

**LABOR UNIONS AND
CLASS ACTIONS:
THE UNION PERSPECTIVE ON
COLLECTIVE LITIGATION**

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I. THE LABOR UNION AS CLASS REPRESENTATIVE²

A. An Accepted Method of Practice

Today, labor unions' standing to pursue class litigation under Title VII³ receives approval by U.S. Courts.⁴ Originally, however, the EEOC did not take such a stance, despite wording in Title VII that an EEOC charge could be filed 'by a person claiming to be aggrieved'⁵ and a definition of person that included 'one or more. . .labor unions.'⁶

In 1966, however, the EEOC changed this position, stating that a labor union may be a 'person aggrieved' for purposes of both agency and court action. This policy change was quickly taken up by the courts.⁷

¹ The authors of this paper concentrate their practice in the representation of labor unions and their members and the prosecution of class action litigation in a variety of contexts including employment, consumer and toxic tort cases. This paper assumes a basic understanding of the class action as a litigation vehicle. The focus is on the impact of a labor union on such litigation. Nothing contained in this paper is intended as legal advice concerning any particular case or set of facts.

² For a general discussion of unions as class representatives, *See* James E. Youngdahl, *Union Standing in Prosecution of Employment Discrimination Litigation: Questions of Class*, 38 Ark. L. Rev. 24 (1984).

³ Title VII Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*

⁴ *International Woodworkers of America v. Georgia Pacific Corp.*, 568 F.2d 64 (8th Cir. 1977); *Social Services Union, Local 535 v. County of Santa Clara*, 609 F.2d 944 (9th Cir. 1979); *International Woodworkers of America v. Chesapeake Bay Plywood Corp.*, 659 F.2d 1259 (4th Cir. 1981).

⁵ 42 U.S.C. § 2000e-5(a).

⁶ 42 U.S.C. § 2000e(a).

⁷ *International Chemical Workers Union v. Planters Mfg. Co.*, 255 F.Supp. 365 (N.D.Miss. 1966).

Accordingly, in reliance on long-standing U.S. Supreme Court precedent,⁸ a union's right to act as a plaintiff in a class action on behalf of its aggrieved members is a settled issue.

B. Ethical Considerations⁹

Potential conflicts may arise if counsel for a class of individuals is also serving as counsel for those individuals' labor union as class representative. The Union may have organizing or bargaining objectives related to the litigation wholly apart from the goal of individual class members to secure the maximum recovery possible. However, as discussed in the cases cited above, courts recognize that unions possess more resources and information than any individual claimant and are uniquely situated to advance their members' interests as class representatives.

This is not to say, however, that a union could properly act as a class representative in, for instance, a class action discrimination suit in which it is charged, together with the employer, with complicity in the underlying discrimination.¹⁰ Such a division between the union and the class would, most likely, prevent class counsel from representing the union as well.

Also, of course, once push comes to shove and money starts to be laid on the table, people's true personalities come out and may lay bare contentious conflicts. This can be worsened where a class is partly composed of union members and partly of non-members.¹¹ But, intra-union

⁸ *Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1974); *Hunt v. Washington Apple Advertising Comm.*, 432 U.S. 333, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1997); *Harris v. McRae*, 448 U.S. 297, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980).

⁹ This portion of the paper draws extensively from William T. Payne & Henry M. Willis, *The Ethical Problems That Labor Lawyers Face When Settling Large Scale Actions*, (1998 LCC).

¹⁰ The court in *Directors Guild of America, Inc. v. Warner Bros., Inc.*, 2 Fed. Rules Serv. 3d 1429 (C.D.Cal. 1985) noted that no union has been certified as a class representative when an employer makes a counterclaim of discrimination liability.

¹¹ *Clark Equipment Co. v. AIW International Union*, 803 F.2d 878 (6th Cir. 1986). (Settlement approved over dissent of non-union class members).

conflicts can arise as well.¹² Suffice to say that the emotionally charged loyalties engendered by trade unionism may create an entirely unique set of possible class divisions or typicality problems. Class settlement issues can be complex simply when dealing with the issue of money. Toss in member/non-member, high seniority/low seniority issues as well and emotions can begin to dominate a proposed settlement.

What of the situation where a labor union does not or cannot participate directly in litigation but is willing to lend its financial resources? This situation can be analyzed under the ABA's Model Rules as a classic third-party funding issue. The keys are that the individual clients must consent to the arrangement and that the lawyer must exercise his professional judgment solely for the benefit of the class members he represents.

The union must not attempt to force a settlement on the class to advance its own organizing, bargaining, or political ends. A class action should be settled on its merits and solely with the consent of the class members. Any tie made between settlement of the case and benefits running to the union, such as recognition or particular contract terms, must be disclosed to the class when they are asked to decide whether to accept the settlement. The simplest rule to follow is disclosure to the class and receipt of their consent.

II. THE LABOR UNION PERSPECTIVE ON VARIOUS CLASS ACTIONS

A. The Fair Labor Standards Act (FLSA)

The Fair Labor Standards Act¹³ provides for class action suits through an "opt-in" procedure, in contrast to the traditional Rule 23 class. Specifically, the Act provides:

¹² *Airline Stewards & Stewardesses Local 550*, 490 F.2d 636 (7th Cir. 1973). (Class division over seniority issues).

¹³ 29 U.S.C. §§ 201, *et. seq.*

“No employee shall be a party plaintiff to any [FLSA suit] unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. . .”¹⁴

Thus, in contrast to Rule 23 suits, in which only representative plaintiffs may be personally identified and used to certify a class of thousands with no idea litigation on their behalf is even proceeding, the FLSA requires each individual client be personally identified and their signature of approval secured.

Imagine this scenario. An FLSA Plaintiff’s lawyer learns from a friend that his friend is not receiving overtime at the local franchise of a national restaurant chain where he works. The lawyer signs up his friend and files a lawsuit worth a few thousand dollars. Now, dreaming of the many thousands of ‘similarly situated’ workers at the chain’s hundreds of other franchises, the lawyer must undergo a laborious process of seeking court assistance to send notice to every worker who might be affected by the new lawsuit, asking them if they would like to join.¹⁵

Though not an insurmountable task, this process confronts the lawyer with considerable work, time and expense before the ‘real’ lawsuit can even begin. This places an additional layer of pressure on the plaintiff’s lawyer in his effort to keep the suit moving forward, perhaps battling a defendant with unlimited defense resources using a minimal budget.

Now imagine the enterprising union lawyer who, in conferring with the leadership of a local union client, hears similar tales of an entire bargaining unit suffering a similarly Dickensian nightmare of wage oppression by their employer. The entire dynamic of such a case will obviously be very different from the outset. Utilizing the union’s “human infrastructure,” that is, their innate ability to undertake collective action, a mass dissemination of information regarding potential FLSA claims followed by an organized mass sign-up can occur before a complaint is even drafted.

¹⁴ 29 U.S.C. § 216(b).

¹⁵ For an excellent discussion of how to structure an FLSA class notice in these circumstances, *See Belcher v. Shoney’s Inc.*, 927 F.Supp. 249 (M.D. Tenn. 1996).

The employer in the first scenario is provided with a whole set of extra tactical defenses to fight and pressure the plaintiffs, particularly if plaintiff's counsel suffers from a small war chest with which to prosecute the case. In the second scenario, the employer is immediately confronted with an *en masse* attack by its entire workforce. Clearly, this second scenario presents odds more in favor of pressuring an early settlement.

A labor union is naturally adapted to the creation and swift prosecution of large scale FLSA suits. This may be particularly true in industries using large numbers of non-English speaking workers who, otherwise, may well toss a poorly thought out, and unilingual, written notice straight into the trash.¹⁶ Also, a union composed of such workers will have people within its own hierarchy able to facilitate communication directly with the workers in their own language, explain the lawsuit to them, and reassure them of its advisability. This ability to build trust among the workers can spell the difference between success and failure in creating an FLSA class.

B. The Family and Medical Leave Act (FMLA)

Although the Family and Medical Leave Act (FMLA)¹⁷ has been in existence since 1993, the litigation over this Act, to date, has mostly involved private suits for individual claims.¹⁸ There have been no classes certified, as of yet, for an FMLA suit, though one court has suggested the possibility.¹⁹ However, the Act contains "on behalf of" language that

¹⁶ Migrant farm work, poultry processing, and meat-packing spring to mind as good examples of industries often heavily dependant on non-English speaking workforces. They are also often quite ready to succumb to the temptation of shorting such workers who are far less likely to know their rights and who may fear INS scrutiny if they raise a challenge.

¹⁷ 29 U.S.C. §§ 2601 *et seq.*

¹⁸For a thorough discussion on the possible uses of the class form in FMLA litigation, *see* Mary K. O'Melveny, *Making the FMLA More Effective: The Case for FMLA Class Actions*, (Washington, D.C. 1999).

¹⁹ *Cox v. Autozone, Inc.*, 990 F.Supp. 1369, 1373, n. 7 (M.D. Ala. 1998).

suggests the way is open for the use of Rule 23 in an FMLA context. Specifically:

“An action for damages or equitable relief. . . may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and on behalf of

(A) the employees; or

(B) the employees and other employees similarly situated.”²⁰

The FMLA, just as the FLSA, discussed above, is an area of law particularly suited to use and facilitation by labor unions. A 1996 DOL report showed 60% of employees did not know their FMLA rights and 60% of employers did not know their FMLA obligations.²¹ What this demonstrates is an opportunity for labor unions to serve, as they traditionally have in other areas, as workforce educators, letting their bargaining unit members know of the protections the FMLA provides.

This, of course, translates into the same phenomenon noted above in the FLSA discussion. With a workforce’s union disseminating information on the FMLA, building their members’ knowledge base and confidence regarding their rights, a natural next step is for the union to aid the workers in demanding and enforcing their rights. Also, once again, a union’s innate ability for collective action ties directly into the possibility for use of the class action vehicle in FMLA litigation.

Since class certification must occur early in such litigation, the union is an obvious means for gathering the information necessary to accomplish that task without relying on cumbersome discovery mechanisms. Although the FMLA has no “opt-in” language like the FLSA, a union could still use mass membership meetings to gather the information necessary to structure an effective FMLA suit early on.

Since the FMLA is a fairly new act, providing substantial and substantive rights to many workers, it is natural that there are many people with questions regarding their FMLA rights and how they can effectively

²⁰ 29 U.S.C. § 2617(a)(2).

²¹ See Mary K. O’Melveny, *supra* note 18.

access those rights. Labor unions are ideally suited for aiding workers in accomplishing these goals through class action litigation.

C. The Worker Adjustment and Retraining Notification Act (WARN)

The Worker Adjustment and Retraining Notification Act (WARN Act) became law in February 1989.²² The Act requires, with a few exceptions, that covered employers give written notice to individual employees or their union, sixty days before undertaking a plant closing or mass layoff at any single site of employment.²³ An employer who does not give such notice can be liable for up to sixty days' pay and benefits to terminated employees, civil penalties to local government, and attorneys' fees.²⁴

In 1996, the U.S. Supreme Court definitively settled the issue of whether a labor union may sue under the WARN Act on behalf of affected workers.²⁵ This unanimous decision overturned the Eighth Circuit, previously alone among the Circuits in holding unions could not bring such a suit.²⁶

Few issues are of more importance to the collective interests of labor unions than job security. Further, few employment laws are more pointedly directed at the protection of the interests of a given *group* of workers than the WARN Act. By its very nature, WARN is designed to protect large groups of workers being affected by mass layoffs. Suits brought pursuant to the Act will, similarly, involve groups of workers.

²²29 U.S.C. §§ 2101 *et seq.*

²³ For an overview of the substantive law created by the WARN Act, *see* Janet G. Payton, *Corporate Counsel's Primer on The WARN Act*, (Business Laws, Inc. 1999).

²⁴ *Id.*, at p. 2.

²⁵ *UFCW Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 116 S.Ct. 1529, 134 L.Ed.2d 758 (1996).

²⁶ *See* Janet G. Payton, *supra* note 23, at p. 22.

Here again, we see the role of the labor union as protector of workers' collective rights by informing them of such rights and aiding in the prosecution of a lawsuit on their behalf. Since a unionized workforce will receive its WARN Act notice through its union, the union is immediately involved and has a vested interest in ensuring their members' rights are protected through the collective action of class litigation.

A WARN Act notice provided to a union must include:

- the name and address of the site where the mass layoff or plant closing will occur and the name and telephone number of the company representative to contact for further information;
- a statement as to whether the planned action will be temporary or permanent and, if the entire plant is to be closed, a statement to that effect;
- the expected date for the first separation (or a range of fourteen days during which the separations are expected to occur) and the anticipated schedule for separations; and
- the job titles of the positions to be affected and the names of all employees currently holding such positions.²⁷

Obviously, then, in an organized setting, the union is uniquely charged with aiding workers in protecting their rights and helping them through the transition created by mass workforce reductions.

D. The Employee Retirement Income Security Act (ERISA)

The Employee Retirement Income Security Act of 1974 (ERISA)²⁸ is another area of federal law that often impacts workers in a collective fashion. One such example arose in Texas in 1990, in the representation of both unions and individual plaintiffs in an ERISA-based class action.²⁹

²⁷ *Id.* at p. 23, quoting 20 C.F.R. § 639.7(c).

²⁸ 29 U.S.C. §§ 1001 *et seq.*

²⁹ *UPIU et al. v. Champion Intl. Corp.*, 908 F.2d 1252 (1990).

In *UPIU v. Champion*, union retirees sought recovery from their former employer for increases assessed on their monthly medical insurance premiums over a course of some years. The suit was based not only on ERISA, but also on Section 301 of the Labor Management Relations Act,³⁰ for breach of a collective bargaining agreement, as the workers' agreement had been the document setting forth their insurance premium obligations.

Though the case itself turned on issues of interpreting one ERISA plan's contract language, it demonstrates, once again, the role of the labor union in safeguarding workers' rights through the medium of class action litigation. Each individual worker's losses were too small to warrant individual lawsuits and the union was possessed of the knowledge and resources necessary to prosecute the action. Further, the existence and relevance of a collective bargaining agreement created an extra lever with which to pry at the employer's attempts to resist suit.

The collective bargaining process is intended to be determinative of workers' rights and obligations in their individual workplaces. As seen in *UPIU v. Champion*, a labor agreement also facilitates a class action insofar as certain of its terms, if breached, may affect an entire bargaining unit, not merely one individual.³¹ Thus, the collective nature of trade unionism shows its vitality and inherent benefit once again in the class action arena.

E. Title VII of the Civil Rights Act of 1964 (Title VII)

Union aid to class action plaintiffs utilizing Title VII theories can be helpful to the class in all the same ways as discussed above regarding those statutes. However, an important difference can arise here as, unlike the FLSA, FMLA, WARN, and ERISA³² which usually do not involve a labor union as a defendant, Title VII carries with it an attendant risk of the union being named as a defendant in its own right.

³⁰ 29 U.S.C. § 185.

³¹ While breaches of a collective bargaining agreement normally are subject to grievance arbitration under the law, retirees are not required to exhaust those procedures.

³² With a notable exception for ERISA actions against pension and health/welfare funds administered in whole or in part by union trustees pursuant to the Taft-Hartley Act, 29 U.S.C. §§ 141-188.

Though the bad old days of large-scale litigation over such things as separate lines of promotion for African-American workers versus Caucasian workers, as well as separate unions for each, are largely a thing of the past, this is not to say unions are no longer targets for this sort of litigation. Because of the risks inherent in Title VII suits, union counsel should assure themselves that the union itself cannot be implicated, before aiding plaintiffs in developing information for their suit against their employer.

F. The Americans With Disabilities Act (ADA)

The Americans With Disabilities Act (ADA),³³ in effect since 1990 does not particularly lend itself well to the class action vehicle for two reasons. First, the issue of a disabled worker needing accommodation in the workplace is not one that tends to occur in large numbers but, rather, one at a time. Second, in those workplaces large enough to have many disabled workers at one time, such workers will be hindered by “typicality” problems in attempting to certify a class. That is, because every worker will have their own unique injury/disability requiring unique accommodation, their concerns will not be easily addressed by the type of blanket relief offered by the class action.

The union perspective here is geared more toward addressing worker concerns on an individual basis and facilitating employer accommodation of workers. This is especially true as a labor union itself has no duty to accommodate workers or to ensure a non-hostile work environment.³⁴

As discussed in more detail below, suing a union under an ADA theory is largely a needless complication as any monetary relief can usually be obtained from the employer’s deep pocket and any remedial relief requires the employer to take action to accommodate a disabled worker.

³³ 42 U.S.C. §§ 12101 *et seq.*

³⁴ *Cole v. Appalachian Power Co.*, 903 F.Supp. 975 (S.D.W.Va. 1995). (Though *Cole* is a Title VII case, the ADA draws from Title VII law for its own analyses. *Vendetta v. Bell Atlantic Corp.*, No. 97-4838, 1998 U.S. Dist. LEXIS 14014, at *28 (E.D. Pa. Sept. 8, 1998).

III. THE LABOR UNION AS CLASS ACTION DEFENDANT

A. Using a Union's Strengths to Bust a Rule 23 Class

The flip-side to using a union's inherent collective nature to facilitate class actions is, of course, using it to defeat class actions. Just as the organized structure of a labor union can allow its leadership and its legal counsel to seek out and organize its aggrieved members into a viable class, the same structure facilitates the easy identification of those who do not share a purported class' tales of woe.

Imagine this scenario. Two or three named, female plaintiffs sue a union on behalf of a purported class of women alleging the union's hiring hall system discriminatorily prevents them from seeking work to the same degree as their male counterparts. Initially, this may seem like a dangerous case. However, a review of hiring hall procedures and an informal polling of other female union members by the union's leadership may reveal a strikingly different picture.

Using information gleaned from speaking with other female union members and placing it in affidavit form, a union, thus armed, may challenge the plaintiffs' class certification effort on the grounds they lack typicality and numerosity in their claims, preventing them from creating a class at all. Suddenly plaintiff's counsel is left with two or three traditional Title VII suits and an initial surge of evidence suggesting that not even those claims are as strong as previously thought.

Of course, the other side of that coin is that a review of the membership may, indeed, reveal real problems within the union. However, if this is the case, better to know up front for purposes of deciding on a strategy aimed at helping control and structure any future settlement.

A final note on this scenario – contacting the other female members of the local does not present the type of ethical problems usually inherent in contacting an opposing party directly, even if the union's lawyer talks with the women directly. This is due to the fact that, until a class is actually certified, the other women are not part of the opposing party.

B. Ill-Conceived Class Actions: Talking Sense to Plaintiff's Lawyers

Often, a Plaintiff's lawyer may toss a labor union into their suit as a defendant for less than clear reasons. A poorly crafted suit may simply take a "shotgun" approach, naming every entity connected with a class' employment, however tangential. Also, in any given group of workers of any size in a unionized workplace, there will inevitably be some with hard feelings toward the union, whatever the reason. Particularly in the case of class action plaintiff's lawyers who don't normally practice labor law, they may well throw the union into the suit based on any number of hazy worker complaints.

In such a situation, if it is apparent the union has been added to a suit for such reasons, a union may be able to negotiate its way out simply by pointing out the disadvantages of holding them in, and the advantages of letting them out. Litigation, particularly that as complex as class actions, can be a sufficiently difficult undertaking with only one defendant working to undermine your case. Having *two* resourceful defendants attacking you can prove devastating, particularly if a union is able to use its organization to undermine class certification, as discussed above.

Also, as discussed above, regarding a union's natural ability to gather information and assist in the creation of a class, they can be a great ally to the plaintiffs in a class action suit. Which is the more desirable scenario – the union you named for uncertain reasons using its resources to undermine your class and dog your steps at every turn, or the union who uses its resources to help you build, certify and prosecute your class action against a common enemy? Obviously, plaintiffs need all the friends they can get.

This is particularly true when considered in terms of the remedy being sought in the litigation. Money -- ever the common denominator -- is either going to be available in sufficient quantity from the deep pockets of the employer, or the suit is not going to be worth filing in the first place. Having a dues-dependent labor union in your suit simply will not gain any financial advantage, especially once the putative class members figure out that any judgment against their union will come straight out of the dues they themselves paid over the years.

Further, as to corrective or injunctive relief, it is invariably the employer who has exclusive control over the workplace. Outside of hiring hall settings, it is the employer who shoulders the main burden of ensuring the workplace is operated in accordance with the law.³⁵ A “management rights” clause in a labor agreement can also be interpreted as a “management responsibilities” clause.

If there is negotiated contractual language that gives rise, for instance, to a class suit for discrimination, the union could be named merely as a necessary party under Federal Rule of Procedure 19(a), solely to assure corrective relief is implemented and the contractual issue resolved, without putting them on the hook for monetary damages.

Ultimately, monetary judgments by a class of workers against their own union can be counter-productive. It should be apparent that extracting money from their union does not punish the union, it punishes the workers themselves because a union’s resources are only what the members themselves have given; a union does not pay from its “own” money in the same sense that an employer must pay out of its own funds.

CONCLUSION

In conclusion, it is important for plaintiffs to remember, given the complexity and demands of class action litigation, who they can look to for guidance and support. Though labor unions are not untainted when it comes to the treatment of workers, it should be apparent their purpose for existing is to aid and protect workers and their interests. In this regard, labor unions can be a powerful ally for plaintiffs seeking class relief under Rule 23 or similar collective litigation.

Plaintiff’s counsel looking for a source of information, for funding, for a means of reaching out to the individual members of a given class, should consider the possibility that a labor union may be an excellent tool for accomplishing their clients’ goals of obtaining a better workplace. As Lane Kirkland, former AFL-CIO President, once stated: “I am not talking about fault; I’m trying to look for answers.”³⁶

³⁵ Cases involving non-*bona fide* collectively bargained seniority systems are things of the past.

³⁶ Lane Kirkland, AFL-CIO President, “*The David Brinkley Show*,” Labor Day, 1988.