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General Telephone Company of the Southwest v. Falcon: Rule 23's Application to Title VII

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GENERAL TELEPHONE COMPANY OF THE SOUTHWEST v. FALCON: RULE 23's APPLICATION TO TITLE VII

I. INTRODUCTION

A minority person comes into your office and complains of his employer discriminating against him on the basis of his race or national origin. He alleges, specifically, that he was denied a promotion which was granted to several white employees with lower evaluation scores, seniority, and qualifications.

You accept him as a client and file a complaint with the Equal Employment Opportunity Commission (EEOC). The complaint alleges that the employer maintained a policy, pattern and practice of employment which discriminated against both your client and minorities as a class. You receive a right to sue letter from the EEOC and bring a Title VII class action in the federal district court.[1] At this juncture you will have to address the issues of the scope and breadth of the prospective class, and, more particularly, whether or not it will be possible to represent

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1. A Title VII suit may not be brought in the district courts without first filing a charge with the EEOC and receiving a right to sue letter therefrom. 42 U.S.C. § 2000e-5(b) (1976) (Necessity and timeliness of filing a charge with the EEOC); 42 U.S.C. § 2000e-5(k)(1) (1976) (Right to sue letter); 42 U.S.C. §22000e-5(f) (1976) (Enabling legislation giving the federal district courts sole authority to hear Title VII suits). *See* note 6, *infra*.

Caveat: 42 U.S.C. § 2000e-5(c) (1976) provides that when there is a qualified state employment agency, a complaint must be filed there. The statute also provides that the limitations period for filing with the EEOC is extended from 180 days to 300 days when the aggrieved party has initiated a complaint with such agency. *Id.* Section 2000e-5(c) further provides that no charge may be filed with the EEOC until the expiration of 60 days after proceedings have been commenced with the state agency. If such state is a deferral state, where the EEOC will defer any charge filed with it to the state agency, then there is a trap for the unwary. In Mohasco Corp. v. Silver, 447 U.S. 807 (1980), the Supreme Court held that the effect of this deferral provision is to render untimely any charge originally filed with the EEOC more than 240 days after the act complained of, unless the state agency disposes of the charge before a total of 300 days has elapsed. *Id.* at 814 n.16. *See also* Williams v. Owens-Illinois, Inc., 665 F.2d 918, 923 n.2 (9th Cir. 1982).

a class of both employees who were denied promotion as well as applicants who were denied employment.

It was this latter aspect of class certification, whether or not it is possible to allow an employee to represent a class of both employees and applicants, which was before the United States Supreme Court in *General Telephone Company of the Southwest v. Falcon*, but the Court in effect left that issue unanswered.[2] This case note will summarize and discuss the outcome and background of that case, along with the application of Rule 23[3] to Title VII actions.

Currently, under the Federal Rules of Civil Procedure, courts are not required to include findings of fact and conclusions of law in orders granting or denying class certification.[4] Be-

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2. 102 S. Ct. 2364 (1982) (Justice Stevens delivered the opinion of the court. Chief Justice Burger concurred in part, and dissented in part.) The facts in the introduction to this note are essentially those found in *Falcon*.

3. Rule 23 provides 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.

Furthermore, the rule requires that the suit satisfy one of Rule 23(b)'s three subdivisions, but this only becomes relevant after Rule 23(a)'s requirements are met. *See, e.g.*, Ladele v. Consolidated Rail Corp., 95 F.R.D. 198, 202 (E.D. Penn. 1982).

Rule 23(b) provides in pertinent part:

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

Employment discrimination suits are regarded as Rule 23(b)(2) suits. *See* Wetzel v. Liberty Mutual Ins. Co., 508 F.2d 239, 250 (3d Cir. 1975), *cert. denied*, 421 U.S. 1011. *See also* Fed. R. Civ. P. advisory committee note to the 1966 Rule 23 revisions, 39 F.R.D. 69, 102 (1966).

4. Fed. R. Civ. P. 52 provides that "Findings of fact and conclusions of law are unnecessary on decision of motions under Rules 12 or 56 *or any other motion* . . . ." (emphasis added). *See also* Fed. R. Civ. P. 52 notes of advisory committee on 1946 amendments. ("The last sentence of rule 52(a) as amended will remove any doubt that findings and conclusions are unnecessary upon decisions of a motion . . . except as provided in amended Rule 41(b).")

cause of the complex nature of the law and facts involved in class suits, this note will also suggest a requirement, possibly through amendment of the Federal Rules of Civil Procedure, that such orders make explicit, through written findings and conclusions, the factors taken into account in the court's decision. Such a requirement would aid the courts in properly applying Rule 23 to Title VII. Moreover, written findings of fact and conclusions of law would also provide the parties, especially the losing party, with an articulated basis for the court's decision.

II. RULE 23 AND TITLE VII

Rule 23 of the Federal Rules of Civil Procedure provides that a class action may be maintained by a party to a lawsuit when: (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 class are typical of the claims or defenses of the class representative; and (4) the representative party will fairly and adequately protect the interests of the class.[5]

Title VII was passed in order to abrogate the adverse consequences of employment discrimination.[6] Rule 23, therefore, has

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5. *See* note 3, *supra.*

6. "The primary purpose of Title VII was to 'assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens.' " Teamsters v. United States, 431 U.S. 324, 348 (1976). *See also* S. REP. No. 872, 88th Cong., 2d Sess., *reprinted in* 1964 U.S. CODE CONG. & AD. NEWS 2355, 2515:

> The failure of our society to extend job opportunities to the Negro is an economic waste. The purchasing power of the country is not being fully developed. This, in turn, acts as a brake upon potential increases in gross national product. In addition, the country is burdened with added costs for the payment of unemployment compensation, relief, disease, and crime.
>
> National prosperity will be increased through the proper training of Negroes for more skilled employment together with the removal of barriers for obtaining such employment. Through toleration of discriminatory practices, American industry is not obtaining the quantity of skilled workers it needs . . . .
>
> A nation need not and should not be converted into a welfare state to reduce poverty, lessen crime, cut down unemployment, or overcome shortages in skilled occupational categories. All that is needed is the institution of proper training programs and the elimination of discrimination in employment

generally been liberally applied to Title VII actions because discrimination based on factors such as race, sex, or national origin is, by definition, class discrimination.[7] The problem, however, is properly defining the scope and breadth of the class so that it falls both within the confines of Rule 23's four requirements and still furthers the policies and objectives of Title VII.[8]

III. THE "ACROSS THE BOARD" APPROACH

The Fifth Circuit adopted an "across the board" approach to Title VII class action suits by allowing an employee, aggrieved by a single employment practice, to attack many of the em-

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practices . . . .

In response to this need, the Judiciary Committee incorporated Title VII into H.R. 7152.

See also County of Washington v. Gunther, 101 S. Ct. 2242, 2252 (1981), citing S. REP. No. 867, 33d Cong., 2d Sess. 12 (1964); McDonnell Douglass Corp. v. Green, 411 U.S. 792, 800-01 (1973); Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 209 (1972); Griggs v. Power Duke Co., 401 U.S. 424, 426-30 (1971) ("Congress provided for Title VII . . . for class actions for the provisions of [Title VII and] the objective of Congress in the enactment of Title VII . . . was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.")

7. In Bowe v. Colgate Palmolive Co., 416 F.2d 711, 719 (7th Cir. 1969), in an oft quoted passage, the court stated that a Title VII suit is necessarily a class action "as the evil sought to be ended is discrimination on the basis of a class characteristic, i.e., race, sex, religion or national origin." *See* Jenkins v. United Gas Corp., 400 F.2d 28, 33 (5th Cir. 1968) ("Whether in name or not, [a Title VII] suit is perforce a sort of class action for fellow employees similarly situated.") *See also* United States v. McDonald, 432 U.S. 385, 393, n.13 (1977); Albermarle Paper Co. v. Moody, 422 U.S. 405, 414 n.8 (1974).

8. Vuyanich v. Republic National Bank, 82 F.R.D. 420 (N.D. Tex. 1979) ("Indeed, the body of Rule 23 law is virtually incomprehensible unless cases are viewed as fashioning distinct approaches for distinct substantive areas . . . . Therefore, this court ought to apply the standards of Rule 23 to the purported class and its representatives with its gaze leveled at Congress' intent in enacting Title VII.")

The desirability of bringing Title VII suits via class action is enhanced by its inherent economy of litigation. Califano v. Yamasaki, 442 U.S. 682, (1979) ("Class action device saves the resources of both courts and the parties by permitting an issue potentially affecting every party to be litigated in an economical fashion under Rule 23." *Id.* at 701.) (No abuse of discretion in certifying a nationwide class.) *See also* Coopers & Lybrand v. Livesay, 437 U.S. 463, 469 (1977); American Pipe & Construction Co. v. Utah, 414 U.S. 538, 553 (1973). "[Rule 23] encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness of bringing about other undesirable results." Advisory Committee Notes to 1966 Amendments to Rule 23, 39 F.R.D. 69, 102-03 (1966). The rule in fact codifies the older equitable procedure whereby a single representative could represent an entire class. *See* Supreme Tribe of Ben Hur v. Cauble, 255 U.S. 356, 363 (1920) ("For convenience, therefore, and to prevent a failure of justice, a court of equity permits a portion of the parties in interest to represent the entire body . . . ."); Smith et. al. v. Swormstedt et. al., 57 U.S. (16 How.) 288 (1853).

ployer's employment practices if there is an alleged underlying policy of discrimination.[9]

The "across the board" approach epitomizes the liberality accorded to Title VII class suits because it allows an employee discriminated against in hiring to attack not only the employer's hiring practices but also its other employment practices, such as transfer and promotion.[10] The Supreme Court has criticized this approach because "conflict might arise . . . between employees and applicants who were denied employment and who will, if granted relief, compete with employees for fringe benefits or seniority."[11] This presumed conflict of interest is considered fatal to broad class certification because a hiring class representative would not fairly and adequately pursue the claims of other employed class members as is required by Rule 23(a)(4).[12] But despite such criticism from the Supreme Court, the "across the board approach" has been applied and adopted by the lower courts.[13] For example, the Ninth Circuit Court of Appeals recently adopted the "across the board approach" in *Jordan v. County of Los Angeles*.[14]

Falcon came to the Supreme Court out of the Fifth Circuit, which, at the time Title VII was passed, included the states of Alabama, Georgia, Florida, Louisiana, and Mississippi.[15] These southern states are notorious for their history of discrimination,[16] and therefore it is probably no coincidence that the Fifth

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9. *See* notes 19 to 23 and accompanying text *infra*.

10. *See* note 22 *infra*.

11. 102 S. Ct. 2364, 2371 n.13 (1982).

12. *See also* East Texas Motor Freight v. Rodriguez, 431 U.S. 395 (1977); notes 24 to 31 and accompanying text *infra*. *See also* Franks v. Bowman, 424 U.S. 747 (1975) which allows applicants denied employment due to unlawful discrimination to receive retroactive seniority. This, therefore, raises a potential conflict of interest between the applicants and the employees.

13. *See* note 22 *infra*.

14. 669 F.2d 1311, 1318-19, and n.10 (9th Cir.), *vacated and remanded*, 51 U.S.L.W. 3252 (1982). *See also* Gay v. Waiters' & Dairy Lunchmen's Union, 549 F.2d 1330 (9th Cir. 1977).

15. Former 28 U.S.C. § 41, *amended* Oct. 14, 1980, P.L. 96-452, § 2, 94 Stat. 1994 (Fifth Circuit Court of Appeals Reorganization Act of 1980) (reduced the Fifth Circuit to the District of the Canal Zone, Louisiana, Mississippi, and Texas).

16. The frenetic pace and extent of change in race relations in the past twenty years has dimmed the memory of what it was to be a Negro citizen in the South in 1954. All public schools were segregated [by law]; public accomodations were segre-

Circuit was the first appellate court to review the application of Rule 23 to Title VII in *Oatis v. Crown-Zellerbach.*[17]

In *Oatis,* the Fifth Circuit Court of Appeals reasoned that because racial discrimination was by definition class discrimination, a broad application of Rule 23 to Title VII was thereby warranted.[18] Later, the Fifth Circuit relied on *Oatis* in *Johnson v. Georgia Highway Express, Inc.*[19] and concluded that Rule 23 would permit "an 'across the board' attack on unequal employment practices alleged to have been committed by the [employer] pursuant to its policy of racial discrimination."[20] In an oft quoted passage the *Johnson* court stated that "[w]hile it is true . . . that there are different factual questions with regard to different employees, it is also true that the 'Damoclean threat of a racially discriminatory policy hangs over the racial class [and] is a question of fact common to all members of the class.' "[21]

Any alleged discriminatory policy was therefore perceived as providing common questions of law and fact, and the typical claims or defenses which satisfied the requirements of Rule 23. *Johnson,* and the across the board approach, have continually been cited with approval both in[22] and out[23] of the Fifth Circuit,

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> gated; only a minute percentage of registered voters was black; and black public office holders were virtually non-existent. Black families had less than one-half the median incomes of white families, and illiteracy rates were appallingly high. The black American in the South was a second class citizen, an exile in his own country.

F. READ & L. MCGOUGH, LET THEM BE JUDGED xi (1978). *See also* 1964 U.S. CODE CONG. & AD. NEWS 2355, 2513-17.

17. 398 F.2d 496 (5th Cir. 1968).

18. *Id.* at 499.

19. 417 F.2d 1122 (5th Cir. 1969).

20. *Id.* at 1124.

21. *Id.*

22. Payne v. Travenol Laboratories, Inc., 565 F.2d 895 (5th Cir.), *cert. denied,* 439 U.S. 835 (1978); Long v. Sapp, 502 F.2d 34 (5th Cir. 1974) (Reaffirmed *Johnson* and allowed a terminated employee to challenge racially discriminatory policies throughout the employer's business.) In Carr v. Conoco Plastics Inc., 423 F.2d 57 (5th Cir.), *cert. denied,* 400 U.S. 951 (1970), the court allowed rejected applicants to attack both the employer's plant practices as well as hiring practices. The court stated that the "plaintiffs here seek equal opportunity for employment, and charge defendants with discriminating against them on account of race. There can be no serious question but that plaintiffs have the right to bring the action for themselves and others similarly situated. *Envisioning an equal opportunity for employment [the rejected applicants] have the correlated right to enjoy nondiscriminatory practices within the plant." Id.* at 65. (emphasis added). *See also* Doe v. First City Bancorp., Inc., 81 F.R.D. 562 (S.D. Tex. 1978).

but the validity of the across the board approach was ostensibly questioned, prior to these cases, by the Supreme Court in *East Texas Motor Freight v Rodriguez.*[24]

In *Rodriguez,* three city truck drivers, allegedly wrongfully denied transfers to more desirable routes, sought to represent all Blacks and Mexican-Americans aggrieved by the employer's various employment practices. The district court found that the employer's transfer policies were neutral, and dismissed the individual claims. Moreover, it dismissed the class claim because the plaintiffs had never motioned the court for a class certification hearing and, to the court, this indicated that the plaintiffs would not be adequate class representatives under Rule 23(a)(4).[25] The Court of Appeals for the Fifth Circuit reversed on this latter finding by reasoning that the trial court itself "has an independent obligation to decide whether an action brought on a class basis is to be maintained even if neither of the parties moves for a ruling under [Rule 23] subsection (c)(1)."[26] Stating that Rule 23 should be liberally applied to Title VII suits, the Fifth Circuit court then certified a class of Black and Mexican-American city driver employees covered by certain collective bargaining agreements.[27]

The Supreme Court unanimously reversed.[28] The Court stated that the standards of Rule 23 required that "a class representative . . . be part of the class and 'possess the same inter-

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See generally, How Far the Across the Board: The Permissible Breadth of Title VII Class Actions, 24 ARIZ. L. REV. 61 (1982) (Pre-*Falcon*).

23. Jordan v. County of Washington, 669 F.2d 1311, 1318-19 (9th Cir.), *vacated and remanded,* 51 U.S.L.W. 3252 (1982); Barnett v. W.T. Grant, 518 F.2d 543 (4th Cir. 1975).

24. 431 U.S. 395 (1977).

25. *Id.* at 404-05. The district court "stressed the plaintiffs' failure to move for a prompt determination of the propriety of class certification, their failure to offer evidence on that question, their concentration at the trial on their individual claims, their stipulation that the only issue to be determined concerned the company's failure to act on their applications" and a conflict between the relief the plaintiffs sought and a seniority system recently approved by the membership of their union. *Id.* at 400. For the text of Rule 23(a)(4), *see* note 3, *supra.*

26. 505 F.2d 40, 50 (5th Cir. 1974) (quoting 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE, § 1785 (1972).) Rule 23 subsection (c)(1) provides that "[a]s soon as practicable after the commencment of an action brought as a class action, the court shall determine by order whether it is to be so maintained."

27. *Id.* citing 7 C. WRIGHT & A. MILLER, *supra* note 26, § 1771 (1972); Bing v. Roadway Express Inc., 485 F.2d 441, 446 (5th Cir. 1973).

28. 431 U.S. 395 (1977).

est and suffer the same injury' as the class members."[29] Applying this test to the facts of the case as found by the trial court, the Supreme Court reversed because the named plaintiffs were not qualified for the line driver positions and "therefore could have suffered no injury as a result of the allegedly discriminatory practices."[30] The Court ruled that the plaintiffs "were, therefore, simply not eligible to represent a class of persons who did allegedly suffer injury."[31] The court added:

> We are not unaware that suits alleging racial or ethnic discrimination are often by their very nature class suits, involving classwide wrongs. Common questions of law or fact are typically present. But careful attention to the requirements of [Rule 23] remains nonetheless indispensable. The mere fact that a complaint alleges racial or ethnic discrimination does not in itself ensure that the party who has brought the lawsuit will be an adequate representative of those who may have been the real victims of that discrimination.[32]

IV. *General Telephone Company of the Southwest v. Falcon*

In *Falcon,* an employee who was allegedly unlawfully denied a promotion brought a Title VII suit and sought to have it maintained as a class action. The plaintiff alleged the facts set forth in the introduction of this note, and the district court certified a class comprised of Mexican-American employees and Mexican-American applicants not hired by the defendant. The district court certified the class without holding an evidentiary hearing on the class issues, and merely supported its order "by the rul-

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29. *Id.* at 403-04. This same interest and same injury test was first applied in Schlesinger v. Reservist Committee to Stop the War, 418 U.S. 208, 216 (1973).

30. 431 U.S. at 403-04.

31. *Id.* at 406. Note that the appellate court discounted entirely the district court's finding of a conflict between the plaintiffs and the other class members because the appellate court concluded that the district court could have narrowed the class or broken it up into subclasses, (*see* Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 499 (5th Cir. 1968)) or it could have shaped the relief to avoid injustice. Citing Franks v. Bowman Transportation Co., 495 F.2d 398, 414 (5th Cir. 1974).

32. *Id.* at 405-06. *See generally Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964,* 84 HARV. L. REV. 1109 (1971). "The Fifth Circuit's 'across the board' class action concept goes a long way toward effectuating the public interest. But it nonetheless should not be applied before a careful examination is made to be certain that the plaintiff really does fairly and adequately represent the interests of the class for which he purports to act." *Id.* at 1220.

ing of the United States Court of Appeals for the Fifth Circuit in *Johnson v. Georgia Highway Express, Inc.*, that any victim of racial discrimination in employment may maintain an across the board attack on all unequal employment practices alleged to have been committed by the employer pursuant to a policy of racial discrimination."[33]

After granting the class certification motion, the district court, in the liability phase of the trial, entered separate orders with respect to the plaintiff and the class. The court found that the defendant had discriminated against the plaintiff in promotion but not in hiring, and that it had discriminated against the class in hiring but not in promotion.[34] The result reached was an ironic dichotomy because the representative plaintiff's interest was inversely related to the interests of the class. An employee discriminated against in promotions but not in hiring was representing a class discriminated against in hiring but not promotion.[35]

On appeal to the Fifth Circuit, the defendant asserted two principle arguments: first, "that the failure to hold an evidentiary hearing on the issue of certification" required reversal of the class certification; and second, that the Supreme Court ruling in *East Texas Motor Freight v. Rodriguez* foreclosed the possibility of an employee representing applicants in a class suit.[36] The appellate court rejected the first argument by stating that "[i]f later evidence shows the decision to certify the class to have been a correct one, there is obviously no need to have held such a hearing."[37] In other words, the court was stating that if

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33. 102 S. Ct. 2364, 2368 (1982).

34. *Id.* at 2368. The reason the class certification hearing is separated from the liability issue is that: "[N]othing in either the language or history of Rule 23 . . . gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action. Indeed, such a procedure contravenes the rule . . . . [It] is directly contrary to the command of subdivision (c)(1) . . . ." Eisen v. Corlise & Jacquelin, 417 U.S. 156, 177-78 (1974).

35. 102 S. Ct. 2364, 2368 (1982). As to this resulting form of class representation, the Court stated "the individual and class claims might as well as have been tried separately," and added, "It is clear that the maintenance of respondent's action as a class action did not advance the 'efficiency and economy of litigation which is the principal purpose of the procedure,' " citing American Pipe & Construction Co. v. Utah, 414 U.S. 438, 553 (1974). *See also* note 8, *supra*.

36. 626 F.2d 369, 373-74 (5th Cir. 1980).

37. *Id.* at 374, citing King v. Gulf Oil Co., 581 F.2d 1184, 1186-87 (5th Cir. 1968).

the decision to certify a class was correct, then the absence of an evidentiary hearing was nonprejudicial and irrelevant in terms of appellate review.

The employer's second argument at the appellate level was that *Rodriguez* foreclosed the possibility of an employee representing a class of both applicants and employees because the promotion claim would necessarily lack a factual nexus with any of the hiring claims, and therefore such a class would fail to satisfy the commonality and typicality requirements of Rule 23.[38] The employer argued that the certification of such a class would violate the standard of *Rodriguez* because a plaintiff who had been hired by the employer would lack the same interests and same injuries as the applicants who had never been hired, and therefore the plaintiff could not be a proper representative of such a class.[39]

In response to this argument, the *Falcon* plaintiff argued that the Fifth Circuit had not interpreted the nexus requirement of *Rodriguez* restrictively[40] and cited *Payne v. Travenol*[41] in

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38. *See* note 3, *supra*. *See also* Satterwhite v. City of Greenville, 578 F.2d 987, 993-94 (5th Cir. 1978), *vacated and remanded*, 445 U.S. 940 (1980). *Cf.* Jordan v. County of Los Angeles, 669 F.2d 1311, 1318-19 (9th Cir.), *vacated and remanded*, 51 U.S.L.W. 3252 (1982) which stated:

> Variations regarding qualifications and prior work records are typically present in Title VII employment discrimination cases. Where the common thread of discrimination is alleged to weave through the defendant's employment practices, the varying ways in which the alleged discriminatory policy affects different class members, if at all, should not preclude class certification . . . . As both the claims of the named representative and the claims of the class stem from the same practice of the defendant and are based upon the same legal theory, the required nexus is present. The existence of this nexus is further demonstrated by the fact that the requested injunctive relief will, if granted, inure to the benefit of the class and class representative as a member thereof.

Id. at 1321-22 (citations omitted).

39. *See, e.g.*, Scott v. University of Delaware, 601 F.2d 76, 87-88 (3d Cir.), *cert. denied*, 444 U.S. 931 (1979); Hill v. Western Electric Co., Inc., 596 F.2d 99 (4th Cir.), *cert. denied*, 444 U.S. 929 (1979). The validity of this argument may in fact be quite specious. *See, for example*, Trafficante v. Metropolitan Life Ins., Co., 409 U.S. 205 (1972); Waters v. Hublein Inc., 547 F.2d 466 (9th Cir. 1976), *cert. denied*, 433 U.S. 915 (1977); Richardson v. Restaurant Marketing Assoc., 527 F. Supp. 690 (N.D. Cal. 1981); *Work Environment Injury Under Title VII*, 82 YALE L.J. 1695 (1973).

40. 626 F.2d at 375; *see also* cases cited therein, and Vuyanich v. Republic National Bank, 82 F.R.D. 420 (N.D. Tex. 1979) ("Indeed, the purposes of Title VII counsel in

support of its assertion that the across the board approach was still permissible in the Fifth Circuit notwithstanding the Supreme Court's decision in *Rodriguez*.[42]

In *Payne*, Black women brought an action against the defendant employer and attacked the employer's educational requirements for a certain job classification because the requirements allegedly had a disparate racial impact and lacked any significant business necessity. The trial court sustained this argument and allowed the case to proceed as a class action. The employer appealed, and at the appellate level argued that the plaintiffs should not be allowed to represent a class which included those positions because the advanced education requirements only applied to one particular type of job for which the class representatives were not qualified. This was rejected by the appellate court:

> Plaintiff's action is an "across the board" attack on unequal employment practices alleged to have been committed by Travenol pursuant to a policy of racial discrimination. As parties who have allegedly been aggrieved by some of these discriminatory practices, plaintiffs have demonstrated a sufficient nexus to enable them to represent other class members suffering from different practices motivated by the same policies.[43]

The appellate court in *Falcon* agreed with the *Payne* holding and concluded that a class of both applicants and employees would not be overly broad and could be represented by the plaintiff. The appellate court in *Falcon* held that both plaintiff and the class complained of a common injury based on discrimination because of their national origin, and that this commonality outweighed any dissimilarities which might arise by different specific discriminatory practices (i.e. hiring and promotion).[44]

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favor of across the board representation. Recent Fifth Circuit cases have endorsed such suits.") *See also* Jordan v. County of Los Angeles, 669 F.2d 1311, 1318-19 (9th Cir.), *vacated and remanded*, 51 U.S.L.W. 3252 (1982).

41. 565 F.2d 895 (5th Cir.), *cert. denied*, 439 U.S. 835 (1978).

42. 626 F.2d at 375. Payne v. Travenol, *supra* note 41. *See also* Satterwhite v. City of Greenville, 578 F.2d 987, 993-94 n.8 (5th Cir. 1978), *vacated and remanded*, 100 S. Ct. 1334 (1980); *Cf.* Local 194, Retail & Wholesale & Dept. Store Union v. Standard Brands Inc. 85 F.R.D. 599 (N.D. Ill. 1979).

43. 565 F.2d 895, 900 (5th Cir. 1978) (citation omitted).

44. 626 F.2d at 375.

The appellate court added that in addition to this "alliance" the plaintiff had "showed a similarity of interest based on job location, job function and other considerations."[45] The appellate court concluded from this that "a sufficient nexus between the plaintiff's claims and those of the class" were therefore present and consequently the requirements of Rule 23 were satisfied.[46] From this ruling, the Supreme Court "granted certiorari to decide whether the class action was properly maintained on behalf of both employees who were denied promotion and applicants who were denied employment."[47]

The Supreme Court reversed and remanded, with one dissent which would have remanded the case for the class allegations to be dismissed. The Supreme Court held that the district court erred in permitting the plaintiff to maintain a class action on behalf of both employees and applicants. The Court found that without gathering evidence on the class issues it was error to presume that the individual's claim and the class claims shared common questions of law or fact and that the individual's claim would be typical of the class. "Conceptually," the Court stated, "there is a wide gap between (a) an individual's claim that he has been denied a promotion on discriminatory grounds, and his otherwise unsupported allegation that the company has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual" such that the prerequisites of Rule 23(a) will be met.[48] The Court further noted that even though the "proposition underlying the across-the-board rule—that racial discrimination is by definition class discrimination"—was a correct one, it concluded that this finding "neither determines whether a class action may be maintained in accordance with Rule 23 nor defines the class that may be certified."[49] The Court reasoned:

> [E]ven though the evidence that [the plaintiff] was passed over for promotion when several less deserving whites were advanced may support the conclusion that [Falcon] was denied the promotion because of his national origin, such evidence

45. *Id.* at 375-76.
46. *Id.* at 376.
47. 102 S. Ct. 2364, 2369 (1982).
48. *Id.* at 2371.
49. *Id.* at 2370-71 (footnote omitted).

> would not necessarily justify the additional inferences (1) that this discriminatory treatment is typical of [the employer's] promotion practices, (2) that [the employer's] promotion practices are motivated by a policy of ethnic discrimination that pervades [the employer's work place], or (3) that this policy of ethnic discrimination is reflected in the [employer's] other employment practices, such as hiring, in the same way it is manifested in the promotion practices.[50]

The Court noted that the district court erred by presuming that the plaintiff had satisfied the requirements of Rule 23 without carefully evaluating the "legitimacy of [Falcon's] plea that he is a proper class representative under Rule 23(a)."[51] The Court stressed that a careful scrutiny of the facts was necessary because a judgment by the court will become res judicata to the class, and therefore significant unfairness would result "if the framing of the class is overbroad."[52] The Court concluded that a class may only be certified, "after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied."[53]

V. Critique and Analysis

The holding in *Falcon* is quite simple— "that a Title VII class action, like any other class action, may only be certified if the trial court is satisfied after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied."[54] This simple holding instructs courts in fairly clear language to approach Title VII class suits without any presumption of liberality.[55] The lower courts, however, are in conflict as to the broader significance underlying the Court's decision. For example, at least one court has held that the across the board approach has received an imprimatur of approval through *Falcon*;[56] other courts have interpreted *Falcon* as merely requiring them to conduct an eviden-

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50. *Id.* at 2371. With regard to the court's conclusion that a plaintiff discriminated against in promotion but not in hiring could represent a class discriminated against in hiring but not in promotion, *see* note 35 and accompanying text, *supra*.

51. 102 S.Ct. at 2372.

52. *Id.*

53. *Id.* at 2373.

54. *Id.*

55. For the differing interpretations of this decision, *see* notes 60 and 61 and accompanying text *infra*.

56. Meyer v. MacMillan Pub. Co., Inc., 95 F.R.D. 411 (S.D.N.Y. 1982).

tiary hearing on the class issues;[57] still other courts have concluded that the across the board approach can no longer be condoned under the standard set forth in *Falcon*.[58]

The two extreme interpretations of *Falcon* can be traced to two conflicting passages in the Court's opinion. On the one hand, the Court cited one of its previous decisions and stated that "[i]n employment discrimination litigation, conflicts might arise, for example, between employees and applicants who were denied employment and who will, if granted relief, compete with employees for fringe benefits or seniority. Under Rule 23, the same plaintiff could not represent these classes."[59] However, in almost the same breath, the Court continued:"Significant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decision-making processes."[60]

In *Meyer v. MacMillan Publishing Co.*,[61] a district court certified a class of both applicants and employees, and stated, in a cavalier opinion, that "[w]hile we do not yet have the benefit of further elaboration concerning the meaning of 'significant proof [of] . . . a general policy of discrimination,' we think that the affidavits submitted by plaintiffs meet that standard."[62] Note that both in *Rodriguez* and in *Falcon* the Supreme Court had condemned the practice of certifying a class by merely relying on the pleadings.[63] Yet the *Meyer* court, in a sense, did just this by finding the requisite "significant proof" in the plaintiff's affidavits. Moreover, the *Meyer* court relied heavily on *Falcon* to support its opinion that this was all still permissible.[64]

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57. Wheeler v. City of Columbus, Mississippi, 686 F.2d 1144 (5th Cir. 1982); Anderson v. City of Albuquerque, 690 F.2d 796 (10th Cir. 1982); McKenzie v. Sawyer, 684 F.2d 62 (D.C. Cir. 1982); *Meyer v. MacMillan*, note 55, *supra*.

58. De Medina v. Reinhardt, 686 F.2d 997 (D.C. Cir. 1982); Nation v. Winn-Dixie Stores, Inc., 95 F.R.D. 82, 85 (N.D. Ga. 1982); Hawkins v. Fulton County, 95 F.R.D. 88, 92 (N.D. Ga. 1982).

59. 102 S. Ct. at 2371 n.13. *Cf.* Carr v. Conoco Plastics, *supra* note 22.

60. *Id.* at n.15.

61. 95 F.R.D. 411, 415 (S.D.N.Y. 1982).

62. *Id.* at 415.

63. 102 S. Ct. at 2370-72.

64. 95 F.R.D. at 415-16. This case also allowed an exempt employee to represent nonexempt employees, although this has been held to be impermissible in other cases,

The *Meyer* interpretation of the *Falcon* holding, albeit a minority interpretation at this time, is probably correct. If the Supreme Court was intent on sounding a death knell for the across the board approach, then it could have taken stronger action when the issue was before it. It could have dismissed the class allegations of the plaintiff's complaint altogether, instead of merely remanding the class issues for further consideration,[65] and could have deleted the dicta which has been seized upon by the *Meyer* court. This procedural aspect of *Falcon*, taken together with the dicta relied on by *Meyer*, leaves the practitioner and the courts with a solid argument that the across the board approach has not been affected by the Supreme Court's decision. While at the time of this writing it is too early to forcefully come to this conclusion, this aspect of the case does provide a viable argument against an overly restrictive reading of *Falcon*.

VI. A SUGGESTION

The trial court in *Falcon* and the appellate court in *Rodriguez* were attempting to fashion broad relief in response to the broader impact of race discrimination, which is, by definition, class discrimination.[66] Given the South's history, it is hard to fault such judicial activism[67] and liberal application of Rule 23

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see, e.g., Nation v. Winn-Dixie Stores, Inc., 95 F.R.D. 82, 86 (N.D. Ga. 1982); Ladele v. Conrail, 95 F.R.D. 198 (E.D. Penn. 1982); Piva v. Xerox, 70 F.R.D. 378 (N.D. Cal. 1975).

65. Chief Justice Burger concurred in part and dissented in part. He concurred in the general principles of the Court's discussion on the requirements of Rule 23, but with regard to the decision to remand the case for further consideration, he noted that Falcon's complaint of discrimination in promotion was an individualized plea not susceptible to class treatment. Noting that the principle behind class suits was economy and efficiency of litigation, which would not, in his opinion, be advanced in the case before the court, he would have remanded with instructions to dismiss the class claim. 102 S. Ct. at 2373.

66. *See* notes 6 and 16, *supra*.

67. *See* notes 7 and 16, *supra*. *See also* Horn v. Associated Wholesale Grocers, Inc., 555 F.2d 270 (10th Cir. 1977) discussing the numerosity requirement of Rule 23:

> Why was it important to give such stress to the requirement of large number? Considering that the presence of the parties in the class was unimportant to the granting of injunctive relief, this emphasis appears misplaced. We conclude that it did not justify rejection of the class. There can be judicial notice that employees are apprehensive concerning loss of jobs and the welfare of their families. They are frequently unwilling to pioneer an undertaking of this kind since they are unsure as to whether the court will support them. Even if they do prevail, they are apprehensive about offending the employer as a result of taking a stand.

to Title VII.[68] However, one would be equally hard pressed to find employers, and their amici curiae,[69] who share this enthusiasm. Despite any assumed altruism on the part of the lower courts, the fact remains that the Supreme Court has used both *Rodriguez*[70] and *Falcon*[71] as opportunities to strongly criticize, albeit by dicta, the across the board approach.

Justice Godbold, in his specially concurring opinion to *Johnson v. Georgia Highway Express,* presented this caveat with regard to the potential unfairness to class members bound by res judicata to an adverse ruling against an overbroad class: "[T]he error of the 'tacit assumption' underlying the across-the-board rule [is] that all will be well for surely the plaintiff will win and manna will fall on all the members of the class."[72]

The holding in *Falcon* is intended to vitiate this potential unfairness in the "tacit assumption" by requiring a rigorous analysis of the case in order to ensure strict compliance with Rule 23. If the courts are now required to hold an evidentiary hearing and rigorously analyze compliance with Rule 23, why should the courts not also be required to support their orders granting the certification of a class with written findings of fact and conclusions of law? While there is not much opinion on this, it has been stated that:

> Although the district court is not required to make findings in deciding a motion of the type here involved [Rule 23], we do think that where,

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Id. at 275.

68. *See* notes 16, 22, and 60 and accompanying text, *supra.*

69. Note that only thirteen class members were found to exist in *Falcon.* Classes with greater numerosity have been denied. *See, e.g.,* Crawford v. Western Elec. Co., Inc., 614 F.2d 1300 (5th Cir. 1980) (34 class members not sufficiently numerous); Garcia v. Gloor, 618 F.2d 264 (5th Cir. 1980), *cert. denied,* 449 U.S. 1113 (31 class members not sufficiently numerous). What was it that compelled the defendant, and amici, not to also argue the numerosity issue when classes with far more numbers have been denied certification solely on the basis of numerosity? This aspect of the case suggests that the defendant took the case up to the Supreme Court specifically seeking a restrictive ruling on the commonality and typicality requirements of Rule 23.

70. *Accord* Shelton v. Pargo, Inc., 582 F.2d 1298 (4th Cir. 1978); Local 194, Retail & Wholesale & Department Store Union v. Standard Brands, 85 F.R.D. 599 (N.D. Ill. 1979).

71. *See* note 57, *supra. Cf.* notes 56 and 60 and accompanying text, *supra.* For an intermediate reading of *Falcon,* see Ladele v. Conrail, 95 F.R.D. 198 (E.D. Penn. 1982).

72. 102 S. Ct. 2364, 2372, citing Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1127 (5th Cir. 1969).

> as here, the district court is presented with conflicting positions of substance as to how it should exercise its discretion in determining whether to permit a class action, it is salutary practice to give the litigants, either orally or in writing, at least minimum articulation of the reasons for its decision.[73]

It would be preferable, however, to take this salutory practice one step further and require a writing.[74] Given that one of the prime justifications for allowing the class action device, in the first instance, is its inherent economy and efficiency of litigation,[75] then the minimal effort taken to make written findings of fact and conclusions of law should not significantly effect that economy. Moreover, not only would the courts assure themselves of going a long way towards fulfilling the *Falcon* requirements, but also the courts might better shore up their decisions from appellate attack, and ultimate Supreme Court review. For example, had the *Falcon* district court determined at an earlier date that the certification of a class would result in an ironic inverse representation,[76] then it could have ordered notice for intervention to go out to a more qualified representative of the class.[77]

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73. Interpace Corp. v. City of Philadelphia, 438 F.2d 401, 404 (3d Cir. 1971). *See also* MANUAL FOR COMPLEX LITIGATION, § 1.40, n.29 (4th ed. 1977).

74. Mr. Sam Kagel, Esq., a mediator/arbitrator, explains why he will unfailingly provide a written opinion with his arbitration awards by way of example. Mr. Kagel was once asked by a prominent owner of a national football team exactly what he did in order to write an arbitration award. Mr. Kagel responded that he always writes his opinions with the losing party in mind because it will be that party who not only has an interest, but also has a right, in knowing just why he lost. Drawing an analogy to football, Mr. Kagel said that after a football game is over, it is the winning party who celebrates, while the losing party stays in the clubhouse reviewing the video tapes. Similarly, if an employer has a class certified against him, it is only fair that he should know why he lost with particularity. Moreover, this ruling might put the employer on notice so that it might sooner correct its discriminatory employment practices. Interview with Sam Kagel Esq., mediator/arbitrator, in San Francisco, California (January 31, 1983).

75. *See* note 8, *supra*.

76. *See* note 35 and accompanying text, *supra*.

77. Fed. R. Civ. P. 23(d) provides, in part:

> In the conduct of actions to which this rule applies, the court may make appropriate orders: . . . (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such a manner as the court may direct to some or all of the members of any step of 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 come into the action.

VII. CONCLUSION

The holding in *Falcon* requires the federal courts to hold an evidentiary hearing on the class representative's Rule 23 qualifications. At least one reported case has held, in no uncertain terms, that *Falcon* nevertheless expressly permits an across the board approach to Title VII suits.[78] Other courts have come to an opposite, although questionable, conclusion.[79] The fact is, however, that it is possible to glean dicta from the opinion which will support either conclusion.[80]

A preferable alternative would be to require the courts to issue written findings of fact and conclusions of law with any order certifying a class. If a court's review of the facts, and its sense of justice, compels it to accept an across the board attack on the defendant's employment practices, then a careful scrutiny of the facts, or enlistment of the powers available to it,[81] should result in an order meeting the *Falcon* and *Rodriguez* standards. In this fashion, a court might both advance its sense of justice and remain within the parameters of *Falcon*.

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See also note 31, *supra*.

78. *See* note 61 and accompanying text, *supra*.

79. *See* note 58, *supra*.

80. *See* notes 59 and 60, *supra*.

81. *See* note 77, *supra*.

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