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Title VII -- Class Actions -- Adequacy of Representation -- Air Line Stewards & Stewardesses Association, Local 550, v. American Airlines, Inc.

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Title VII—Class Actions—Adequacy of Representation—*Air Line Stewards & Stewardesses Association, Local 550, v. American Airlines, Inc.*[1]—Several individual plaintiffs appeal from a district court judgment approving settlement of two separate class actions (American Airlines, Inc. and Trans World Airlines, Inc. being the respective defendants), ordering it implemented, and dismissing the action on the merits.[2] A related class action against American Airlines and Air Line Stewards and Stewardesses Association (ALSSA) was also dismissed, and those plaintiffs appeal.[3]

In June 1970, ALSSA filed charges with the Equal Employment Opportunity Commission (EEOC) against the defendant airlines, alleging that the airlines' policy of terminating the employment of stewardesses who became pregnant violated Title VII of the Civil Rights Act of 1964.[4] Thirty days later EEOC notified the union that it was entitled to commence a civil action under § 706(d) of the Act;[5] later ALSSA and several individuals filed class actions against the airlines. The complaints asserted that the actions were class actions under Rule 23(b)(2) of the Federal Rules of Civil Procedure,[6] and that the class consisted of all present and former stewardesses employed by the airlines at any time since July 2, 1965[7] who had been,[8] desired to be, or would desire in the future to be, pregnant. The complaint sought declaratory, injunctive and monetary relief.

By October, 1970, collective bargaining agreements between ALSSA and the airlines provided for prospective elimination of the challenged practice,[9] leaving reinstatement of discharged stewardesses with accrual of seniority and back pay, if any, the only issues remaining to be litigated. In July 1971, a year after the actions had been filed, ALSSA and the airlines reached agreement on a settlement, subject to court approval.[10]

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[1] 490 F.2d 636 (7th Cir. 1973), cert. denied, — U.S. —, 42 U.S.L.W. 3628 (U.S. May 13, 1974).

[2] Fed. R. Civ. P. 23(e) provides: "A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs."

[3] 490 F.2d at 637.

[4] 42 U.S.C. §§ 2000e et seq. (1970).

[5] 42 U.S.C. § 2000e-5(d) (1970).

[6] Fed. R. Civ. P. 23(b)(2) provides:

> An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition . . . 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 . . . .

For the prerequisites to a class action contained in subdivision (a) of Rule 23, see note 12 infra.

[7] July 2, 1965 was the effective date of the Civil Rights Act of 1964, 78 Stat. 266 (1964).

[8] See note 47 infra for a discussion of the time requirements for filing a complaint under Title VII.

[9] 490 F.2d at 638.

[10] See Fed. R. Civ. P. 23(e), quoted in note 2 supra.

The airlines and the union proposed that discharged stewardesses who desired reemployment be required to notify the airlines of that desire within sixty days of court approval of the settlement. The stewardesses would not be reinstated immediately, but instead would be placed on a preferential hiring list to fill vacancies ahead of new applicants. When offered a job, a stewardess would be required to accept it within ten days; actual reinstatement was conditioned on her meeting weight restrictions and other physical qualifications in effect at the time of her discharge. Upon reinstatement a stewardess who had been employed by American Airlines would have the same seniority she had on the day of her discharge; for a former TWA stewardess, seniority would be the same as she had on the day of her discharge plus ninety days. The airlines would not be liable to a discharged stewardess who failed to give timely notice of a desire to be reemployed or to accept an offer of reemployment. There were no provisions made for back pay. The settlement offered a redefinition of the class as all those whose employment was terminated because of pregnancy between the effective date of the Civil Rights Act of 1964 and July 31, 1969, in the case of TWA, and August 11, 1970, in the case of American Airlines.[11]

On July 16, 1971 the district court made its first ruling concerning the maintenance of the actions as class actions. The court did not specifically address the prerequisites to a class action set out in Rule 23(a),[12] nor did it address itself to any of the additional requirements of Rule 23(b). Nevertheless, it ordered that both actions be maintained as Rule 23(b)(2) class actions, with the result that the class in each action was defined in accordance with the proposed settlement.[13] Notice of a hearing on the proposed settlement was sent out, but the hearing was delayed while an appeal was taken on an issue not here relevant.[14] A second notice was sent out in February 1972 for a hearing in March.

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[11] 490 F.2d at 638.

[12] Fed. R. Civ. P. 23(a) stipulates:

> 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.

[13] Brief for Appellants at 7, Airline Stewards & Stewardesses Ass'n, Local 550 v. American Airlines, Inc., 490 F.2d 636 (7th Cir. 1973) [hereinafter cited as Brief for Appellants].

[14] The hearing was delayed by the EEOC's appeal of a district court order denying the Commission the right to intervene in the class actions pursuant to Fed. R. Civ. P. 24(a). The Commission, noting that the proposed settlement did not entitle the discharged stewardesses to immediate unconditional reinstatement, full seniority from time of first hire and back pay from the date of discharge, asserted that the settlement afforded a narrower brand of relief than would be awarded upon successful litigation of the claim. Consequently, the Commission argued, it should be allowed to intervene to protect "the public interest" by making certain the remedies ultimately agreed on by ALSSA and the airlines vindicated the policies of Title VII.

Meanwhile, on July 14, 1971, dissatisfaction with the proposed settlement surfaced when several of the discharged stewardesses in the American Airlines suit filed their own class action in a federal district court in California.[15] That action was stayed until the Illinois district court hearing the original actions determined whether the dissident class members were entitled to opt out of the original suits.[16] On February 28, 1972, several more dissident class members brought yet another class action in an Illinois district court,[17] with American Airlines and ALSSA as defendants. Their complaint alleged the same unlawful employment practice charge advanced in the original actions, and in addition, charged that ALSSA had failed in its duty of fair representation. On March 17, 1972, judgment was entered in the original actions which determined then to be (b)(2) class actions; declared the judgment binding on all members of the class; and concluded that the settlement was fair and adequate for all. Three days later the dissident class action brought against American Airlines and ALSSA was dismissed, apparently on the ground that the claims had been adjudicated by the judgment of March 17.[18]

The Court of Appeals for the Seventh Circuit reversed and HELD: (1) the union, whose interests were antagonistic to previous members who had been discharged because of pregnancy, was not

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The court of appeals rejected this and other similar contentions by stating that, as a general proposition, "the public interest" may be served by a voluntary settlement in which each side gives ground in the interest of avoiding litigation, especially in actions under Title VII, where there is great emphasis on private settlement and elimination of unfair employment practices without litigation. Intervention by the EEOC was thus denied. Air Line Stewards & Stewardesses Ass'n, Local 550 v. American Airlines, Inc., 455 F.2d 101, 107-08 (7th Cir. 1972).

[15] Brief for Appellants, supra note 13, at 5.

[16] Fed. R. Civ. P. 23(c)(2)(A) allows a member of a class action maintained under subsection (b)(3) to exclude himself from the suit and thereby avoid binding judgment. Members of class actions maintained under subsections (b)(1) or (b)(2) do not have this option. This feature of (b)(3) is the opposite of the device in the old Rule 23 "spurious" class actions, in which only those parties who actually intervened in the action were bound by the judgment. The "spurious" class action was not really a class action at all, but merely a device for permissive joinder. See Comment, Rule 23: Categories of Subsection (b), 10 B.C. Ind. & Com. L. Rev. 539, 546 (1969). For the text of old Rule 23, see Rules of Civil Procedure for the District Courts of the United States, 308 U.S. 645, 689 (1939).

Since the district court subsequently determined that the action was a (b)(2) class action, and since Fed. R. Civ. P. 23(c)(3) makes binding on the entire class a final judgment entered in a (b)(2) action, the objecting stewardesses' dissident actions would have been barred by res judicata had the court of appeals not reversed, as it did in this instance. There are instances, though, where such final judgments are subject to collateral attack in a later action. For example, in Gonzales v. Cassidy, 474 F.2d 67 (5th Cir. 1973), the court held that, although the class representative's representation in the prior (b)(2) suit was adequate up to the time that a three-judge district court entered its final order on remand, the representative's failure to appeal that order, which denied retroactive relief to all members of the class except the representative himself, constituted inadequate representation of the class, and the class was not bound by the judgment and the judgment could not be res judicata as to that class. 474 F.2d at 75.

[17] Brief for Appellants, supra note 13, at 6.

[18] 490 F.2d at 639.

an adequate representative of the class even though it was a certified bargaining agent under the Railway Labor Act;[19] and (2) the former members of the union who had been discharged from their jobs because of pregnancy had the right to exclude themselves from the class.[20] The court rejected ALSSA's contention that its status as certified collective bargaining agent under the Railway Labor Act gave it the power to adjust and accommodate the rights of present and former stewardesses which sprang from Title VII, subject only to its obligation of fair representation.[21] It found that unions play no special role in the vindication of the policies of Title VII.[22] It also determined that the class actions were improperly classified as (b)(2) actions, and should henceforth be treated as (b)(3) actions, thus giving each stewardess the right to exclude herself or appear through counsel.[23] The court remanded the actions originally brought against the airlines with instructions that ALSSA be replaced as the representative party by one or more members of the class in each action.[24] The court also reversed and remanded the action brought against ALSSA and American Airlines, since it had been dismissed on the theory that the claims therein had been adjudicated by a judgment now being reversed.[25]

This note will examine the so-called "majority rule" principle which governs a collective bargaining situation and show why its application to a Title VII claim is inappropriate. It will then analyze the duty of fair representation which obtains under this principle and will distinguish it from the standard of fair representation to which a representative party is held under Rule 23 of the Federal Rules of Civil Procedure. Finally, it will discuss the different circumstances under which a class action may be maintained under subcategories (b)(2) and (b)(3) of Rule 23.

ALSSA's defense of the settlement it negotiated rests on the assertion that its

> role as an exclusive collective bargaining agent for the stewardesses employed by these airlines gives it the power to accommodate and adjust the rights of present and former stewardesses which spring from Title VII, subject only to its obligation of fair representation.[26]

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[19] 45 U.S.C. §§ 151-63 (1970). Section 151, 152 and 154-63 are made applicable to carriers by air by 45 U.S.C. § 181 (1970).

[20] 490 F.2d at 643.

[21] Id. at 641.

[22] Id. at 642.

[23] Id. at 643. Since individual stewardesses may now opt out of each class, the class action filed against American Airlines in a California district court by dissident members of the instant actions, which had been stayed pending the outcome of these cases, may now go forward.

[24] Id.

[25] Id. at 644.

[26] 490 F.2d at 640-41.

If ALSSA's contention is correct, then an out of court settlement of the instant class actions is to be judged within the context of the so-called "majority rule" principle.[27] Section 2(4) of the Railway Labor Act provides that a "majority of any craft or class or employees shall have the right to determine who shall be the representative of the craft or class . . ."[28] for the purposes of collective bargaining, and the employer is required to bargain exclusively with the representative so selected.[29] When dealing with matters that are properly the subject of collective bargaining, such as wages, hours of employment, and working conditions,[30] the collective bargaining agent may make contracts which have unfavorable effects on some of the members of the class represented. This is so because the agent, as representative of the *class* and not of any individual, must weigh and balance the conflicting interests of its various members and produce a contract that is in the best interests of the bargaining unit as a whole:[31] it is thought that the welfare of the individual is best served by promoting "the welfare of the group."[32]

The one restraint on this broad discretionary authority of a union, as ALSSA pointed out, is the "obligation of fair representation."[33] This doctrine was first developed thirty years ago in a series of cases beginning with *Steele v. Louisville & Nashville R.R.*,[34] involving alleged racial discrimination by unions certified as exclusive bargaining representatives under the Railway Labor Act.

> Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes 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.[35]

The majority rule principle and the concomitant obligation of fair representation, however, are inapposite in the settlement of grievances. Section 2(2) of the Railway Labor Act of 1934 stipulates:

> [a]ll disputes between a carrier . . . and [an employee] shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier . . . and by the [employee] thereof interested in the dispute.[36]

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[27] See Weyand, Majority Rule in Collective Bargaining, 45 Colum. L. Rev. 556, 565-72 (1945). See also text at note 58 infra.

[28] 45 U.S.C. § 152(4) (1970).

[29] Id.

[30] See 45 U.S.C. § 152(7) (1970).

[31] Steele v. Louisville & Nashville R.R., 323 U.S. 192, 203 (1944).

[32] J.I. Case Co. v. NLRB, 321 U.S. 332, 338 (1944).

[33] 490 F.2d at 640-41.

[34] 323 U.S. 192 (1944).

[35] Vaca v. Sipes, 386 U.S. 171, 177 (1967).

[36] 45 U.S.C. § 152(2) (1970).

Thus, in a grievance dispute, the representative is not to be chosen by a majority of the craft but by the particular employee who is aggrieved. In examining sections 2(4), 2(5), and 9(a) of the National Labor Relations Act,[37] which are analogous to sections 2(2), 2(3) and 2(4) of the Railway Labor Act of 1934,[38] the Fifth Circuit explained:

> Taking the . . . provisions together, it is plain that collective bargaining in respect of rates of pay, wages, hours of employment and other conditions of employment which will fix for the future the rules of the employment for everyone in the unit, is distinguished from "grievances," which are usually the claims of individuals or small groups that their rights under the collective bargain have not been respected. These claims may involve no question of the meaning and scope of the bargain, but only some question of fact or conduct peculiar to the employee, not affecting the [bargaining] unit.[39]

Thus, although the machinery for *presenting* a grievance may be worked out through collective bargaining, the interest *represented* at the presentation is that of the individual employee, not the collective bargaining unit.[40]

The nature of a Title VII claim is analogous to a grievance. "The real party in interest in [Title VII] conciliation endeavors is the employee alleged to have been discriminatorily treated,"[41] and not the union. Though "[t]here is nothing in [Title VII] which [precludes a union] from recognizing the injustice done to a substantial minority of its members and from moving to correct it . . . ,"[42] the fact that a collective bargaining representative is defined in Title VII and

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[37] 29 U.S.C. §§ 152(4), (5), 159(a) (1970). Section 2(4) of the NLRA states: "The term 'representatives' includes any individual or labor organization." 29 U.S.C. § 152(4) (1970). Section (a) states:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* that any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect: *Provided further,* that the bargaining representative has been given opportunity to be present at such adjustment.

29 U.S.C. § 159(a) (1970).

[38] 45 U.S.C. §§ 152(2), (3), (4) (1970).

[39] Hughes Tool Co. v. NLRB, 147 F.2d 69, 72-73, 15 L.R.R.M. 852, 855 (5th Cir. 1945) (footnote omitted).

[40] Id.

[41] Air Line Stewards & Stewardesses Ass'n, Local 550 v. American Airlines, Inc., 455 F.2d 101, 106 (7th Cir. 1972).

[42] Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 719 (7th Cir. 1969).

made a potential defendant in unlawful employment practice cases[43] indicates that Congress did not intend to give to unions "the power to accommodate and adjust the rights . . . which spring from Title VII,"[44] as ALSSA contends.

In spite of the fact that the employee is the real party in interest in both situations, 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,[45] while the latter is a *statutory* claim completely independent of the grievance-arbitration procedures of a collective bargaining contract. Although an employment practice forbidden by Title VII may be treated as an unfair labor practice[46] 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.[47]

It is clear, then, that a union's status as a certified collective bargaining agent gives it no special role to play in Title VII disputes. But given ALSSA's position to the contrary during the course of litigation and negotiations, it is not surprising that the settlement it reached with the airlines strongly suggests that it is the product of a collective bargaining process.[48] On the question of back pay,[49] ALSSA was fairly confident that, if the claim of discrimination were

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[43] 42 U.S.C. § 2000e(e) (1970).

ALSSA's potential status as a defendant in the instant suits is no mere theoretical possibility. Prior to the institution of the class actions, ALSSA sent letters to the airlines, which stated that "our most recent legal advice is to the effect that termination for pregnancy is an unlawful practice regardless of marital status, and leaves both the Company *and the Union open to suit*." Brief for Appellants, supra note 13, at 9. (Emphasis added.)

[44] 490 F.2d at 640-41.

[45] Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965). In *Republic*, the Supreme Court held that the grievance-arbitration procedures of a collective bargaining agreement must be exhausted before an employee may file suit to enforce his contractual rights. Id. at 656.

[46] Packinghouse Workers v. NLRB (Farmers' Cooperative Compress), 416 F.2d 1126, 70 L.R.R.M. 2489 (D.C. Cir.), cert. denied, 396 U.S. 903 (1969). But see Jubilee Mfg. Co., 202 NLRB No. 2, 82 L.R.R.M. 1482 (1973).

[47] Alexander v. Gardner-Denver Co., — U.S. —, 94 S. Ct. 1011, 1022 (1974).

[48] The prospective termination of the alleged unlawful employment practice, which was the basis of the original complaint, was in fact obtained under a collective bargaining agreement. 490 F.2d at 638.

[49] 42 U.S.C. § 2000e-5(g) (1970) provides that, if the court finds that the employer engaged in an unlawful employment practice, the court may order such affirmative action as may be appropriate, including reinstatement with full back pay. In Sprogis v. United Airlines, Inc., 444 F.2d 1194 (7th Cir. 1971), a stewardess discharged for violating a company rule that stewardesses be unmarried established employer's liability under Title VII and was reinstated with back pay and seniority accruing up to the date of her reinstatement.

Both ALSSA and the airlines stipulated that the back pay claims involved a substantial sum of money. Although no attempt was made to determine the amounts potentially at issue, one estimate of the total back pay claims, suggested to the district court, was $10 million. Brief for Appellants, supra note 13, at 16.

litigated, and the airlines' liability established, several class members would be able to establish back pay claims.[50] However, ALSSA estimated that such litigation would consume five years, and rather than postpone final relief for everyone for that period of time, the union decided to subordinate the interests of those with back pay claims to the interest of those who desired to return to work.[51] Another factor influencing the union's decision to settle, rather than litigate, was its belief that the statute of limitations might successfully be urged against 90% of the class, and that variations in the circumstances of discharge raised additional questions concerning recovery by individual stewardesses.[52] On the question of seniority, ALSSA realized that the greater the amount of seniority granted to reinstated stewardesses, the larger the number of currently employed junior stewardesses who would be put to disadvantage.[53] It therefore placed the interests of the currently employed stewardesses ahead of the interests of the discharged stewardesses and stipulated that reemployed members of the class would retain the seniority they had on the day of discharge, rather than have seniority accrue up to the date of reinstatement.

It is submitted that in reaching this settlement ALSSA was guided by the majority rule principle and agreed to terms with the airlines which vindicated the interests of the bargaining unit as a whole (the "majority" in this case being presently employed stewardesses who presumably controlled the union). Judged against the statutory duty of fair representation enunciated in *Louisville* and its progeny,[54] under which a union may exercise a broad amount of discretion, it cannot be said that the choices made by ALSSA were "arbitrary." But when judged against the standard of representation set out in Rule 23(a), the context within which the choices were made, the settlement reached was improper.

Rule 23(a) provides:

> One or more members of a class may sue or be sued as

[50] 490 F.2d at 640.

[51] Id. Although the sole relief afforded by the settlement was the possibility of reemployment, ALSSA made no attempt to discover what portion of the classes either desired, or would be able to qualify for, reemployment. Brief for Appellants, supra note 13, at 19-20.

[52] 490 F.2d at 639-40. At the time these actions were brought, 42 U.S.C. § 2000e-5(d) (1970) required that a charge of unlawful employment discrimination had to be filed with the EEOC within ninety days after the alleged unlawful employment practice occurred (210 days in the case of a complaint initially filed with a state or local enfrocement agency). ALSSA was uncertain whether stewardesses who had been discharged more than ninety days before charges were first filed with the EEOC would be able to rely on the later filing by other members of the class. 490 F.2d at 639. The Equal Employment Opportunity Act of 1972 changed the time requirement from ninety days to 180 days (300 days in the case of a complaint initially filed with a state or local enforcement agency). 42 U.S.C. § 2000e-5(e) (Supp. II 1972).

[53] Seniority has an important effect on every aspect of a stewardess's job, including location of her home base, pay schedules, choice of flight schedules and vacation benefits. Brief for Appellants, supra note 13, at 64.

[54] See text at notes 34-35 supra.

> representative parties on behalf of all *only if* . . . (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.[55]

These requirements are "an attempt to deal effectively with multiparty litigation without sacrifice of the individual's rights of due process."[56] Specifically, clause (3) indicates the identity of interest which the representative of the class must share with the absentee members. It "emphasizes that the representative ought to be squarely aligned in interest with the represented group."[57]

This respect for the individual's interest is a far cry from the immateriality of an individual employee's interest which obtains under the majority rule principle of collective bargaining, where,

> by analogy to the political process, each employee, union and non-union alike, who falls within the unit over which the elected representative has jurisdiction, is subject to all provisions respecting his employment upon which the representative and his employer agree. . . . [T]he union and the employer . . . bind the employee to each change effected [through collective bargaining] *irrespective of the employee's intent in the matter.*[58]

The terms of the agreement negotiated by ALSSA were settled on "irrespective of the employee's intent in the matter": not once throughout the entire course of negotiations for settlement did ALSSA consult with any of the discharged stewardesses it represented.[59] Furthermore, the union's interest was not "squarely aligned" with the interests of the absentee members of the class: ALSSA admitted that, at least with respect to the issue of seniority, it chose to protect the antagonistic interests of the currently employed stewardesses who presumably controlled ALSSA, at the expense of the class of former stewardesses it represented.[60] Given this

[55] Fed. R. Civ. P. 23(a) (emphasis added). For the first two prerequisites to a class action, which are not in issue here, see note 12 supra.

[56] Donelan, Prerequisites to a Class Action Under New Rule 23, 10 B.C. Ind. & Com. L. Rev. 527, 528 (1969).

[57] Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I), 81 Harv. L. Rev. 356, 387 n.120 (1967).

[58] Weyand, Majority Rule in Collective Bargaining, 45 Colum. L. Rev. 556, 561 (1945) (emphasis added).

[59] 490 F.2d at 638.

[60] Id. at 640. In Lynch v. Sperry Rand Corp., 6 F.E.P. Cases 1306 (S.D.N.Y. 1973), a union and present and former male employees brought a Title VII class action against an employer, alleging that the company's retirement and pension plans discriminated against men and in favor of women. The district court ruled that the union must be excluded from the prosecution of the case since the union, which was composed of both male and female employees, had a serious potential conflict between its duty to its male employee membership and its duty to its female membership. 6 F.E.P. Cases at 1310-11. The union was also

conflict of interest between the duty it owed members of the union whom it represented in the class actions and the duty it owed to members of the union not parties to the litigation, it is manifest that ALSSA could not "fairly and adequately protect the interests"[61] of the former group.

The inimical results of ALSSA's misinterpretation of the standard of representation it must meet during the course of the litigation were compounded by the district court's improper classification of the class actions. The complaints as originally filed asserted that the suits were (b)(2) class actions; the court acquiesced in this classification at the hearing on the out-of-court settlement even though individual members of the class raised objections to it.[62]

Subsection (b)(2) of Rule 23 is expressly limited to cases in which "final injunctive relief or corresponding declaratory relief with respect to the class as a whole"[63] will be appropriate. A prayer for monetary relief will not necessarily prevent a suit from proceeding under (b)(2), but when such relief predominates, or is the sole appropriate relief, the action cannot be maintained under (b)(2).[64]

Presently employed stewardesses fit the (b)(2) category. The employment practice complained of had not affected them, it only threatened to affect them. Having suffered no harm, they could not pray for monetary relief; "final injunctive relief" was their sole appropriate relief. The discharged stewardesses, on the other hand, had suffered a harm for which they sought damages in the complaint as originally drawn. The appropriate remedy for them was not prospective termination of the practice, i.e., final injunctive relief, but rather a declaration that the practice was unlawful. Such a declaration would serve as a basis for awarding back pay and causing reinstatement to their former jobs. This type of declaratory relief does not "correspond" to final injunctive relief and is therefore not covered by (b)(2).

The appropriate class action category for the discharged stewardesses is (b)(3). Subsection (b)(3) of Rule 23 provides in part:

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disqualified from the class on the ground that, since the challenged pension and retirement plans were the result of collective bargaining agreements between the union and the company, there was at least a question whether the union might be directly liable to male employees for damages suffered as a result of the discriminatory plans. Id. See 7 C. Wright & A. Miller, Federal Practice and Procedure: Civil § 1761 at 588-92 (1972). But see Pulp Workers Local 186 v. Minnesota Mining & Mfg. Co., 304 F. Supp. 1284, 71 L.R.R.M. 2427, (N.D. Ind. 1969), where it was held that a union which had filed a formal charge of sex discrimination with the Equal Employment Opportunity Commission on behalf of only one of its members was not precluded from maintaining an action on behalf of itself and on behalf of all those employees who had been discriminated against on the basis of sex and from seeking back pay and reinstatement relief. 304 F. Supp. at 1293, 71 L.R.R.M. at 2435.

[61] Fed. R. Civ. P. 23(a)(4).

[62] 490 F.2d at 639.

[63] For the full text of Fed. R. Civ. P. 23(b)(2), see note 6 supra.

[64] Comment, Rule 23: Categories of Subsection (b), 10 B.C. Ind. & Com. L. Rev. 539, 543-44 [hereinafter cited as Comment].

> An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition . . . (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.[65]

Subsection (b)(3) is a "broad, catch-all category."[66] Unlike (b)(2), which is concerned with the type of relief sought, (b)(3) seeks to promote more practical ends, "to achieve economies of time, effort and expense and promote uniformity of decision."[67] For an action to proceed under (b)(3), the court must first make two specific findings: that common questions of law or fact "predominate over any questions affecting only individual members" and that "a class action is superior" in efficiency to any other form of settlement.[68]

The predominance of a common-question requirement should be construed in light of the broad scope and purpose of economy of (b)(3): it does not mean that the common question must be dispositive of the entire litigation.[69] In *American Airlines*, though there are varying questions of law or fact affecting ultimate recovery by individual members of the class,[70] there is one threshhold question of law which "predominates": the lawfulness of the airlines' employment practice. The secondary issues affecting the ability of

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[65] Fed. R. Civ. P. 23(b)(3).

[66] Comment, supra note 64, at 555.

[67] Advisory Committee's Note to Fed. R. Civ. P. 23, 39 F.R.D. 98, 102-03 (1966).

[68] Fed. R. Civ. P. 23(b)(3). The Fedral Rule lists four matters which are pertinent to these findings:

> (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.

Id.

[69] Comment, supra note 64, at 549.

[70] In addition to stewardesses who were discharged on grounds of pregnancy, some members of the class were fired on the ground that they had concealed their pregnancy in violation of a company rule. Others had voluntarily resigned after becoming pregnant, while still others resigned but claimed they were coerced. 490 F.2d at 640. ALSSA's concern that these varying circumstances threatened recovery by individual stewardesses does not appear to be well-grounded. Voluntary resignation in anitcipation of automatic termination of employment upon the happening of an event is "voluntary" only in the sense that it is in compliance with a stated company policy: the only *choice* involved is the *timing* of the termination of employment, not whether or not it will occur. As for those who were discharged for concealing their pregnant condition, query whether violation of a company rule for concealment of a physical condition not easily disguised is merely an alternative method of enforcing the challenged company practice. In any case, equitable considerations should militate against the harsh result of denying relief in such circumstances, since, if the challenged practice is found to be unlawful, a stewardess guilty of concealing her pregnancy would have done so to avoid the consequences of an illegal employment practice.

specific members of the class to be afforded relief can be handled by dividing the class into subclasses.[71] This procedure will insure that the common question of the airlines' liability will be settled without being obscured by questions relating merely to recovery. By going forward in this manner an unnecessary multiplicity of suits will be avoided and uniformity of decision will be assured. The economy of litigation so obtained, and the due process safeguards so established, indicate that this procedure is "superior" in terms of fairness and efficiency to other forms of settlement.

CONCLUSION

The statutory authority granted a union to collectively bargain for its members is different from the authority granted a representative party by Federal Rule 23. The former properly accords a union broad powers of discretion, to be exercised within the context of a contractual relationship between two private groups, while the latter is subject to stringent standards intended to safeguard the due process rights of individuals in a judicial proceeding.

Title VII creates a statutory right to be free from discrimination in employment. It also provides a procedure of individual enforcement of that right which is philosophically at odds with the theory of collective bargaining that the welfare of the individual is best served by furthering "the welfare of the group." This statutory concern for the individual is not diminished when the enforcement of that right takes the form of a class action. For this reason it is important that courts carefully scrutinize the role a union seeks to play in a Title VII class action. If the courts abdicate this responsibility, harm to the policies embodied in Title VII will result from the potential conflicts of interests between different classes within the union and a union's tendency to resolve such conflicts on the basis of what is best for the union as a whole rather than what will insure the full vindication of the specific individual rights involved.

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[71] Fed. R. Civ. P. 23(c)(4) states:
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.