University of Richmond Law Review

Volume 10 | Issue 2 Article 12

1976

Constitutional Law- Civil Rights- Representative Party Need Only Show Sufficient Nexus With Class For Title VII Class Action to Continue

Constitutional Law—Civil Rights—REPRESENTATIVE PARTY NEED ONLY SHOW SUFFICIENT NEXUS WITH CLASS FOR TITLE VII CLASS ACTION TO CONTINUE—*Barnett v. W.T. Grant Co.*, 518 F.2d 543 (4th Cir. 1975).

For many years the brunt of racial discrimination was sorely felt in the area of employment. Today, however, an employee or job applicant who desires to redress an alleged racially discriminatory employment practice has two statutory remedies: 42 U.S.C. § 1981,[1] and Title VII of the Civil Rights Act of 1964.[2] Under section 1981, all citizens "have the same right . . . to make and enforce contracts," which necessarily includes the right to contract for employment. It has been established that an action under this section may be brought alleging racial discrimination in employment without demonstrating state action.[3] Title VII was enacted to reinforce section 1981,[4] eliminate historical patterns of discrimination in employment and provide broad relief for victims of that discrimination.[5] To achieve these goals, Title VII forbids an employer in his employment practices from discriminating on the basis of race, color, religion, sex or national origin.[6] An individual who alleges a violation of Title VII has two available remedies: filing a complaint with the Equal Employment Opportunity Commission,[7] or bringing a private action in a federal district court.[8]

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1. 42 U.S.C. § 1981 (1970) provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

This section was derived from the Civil Rights Act of 1866 and the Enforcement Act of 1870.

2. 42 U.S.C. §§ 2000e to 2000e-15 (1970), *as amended* 42 U.S.C.A. §§ 2000e to 2000e-17 (Supp. II, 1972). For an analysis of the 1964 legislation see 78 HARV. L. REV. 684 (1965). For an analysis of the 1972 legislation see Sape & Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824 (1972).

3. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 441-43 n.78 (1968); Sanders v. Dobbs Houses, Inc., 431 F.2d 1097, 1098 (5th Cir. 1970), *cert. denied*, 401 U.S. 948 (1971).

For background on the state action debate see Note, *Section 1981 and Private Discrimination: An Historical Justification For a Judicial Trend*, 40 GEO. WASH. L. REV. 1024, 1031-33 (1972).

4. Sanders v. Dobbs Houses, Inc., 431 F.2d 1097, 1101 (5th Cir. 1970), *cert. denied*, 401 U.S. 948 (1971); 110 CONG. REC. 13650-52 (1964).

5. For a discussion of the congressional intent and legislative history of Title VII see Vaas, *Title VII: Legislative History*, 7 B.C. IND. & COM. L. REV. 431 (1966); BNA, THE CIVIL RIGHTS ACT OF 1964 (1964); EEOC, LEGISLATIVE HISTORY OF TITLES VII AND XI OF THE CIVIL RIGHTS ACT OF 1964, at 10-11 (1964).

6. 42 U.S.C.A. § 2000e-2 (1974).

7. *Id.* § 2000e-5(b).

8. *Id.* § 2000e-5(f).

In 1966, the procedural basis securing a Title VII claimant's access to a federal district court was developed.[9] Rule 23 of the Federal Rules of Civil Procedure[10] was amended "to make it clear that civil rights suits for injunctive or declaratory relief can be brought as class actions."[11] The draftsmen specifically designed subsection (b)(2) of Rule 23[12] to be used in civil rights class action suits where the class is too broad and diverse to allow precise definition.[13] Definitive guidelines were developed under Rule 23(a)[14] regarding the essential characteristics of both the class and its representative.[15]

Problems arose as courts attempted to reconcile the broad Title VII remedies with the specific prerequisites of Rule 23(a).[16] The central issue has been whether the representative party of a class action may continue to represent the original, broad class once his individual claim has been dismissed, or whether the class must be substantially narrowed to conform

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9. *See* 3B J. MOORE, FEDERAL PRACTICE ¶ 23.02-1 (2d ed. 1975) [hereinafter cited as MOORE]. *See also* Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 386 (1967).

10. FED. R. CIV. P. 23.

11. 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1776, at 35 (1972) [hereinafter cited as WRIGHT & MILLER]. Prior to 1966, some courts held that since there was no direct reference to class actions seeking equitable relief (injunction or declaratory judgment), Rule 23 and the class action were unavailable for suits in equity. 7A WRIGHT & MILLER § 1775, at 24. *See* Oatis v. Crown Zellerbach Corp., 398 F.2d 496 (5th Cir. 1968); Morse, *The Scope of Judicial Relief Under Title VII of the Civil Rights Act of 1964*, 46 TEXAS L. REV. 516, 515-26 (1968); Note, *Class Actions Under Amended Rule 23: Three Years of Judicial Interpretation*, 49 B.U.L. REV. 682, 692-700 (1969).

12. FED. R. CIV. P. 23:

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

13. Amended Rule 23. *See generally* Advisory Committee's Note, 39 F.R.D. 98 (1966); 3B MOORE ¶ 23.40; 7A WRIGHT & MILLER § 1775; Comment, *Rule 23: Categories of Subsection (b)*, 10 B.C. IND. & COM. L. REV. 539, 544 (1969).

14. FED. R. CIV. P. 23:

> **(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.

15. *See* 3B MOORE ¶ 23.04; 7 WRIGHT & MILLER § 1759; Note, *Class Actions: Defining the Typical and Representative Plaintiff Under Subsections (a)(3) and (4) of Federal Rule 23*, 53 B.U.L. REV. 406 (1973).

16. 7 WRIGHT & MILLER § 1771.

to the specific status of the representative party.[17] One view, based on strict construction of Rule 23(a)(3) and (4), states that the representative must be a member of the class for the class action to continue.[18] A conflicting view, traditionally followed by the Fourth Circuit,[19] has held that once the class representative has established his membership in the class, the subsequent dismissal or mootness of his individual claim will not prevent him from continuing as class representative; nor will it prevent the broad-based class action from proceeding.[20] A third view has been taken by the Fifth Circuit in an attempt to reach a middle ground in this area of controversy. It has found that the class representative may continue to represent the class after his individual claim has been dismissed, provided he can dem-

17. *See generally* 7 WRIGHT & MILLER § 1761; Comment, *Continuation and Representation of Class Actions Following Dismissal of the Class Representative*, 1974 DUKE L.J. 573; Comment, *Class Actions and Title VII of the Civil Rights Act of 1964: The Proper Class Representative and the Class Remedy*, 47 TUL. L. REV. 1005, 1006-11 (1973).

18. In Bailey v. Patterson, 369 U.S. 31, 32-33 (1962), the Supreme Court, although allowing the class action to continue, stated that plaintiffs "cannot represent a class of whom they are not a part." *See also* Hall v. Beals, 396 U.S. 45, 49 (1969); Spriggs v. Wilson, 467 F.2d 382, 385 (D.C. Cir. 1972).

In Long v. Sapp, 502 F.2d 34 (5th Cir. 1974), although the class action was again permitted to continue, the Fifth Circuit reaffirmed "the panel's acknowledgement that membership in the class remains a prerequisite to pursuance of the class action. The words of the Rule permit no relaxation of this requirement." *Id.* at 42.

In Norman v. Connecticut State Bd. of Parole, 458 F.2d 497 (2d Cir. 1972), a class action was dismissed because the representative's individual claim became moot subsequent to final adjudication. The Court of Appeals for the Second Circuit said: "Since it is clear that a named plaintiff cannot bring a suit for a class of which it is not a part . . . we remand the case to the district court with directions to dismiss the action without prejudice on grounds of inadequacy of representation . . . ." *Id.* at 499.

It has been argued that "[t]his prerequisite [of class membership] is inherent in the real party in interest requirement prescribed by Rule 17(a) and is reinforced by the statement in Rule 23(a) that 'one or more *members* of a class may sue or be sued as representative parties . . . .'" 7 WRIGHT & MILLER § 1761, at 584-85 (footnotes omitted; emphasis added).

But cf. Jenkins v. United Gas Corp., 400 F.2d 28 (5th Cir. 1968). *See generally* Bledsoe, *Mootness and Standing in Class Actions*, 1 FLA. ST. U.L. REV. 430, 436-51 (1973).

19. Moss v. Lane Co., 471 F.2d 853 (4th Cir. 1973); Cox v. Babcock & Wilcox Co., 471 F.2d 13 (4th Cir. 1972); Brown v. Gaston County Dyeing Mach. Co., 457 F.2d 1377 (4th Cir.), *cert. denied*, 409 U.S. 982 (1972).

20. Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239 (3d Cir. 1975); Roberts v. Union Co., 487 F.2d 387 (6th Cir. 1973); Reed v. Arlington Hotel Co., 476 F.2d 721 (8th Cir.), *cert. denied*, 414 U.S. 854 (1973); Rivera v. Freeman, 469 F.2d 1159 (9th Cir. 1972).

It has been suggested that a class action, once certified, assumes an independent judicial life which is not affected by the subsequent success or failure of the representative's individual claim: "[O]nce the judicial machinery has been set in train, the proceeding takes on a public character in which remedies are devised to vindicate the policies of the [1964 Civil Rights] Act, not merely to afford private relief to the employee." Hutchings v. United States Indus., Inc., 428 F.2d 303, 311 (5th Cir. 1970).

onstrate a sufficient nexus between the class and his own interests.[21]

Barnett v. W.T. Grant Co.[22] presented the Fourth Circuit with the opportunity to reevaluate its position regarding this widely disputed point of law. Plaintiff Barnett, a black man employed by defendant W.T. Grant Company,[23] sought a promotion from switcher to long-distance truck driver. After Grant waived its age and experience prerequisites, which would have immediately disqualified Barnett, he received an unfavorable rating on his driving test and was refused the promotion. Barnett filed an individual claim against Grant in a United States district court, under section 1981 and Title VII, alleging employment discrimination based on race. He subsequently amended that claim to include a class action under Rule 23(b)(2) on behalf of all present, past, and potential Grant employees affected by the alleged discriminatory practices. Those practices included racial discrimination both in the hiring of over-the-road drivers and in the selection of supervisors. After a trial on the merits, the district court dismissed Barnett's individual claim[24] and narrowed the scope of the class he could represent to only "that group of black persons who have unsuccessfully applied for or requested road driving jobs with the company."[25] Thus limited to the precise characteristics of Barnett himself, the class no longer complied with the numerosity requirements of Rule 23(a)(1) and the class action failed.[26]

Although the court of appeals agreed that the district court acted within its proper discretion in disallowing the class action once the scope had been narrowed, it reversed on the question of narrowing the class which Barnett could represent.[27] Judge Craven, speaking for a unanimous court, noted the all-inclusive nature[28] of Barnett's claim and reiterated the legislative in-

21. Long v. Sapp, 502 F.2d 34, 42 (5th Cir. 1974); Huff v. N.D. Cass Co., 485 F.2d 710, 714 (5th Cir. 1973).

The nexus theory was enunciated by Judge Godbold in his majority opinion in *Huff*, in an attempt to allay his own concerns about the appropriateness of a class representative whose individual claim had been dismissed. Judge Godbold felt there should be some minimal aspect of commonality between the class and its representative. Thus, in *Huff*, the case was remanded to allow the district court to apply the "nexus" test.

22. 518 F.2d 543 (4th Cir. 1975).

23. Also included as co-defendants were the International Brotherhood of Teamsters and its area representative, Local 71.

24. The district court found that, rather than suffering from discrimination, "Barnett may actually have received preferential treatment." 518 F.2d at 545.

25. *Id.* at 547.

26. The district court found that the new class consisted of fewer than five persons under the narrower criteria. Five persons were not considered "so numerous that joinder of all members is impracticable." FED. R. CIV. P. 23(a)(1).

27. 518 F.2d at 545.

28. The circuit court gave considerable weight to the fact that Barnett's claim of discrimi-

tent that Title VII provide sufficient latitude to discern covert discriminatory employment practices.[29] He also stressed that the very purpose for the enactment of Rule 23(b)(2) was to provide an adequate vehicle for the resolution of such broad discrimination cases.[30] Judge Craven concluded that the district court, in narrowing the class, did not effectuate the intent of Title VII and Rule 23(b)(2).

In reversing the restrictions on Barnett's representation, the Fourth Circuit neglected its own precedent[31] and relied upon Fifth Circuit authority[32] to support its holding. In *Johnson v. Georgia Highway Express, Inc.*,[33] the plaintiff, a black employee discharged from his job for allegedly discriminatory reasons, attempted to represent all present and former black employees who might have been treated similarly by the defendant. The district court narrowed the class membership before trial to only those black employees who had been discharged; no attempt was made to determine the facts of the case. The Fifth Circuit reversed the narrowing of the class,[34] and remanded, saying there must be a trial to determine what, if any, discrimination Johnson himself had suffered before the class could be narrowed.[35] In contrast, a full trial was held by the district court in *Barnett*, with the determination that not only had Barnett not been discriminated against, but that he may have received preferential treatment.[36]

In *Long v. Sapp*,[37] a black employee, alleging discriminatory employment practices, brought a Title VII class action on behalf of all present and prospective black employees of the defendant. After a full trial, the district court narrowed the class because the representative employee had been lawfully discharged and was therefore no longer similarly situated with the class she sought to represent. The Fifth Circuit reversed, reasoning that

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nation was a pervasive attack on Grant's entire operation: "Viewed broadly, Barnett's suit is an 'across-the-board' attack on all discriminatory actions by defendants on the ground of race, and when so viewed it fits comfortably within the requirements of Rule 23(b)(2)." *Id.* at 547.

See also Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1124 (5th Cir. 1969); Potts v. Flax, 313 F.2d 284, 288-89 (5th Cir. 1963); Hall v. Werthan Bag Corp., 251 F. Supp. 184, 186 (M.D. Tenn. 1966). *Contra*, White v. Gates Rubber Co., 53 F.R.D. 412, 413 (D. Colo. 1971); Hyatt v. United Aircraft Corp., 50 F.R.D. 242, 248 (D. Conn. 1970).

29. *See* note 4 *supra*.

30. Advisory Committee's Note, 39 F.R.D. 98 (1966); 3B MOORE ¶ 23.01 [10-2].

31. *See* cases cited in note 19 *supra*.

32. Long v. Sapp, 502 F.2d 34 (5th Cir. 1974); Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969).

33. 417 F.2d 1122 (5th Cir. 1969).

34. *Id.* at 1124.

35. *Id.* at 1125.

36. 518 F.2d at 546.

37. 502 F.2d 34 (5th Cir. 1974).

even though the plaintiff had been lawfully discharged, the fact that she was both black and a former employee established the necessary nexus to enable her to continue to represent the inclusive class.[38]

In allowing the class action in *Barnett* to continue, the Fourth Circuit adopted the "nexus" rationale of *Long*.[39] Barnett had alleged that Grant's discriminatory conduct permeated the entire organization. The court of appeals found that, although Barnett's specific individual claim had been dismissed, he continued to possess a claim as a member of the class of present Grant employees. This latter claim formed a sufficient nexus between Barnett and the class to permit him to continue as its representative.[40] The circuit court's finding of actual racial discrimination by Grant may have influenced its determination that a sufficient nexus existed. Barnett had presented statistical evidence at trial, demonstrating a significant variance between Grant's black employment percentage and the percentage of blacks in the surrounding community.[41] The court found that this statistical data established a prima facie case of racial discrimination and that, contrary to the opinion of the district court, it was unnecessary for Barnett to prove "specific instances of overt discrimination."[42]

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38. *Id.* at 43.

39. 518 F.2d at 548.

40. *Id.*

41. At the commencement of this suit, the W.T. Grant Company employed blacks only in the non-supervisory category of warehousemen. These black warehousemen represented 19% of Grant's total non-supervisory work force. In comparison, blacks accounted for approximately 25% of the adult population in the surrounding community of Charlotte, N.C. In the category of over-the-road drivers, Grant employed no blacks out of a total of 27 employees. *Id.* at 549. Such statistical variances have consistently been held to infer the existence of racial discrimination. United States v. Chesapeake & O. Ry., 471 F.2d 582, 586 & n.7 (4th Cir. 1972), *cert. denied*, 411 U.S. 939 (1973); Parham v. Southwestern Bell Tel. Co., 433 F.2d 421, 426 (8th Cir. 1970). *See* Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 268-81 (1971); Note, *Employment Discrimination: Statistics and Preferences Under Title VII*, 59 VA. L. REV. 463 (1973).

42. 518 F.2d at 549. Judge Craven noted other aspects of Grant's employment practices that strengthened Barnett's statistical challenge. These included word-of-mouth hiring (*see* United States v. Georgia Power Co., 474 F.2d 906, 925 (5th Cir. 1973)), separate hiring locations for the two Grant divisions (transportation and warehouse), the periodic display of a sign stating that no applications were being taken, a collective bargaining agreement which provided no carry-over seniority rights for intracompany transfers (*see* Gould, *Employment Security, Seniority and Race: The Role of Title VII of the Civil Rights Act of 1964*, 13 HOW. L.J. 1 (1967)), and the lack of objective criteria in hiring supervisors (resulting in at least one qualified black employee being passed over for a promotion in favor of a white employee with less seniority). This combination of statistical data, employment practices, and subjective promotion criteria firmly established the validity of Barnett's substantive class action complaint. Brown v. Gaston County Dyeing Mach. Co., 457 F.2d 1377 (4th Cir.), *cert. denied*, 409 U.S. 982 (1972).

In attempting to structure an appropriate remedy, the court took notice of Grant's significant voluntary progress toward eliminating racial discrimination since the beginning of the suit.[43] The court was concerned, however, about the class members' available remedies should the suit be dismissed and Grant later resume its discriminatory practices. The court also did not wish to have the district court hear the case again: if Barnett was unsuccessful in his representation, the substantiated claims of the class members would be foreclosed by the doctrine of res judicata.[44] The case was thus remanded to the district court, with instructions to monitor Grant's new non-discrimination policies. Should Grant fail to maintain these policies, the district court was ordered to immediately enjoin all discriminatory employment practices.[45] This remedy not only accomplished the aims of Title VII in an equitable manner, but was also found in Fourth Circuit precedent.[46]

The Fourth Circuit's application of Rule 23 in *Barnett* is helpful, and perhaps necessary, if the congressional intent underlying Title VII is to be achieved.[47] But conflict continues[48] over the application of Rule 23 to civil rights class actions where the representative's individual claim is no longer valid. In *Barnett*, the Fourth Circuit adopted the Fifth Circuit's "nexus" rationale,[49] but made no attempt to reconcile the sharply contradictory

43. 518 F.2d at 550.

44. *See* Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1125-27 (5th Cir. 1969) (Godbold, J., concurring); 3B MOORE ¶ 23.31 [3].

45. 518 F.2d at 550.

46. Cox v. Babcock & Wilcox Co., 471 F.2d 13, 16 (4th Cir. 1972).

47. It has been suggested that "the very nature of the claims asserted and the relief requested in Rule 23(b)(2) suits does suggest that a less stringent application of Rule 23(a) is appropriate." 7 WRIGHT & MILLER § 1771, at 663. A more stringent interpretation would frustrate civil rights litigation seeking to remedy amorphous practices of covert discrimination. If the letter of Rule 23(a) were followed, an employer against whom a Title VII class action had been filed would need to do no more than satisfy the individual demands of the class representative in order to have the suit dismissed.

48. There are conflicts even within circuits. *Compare* Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239 (3d Cir. 1975), *with* Rothblum v. Board of Trustees, 474 F.2d 891 (3d Cir. 1973). *Compare* Roberts v. Union Co., 487 F.2d 387 (6th Cir. 1973), *with* Heard v. Mueller Co., 464 F.2d 190 (6th Cir. 1972). *Compare* Batiste v. Furnco Const. Corp., 503 F.2d 447 (7th Cir. 1974), *with* Mintz v. Mathers Fund, Inc., 463 F.2d 495 (7th Cir. 1972).

49. Although the nexus interpretation of Rule 23(b)(2) may be essential to preserve effective civil rights litigation, its value in reconciling the conflicting views of the rights of a class representative is limited. Courts following this theory must search for common elements which form the nexus between the class and its representative. The nexus found by Judge Craven in *Barnett* was tenuous, the only common elements being race and prior contact with the defendant employer. There appears to be no practical difference between this nexus theory and the traditional Fourth Circuit view.

case history. Although writers have offered alternatives,[50] the courts appear content to decide employment discrimination suits on a case-by-case basis, dispensing justice as appropriate in each specific case, but providing no definitive guidelines for future reference.

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50. Comment, *Continuation and Representation of Class Actions Following Dismissal of the Class Representative*, 1974 DUKE L.J. 573, 597-608 (bifurcated trial); Note, *The Tentative Settlement Class and Class Action Suits Under Title VII of the Civil Rights Act*, 72 MICH. L. REV. 1462 (1974) (use of tentative settlement classes).