]422 U.S. 490 (1975).

[28]*Id.* at 511 (citing Sierra Club v. Morton, 405 U.S. 727, 734-41 (1972)).

who claims damages must be a party to the suit, and the organization lacks standing to claim damages on his behalf."[29]

The defendant in *Local 194* had argued that the union members had conflicting interests and therefore the union could not represent any of them. In rejecting this argument, the court of appeals emphasized that this was not a new problem for unions and that not all union members would be bound by the suit.[30] "Often a union finds itself in the position of representing a membership whose interests conflict, not only in Title VII cases, but in its collective bargaining role. This does not disqualify it from acting at all."[31] The union's duty "is to represent fairly the interests of all members without discrimination toward any."[32]

> Title VII [however], unlike the National Labor Relations Act, does not create nor necessarily recognize powers of exclusive representation,[33] . . . and individual union members may elect not to have the union represent them. The union has standing, however, to represent those employees who wish to be represented but do not elect to become parties to the action.[34]

The second issue decided by the court of appeals dealt with the question of whether a union representing its members in a Title VII action must satisfy any of the prerequisites required by rule 23 for certification of a suit as a class action. In deciding the issue, the court of appeals again relied upon the reasoning of the Supreme Court in *Warth v. Seldin.*[35] In *Warth,* the Supreme Court reasoned that, absent injury to itself, the association does not have standing to bring actions to recover damages for individualized injuries to its members. Therefore, because "both the fact and extent of injury would require individualized proof," the Supreme Court ruled that "each member . . . who claims injury as a result of the respondents' practices must be a party to the suit."[36]

With the "individualized proof" as the pivotal concern, the court of appeals reasoned that neither rule 23(b)(1) nor rule 23(b)(2) could apply under an organizational representation theory as neither allows the class members to opt out of the suit to pursue individual remedies. Such opting out was required to avoid binding members with conflicting interests. Although rule 23(b)(3) allows members to opt out, the court of appeals implied that the factors considered under this section would render a class action inappropriate

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[29]*Id.* at 515-16.

[30]540 F.2d at 866-67.

[31]*Id.* (citing Humphrey v. Moore, 375 U.S. 335, 349 (1964)).

[32]*Id.* (citing Vaca v. Sipes, 386 U.S. 171, 177 (1967)).

[33]Air Line Stewards and Stewardesses Ass'n, Local 550 v. American Airlines, Inc., 490 F.2d 636 (7th Cir. 1973), *cert. denied* 416 U.S. 993 [hereinafter referred to as *Stewards*].

[34]*Local 194,* 540 F.2d at 866.

[35]422 U.S. 490 (1975).

[36]*Id.* at 515-16.

when the union acted as the class representative.[37] This is true primarily because of the union's continued inability to represent adequately the competing interests of the class members.

Finally, the court of appeals reasoned that if rule 23 governed organizational representation suits, the Supreme Court in *Warth* could have stated this to be the case, rather than merely citing the rule as being analogous.[38] Further, the Supreme "Court's remarks plainly imply that the organization's members are not parties to an organization representation suit. Yet class members are parties to class actions."[39] From this analysis, the court of appeals concluded from *Warth* "that organizational representation suits need not be brought as class actions, and that the requirements of Rule 23 are applicable only by analogy and only to the extent they are consistent with *Warth v. Seldin.*"[40]

In an earlier decision, *Air Line Stewards and Stewardesses, Local 550 v. American Airlines, Inc.*,[41] the Seventh Circuit ruled that a union attempting to represent the interests of different factions of its membership whose interests were antagonistic would be an inadequate class representative in a class action. Although *Local 194* had the effect of superceding the opinion in *Stewards* on the issue of whether rule 23 criteria must be met in actions under Title VII, the two cases taken together form a more complete picture of the parameters of actions to be filed under Title VII. Before making any substantive distinction between the two cases, an examination will be made of the Seventh Circuit's handling of *Stewards.*

Stewards

Defendant airlines until October 1970 followed the practice of permanently discharging any stewardess who became pregnant. The Airline Stewards and Stewardesses Association (ALSSA) and twelve stewardesses who had lost their jobs under this policy commenced an action against American

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[37] *Local 194,* 540 F.2d at 866.

[38] In the nature of things, an organization suing solely as a representative of one or more of its members would be unable to meet all the requirements of Rule 23, if those requirements were read literally. It is not a member of the class of persons whose rights are to be vindicated, and inasmuch as it can even sue on behalf of a single member, Warth v. Seldin, 422 U.S. at 511, the standard of numerosity, Rule 23(a)(1) is not apt. The same is true of the common-question and typicality standards, Rule 23(a)(2) and (3), when the organization represents a single member, and, if more are represented, these matters are best controlled by joinder rules. In short, although Rule 23 may provide a useful analogy in some cases in which an organization represents its members, it is not controlling. We therefore need not apply without qualification the body of law that has developed under the adequate-representation standard of Rule 23(a)(4).

540 F.2d at 867.

[39] *Id.* at 867. *See also* Zahn v. International Paper Co., 414 U.S. 291, 301 (1973).

[40] 540 F.2d at 867.

[41] *Stewards,* 490 F.2d 636 (7th Cir. 1973).

Airlines challenging this practice of unlawful sex discrimination as a violation of Title VII. The complaint asserted that the action was within rule 23(b)(2) of the Federal Rules of Civil Procedure and that the class consisted of all present and former American Airlines 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."[42] The complaint sought declaratory, injunctive and monetary relief.

In attempting to reach a settlement with American Airlines, the union encountered numerous conflicts between the interests of presently employed stewardesses and former stewardesses who had lost their jobs under the "discharge-for-pregnancy" policy. Problems arose particularly in the area of seniority, where currently unemployed stewardesses were asking for seniority accrued from the date of their illegal dismissal and immediate reinstatement. Also, because the airline was unwilling to negotiate concerning backpay for the reinstated stewardesses, an issue arose as to whether a settlement which would avert a possible five-year court battle, but which would greatly compromise the complaints[43] of both factions of the membership, would be in the best interest of either faction.

The inability of the union to resolve the conflicting interests of both factions of the membership made the application of policies underlying rule 23 the pivotal concern in *Stewards*. Because the complaint filed by plaintiffs in this case asserted that the action was within rule 23(b)(2), it had the effect of not allowing any of the plaintiffs individually to opt out of the action. Without the ability to opt out, individual stewardesses would be bound by any settlement which the union made, regardless of their dissatisfaction with the terms of the settlement. Upon settlement of the claim, the district court ruled that the union and the named plaintiffs were adequate representatives of the class, and that in spite of objections by some of the individual plaintiffs, the action was a rule 23(b)(2) class action and was binding on all members of the class.[44]

Before deciding which section of rule 23 applied, the court of appeals first dealt with the distinction between the degree of duty placed upon the union under the Railway Labor Act[45] and under Title VII of the Civil Rights Act of 1964.[46] The court ruled that "except for the area of collective bargain-

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[42]*Id.* at 638.

[43]Although both discharged and presently employed stewardesses were seeking the discontinuance of the "discharge-for-pregnancy" policy, most of the discharged stewardesses were also seeking immediate reinstatement, backpay, seniority accrued from the date of their illegal dismissal, and other personal damages which may have accrued from their illegal dismissal. Since the presently employed stewardesses had not yet been affected by the policy, none of them had any damages. Therefore, discharged stewardesses stood to lose much more than presently-employed stewardesses in any type of settlement which included a compromise of interests by the union.

[44]490 F.2d 636, 642 (1973).

[45]Act of May 20, 1926, ch. 347, 44 Stat. 577, as amended 45 U.S.C. §§ 151-188 (1970).

[46]42 U.S.C. § 2000e-5 to -17 (1970 & Supp. V 1975).

ing and its necessary incidents," where under the Railway Labor Act unions have the powers of exclusive representation,[47]

> the union has no unique authority to compromise the rights of its members. Its adequacy as a representative party in a class suit, and its authority to compromise the rights of its members in a class suit when such rights do not arise out of collective bargaining agreements are to be tested and judged in the ordinary way.[48]

Upon deciding that the union would be treated as any other class representative, the court then weighed the appropriateness of applying rule 23(b)(3) rather than rule 23(b)(2) as the lower court had done. In applying the differing interests of the class members under either (b)(2) or (b)(3), the court ruled that "[a]s to the discharged stewardesses, the class action would, even at the beginning have had to be maintained under (b)(3), with each stewardess having the right to exclude herself, or appear through counsel."[49] The logic of this rationale is indicated by the fact that rule 23(b)(2) applied to class 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."[50] The discharged stewardesses sought more than just "final injunctive relief or corresponding declaratory relief." They sought reinstatement, retroactive seniority, backpay and individual monetary damages which had accrued. Rule 23(b)(2) would also not have allowed dissatisfied stewardesses to opt out of the suit.[51] Therefore, it appears that rule 23(b)(3) would have been the most appropriate class action theory under which to

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[47]45 U.S.C. §§ 151-188 (1970).

[48]*Stewards*, 490 F.2d at 642.

[49]*Id.* at 643.

[50]*Id.* (citing Fed. R. Civ. P. 23(b)(2)).

[51]Under rule 23(c)(1), the court is given discretion to alter or amend the action as it deems necessary. However, it is doubtful that most courts would allow large numbers of potential plaintiffs to opt out of an action, especially if it is pleaded as a (b)(2) class action. Using subclasses would be one limited alternative for dealing with some of the conflicts which would arise in an action such as *Stewards*. Although the Supreme Court has never ruled on the appropriateness of courts allowing opting-out in rule 23(b)(2) class actions, most courts have accepted the conclusion of Professor Moore that "members of the class in an action under (b)(1) or (b)(2) have no privilege of opting-out." 3 MOORE'S FEDERAL PRACTICE ¶ 23.60 (2d ed. 1977). However, some courts have permitted members of a rule 23(b)(2) class to withdraw from the action. *See, e.g.*, Walker v. Styrex Indus., 15 F.E.P. Cases 274 (M.D.N.C. 1976); Osta Powicz v. Johnson Bronze Co., 369 F. Supp. 522 (W.D. Pa. 1972), *aff'd in part, vacated in part*, 541 F.2d 394 (3d Cir. 1976) (class action treatment accepted); Clark v. American Marine Corp., 297 F. Supp. 1305, 1306 (E.D. La. 1969).

In the recent case of Bauman v. U.S. Dist. Court, 557 F.2d 650 (9th Cir. 1977) the court of appeals allowed the district court's order permitting "opting-out" in a rule 23(b)(2) based on the following construction of the lower court's order: (1) Class members are *permitted* but not required to respond to the class notice; (2) Nonresponding class members will not be excluded from the class; (3) Nonresponses will not be used to determine that the numerosity requirement has not been met. *Id.* at 660.

allow the suit to proceed.[52] In a (b)(3) class action, the discharged stewardesses could opt out of the suit and pursue their individual damage remedies of backpay and seniority.

Comparison of Local 194 and Stewards

At first glance, *Local 194* appears to be a reversal of *Stewards*. The basic issues in the two cases are similar, but may be distinguished in two critical areas. The first is that *Stewards* was handled as a class action under rule 23 and *Local 194* was adjudicated as an organizational representation suit. The second is that *Stewards* was a case of a union representing two major factions of its membership with conflicting interests which proved to be fatal to the union's ability to represent the class. In *Local 194,* the court circumvented the conflicting interests by allowing the union to represent only those members who were willing to be represented by the union. Upon closer analysis of the decisions in *Local 194* and *Stewards,* the question arises as to whether substantial differences exist between the class action and organizational representation approaches. Although *Local 194* allows the union to get around rule 23 requirements, the question still remains as to what effect organizational representation suits will have in dealing with the conflicting interests of the union members.

Using the facts of *Stewards* as an example, an examination of the organizational representation approach can be made. In *Stewards,* the major issue common to both present and discharged stewardesses involved the "discharge-for-pregnancy" policy. The one major area of conflict between the two factions centered around the issues of seniority and immediate rehiring. As the discharged stewardesses sought retroactive seniority from the dates of their illegal discharge, the practical effect would be for the discharged stewardesses to "bump" many of the present stewardesses out of jobs due to their lack of seniority.

If the union in *Stewards* had been able to pursue the action as an organizational representation suit, this still would not have resolved the conflict between the stewardesses' interests. Whether the union represented the discharged stewardesses or the presently employed stewardesses, the conflict between the interests of the two groups would have remained. Discharged stewardesses would still not be able to be rehired immediately, with accrued seniority, without "bumping" the presently employed stewardesses who had accumulated less seniority.

With this analysis in mind, the conclusion can be drawn that the decision in *Local 194* is but a procedural modification. The decision to allow

[52]Rule 23(c)(4) allows, "when appropriate: (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly."

organizational representation suits does not deal with the substantive problem underlying rule 23, namely the representation of a class of plaintiffs with conflicting interests. Rather, organizational representation suits appear to be only a procedural maneuver for allowing the union to continue to take an active role in attacking discriminatory activities of the employer.

STATE OF TITLE VII ACTIONS AFTER LOCAL 194

Although the organizational representation approach in *Local 194* can be characterized as merely a procedural mechanism, it does provide an alternative for unions which may be apprehensive about their ability to satisfy rule 23 requirements. In combining *Local 194* and *Stewards* with the prevailing case law in the area, certain guidelines regarding union representation under Title VII may be drawn:

(A) A union may have standing to sue under Title VII and section 1981 if it has either suffered injury under the Act or is asserting the rights of its membership.[53] However, a union, absent injury to the organization itself, has standing to sue on behalf of its membership only insofar as injunctive and declaratory relief is concerned.[54]

(B) Unlike collective bargaining under the Railway Labor Act and the National Labor Relations Act wherein the union has exclusive powers of representation, the union under a Title VII action has no unique authority to compromise the rights of its members who are victims of discrimination.[55] However, a union's representation, in collective bargaining, of its member whose interests conflict does not deprive it of standing to sue the employer on behalf of willing members for alleged discrimination simply because of the conflict in the members' interests.[56] And a union that sues the employer under Title VII and section 1981 on behalf of the members does not have to meet the requirements of rule 23, but may instead treat the action as an organizational representation suit wherein the union litigates the case on behalf of its willing members who are alleged victims of discrimination. However, the union's representation of the interests of the discriminatees must be done in light of its duty of fair representation to all of its members.[57]

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[53] *Local 194*, 540 F.2d at 865.

[54] *Id.*

[55] *Id.* at 866; *Stewards*, 490 F.2d at 641.

[56] *Local 194*, 540 F.2d at 866.

[57] *Id.* at 867-68. It is still unclear how the union will balance its representation of one faction of its members under an organizational representation theory while at the same time fulfill its duty of fair representation to the other faction of its members with conflicting interests. One apparent answer is that so long as the union exercises its discretion with "complete good faith and honesty" and attempts "to represent fairly the interests of all members without discrimination toward any," neither faction will be able to successfully assert that the union has breached its duty to them. Needles to say, this represents a very broad standard and allows the union great discretion.

(C) A union suing under Title VII and section 1981 under a class action theory will have its adequacy as a representative party tested under the same requirements of rule 23 as would any ordinary class representative.[58]

(D) A union suing under Title VII and section 1981 under an organizational representation theory is required to give notice of its representation to all of its members, and any member claiming to be a victim of discrimination who chooses not to be represented by the union may either opt out of the litigation or make an appearance.[59]

The above set of guidelines does not purport to be exhaustive. Rather, it represents an assimilation of the major points decided in *Local 194* and *Stewards* into the present case law in this area.

Intent of Congress

The holding of *Local 194* raises a number of questions about the viability of organizational representation suits in combating large scale employment discrimination under Title VII. One question which needs examination is whether organizational representation suits undercut congressional intent in passing Title VII. Upon examining the legislative history of Title VII and the Equal Employment Opportunity Act of 1972,[60] it becomes clear that although Congress intended to protect individual rights to redress and remedy, there is a strong preference for the adjudication of employment discrimination cases through class action suits.[61] In the Joint Explanatory Statement of the Senate-House Conference Committee considering the 1972 Amendment to Title VII, the class action preference was noted:

> It is hoped that recourse to the private lawsuit will be the exception and not the rule, and that the vast majority of complaints will be handled through the offices of the EEOC or the Attorney General, as appropriate. However . . . .
> [i]n establishing the enforcement provisions under this subsection and subsection 706(f) generally, it is not intended that any of the provisions contained therein shall affect the present use of class action lawsuits under Title VII in conjunction with Rule 23 of the Federal Rules of Civil Procedure. The courts have been particularly cognizant of the fact that claims under Title VII involve the vindication of a major public interest, and that any actions under the Act involves considerations beyond those raised by the individual claimant. As a consequence, the leading cases in this area to date have recognized that many Title VII claims are necessarily class action complaints and that accordingly, it is not necessary that each individual entitled to relief be named in the original charge or in the claim for relief. A provision limiting class

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[58] *Stewards* 490 F.2d at 642.

[59] *Local 194*, 540 F.2d at 865.

[60] 42 U.S.C. § 2000e-5 to -17 (1970 & Supp. V. 1975).

[61] The remaining question is who may initiate such a suit. See Petition and Suggestion By Petitioner For Reheaing in Banc at 2, Local 194, 540 F.2d 864 (7th Cir. 1976).

> actions was contained in the House bill and specifically rejected by the Conference Committee.[62]

Considering the apparent class action preference of Congress, an examination of the resolution of *Local 194* reveals some erosion of the class action preference. Under the organizational representation approach, because unions may only represent those members who are willing to be represented, large factions of alleged discriminatees could potentially be left to make court appearances through individual representation. Further, those who choose not to be represented by the union may have differing interests from the class represented by the union.

In probing the question of whether organizational representation suits under Title VII undercut congressional intent, some of the policies underlying the class action preference should be examined. These policies include: (a) decreasing the multiplicity of individual suits which could emerge from one wrongful act, thus decreasing the number of repetitive cases on court dockets; (b) protecting individual members of the class from inconsistent and varying adjudications while also protecting the interests and rights of the party opposing the class; (c) alleviating some of the financial burden on individuals who must litigate their individual cases through the court system; and (d) vindicating major public interests (*e.g.*, protection against discrimination based on race, sex, religion or national origin).

A significant switch to organizational representation suits to protect Title VII rights would have a definite effect upon the above policies. This switch would have the greatest adverse impact in the area of judicial economy. If, for instance, union members who opt out of being represented by the union pursue their actions individually, and non-union members with similar causes of action pursue their remedies individually, there will certainly be an increase in the number of cases on court dockets. Therefore, to offset these increases in litigation, the courts must either exercise their ability to join cases more frequently, attempt to settle as many issue in prior cases as possible or devise some other method for dealing with the increase.[63]

Nonetheless, a rational analysis of *Local 194* would probably discount any great shift to organizational representation suits. First, because of the courts' tendency to certify the majority of class actions filed under Title VII, there does not appear to be a great need to resort to organizational representation suits.[64] Second, because Title VII encourages reconciliation and settle-

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[62]118 CONG. REC. 7168 (1972), *reprinted in* LEGISLATIVE HISTORY OF P.L. 92-261, at 1847 (1972).

[63]Although this note does not attempt to deal with the issue of res judicata, the res judicata effects of organizational representation suits will certainly affect the degree to which congressional policies underlying class actions will be eroded by this type of representation.

[64]General agreement exists among commentators that the courts have been quite liberal in applying the rule 23 strictures on class actions filed under Title VII. *See generally* 3 MOORE'S FEDERAL PRACTICE ¶ 23.10-1 (2d ed. 1974); 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND

ment, most parties are willing to resolve their claims as judiciously and expeditiously as possible without having to pursue their remedies through the courts. Third, because of the costs involved with litigating a case through the appellate process, most parties would prefer to have their claims either settled in a class action or joined with as many other plaintiffs as possible. In this way, expenses may be spread over a larger group of parties.

For these reasons, it is doubtful that the use of organizational representation suits will greatly undercut congressional preference for the use of class actions to pursue Title VII violations. Particularly since the court in *Local 194* devised this remedy as analogous to a rule 23 class action, most of the policies of rule 23 will be preserved.

The significant role played by labor unions in contemporary American society justifies any erosive effect the decision in *Local 194* may have on the policies behind the congressional preference for class actions. Because of the large number of workers who are represented by unions and because of the crucial interests they were organized to protect, denying unions the ability to represent any of their members because some of them have conflicting interests would create an anomolous result. It is difficult to imagine Congress placing such a heavy burden of fair representation upon unions through the Labor Management Relations Act[65] and the Railway Labor Act,[66] while conversely permitting the total exclusion of unions when their members have conflicting interests. During the institution of an employment discrimination action, union members are in the greatest need of the financial backing and expertise of their union. Without the union's representation, the union members lose one of their most powerful advocates. Although the union will not be able to represent adequately the interests of some of its members, due

PROCEDURE § 1771, at 662-63 (1972); Comment, *Class Actions and Title VII of the Civil Rights of 1964: The Proper Class Representative and the Class Remedy*, 47 TUL. L. REV. 1005, 1006-11 (1973). This liberality is primarily a function of the remedial nature of Title VII and the undeniable fact that employment discrimination on the basis of a class characteristic is by definition suited to class action treatment. It is recognized that the class action device, with its binding res judicata effect on all members is an efficient and powerful mechanism for redress of grievances when properly utilized and not abused. *See* Note, *The Class Action and Title VII—An Overview*, 10 U. RICH. L. REV. 325 (1976).

It could be said that Title VII actions are, by their very nature, class actions. Bowe v. Colgate Co., 416 F.2d 711, 719 (7th Cir. 1969), typifies this view. On the class action aspects of the case, the court stated: "A suit for violation of Title VII is necessarily a class action as the evil sought to be ended is discrimination on the basis of a class characteristic, *i.e.*, race, sex, religion or national origin." *Id.* at 719. However, the view that Title VII cases are necessarily class actions has been specifically refuted in a number of cases. *E.g.*, Gregory v. Litton Systems, Inc., 472 F.3d 631, 633 (1972). For example, in Gresham v. Ford Motor Co., 53 F.R.D. 105 (D.C. Ga. 1970), the court stated that the premise that every civil action for racial discrimination in employment states a case for treatment as a class action "is unacceptable on a legal level. . . . [and] is also unacceptable on the level of equity." The court explained: "[I]t is patently unfair to the company to require it to list, explain and defend every refusal to hire, failure to promote, disciplinary action and termination of every applicant or employee . . ." *Id.* at 107.

[65]29 U.S.C. § 141-151 (1970 & Supp. V. 1975).

[66]45 U.S.C. § 152(4) (1970).

to the conflicting interests which may arise among the membership, as long as a good faith effort is made to do what is in the best interest of all of its members, it has not breached its duty of fair representation.

The decision in *Local 194* serves another function in that organizational representation suits insure the presence of the union in the litigation in spite of conflicts which may arise. To allow the union to remain dormant because certain factions of its membership have conflicting interests will carve an unnecessary loophole into the union's duty to represent fairly and adequately the interests of its membership. If for no other reason than to close this loophole, *Local 194* is a contribution to labor law.

CONCLUSION

The decision in *Local 194* represents a deviation from the traditional class actions which have been instituted to attack employment discrimination under Title VII. Although the legislative history of Title VII shows a clear congressional preference for class actions to combat employment discrimination, the availability of organizational representation suits does not severely undercut the policies underlying class actions. In fact, organizational representation suits appear to be only a procedural deviation rather than a mechanism for dealing with the more substantive problem of how a union may adequately represent a class of plaintiffs with conflicting interests.[67] *Local 194* appears to be only a procedural maneuver for allowing the union to continue to take an active role in attacking discriminatory activities of the employer, in spite of conflicts which may arise among the interests of the union members.

The decision in *Local 194* should not, however, be underrated. To deny unions the ability to defend the statutory rights of any of its membership because some of them have competing interests is to eliminate the union at a time when the membership most needs its financial backing and expertise in dealing with labor disputes. Also, to allow the union to remain dormant at a time of strife between its membership and the employer is to allow the union to exercise a loophole which is anomolous to the heavy duty placed upon labor organizations through the Labor Management Relations Act. *Local 194* has, at least, closed this loophole.

RICHARD J. EPPS, JR.

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[67]The court of appeals solution in *Local 194* appears to be the most satisfactory manner for dealing with the conflicts presented in this case. An alternative would be to allow the union to compromise and settle both contractual and statutory rights of its members when violations of these rights may be directly traced to the employee's job. Although this alternative would be contrary to the congressional policy of providing Title VII statutory rights as a mechanism for *individual* redress of grievances, a countervailing consideration is the availability of an action for breach of the duty of fair representation which would be available if the union failed adequately to represent the interest of an individual. To give effect to this alternative, however, the court would have to hold the union to an even higher standard in the duty of protecting statutory rights of the union members than it requires in the case of contractural rights.