Class Procedure by the Handicapped in Employment Discrimination Cases

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COMMENT

CLASS PROCEDURE BY THE HANDICAPPED IN EMPLOYMENT DISCRIMINATION CASES

When an employer rejects an otherwise qualified job applicant or restricts the advancement of a qualified employee, oftentimes the instance is not isolated. Consequently, the class action has become an important procedural device in the litigation of employment discrimination cases, frequently involving women and racial minorities. It has also proven to be a valuable tool in redressing wrongs against the handicapped in the fields of education, residential institutionalization.

1. A class action is a procedural device "by which, where a large group of persons are interested in a matter, one or more may sue or be sued as representatives of the class without needing to join every member of the class." C. Wright, Law of Federal Courts 345 (3d ed. 1976). For a comprehensive treatment of the class action procedure, see, e.g., H. Newberg, Class Actions (1977) (in 6 volumes); B.L. Schlei, Employment Discrimination Law 278-369 (1976); 7 Wright & Miller, Federal Practice and Procedure: Civil §§ 1751-1771 (1972); 7A Wright & Miller, Federal Practice and Procedure: Civil §§ 1772-1803 (1972). The leading case on class actions is Hansberry v. Lee, 311 U.S. 32 (1940), in which the Supreme Court, after a discussion of what constitutes a class action, held that to bind the petitioners to a judgment rendered in an earlier action in which they had not participated would deny them due process since the earlier action did not meet the requirements of a class action.


3. See, e.g., Barnett v. W.T. Grant Co., 518 F.2d 543 (4th Cir. 1975) (class of all black persons who had been or might be affected in the future by the unlawful employment practices of the employer); East Texas Motor Freight Sys., Inc. v. Rodriguez, 505 F.2d 40 (5th Cir. 1974), rev'd, 431 U.S. 395 (1977) (Mexican-American truck drivers seeking to represent all blacks and Mexican-Americans in the collective bargaining unit); Long v. Sapp, 502 F.2d 34 (5th Cir. 1974) (class of blacks discharged by employer, those who had applied for employment, and those who would have applied had there been no racial discrimination); Johnson v. Georgia Highway Express, 417 F.2d 1122 (5th Cir. 1969) (class of all blacks who had suffered from a number of discriminatory practices by an employer represented by one who had suffered from only one of those practices); Harriss v. Pan Am. World Airways, Inc., 74 F.R.D. 24, 48-49 (N.D. Cal. 1977) (class comprised of black, Hispanic and American Indian grocery store distribution center employees challenged racially discriminatory policies of compensation and terms of employment).

4. See, e.g., Frederick L. v. Thomas, 419 F. Supp. 960 (E.D. Pa. 1976), aff'd, 557 F.2d 373 (3d Cir. 1977) (learning disabled children deprived of adequate and appropriate education);
tion, and public transportation. Yet, in spite of a successful record in these areas, little has been written or reported on the use of the class action in cases of employment discrimination against the handicapped. Since statistics show that large numbers of handicapped persons are ready and willing to perform but are unable to secure employment, it is relatively certain that widespread discrimination is occurring. Why then does current reported case law not reflect greater usage of the class action by handicapped employment discriminatees? Various reasons have been asserted for avoiding the class action in these cases. Additionally, trial courts, when confronted with such actions, may have preferred to restrict the representative plaintiffs to individual suits or to joinder with other identified claimants. Nevertheless, because of its definite advantages, the class action may be the most appropriate course to follow when an employer allegedly discriminates against handicapped persons in any employment-related practices.

The purpose of this Comment is to encourage attorneys to bring class actions on behalf of handicapped persons who have fallen victim


6. See, e.g., Lloyd v. Regional Transp. Auth., 548 F.2d 1277 (7th Cir. 1977) and Bartels v. Biernat, 405 F. Supp. 1012 (E.D. Wis. 1975), two actions brought by classes of mobility handicapped persons challenging the barriers imposed to their use of public mass transit systems.
7. The most recent statistics indicate that 1,669,161 of the 7,264,631 handicapped persons who are able to work are not in the labor force. [1976] 2 EMPL. PRAC. GUIDE (CCH) 5373 (fact sheet entitled Who Are the Handicapped?). See Burgdorf & Burgdorf, A History of Unequal Treatment: The Qualifications of Handicapped Persons as a "Suspect Class" Under the Equal Protection Clause, 15 SANTA CLARA L. REV. 855, 864 & nn.60-68 (1975) [hereinafter cited as Burgdorf]; Wright, Equal Treatment of the Handicapped by Federal Contractors, 26 EMORY L.J. 65, 68 n.13 (1977); Note, Potluck Protections for Handicapped Discriminatees: The Need to Amend Title VII to Prohibit Discrimination on the Basis of Disability, 8 LOY. CHI. L.J. 814, 815 & n.6 (1977).
8. Critics of the policy of allowing class treatment of the handicapped argue that a "handicapped" person is not readily identifiable, and, even if he can be identified, he may be unable to perform in a given capacity specifically because of the characteristic defect. See notes 62-81 and accompanying text infra.
9. In the federal courts, a person will be "joined", or made a party to the action, if his presence as a party is necessary for just adjudication. FED. R. CIV. P. 19. Furthermore, provision is made for permissive joinder, by which a party may be joined if he asserts a right arising out of the same transaction and there is a common question of law or fact. Id. 20(a). However,
to employment discrimination. In initiating a class suit, it is suggested that the attorney first consider the remedial laws available to the handicapped employment discriminatee and then, if a choice exists, select the forum in which the procedural law is most conducive to such an action. This Comment will survey the remedies available to the discriminatee under federal and state law, discuss and compare the federal rule \(^{10}\) and state class action statutes, and examine the individual requirements of the rules, focusing on the special problems they may present in handicap employment discrimination cases.

**Remedial Law**

Although federal law is often preferred to state law, it does not always appear to be the best choice in handicap employment discrimination cases. In fact, federal law is out of the question where the prospective defendant is a private employer, for none of the Constitutional and statutory remedies available are directly applicable to employers who have no relevant connection with the government. Additionally, no private right of action has been established, explicitly or implicitly, under much of the federal remedial law. Unless Congress decides to include the handicapped under the auspices of Title VII of the Civil Rights Act of 1964,\(^{11}\) handicapped employment discriminatees will have only limited remedies under federal law.

The Constitution offers two potential sources of relief for the handicapped employment discriminatee, both requiring governmental action on the part of the defendant employer. The first, the equal protection clause,\(^{12}\) offers little solace to the handicapped client who complains of being denied equal employment opportunity, for there is no fundamental right to employment,\(^{13}\) and the handicapped have yet to qualify as a "suspect class."\(^{14}\) Therefore, the court's strictest

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10. FED. R. CIV. P. 23.
11. 42 U.S.C. §§ 2000e to 2000e-17 (1970 & Supp. V 1975). Title VII, as amended by the Equal Employment Opportunity Act of 1972, prohibits discrimination based on race, sex, color, religion or national origin by private as well as governmental employers. Id. § 2000e-2. Furthermore, a private suit may be filed by the aggrieved party after he receives a right to sue letter from the E.E.O.C. Id. § 2000e-5().
14. See Gurmankin v. Costanzo, 411 F. Supp. 982, 992 n.8 (E.D. Pa. 1976), aff'd, 556 F.2d 184 (3d Cir. 1977), where the court distinguished the handicapped from suspect classes because of the ability to justify the classification on grounds of the differing abilities of the handicapped and the non-handicapped. The essential features of a suspect class are that the members are "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection
standard of review, requiring the employer to justify his actions through a showing of compelling governmental interest in the conduct, cannot be invoked. Discriminatory conduct by the employer toward the handicapped is not likely to be found unconstitutional via the less stringent rational basis standard, for the court will not disturb a practice in which the employer appears to have a legitimate interest to which the plaintiff's handicap is reasonably related.\footnote{See, e.g., \textit{Spencer v. Toussaint}, 408 F. Supp. 1067, \textit{continued after stay} 425 F. Supp. 984 (E.D. Mich. 1976), in which plaintiff, who had a prior history of mental illness, brought suit under the equal protection clause because she was denied a position as a bus driver. The court found that the employer had a legitimate interest in safety and that the plaintiff's mental health was reasonably related to that interest. Under the minimum-rationality analysis, the state's classification was presumed constitutional. See \textit{McDonald v. Board of Election Comm'rs}, 394 U.S. 802, 809 (1969); \textit{Lindsley v. Natural Carbonic Gas Co.}, 220 U.S. 61, 78-79 (1911).}

Thus, an interest in safety or efficiency will provide a legitimate reason for the employer to exclude the handicapped.\footnote{See \textit{Spencer v. Toussaint}, 408 F. Supp. 1067, \textit{continued after stay} 425 F. Supp. 984 (E.D. Mich. 1976).}

Secondly, the employer's practices may be challenged under the due process clause.\footnote{U.S. CONST. amend. V, amend. XIV, § 2.} The handicapped employee may allege, for example, that he was fired without a proper hearing,\footnote{See \textit{Bevan v. New York State Teacher's Retirement Sys.}, 44 App. Div.2d 163, 355 N.Y.S.2d 185 (1974). \textit{Bevan} involved a tenured school teacher who became blind but was not allowed to return to work after completing a rehabilitation program. The court ordered reinstatement and backpay on the ground that a prior hearing was necessary before discharge. Traditional due process rights in respect to public employment were developed in \textit{Board of Regents v. Roth}, 408 U.S. 564 (1972).} or that the employer violated the plaintiff's due process rights by creating an irrebuttable presumption that the plaintiff is unable to perform.\footnote{See \textit{Gurmankin v. Costanzo}, 411 F. Supp. 982 (E.D. Pa. 1976), \textit{aff'd}, 556 F.2d 184 (3d Cir. 1977), in which the school district was found to have violated the blind plaintiff's due process rights by creating the irrebuttable presumption that all blind persons were unqualified to teach. See also \textit{Cleveland Bd. of Educ. v. LaFleur}, 414 U.S. 632 (1974) (teacher challenged mandatory maternity leave); \textit{Vlandis v. Kline}, 412 U.S. 441 (1973) (prior non-state resident challenged university out-of-state tuition policy) \textit{Stanley v. Illinois}, 405 U.S. 645 (1972) (unmarried father challenged state's statutory presumption of unfitness of all unmarried fathers to raise their children).} Yet, regardless of the challenge, some form of governmental action, state or federal, must be established in order to bring the employer within

from the majoritarian political process.” \textit{San Antonio Indep. School Dist. v. Rodriguez}, 411 U.S. 1, 28 (1973). A strong argument can be made for designating the handicapped as a suspect class. See, \textit{Burdorf, supra} note 7, at 905-08. Handicapped persons are obviously “saddled with disabilities,” and, at least as to the mentally handicapped, politically powerless. Furthermore, society often shuns the handicapped, resulting in stigmatization and unequal treatment in all walks of life. See also \textit{In re G.H.}, 218 N.W.2d 441, 447 (N.D. 1974) (court recognized plaintiff's physical handicap as an accident of birth to which the inherently suspect classification should be applied).
the scope of the Constitution's prohibitions; this has diluted the po-
tency of the remedy considerably.

Some statutory relief for handicapped employment discriminatees has been provided under the Rehabilitation Act of 1973.\textsuperscript{20} This Act is based on the social policy that handicapped persons should receive preferential treatment with respect to jobs which their disabilities do not prevent them from performing, since able-bodied persons may select from a broader range of employment opportunities.\textsuperscript{21} Yet, as is the case with Constitutional sources of relief, the Rehabilitation Act is limited in its scope. Section 501\textsuperscript{22} imposes a duty on executive agencies to establish and maintain affirmative action programs for the hiring of the handicapped, while Section 503\textsuperscript{23} places a similar affirmative obligation upon employers with a contractual relationship of more than $2500 with the federal government. In addition, the complaining applicant or employee in either of these situations is restricted to his administrative remedies, with judicial review permitted only upon their exhaustion.\textsuperscript{24} It has been held that an implied private right of action exists under Section 504,\textsuperscript{25} which prohibits dis-

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\item[21.] Wright, supra note 7, at 98.
\item[22.] 29 U.S.C. § 791(b) (Supp. V 1975) provides, in pertinent part, that:
Each department, agency, and instrumentality . . . in the executive branch shall . . . submit to the Civil Service Commission and to the [Interagency] Committee [on Handicapped Employees] an affirmative action program plan for the hiring, placement, and advancement of handicapped individuals in such department, agency or instrumentality. Such plan shall include a description of the extent to which and methods whereby the special needs of handicapped employees are being met. Such plan shall be updated annually, and shall be reviewed annually and approved by the Commission.
\item[23.] Id. § 793(a). Section 503 states that:
Any contract in excess of $2,500 entered into by any Federal department or agency for the procurement of personal property and nonpersonal services (including construction) for the United States shall contain a provision requiring that, in employing persons to carry out such contract the party contracting with the United States shall take affirmative action to employ and advance in employment qualified handicapped individuals . . . .
\item[25.] 29 U.S.C. § 794 (Supp. V 1975), stating that:
No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

The Seventh Circuit held that an implied private right of action exists under Section 504 in Lloyd v. Regional Transp. Auth., 548 F.2d 1277, 1284-88 (7th Cir. 1977), in which a class of mobility-handicapped persons brought an action to eliminate barriers to the handicapped on public transportation.
\end{enumerate}
\end{footnotesize}
crimination against the handicapped by recipients of federal financial assistance.\(^{26}\) Yet, once again, the requirement of a governmental nexus narrows the scope of this remedy.

State law, in many instances, offers greater protection for the rights of handicapped employment discriminatees. While some statutory provisions enacted in this area constitute mere statements of policy,\(^{27}\) many state laws are of substantial practical value.\(^{28}\) In Illinois, for

26. For purposes of Section 504, “recipient” means:
any state or its political subdivision, any instrumentality of a state or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance.

42 Fed. Reg. 22678 (1977) (to be codified in 45 C.F.R. \(\S\) 84.3(o)).

Also, “federal financial assistance” has been defined as:
any grant, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which the Department provides or otherwise makes available assistance in the form of
(1) funds;
(2) services of Federal personnel; or
(3) real and personal property or any interest in or use of such property.

Id. (to be codified in 45 C.F.R. \(\S\) 84.3(h)).

27. For example, every state has enacted a version of the White Cane Law, which states that it is the policy of the State to encourage disabled persons to become involved in the State’s social and economic life, but which is devoid of effective enforcement. Note, supra note 7, at 836 & nn.135 & 141 (1977). See, e.g., ALASKA STAT. \(\S\S\) 18.06.010-050 (1974); ILL. REV. STAT. ch. 23, \(\S\S\) 3361-66 (1975); N.C. GEN. STAT. \(\S\) 20-175.1 to .3 (1975).

28. In recent years state statutes have been enacted making employment discrimination against the handicapped a misdemeanor and/or providing for a fine and/or imprisonment. Commissions have been established to investigate complaints and prosecute offenders under civil rights, human rights, or fair employment practices acts. Often, the laws protect only the physically disabled. See, e.g., ALASKA STAT. \(\S\) 18.80.220(a)(1) (Cum. Supp. 1976); CAL. LAB. CODE \(\S\S\) 1410, 1412, 1413 (West Supp. 1978) (in addition to physical handicap, this statute covers “medical conditions” related to cancer and provides for class procedure within the administrative process (\(\S\) 1421.1)); D.C. CODE ENCY. \(\S\S\) 6-1502 to 1508 (West Supp. 1977); FLA. CONST. art. 1, \(\S\) 2 and FLA. STAT. ANN. \(\S\) 413.08 (West Supp. 1977); HAW. REV. STAT. \(\S\S\) 378-1 to 10 (1976); IOWA CODE ANN. \(\S\S\) 601A.1 to .17 (West 1975); KAN. STAT. \(\S\S\) 44-1002(j), 1009(a)(1) (Cum. Supp. 1976); NEV. REV. STAT. \(\S\S\) 613.310-430 (1975) (the aggrieved party is given the right to seek an injunction from the State’s district court after procedure through the commission); N.C. GEN. STAT. \(\S\) 128-15.3 (Cum. Supp. 1977) (applies to the state personnel system only and is devoid of enforcement); R.I. GEN. LAWS \(\S\) 28-5-2 (Cum. Supp. 1977); TEX. REV. CIV. STAT. ANN. art. 4419e, \(\S\S\) 1-8 (Vernon 1976) (a very weak statute “entitling” the blind and the physically handicapped to “public” employment); VT. STAT. ANN. tit. 21, \(\S\) 497 (Supp. 1977) (the aggrieved party is given a private right of action for injunction or damages (\(\S\) 498(a))); VA. CODE \(\S\) 40.1-28.7 (1976) (the aggrieved party is given a private right of action for an injunction which must be exercised within 90 days of the alleged discrimination); W. VA. CODE \(\S\) 5-11-1 to 10 (Cum. Supp. 1976) (protects blind discriminatees only).

Many other states provide protection for the mentally handicapped as well as the physically handicapped. See, e.g., ILL. REV. STAT. ch. 38, \(\S\S\) 65-21 to 31 (1975) (private right of action for damages or injunction or declaratory relief) and ILL. REV. STAT. ch. 48, \(\S\S\) 851-905 (1975); IND.
example, the Fair Employment Practices Act (FEPA) applies to all public employers and to those private employers who employ the requisite number of persons for a given amount of time. The FEPA includes discrimination against the individual with a “physical or mental handicap unrelated to ability” within the scope of unfair employment practices. An even better source of relief exists in the Illinois Equal Opportunities for the Handicapped Act (EOHA). Although promulgated as a criminal statute, the EOHA provides for a private right of action for damages or for “any order granting him


29. ILL. REV. STAT. ch. 48, §§ 851-905 (1975) [hereinafter referred to as FEPA].
30. Id. § 852(d) (Supp. 1976), where employer is defined to include:
   (i) any person . . . employing 50 or more persons within the State within each of 20 or more calendar weeks within the current or preceding calendar year prior to July 1, 1968, beginning July 1, 1968, any person employing 25 or more persons during 20 or more calendar weeks within any calendar year, and beginning January 1, 1976, any person employing 15 or more persons during 20 or more calendar weeks within any calendar year; (ii) the State and any political subdivision, municipal corporation or other governmental unit or agency thereof, without regard to the number of employees. The term 'employer' does not include any religious corporation, association, educational institution or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation . . . of its activities.
31. Id. § 853(a).
32. ILL. REV. STAT. ch. 38, §§ 65-21 to 31 (1975) [hereinafter referred to as the EOHA].
   The statute provides that it is an unlawful employment practice for an employer:
   to refuse to hire, to discharge, or otherwise discriminate against any individual with respect to his terms, conditions or privileges of employment, otherwise lawful, because of such individual's physical or mental handicap, unless it can be shown that the particular handicap prevents the performance of the employment involved. . . .
   Id. § 65-23(1).
33. Id. § 65-28 which states that "[a]ny person who commits a discriminatory employment practice . . . is guilty of a class C misdemeanor."
employment, or for any other relief which the court may allow." 34 Furthermore, the action may be brought against any employer who has behaved discriminatoarily. 35 Retaliatory measures taken by the employer because of the employee's exercise of his rights under the Act also are prohibited. 36 Because of such laws, representatives of handicapped employment discriminatees should give serious consideration to bringing an action based on state rather than federal law.

PROCEDURAL LAW

Differences in Federal and state procedure, in addition to Federal and state substantive law, have a major impact on choice of forum, particularly if the case possesses class characteristics. In spite of its complexities, a class action suit offers a very convenient means of litigation for the court, the plaintiffs, and the defendants. 37 Such a suit frees the court from the burden of repetitious adjudication of identical actions. In addition, a class action suit permits injured parties to spread the cost of expensive litigation over a greater number of persons and affords the defendant the opportunity to avoid multiple litigation and the accompanying imposition of multiple and varying standards. 38 Nevertheless, the binding effect of the judgment rendered in a class suit requires the courts to balance the convenience factor against the need to protect the absent parties. This balancing process is evident in class action statutes themselves, especially Federal Rule 23, 39 in which efforts have been made to ensure proper representation of, and notification to, all prospective class members. The way in which a particular jurisdiction satisfies this due process requirement is likely to be a decisive factor in the determination of

34. Id. § 65-29.
35. Id. § 65-22, defining “employer” as “a person or governmental unit or officer in this State having in his or its employ one or more individuals; and any person acting in the interest of an employer, directly or indirectly.”
36. Id. § 65-25, providing that:

It is an unlawful employment practice for any employer or labor organization to discharge, expel or otherwise discriminate against any person because such person opposed any unlawful employment practice specified in this Act or has filed a charge, testified, participated or assisted in any proceeding arising from this Act.
37. See, e.g., Z. CHAFFEE, SOME PROBLEMS OF EQUITY 280 (1950).
39. FED. R. CIV. P. 23, which states, in pertinent part:

(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.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that
   (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and
Before certification to proceed as a class will be granted in a federal court, section (a) of Federal Rule 23 requires that four prerequisites must be met: (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 or defenses of the class; and (4) the representative parties must fairly and adequately protect the interests of the class. The first two requirements—those of numerosity and commonality—apply to the class itself, while the latter two—typicality and representativity—are applicable to the named plaintiff(s) seeking to represent the entire class. Of the four, the numerosity requirement is least likely to create a class certification problem, since the standard is one of impracticability, not impossibility, of joinder of the parties. The courts do not apply a strict numerical test in determining whether the proposed class consists of an adequate number of members. Rather, they examine the surrounding circumstances of the case at hand, including the geographical locations of the plaintiffs, the size of the individual claims, the type of relief required, and the ability and likelihood of individual members bringing individual lawsuits.

Difficulties are more likely to occur with respect to the requirement that common issues of law or fact exist among all class members who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought . . . 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.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: . . . (2) requiring . . . that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; . . .


41. See C. WRIGHT, supra note 1, at 346-47 & nn.17 & 18; Forde, supra note 40, at 122. Connolly, supra note 40, at 184, observes that cases indicate that the lower benchmark of an insufficient number is about 25. See also Roman v. ESB, Inc., 550 F.2d 1343, 1348-49 (4th Cir. 1976) (53 persons insufficient to form class); Hill v. American Airlines, Inc., 479 F.2d 1057, 1059 (5th Cir. 1973) (six insufficient); DeMarco v. Edens, 390 F.2d 836, 845 (2d Cir. 1968) (16 insufficient); Cypress v. Newport News Gen. & Nonsectarian Hosp. Ass’n, 375 F.2d 648, 653
members. For instance, it is unclear whether a court will find commonality where class members suffer from different handicaps or from various degrees of the same handicap, where some are applicants and others are current or former employees, or where the jobs held or desired are not the same. However, a common factual issue will arise where the defendant allegedly acted on grounds generally applicable to the class, as required for maintenance of the action under 23(b)(2). So, for example, if plaintiff employees and/or applicants allege a pattern of discriminatory conduct toward the class by the defendant employer, the commonality requirement of 23(a)(2) is automatically satisfied regardless of the individual circumstances of each member.

The commonality requirement may also be met by pleading that there is a common question of law, as where a statute covers an entire class of persons who wish to challenge its validity or its interpretation. While factual situations pertaining to the application of the law may vary among class members, the law itself remains a common issue.

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42. Fed. R. Civ. P. 23(b)(2) (certification of class possible if opponent has acted or refused to act on grounds generally applicable to the class).

43. See, e.g., Harriss v. Pan Am. World Airways, Inc., 74 F.R.D. 24, 41 (N.D. Cal. 1977), where the court recognized that Title VII cases, involving employment discrimination based on race or sex, normally falling within 23(b)(2), are likely to meet the common question requirement if they meet the (b)(2) test. That court stated that "a demonstration with some specificity (i.e. more than the mere conclusory claim of racial or sex-based discrimination) and their common application to a defined class should substantially satisfy the commonality requirement in Title VII cases." Id. at 41.

44. The majority of the decisions regarding common questions have held that the presence of individual questions will not prevent satisfaction of 23(a)(2). 1 H. Newberg, supra note 1, at 183. See, e.g., Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969) (racial discrimination in employment); City of New York v. C.M.C., 60 F.R.D. 393 (S.D.N.Y. 1973) (antitrust); Kohn v. Royall, Koegel & Wells, 59 F.R.D. 515 (S.D.N.Y. 1973) (sex discrimination in employment); Gesicki v. Oswald, 336 F. Supp. 371 (S.D.N.Y. 1971), aff'd mem., 406 U.S. 913 (1972) (criminal justice); Joseph v. Norman's Health Club, Inc., 336 F. Supp. 307 (E.D. Mo. 1971) (consumer credit). But see Ward v. Luttrell, 292 F. Supp. 165 (E.D. La. 1968). Ward involved a challenge to state labor laws in which the court recognized a common question of law but refused to allow class procedure because it could conceive of no common questions of fact. The court's restraint might be explained by the fact that the class sought to be certified was very, very broad—all female workers in the state.

45. See, e.g., Like v. Carter, 448 F.2d 798 (8th Cir. 1971), in which a class action was filed on behalf of eligible welfare recipients who wished to have their applications processed within a certain time period. Even though the factual situations regarding the processing delay varied from recipient to recipient, a common question of law was found sufficient to meet the 23(a)(2) requirement.

Harriss v. Pan Am. World Airways, Inc., 74 F.R.D. 24, 54-58 (N.D. Cal. 1977). Harriss involved seven Title VII race and sex discrimination cases in which the certification of classes
Normally, a plaintiff has no problem meeting the typicality requirement if the other requirements have been satisfied. Some courts prefer to ignore this prerequisite,\textsuperscript{46} while others use it to reinforce adequacy of representation,\textsuperscript{47} or treat it as an aspect of commonality.\textsuperscript{48} The Tenth Circuit, on the other hand, has given typicality its own independent meaning, requiring a demonstration that other similar claims do in fact exist.\textsuperscript{49} However, it is usually sufficient to allege that like, not necessarily identical, claims would be made by prospective, though unknown, members of the class, and satisfaction of the commonality and representivity requirements will generally guarantee that the claim is typical.

As to the final requirement of 23(a), the named plaintiff will be deemed an adequate representative of the prospective class if (1) his interests do not conflict with those of the class,\textsuperscript{50} (2) his attorney is

\begin{itemize}
  \item was sought after the cases were consolidated. Two actions involved proposed classes which included groups of employees with varying terms and conditions of employment, different status and different locations. Therefore, the court refused to certify them.
  \item See, e.g., Jones v. United Gas Improvement 68 F.R.D. 1, 21 (E.D. Pa. 1975) (racial discrimination in employment case in which typicality was automatically satisfied because commonality was satisfied); Thompson v. T.F.I. Co., 64 F.R.D. 140, 146-49 (N.D. Ill. 1974) (anti-trust case in which court found numerosity, commonality, and representivity satisfied, but failed to even mention the typicality requirement).
  \item Hansberry v. Lee, 311 U.S. 32, 41 (1940); Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 562-63 (2d Cir. 1968), \textit{vacated and remanded on other grounds}, 417 U.S. 156 (1974); Harriss v. Pan Am. World Airways, Inc., 74 F.R.D. 24, 41 (N.D. Cal. 1977). This criterion covers the aspect of collusiveness, where the potential representative is bringing the suit in collaboration
qualified to present the claims of the class,51 and (3) the representation is zealous.52 The fact that the named plaintiff’s own claims are dismissed or become moot, or that the defendant seemingly mends his ways will not necessarily operate to destroy the adequacy of the representation.53

Once the 23(a) prerequisites are satisfied, the court must determine under which, if any, of the three categories of 23(b) the action is to

with the defendant, but, more importantly in relation to employment discrimination, it covers the situation in which the representative’s interests are antagonistic to those of the class. See, e.g., Air Line Stewards and Stewardesses Ass’n Local 550 v. American Airlines, 490 F.2d 636, 642 (7th Cir. 1973) (union cabin attendants not adequate representatives of former stewardesses who wished to be reinstated); American Fin. Sys., Inc. v. Harlow, 65 F.R.D. 94 (D. Md. 1974) (immediate distribution of funds from trust to former employee, the class representative, would diminish the total assets); Lynch v. Sperry Rand Corp., 62 F.R.D. 78 (S.D.N.Y. 1973) (union not adequate representative of union members where it might be directly liable to those it sought to represent); See also C. WRIGHT, supra note 1, at 347-48 (conflict of interests in stockholder and taxpayer suits).


52. “[T]he representative parties must show they will put up a ‘real fight.’” Forde, supra note 40, at 127. See, e.g., Free World Foreign Cars, Inc. v. Alla Romeo, Inc., 55 F.R.D. 26, 29 (S.D.N.Y. 1972) (suit by auto franchisees, in which adequate representation was said to consist of adequate legal representation, common interests, and no present or potential conflict); Hyatt v. United Aircraft Corp., 50 F.R.D. 242, 245 (D. Conn. 1970) (plaintiff unfamiliar with defendant’s practices since he had not been employed by defendant for years and was not an adequate representative); Feder v. Harrington, 52 F.R.D. 178, 183 (S.D.N.Y. 1970) (stockholders’ suit in which court stated that it must be assured that the representative will vigorously pursue the rights of the class through qualified counsel).

be maintained. If individual adjudications would adversely affect either the rights of absent class members or of the opponents of the class, the action qualifies under 23(b)(1). The purpose of this section is to prevent multiplicity of lawsuits concerning the same subject matter. It has been utilized, for example, in suits by taxpayers challenging a public expenditure as well as by persons who have been overcharged by a public utility. If the opponent has behaved in a manner generally applicable to an entire class, making injunctive or declaratory relief appropriate as to the whole class, a class action is maintainable under 23(b)(2). This is the category under which employment discrimination suits, based on Title VII, have been maintained. Finally, if common questions of law or fact predominate over individual claims and the class action is superior to other methods of adjudication, a class action may be maintained under 23(b)(3), the most complicated of the three sections. Most of these actions involve antitrust or securities law.

The court’s determination of which 23(b) category, if any, is appropriate will have significant consequences. Because of its use in Title VII employment discrimination cases, 23(b)(2) seems to be the most appropriate category under which to litigate handicapped employment discrimination actions. Maintenance of such suits under 23(b)(2) also avoids the problems which arise under 23(b)(3). The rule requires that “the best notice practicable under the circumstances” be given to each member of a (b)(3) class. The expense of such notice may be prohibitive, thus preventing the representative from continuing the action on behalf of the class. Notice, however, is discretionary with the court as to (b)(2) classes. A corollary to the notice rule is that all members of (b)(2) classes will be bound by the outcome of the case, while judgment rendered in a (b)(3) action will bind only those who do not request exclusion by “opting out” of the class upon receipt of notice of the suit.

54. FED. R. CIV. P. 23(b).
58. FED. R. CIV. P. 23(c)(2).
59. FED. R. CIV. P. 23(d)(2).
60. FED. R. CIV. P. 23(c)(3).
61. FED. R. CIV. P. 23(c)(2)(B).
The complexities of Federal Rule 23 pose various problems for the prospective class representative. These problems may be magnified in the case of the handicapped individual alleging employment discrimination, primarily as a function of the commonality requirement of 23(a)(2) and the commonality aspects of 23(b)(2) and 23(b)(3).

The anticipation of a commonality problem is likely to have precluded the filing and the certification of many actions that might have been successfully resolved on behalf of a class of handicapped employment discriminatees. Anxiety arises from the existence of a wide variety of handicaps and the differing degrees of mental and physical disabilities, as well as the fact that a handicap may affect one's ability to do a particular job. Critics of the policy of allowing class treatment of the handicapped argue that, unlike race and sex, a “handicapped” person is not readily identifiable, and, even if he can be identified, he may be unable to perform in a given capacity specifically because of the characteristic defect. It is argued that because each handicapped individual is unique, the individual circumstances will always prevail over any claim of common discriminatory treatment. As a result, the handicapped are not susceptible to classification for purposes of employment discrimination lawsuits. Although logical enough on its face, such an argument is not a sufficient reason to totally dismiss the concept of the handicapped as an aggrieved class.

Perhaps if attorneys and courts were to adopt a uniform definition of the word “handicapped,” much of the uncertainty surrounding the commonality requirement could be dispelled. The words “handicapped” and “disabled” have been given a variety of meanings, with a

62. Practitioners as well as courts have had a tendency to avoid presentation and resolution of even the simplest class action problems. For example, a great deal of “buck-passing” has occurred in Gurmankin v. Costanzo, 411 F. Supp. 982 (E.D. Pa. 1976), aff’d, 556 F.2d 184 (3d Cir. 1977). See note 142 infra. The district court did not decide the class question, and, after affirming the district court’s decision in favor of the named plaintiff, the appellate court remanded the case to the lower court for a ruling on the class certification motion. As of this writing, that motion has yet to be ruled upon.

63. See, e.g., Wright, supra note 7, at 93, 98 n.108, 101-02 (handicaps are inherently unsuitable for class treatment). But see Burgdorf, supra note 7, at 858 & n.21, where the author argues that the handicapped can properly be treated as a class, in spite of dissimilar conditions among the members of the class, because they do share the same fate as a result of being labeled as handicapped.

64. See Wright, supra note 7, at 102.
trend toward broad definition. For example, the Rehabilitation Act of 1973 defines "handicapped individual" as:

Any person who (A) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (B) has a record of such an impairment, or (C) is regarded as having such an impairment.

Under this broad definition, persons suffering from conditions such as hypertension and diseases such as cancer are included under the same heading as the blind, the paraplegic, and the deaf. Furthermore, the latest HEW Regulations accompanying Section 504 of the Rehabilitation Act provide for the inclusion of persons with virtually all types of physical or mental disorder.

At the state level, although there is a trend toward inclusion of persons with physical and mental handicaps under the protection of the laws, only a few states provide fairly clear and detailed statutory definitions. The Illinois Fair Employment Practices Act, for example,
ple, refers repeatedly to a “physical or mental handicap unrelated to ability,” but never actually defines “handicap.” 73 The commission’s guidelines provide only that the Act covers “any handicap which, with reasonable accommodation, does not prevent performance of the essential functions of the job in question.” 74 The same vagueness and circularity is evident in the Illinois Equal Opportunities for the Handicapped Act, where “physical or mental handicap” is determined to be:

a handicap unrelated to one’s ability to perform jobs or positions available to him for hire or promotion. . . . It does not constitute

cause of amputation or loss of function or coordination, or any other health impairment which requires special education or related services.” “Medical condition” is defined as “any health impairment related to or associated with a diagnosis of cancer, for which a person has been rehabilitated or cured, based on competent medical evidence.” Id. § 1413(i).

The District of Columbia defines “blind” person as one who is “totally blind, [or] has impaired vision of not more than 20/200 visual acuity.” D.C. CODE ENCY. § 6-1508(1) (West Supp. 1977). “Otherwise physically disabled” is defined as “a medically determinable physical impairment . . . which interferes with ability to move about, to assist himself, or to engage in an occupation.” Id. § 1508(2).

Under Ohio law, “handicap” is defined as

a medically diagnosable, abnormal condition which is expected to continue for a considerable length of time, whether correctable or uncorrectable by good medical practice, which can reasonably be expected to limit the person’s functional ability, including but not limited to seeing, hearing, thinking, ambulating, climbing, descending, lifting, grasping, sitting, rising, any related function, or any limitation due to weakness and significantly decreased endurance, so that he cannot perform his everyday routine living and working without significantly increased hardship and vulnerability to what are considered the everyday obstacles and hazards encountered by the non-handicapped.

OHIO REV. CODE ANN. § 4112.01(M) (Page Supp. 1977). Rhode Island law also provides a detailed definition of physical handicap:

any physical disability, (infirmity), malformation or disfigurement which is caused by bodily injury, birth defect or illness, including epilepsy, and which shall include, but not be limited to, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a seeing eye dog, wheelchair, or other remedial appliance or device.


73. ILL. REV. STAT. ch. 48, §§ 851-905 (1975). The act states:

Whereas denial of equal employment opportunity because of . . . physical or mental handicap unrelated to ability . . . deprives a portion of the population . . . of earnings . . . it is declared to be the public policy of this State that . . . equal employment opportunity or apprenticeship opportunity without discrimination because of . . . physical or mental handicap unrelated to ability . . . should be protected by State law.

Id. § 851 (Supp. 1976). The phrase is also used in sections 853(a), (b), and (c) enumerating the unfair employment practices.

74. Illinois Fair Empl. Prac. Comm’n, Guidelines on Discrimination in Employment Based Upon Physical or Mental Handicap Unrelated to Ability § 3.2(c) (1976).
evidence of 'one's ability to perform jobs or positions available to
him for hire or promotion' . . . that a person . . . in need of mental
treatment as defined by the Mental Health Code of 1967 . . . or
that the person . . . is alleged to have undergone mental treatment
or evaluation. 75

Although guidance is lacking at the state level as to the definition of
"handicapped," the standards which have been promulgated allow for
the same breadth as in federal statutory definitions. 76 Some states,
however, provide only for the "physically disabled," 77 thereby leav-
ing the mentally handicapped unprotected.

Non-statutory definitions may also provide insight into who quali-
fies as handicapped. For example, one commentator defines a hand-
icapped person as one

who is afflicted with a mental, physical, or emotional disability or
impairment which makes achievement unusually difficult . . . .
Physical, mental, or emotional disabilities qualify as handicaps
only if they hinder achievement. [And,] . . . the hindrance must
be substantial; a slight inconsequential disability is not a handicap.
[Also,] . . . a person truly qualifies as handicapped only when he
or she is so labeled by others. 78

Courts which have no exact statutory definition to guide them are
likely to consider all definitions offered to them by the attorneys. It is
therefore wise to become familiar with definitions from non-legal
sources as well as those provided by legislation and case law. Careful
study and preparation are extremely important, for the tendency to-
ward broad definition may create a fear in the courts of binding too
many persons with one judgment. An absent party who might require
unique relief would have to settle for general class relief. At the other
end of the spectrum, courts fear involvement in the complicated task
of designing a plan of relief which would conform to individual needs,
should general relief appear to be inadequate for the class as cer-
tified. 79

76. A statute which is vague simply leaves the task of defining "handicapped" up to the
courts. So, instead of having the legislature enumerate all of the conditions which fall into the
category, the court is permitted to examine other definitions, the case law, and the facts of the
case in order to determine whether or not the particular plaintiff is handicapped. See Chicago,
Milw., St. P. & Pac. R.R. v. State Dep't. of Ind., Lab. & Hum. Rel., 62 Wis. 2d 392, 215
N.W.2d 443 (1974) (court looked to legislative policy and other definitions in arriving at the
decision that the plaintiff, who had suffered from asthma in the past, was "handicapped" within
meaning of state law).
77. See note 28 supra.
78. Burgdorf, supra note 7, at 857.
79. Such a plan was devised by the court in Wyatt v. Stickney, 344 F. Supp. 373 (N.D. Ala.
Depending on the definition, a single class of handicapped employment discriminatees may consist of non-handicapped persons whom the employer has perceived and treated as handicapped (for example, so-called "ugly" individuals), currently handicapped persons who are not labeled as such, persons who were at one time burdened with an affliction which has since disappeared, and persons who are currently afflicted with a condition, disease, or traditional handicap of which the employer is aware. The definition problem is further complicated by the requirement that the handicapped complainant must have been able to perform a particular job at the time of the alleged discrimination. How, argue the skeptics, can it be said that an employer has discriminated against handicapped persons as a class, when the determination involves an evaluation of each individual situation? Yet, it is precisely this wholesale rejection of the handicapped by employers, refusing to evaluate them on the basis of reasonable and relevant criteria, that creates the pattern of discrimination which automatically satisfies the commonality requirement!

State Class Action Statutes

Because state law may provide a better source of relief for handicapped employment discriminatees, and because of certain jurisdictional restrictions and notice requirements in the federal courts, attention should be focused upon the state law governing class action procedure. Although they vary from state to state, legislative enactments on the subject traditionally have been placed into one of three categories: (1) those which are patterned after the 1849 Amend-


81. Statutes generally express that the handicapped individual must also have been "qualified" for the particular job, or that the handicap did not "affect ability." The meaning of "qualified" opens up a whole new problematic area. See, e.g., 41 C.F.R. § 60-741.2 (1976) (regulations for § 503 of the Rehabilitation Act), which defines "qualified handicapped individual" as one "who is capable of performing a particular job, with reasonable accommodation to his or her handicap."

82. See text accompanying notes 27-36 supra. The plaintiff may have a private right of action and/or a claim against a private employer under certain state laws.

83. In actions which require the $10,000 jurisdictional amount, claims may not be aggregated, but each class member must have at least that large of a claim. Zahn v. Int'l Paper Co., 414 U.S. 291 (1973).

84. Where notice is required by the rule or by the court, it must be given to all identifiable class members, plaintiff bearing the burden. Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).

85. Note, supra note 38, at 93; 1 H. NEWBERG, supra note 1, at 304.
ment of the Field Code of New York;\textsuperscript{86} (2) those which follow Federal Rule 23, prior to its 1966 amendment;\textsuperscript{87} and (3) those which closely resemble the present federal rule.\textsuperscript{88} A possible fourth category may be represented by Illinois' new class action statute.\textsuperscript{89}

Regardless of the category into which a statute falls, the rule itself is not the sole determinant of whether state law is conducive to maintenance of a handicapped class action. Rather, the state's view of what constitutes commonality is likely to be decisive, for under some state laws, the existence of varying individual circumstances will preclude a finding that the common issue requirement is met. This may create problems in the maintenance of class actions by the handicapped, since such individuals are often unique in certain respects.

The original class action statutes, those patterned after the Field Code,\textsuperscript{90} require that parties be numerous and that they be adequately represented by parties who share a "common or general interest." Since the language is both broad and vague, judicial policy, rather than the statutes themselves, determines whether or not a

\textsuperscript{86} The 1849 Amendment states:

\begin{quote}
[\textit{when the question is one of a common or general interest of many persons, or when the parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole.}\textsuperscript{\textcopyright{1849}}.
\end{quote}


\textsuperscript{87} The statute read as follows:

\begin{quote}
(a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.
\end{quote}


\textsuperscript{89} Ill. Ann. Stat. ch. 110, §§ 57.2 to 57.7 (Smith-Hurd Supp. 1978). See text accompanying note 113 infra.

\textsuperscript{90} See note 86 supra.
class action will be permitted.\textsuperscript{91} Thus, it is no wonder that the meaning of "common or general interest" varies from jurisdiction to jurisdiction. The court may require that a community of interest lie in a specific fund or property,\textsuperscript{92} an interpretation which is detrimental to handicapped employment discriminatees seeking class certification. Instead of this "common fund" concept, the "unity of interest" standard may be applied,\textsuperscript{93} producing an equally harsh result for handicapped class applicants. Under this standard, class action may be disallowed if separate persons have suffered separate wrongs, even though the wrongful acts were committed by similar means and pursuant to a single plan.\textsuperscript{94} Thus, an employer may justify his conduct under the unity of interest standard by claiming that a particular class member was rejected for particular reasons, that he applied for a particular job, or that he had a unique handicap, any of which might defeat the plaintiff's assertion of commonality.

Nevertheless, at least one Field Code state has been progressive in its interpretation of the statute. California law requires a clearly ascertainable class and a strong community of interest in order for the action to proceed.\textsuperscript{95} However, "where one of these elements is exceedingly strong, the other may be inferred."\textsuperscript{96} Community of interest need not be represented by a common fund or other property. Rather, there must be common questions of law or fact and those questions must be of sufficient impact as to make a class action more equitable to the parties than a series of individual suits would be. Although the California statute is based on the Field Code, the federal rule appears to have been judicially adopted\textsuperscript{97} and a policy of

\textsuperscript{91.} Note, supra note 38, at 96.
\textsuperscript{92.} See, e.g., Lile v. Kefauver, 244 Ky. 486, 492, 51 S.W. 2d 473, 475 (1932) (court held presence of common questions of fact and law insufficient in absence of common fund).
\textsuperscript{94.} Society Milion Athena, Inc., v. Nat'l Bank of Greece, 281 N.Y. 282, 292-93, 22 N.E.2d 584, 587, 590 (1939). See Hall v. Coburn Corp. of Am. 26 N.Y.2d 396, 400, 259 N.E.2d 720, 721, 311 N.Y.S.2d 281, 282-83 (1970) (where purchasers sued merchants for violation of New York Retail Installment Sales Act, there was no unity of interest since the wrongs were separate); Gaynor v. Rockefeller, 15 N.Y.2d 129-30, 256 N.Y.S.2d 584, 590 (1965) (separate wrongs led to a finding of no unity of interest where blacks alleged discrimination by construction unions). But see Richards v. Kaskel, 32 N.Y.2d 524, 535-36, 300 N.E.2d 388, 393-94, 347 N.Y.S.2d 1, 8-9 (1973) (unity of interest was found where tenants who refused to purchase co-operative interests in the building brought action against the landlord).
\textsuperscript{96.} Id. at 211-12.
\textsuperscript{97.} See Daar v. Yellow Cab Co., 67 Cal.2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967).
looking to Rule 23 for guidance is evident in the opinions of the courts of that state. As a result, states like California, which interpret the antiquated Field Code law in light of modern circumstances, are less likely to present insurmountable barriers to the qualification of classes of handicapped employment discriminatees than those which continue to read the rule restrictively.

State statutes which are similar to the original Rule 23 require numerous parties, adequate representation, and a community of interest, which must fall into one of three categories, commonly designated as true, hybrid, or spurious class actions. Though often criticized, the "spurious" class seems to be the most appropriate for handicapped employment discriminatees, for the right sought to be enforced must be several, a common question of law or fact must exist, and common relief must be sought. In actuality, however, the spurious class action merely constitutes permissive joinder, the judgment being res judicata only as to the named parties and those who intervene. Therefore, this type of action does not serve the intended purpose of the class action—to eliminate the possibility of multiple lawsuits regarding the same violation. Yet, because the effect of the judgment is less drastic than under other types of statutes, courts applying this statutory model are likely to be more receptive to the argument that a general discriminatory policy toward the handicapped is sufficient to meet the commonality requirement.

98. See, e.g., La Sala v. American Sav. & Loan Ass'n, 5 Cal.3d 864, 489 P.2d 1113, 97 Cal. Rptr. 849 (1973); Vasquez v. Superior Court, 4 Cal.3d 858, 484 P.2d 964, 94 Cal. Rptr. 796 (1971).

99. See note 87 supra.

100. FED. R. CIV. P. 23(a)(1), 28 U.S.C. app., at 6101 (1964). A true class action exists "when the character of relief sought is joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it." Id.

101. FED. R. CIV. P. 23(a)(2), 28 U.S.C. app., at 6101 (1964). A hybrid class exists when the character of relief sought is "several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action." Id.


103. See, e.g., Wright, supra note 1, at 349; Note, supra note 38, at 107. Criticisms include the argument that the spurious action is merely a permissive joinder device and that it has no binding effect on absent class members.


105. See Note, supra note 38, at 107-08.

106. Where the defendant's practices constituted a single discriminatory plan which damaged the entire class in the same manner, commonality has been found even though individual transactions occurred and amounts of individual recovery varied. See, e.g., Kainz v. Anheuser-Busch, Inc., 194 F.2d 737, 743 (7th Cir.), cert. denied, 344 U.S. 820 (1952) (suit by retail liquor dealers against brewery, involving different times, prices and quantities); Riter v. Keokuk Electro-Metals Co., 248 Iowa 710, 82 N.W.2d 151 (1957) (property owners with individual claims of damage sued a company whose activities polluted the air).
Just as California courts have followed the present federal rule in interpreting the Field Code type statute, Pennsylvania has judicially adopted the modern Rule 23, although the state's statute is patterned after the old federal rule. This is significant because of the important legal battles that have been fought on behalf of classes of handicapped persons in the state of Pennsylvania.

Where the modern Federal Rule 23 has been adopted by the state legislature, the practitioner is still subject to the rule's disadvantages, including three different categories under which the class may be maintained and the possibility of mandatory notice to absent members, should the class fall into the third category. Also, although this type of statute provides more definite guidelines than its predecessors, it provides less room for judicial creativity on a case by case basis. Yet, as to the commonality requirement, it is certainly more liberal than the other statutes, barring a strict judicial construction. Because of the "pattern of discrimination" line of reasoning widely accepted in Title VII employment discrimination cases, courts adhering to the modern rule are likely to certify a class of handicapped employment discriminatees regardless of differing individual circumstances.

Finally, Illinois' recent codification of class action procedure offers an example of how class action statutes can be improved. The statute states, in pertinent part:

(a) An action may be maintained as a class action in any court of this State and a party may sue or be sued as a representative party of the class only if the court finds:

1. The class is so numerous that the joinder of all members is impracticable.
2. There are questions of fact or law common to the class, which common questions predominate over any questions affecting only individual members.

107. See text accompanying notes 95-98 supra.
109. See Pa. R. Civ. P. 2230. The rule, which became effective in 1941, excluded any mention of the three class categories, but the courts still incorporated them. 1 H. NEWBERG, supra note 1, at 354. See, e.g., Charles v. Crestview Prop., Inc., 15 D&C2d 568 (C.P. Daugh. 1957).
111. See note 58 and accompanying text supra.
112. See text accompanying notes 145-49 infra.
(3) The representative parties will fairly and adequately protect the interest of the class.
(4) The class action is an appropriate method for the fair and efficient adjudication of the controversy.

* * *

Notice in Class Actions. Upon a determination that an action may be maintained as a class action . . . the court in its discretion may order such notice that it deems necessary to protect the interests of the class and the parties.

* * *

Judgments in Class Actions. Any judgment entered in a class action . . . shall be binding on all class members . . . except those who have been properly excluded from the class.\(^\text{113}\)

Although patterned after the federal rule, the Illinois statute is advantageously dissimilar in certain respects, most notably in that notice to absent class members is discretionary with the court under all circumstances.\(^\text{114}\) Therefore, no extra financial burden is automatically placed on the plaintiff as in 23(b)(3) actions, even though all Illinois class actions are theoretically “(b)(3)s,” with the opportunity to “opt out” always available. Additionally, because all actions are “(b)(3)s,” there will not be a problem with the requirement that the common issue must \textit{always} predominate over individual issues.\(^\text{115}\) The handicapped will argue that their common bond is the employer’s discriminatory policy which is conduct which overshadows the existence of varying individual fact patterns. Thus, it is no more difficult to show commonality under the Illinois statute than it is under 23(b)(2) of the federal statute. Lastly, Illinois’ rule is advantageous in that it requires only that the class action device be an appropriate procedure of disposal, not that it be superior to all other procedures as required by the federal rule.\(^\text{116}\)

In summary, when considering the initiation of a class action on behalf of handicapped employment discriminatees, it is important to examine the state’s class action law in conjunction with its remedial statutes, instead of jumping immediately into federal court. The model which the statute follows and its case law interpretation will

\(^{113}\) Ill. Ann. Stat. ch. 110, § 57.2, 4, 6 (Smith-Hurd Supp. 1978) (emphasis added). The codification of class procedure does not appear to have created any vast alterations in the courts’ traditional approach, but it has clarified the rules. The standards applied remain basically the same as those applied by the federal courts. An excellent treatment of Illinois class action law is provided in Steinberg v. Chicago Medical School, No. 48943 (Ill. S. Ct., opinion filed Nov. term, 1977); Forde, supra note 40; Forde, \textit{Class Actions in Illinois: Toward a More Attractive Forum for This Essential Remedy}, 26 \textit{DePaul L. Rev.} 211 (1977).


\(^{115}\) Id. § 57.2(a)(2).

\(^{116}\) Id. § 57.2(a)(4).
provide insight into its advantages and disadvantages in comparison to federal law. At the very least, the state law will be preferable because it lacks the problematic federal jurisdictional and notice requirements. Therefore, if the state court has tended to conform with modern trends in certifying classes of employment discriminatees and/or classes of handicapped persons regardless of the statutory format, and if it has not been inclined to deny certification because of the existence of individual fact patterns, the state forum is likely to be the better of the two. This is especially true where a private right of action against both public and private employers is assured by statute.

The practitioner's pessimism surrounding the initiation of class actions on behalf of handicapped employment discriminatees can be eliminated with the realization that, regardless of the type of handicap or the type of position involved, each member has one very important element in common: the employer's policy of not hiring or promoting handicapped individuals in spite of their ability to perform. Once this common issue has been established, the class may be defined in terms of the employer's conduct, and the existence of individual circumstances will not bar certification of the class. The simplest situation arises where the discriminatory policy appears in writing, verbally expressed to the present or prospective employee, or is otherwise visible to agencies and courts. Certification of a class is further facilitated if the policy applies to only one type of job, such as teaching, and only to those persons with a specific handicap. However, even where the policy is camouflaged and is applied to all handicapped persons who apply for any position or attempt to advance, the class action, though certain to involve complications, may still be an effective procedural device.

117. See note 83 supra.
118. See note 84 supra.
119. See text accompanying notes 27-35 supra.
120. See Burgdorf, supra note 7, at 858 n.21, where the author acknowledges the propriety of treating "handicapped persons" as a single class for purposes of legal analysis, even though the underlying physical, mental, or emotional handicapping conditions of individuals included in that grouping may be quite dissimilar. All such persons are similar in that they have been considered "handicapped" and suffered the consequences thereof. See also Note, supra note 7, at 815, stating that "it is the policy that causes discrimination."
121. See, e.g., Beazer v. New York City Transit Auth., 399 F. Supp. 1032, 1035 (S.D.N.Y. 1975), aff'd, 558 F.2d 97 (2d Cir. 1977) (discriminatory policy against hiring persons on methadone maintenance programs was expressed in Transit Auth. Rule 11(b), which covered "use of drugs").
123. Id. (blind persons).
The Argument for Class Certification in Handicap Employment Discrimination Actions

Successful Utilization in Prior Cases

Several good arguments exist for certification of a class of handicapped employment discriminatees. First, handicap classifications have been successful in several cases. In the area of education, a class consisting of all mentally retarded persons denied access to free, public education was granted an injunction against the defendant school district in Pennsylvania Association for Retarded Children v. Pennsylvania.\textsuperscript{124} Finding that a state statute had been applied by the district in such a way as to postpone or deny the plaintiffs' access to public education, the court ordered a re-evaluation of the named plaintiff. The school district was further ordered to provide each mentally retarded child between the ages of six and twenty-one access to the educational program appropriate to his respective learning capacities.\textsuperscript{125}

In other education-related cases, a class has been certified for: (1) handicapped children seeking to establish their right to specialized education at public expense under the equal protection clause;\textsuperscript{126} (2) learning disabled children seeking to force the respondent school district to expand and upgrade remedial services for the plaintiff class;\textsuperscript{127} and (3) mentally retarded children bringing a civil rights action contesting the denial of public education.\textsuperscript{128} In these cases, the courts have found commonality despite the existence of a wide variety of handicaps and differing degrees of mental and physical disabilities.\textsuperscript{129} Additionally, the courts have delved into individual cir-

\textsuperscript{129} For example, in Frederick L., the court found commonality despite the fact that "learning disabled" included everything from brain injury to dyslexia, causing factual variations among plaintiffs. 419 F. Supp. at 963. The common issue which the court found was the failure to receive the education to which each class member was entitled.

In Lebanks, the court found commonality despite the breadth of the class defined for certification. The court ordered certification of the following class of mentally retarded children: [p]ersons resident of [the] parish who are or become between the ages of five (5) and twenty-one (21) inclusive; who have been, are, or may be suspected of being mentally retarded . . . ; and who have been, are or may be effectively denied a
cumstances, and where appropriate, have prescribed a wide range of relief.

Education is not the only area of litigation in which classes of handicapped persons have been certified. In *Bartels v. Biernat* a class of mobility handicapped persons was granted a preliminary injunction preventing any action toward obtaining new buses for the public mass transit system. Since only injunctive relief was sought and since all 23(a) prerequisites were satisfied, the class was certified under 23(b)(2). The court found no reason to review the individual circumstances of the class members.

In *Beazer v. New York City Transit Authority*, a class of present and past participants in methadone maintenance programs challenged the defendant's blanket exclusion of such persons from any type of employment with the transit authority. The policy that employees could not use "drugs" was expressed in the employer's rules and regulations. The four class representatives—two black

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60 F.R.D. at 138.

130. For example, in *Panitch*, the federal district court refused to label the question moot on the basis that legislative relief had been enacted, 371 F. Supp. at 959-60, and the class representative was not found to be inadequate even though she had been offered public facilities, but chose instead to remain in a private facility. *Id.*

In *Frederick L.*, an elaborate fact-finding process, 419 F. Supp. at 962-71, preceded the court's decision that the defendant had violated state law by failing to identify the learning disabled and failing to implement an approved plan for their proper education. *Id.* at 979.

131. For example, in *Panitch*, the court ordered the state to submit a report detailing its plans for implementing a statute which had been passed to provide relief for the plaintiff class. 371 F. Supp. at 960.

In *Lebanks*, the court set out a detailed plan, via a preliminary consent agreement, to effect a change in the defendant's practices. 60 F.R.D. at 139-53. In addition to the general provisions, special provisions were made applicable to six groups of class members. The six categories were: (1) children in regular classes or newly entering school; (2) children suspected of being retarded or are retarded and not presently served by public schools; (3) children presently in classes for the mentally retarded who had not been given proper notice, evaluation and hearing; (4) parents of children or children that are or might be retarded; (5) persons over 21 who may have been suspected of being or were mentally retarded and were without education as children; and (6) children who are or may be mentally retarded and have discipline problems. *Id.* at 140-51.

132. 405 F. Supp. 1012 (E.D. Wis. 1975). *See Lloyd v. Regional Transp. Auth.*, 548 F. 2d 1277 (7th Cir. 1977), a very similar mobility handicapped class action which was also successful.


134. *Id.* at 1016-17.

135. *Id.* at 1017.


137. *Id.* at 1035.

138. *Id.*
and two Hispanic, two rejected applicants and two former employees—received relief in the form of re-evaluation.\textsuperscript{139} As to the class itself, the court ordered a permanent injunction containing basic directions and guidelines, retaining jurisdiction in order to implement the injunction.\textsuperscript{140}

Finally, in \textit{Bartley v. Kremens},\textsuperscript{141} a class of all persons eighteen years or younger who had in the past, might be in the future, or were presently admitted or committed to state mental institutions sought certification in order to enjoin enforcement of certain allegedly unconstitutional state statutes. The individual class members had been committed under varying circumstances and suffered from different afflictions. Nevertheless, certification of the class was upheld.

An analysis of all of these cases provides guidelines for those considering class procedure on behalf of handicapped employment discriminatees.\textsuperscript{142} First, even though individual circumstances differ (the type of handicap and/or the particular employment situation), one common issue of fact or law (application of a certain rule or statute or a pattern of discriminatory conduct) will give the class the requisite common thread. Second, in some of these cases, the courts went beyond simple general injunctive relief. Thus, in employment discrimination cases, an order enjoining the employer from his discriminatory practices and compelling him to evaluate the handicapped on reasonable criteria would seem to be a reasonable request. The court also might ask that a report on these evaluation criteria be submitted by the employer subsequent to the injunction.

\textsuperscript{139} \textit{Id.} at 1059. Eventually all four representatives were rehired and given backpay. \textit{See Beazer v. New York City Transit Auth.}, 558 F.2d 97, 101 (2d Cir. 1977).


\textsuperscript{142} These guidelines may prove useful when the federal district court resolves the class certification question in \textit{Gurmankin v. Costanzo}, 411 F. Supp. 982 (E.D. Pa. 1976), \textit{aff'd}, 556 F.2d 184 (3d Cir. 1977). \textit{Gurmankin} constitutes a perfect example of how the courts attempt to avoid the class action question in cases of employment discrimination against the handicapped, even where the circumstances make the action especially susceptible to group treatment. Gurmankin, the blind plaintiff, filed an action on behalf of all visually handicapped individuals qualified to teach in the public schools of Philadelphia who by virtue of their handicap had been, were, or would be unable to obtain and secure permanent teaching positions, including in classrooms on non-handicapped children. \textit{Id.} at 983. Certification was sought under 23(b)(2). Complaint filed in \textit{U.S. Dist. Ct. at 4}, \textit{Gurmankin v. Costanzo}, 411 F. Supp. 982 (E.D. Pa. 1976). The district court ruled in plaintiff's favor, reserving judgment on the motion for the class certification; the court of appeals affirmed and remanded the case to the district court for resolution of the unanswered questions. Plaintiffs still await a decision as to whether or not class relief will be provided.
A second argument for allowing class action suits by handicapped employment discriminatees is that such actions can be analogized to Title VII race and sex class actions. Since the courts have little else to rely on in the way of employment discrimination law, the Title VII cases are likely to be influential. It is generally agreed that Rule 23 is liberally applied to those actions, not only because of the remedial purpose of Title VII, but also because “employment discrimination on the basis of a class characteristic is by definition suited to class treatment.”

Since system-wide discriminatory practices and policies against the handicapped also constitute employment discrimination based upon a class characteristic, it may also be said that such practices and policies constitute class discrimination by definition. In fact, Federal Rule 23(b)(2) was designed especially for those cases in which “a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration.”

Courts have generally allowed broad class definitions in Title VII cases, permitting former employees to represent present employees and applicants regardless of whether all class members were actually affected by the employer’s practice. Proof of a pattern of discriminatory conduct which could potentially affect, or has affected, all class members has been sufficient grounds for certification. This “across the board” approach, based upon the employer’s general

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146. See Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969), which validated the practice of allowing an aggrieved employee to maintain a class action against an employer who discriminates generally, even though the representative himself was affected only by a certain aspect of the general practice. Connolly, supra note 40, at 191 states:

[any company-wide policy or practice which is potentially discriminatory . . . can be challenged by a class action as wide as the application of the policy. Practices which do not indicate the breadth of their application on their face can best be
discriminatory policy, may be easily applied to handicapped persons who suffer from such a pattern of discrimination, although perhaps in different aspects and with different results. Even though the 23(a) prerequisites must be satisfied, the across the board policy is responsible for the relaxed application of the numerosity, commonality, typicality and adequacy of representation requirements. Thus, the handicap advocate might argue that, as in Title VII cases, the numerosity requirement is satisfied pro forma, and that the commonality requirement, apparently a major source of apprehension, is met because of the employer’s general discriminatory policy. As to typicality and representivity, the same liberal policy applies, so it can be argued that a blind discriminatee is an adequate representative of the deaf, the diabetic, and the paraplegic.

The United States Supreme Court’s recent decision in *East Texas Motor Freight v. Rodriguez* has been said to cast doubt on the validity of the “across-the-board” approach in sex and race discrimination cases. *Rodriguez* held that where the parties seeking to represent a class of discriminatees were shown to have been unqualified for the positions they sought, they could not have suffered injury from the alleged discrimination, and therefore could not adequately represent people who were allegedly injured by the employer’s practice. Nevertheless, the court recognized that sex and racial discrimination suits are often class suits by their very nature and that

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150. 431 U.S. 395 (1977). Plaintiffs, three Mexican-American city drivers employed by defendant, sought to represent all of the employer's Mexican-American and black city drivers included in the collective bargaining agreement between the employer and the Southern Conference of Teamsters in the state of Texas. They were challenging the union's seniority rule and the employer's "no-transfer" policy. *Id.* at 398-99.


“common questions of law or fact are typically present.” Rather than ruling out the across the board approach in all cases, the Supreme Court seemed to be cautioning against very broad, vague allegations of discrimination by non-representative parties.

Feasibility of Providing an Adequate Remedy

A third argument in favor of certification is that plans of relief can be devised to meet the unique needs of each class member if necessary. First, a bifurcated procedure has been adopted by many courts, in which injunctive relief is granted under a 23(b)(2) certification, requiring no notice, while individual backpay claims are litigated under 23(b)(3), allowing individual discriminatees to appear and prove their damages. For example, in an employment discrimination case, the issue of the employer’s liability for purposes of injunctive relief proceeds under 23(b)(2) with no notice or “opting out.” Once liability is established, the litigation of individual backpay claims is conducted under 23(b)(3), at which point notice to individual class members is mandatory. This approach may be preferable to an exclusive Rule 23(b)(2) or a “mandatory notice under all circumstances” approach, for it expedites the determination of liability and at the same time provides an opportunity for litigation of individual claims for relief.

Second, the court, if it wishes to accept the challenge, can certify a class of handicapped persons, whose individual characteristics require individually designed remedies, under 23(b)(2) and go on to provide an equitable plan of relief which is adequate to satisfy all members’ needs. The job may be complex, but it can be accomplished, as has been demonstrated by the court in Wyatt v. Stickney, the leading

153. Id. at 405.
154. Id. at 405-06.
case on the right to treatment in a mental institution. This action, filed on behalf of all patients involuntarily confined for treatment of mental illnesses in Alabama's mental institutions, resulted in an order requiring that detailed reports on each patient's progress and treatment be submitted to the court.\textsuperscript{160} In addition, the court, in a later proceeding, designated human rights committees for each institution to ensure that no further violations of the patients' rights would occur. Although such intricate forms of relief will be difficult and time-consuming, the cause of handicapped employment discriminatees is worthy of the courts' extra efforts.

\textit{Judicial Willingness to Provide an Adequate Remedy}

A fourth argument is the atmosphere of liberality in the certification of classes and subclasses in other areas. An excellent example is found in \textit{In re Home-Stake Production Co. Securities Litigation},\textsuperscript{161} an adjudication on the certification of a class of purchasers of securities who wished to bring an action for fraud against the sellers of those securities. After determining that all of the 23(a) requirements had been met, the court proceeded to certify the class under 23(b)(3). Nine classes were then designated for the purposes of the litigation, one for each year in which certain investments were offered. Each of these nine classes was further divided into two subclasses.\textsuperscript{162} Certainly, if the courts are willing to be this creative in respect to securities actions, they should be willing to give the same treatment to those whose livelihoods may be dependent upon the abolition of unfair employment practices.

Finally, even in cases where class certification was not requested, where the suit was brought only by one handicapped employee on his or her own behalf, the courts have provided class relief. The major case on this point is \textit{McNutt v. Hills},\textsuperscript{163} in which a blind employee of the Department of Housing and Urban Development alleged that the agency's failure to comply with Section 501 of the Rehabilitation Act of 1973\textsuperscript{164} had hampered his career development.\textsuperscript{165} The court issued summary judgment for plaintiff, but refused to award any of the individual relief requested.\textsuperscript{166} However, the court did require that

\textsuperscript{160} \textit{Id.} at 785-86.
\textsuperscript{161} 76 F.R.D. 351 (N.D. Okla. 1977).
\textsuperscript{162} \textit{Id.} at 376-80.
\textsuperscript{166} \textit{Id.} at 1008.
the agency prepare a detailed report on how it currently met or intended to meet its obligations under the relevant statutes and regulations regarding affirmative action toward the handicapped.\textsuperscript{167}

Relief beyond that required for the single physically handicapped plaintiff was also granted in \textit{Smith v. Fletcher},\textsuperscript{168} a case involving a handicapped female employee of the National Aeronautics and Space Administration. The plaintiff already had been granted relief in the form of promotion and backpay, yet the court proceeded to enjoin the commissioners of the United States Civil Service Commission for failing to abide by the applicable statutes and regulations.\textsuperscript{169} Thus, a remedy was in actuality provided for an entire class of employment discriminatees.

\textbf{CONCLUSION}

The class action is a complicated procedural device. It becomes more complicated when used by the handicapped in an attempt to redress an employer's discriminatory hiring, firing, and promotion practices. Still, the rewards of a successful class action in such cases merit the extra involvement by courts and attorneys. In deciding whether or not to initiate a class suit on behalf of handicapped employment discriminatees and selecting the most appropriate forum for the action, the practitioner should first determine what remedies are available under state as well as federal law and whether or not a private right of action is provided. He may also need to find a law which allows him to proceed against a private employer. Once a suitable remedial rule has been found, a determination must be made as to whether a certifiable class can be defined and, if so, under which class action statute. The most important factor in finding a certifiable class is whether the employer has exhibited a pattern of discrimination against the handicapped.

Because of the advantages of both remedial and procedural law as it exists in certain states (Illinois, for example), the horizons of handicapped employment discriminatees are broader than one might expect. Therefore, it is hoped that the practicing bar will begin to give more attention to class actions on behalf of these persons. Only then will the courts be forced to do the same.

\textit{Stacey Stutzman}

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\textsuperscript{167} Id. \\
\textsuperscript{168} 393 F. Supp. 1366 (S.D. Tex. 1975), \textit{modified}, 559 F.2d 1014 (5th Cir. 1977). \\
\textsuperscript{169} Id. at 1370.
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