

Work Environment Injury Under Title VII

The burden of enforcement of Title VII of the Civil Rights Act of 1964 (the Act)¹ has been borne largely by private persons.² Standing to sue is therefore of critical importance to the success of the Act in ending employment discrimination in the United States. The standing question presents itself in both individual and class actions. Standing barriers to individual suits have generally been construed expansively under the "aggrieved person" language of the Act.³ The more important doctrine of class action standing is dependent on the concurrence of two elements. First, the class must be a proper one in light of Rule 23's requirements of numerosness and commonality of injury.⁴ Second, the person seeking to represent the class must have suffered individual injury which is characteristic of the class and must be capable of adequately protecting its interests.⁵ Courts have not always distinguished these elements of standing in their analysis, even though they have countenanced the formation of ever-more heterogeneous classes represented by plaintiffs less closely connected with their classes.⁶

Several recent decisions have considerably narrowed the concept of standing to represent a class.⁷ These decisions, however, must be evaluated in light of the Supreme Court's subsequent endorsement in *Trafficante v. Metropolitan Life Insurance Co.*⁸ of a broad conception of individual injury in the related area of housing discrimination law.⁹

This Note argues that *Trafficante* compels recognition of the theory that the "conditions of employment" language of Title VII protects the total work environment. Under this theory discriminatory practices directed at one group taint the work environment and thereby cause injury to all employees.

1. Civil Rights Act of 1964, Title VII, §§ 701-16, 42 U.S.C. §§ 2000e-2000e(15) (1970), as amended 42 U.S.C.A. §§ 2000e-2000e(15) (Supp. 1973) [hereinafter cited to section number of the Act].

2. See note 31 *infra*.

3. See notes 34-35 *infra*.

4. See FED. R. CIV. P. 23(a)(1)-(2).

5. See FED. R. CIV. P. 23(a)(3)-(4). For convenience, the question whether the class is a proper one will be referred to as "class standing," while the adequacy of the individual representation will be referred to as "standing to represent the class." These are distinct elements of the general problem of standing in class actions.

6. See note 36 *infra*.

7. *Huff v. N.D. Cass & Co.*, 468 F.2d 172, *rehearing granted*, 468 F.2d 172 (5th Cir. 1972); *Cooper v. Allen*, 467 F.2d 836 (5th Cir. 1972); *Heard v. Mueller Co.*, 464 F.2d 190 (6th Cir. 1972).

8. 409 U.S. 205 (1972).

9. *Trafficante* arose under the Civil Rights Act of 1968, 42 U.S.C. §§ 3600 *et seq.* (1970).

I

Title VII is the central provision of federal antidiscrimination law in the employment area.¹⁰ It forbids employers to discriminate, limit, segregate, or classify employees on the basis of race, color, religion, sex, or national origin as to hiring, firing, compensation, terms, conditions, or privileges of employment.¹¹ The five-member Equal Employment Opportunity Commission (EEOC) was created to administer these provisions.¹² Its primary powers are investigatory and conciliatory, though 1972 amendments authorized the Commission to initiate court proceedings if it is unsuccessful in obtaining voluntary compliance through mediation.¹³ The individual complainant must file his charge with the Commission within 180 days after the occurrence of the unlawful employment practice complained of.¹⁴ Where a state or local agency has been established to hear charges of discrimination, it is given the first opportunity to handle the complaint.¹⁵ Thereafter EEOC itself investigates the charge and determines whether there is reasonable cause to believe it to be true.¹⁶ If it finds reasonable cause, it will attempt to conciliate; otherwise the charge is dismissed with a "no cause" finding.¹⁷ If EEOC does not act on the complaint, finds "no cause," or finds "cause" but fails to enter into a conciliation or settlement agreement acceptable to it and the complaining party, and if it does not file suit on its own within 180 days, it notifies the individual complainant. He may then bring an action in a district court as an aggrieved party within the next 90 days.¹⁸ In such private actions the courts are authorized at the complainant's request to appoint an attorney and commence the action without payment of fees.¹⁹

10. Other relevant statutes include: Equal Pay Act, 29 U.S.C. § 206 (1963); Civil Rights Act of 1866, 42 U.S.C. §§ 1971 *et seq.* & §§ 1981 *et seq.*; Exec. Order No. 11,246 (Federal Contract Compliance Act), 3 C.F.R. § 172 (1973), *as amended by* Exec. Order No. 11,478, 3 C.F.R. § 214 (1973); Age Discrimination Act, 29 U.S.C. §§ 621-34 (1970).

11. *See* Act §§ 703-04, 42 U.S.C. §§ 2000e(2)-(3) (1970).

12. Act § 705, 42 U.S.C. § 2000e-4 (1972).

13. Act §§ 706(a)-(e) outline EEOC's investigating and conciliatory powers. Section 706(f)(1) gives EEOC power to sue and § 706(b)(2) gives EEOC and the Attorney General power to bring suit for a temporary injunction. The Attorney General also retains concurrent power with EEOC to bring "pattern and practice" suits until 1974, at which time this power will be transferred to EEOC alone, § 707. Section 706(b)(1) grants the Attorney General sole power to bring suit against state governments or governmental agencies or political subdivisions, though EEOC retains jurisdiction over investigations and conciliation for these respondents.

14. Act § 706(e).

15. Act § 706(c).

16. Act §§ 706(b), 709.

17. Act § 706(b).

18. Act § 706(f)(1).

19. Act § 706(k) authorizes the court to grant reasonable attorneys fees. *See also* Act § 706(f)(1).

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The level of compliance attained under this scheme has been low.²⁰ The compromises necessary to secure passage of Title VII left EEOC with only its investigatory and conciliatory roles,²¹ and Congress has not acted favorably on periodic proposals that it be empowered to issue cease and desist orders.²² The 1972 amendments conferred power to bring suit, but the EEOC has been handicapped by small appropriations²³ and by political restraints.²⁴ As a result, its effectiveness has been limited.²⁵

These weaknesses of EEOC have placed most of the burden of enforcement on private plaintiffs despite the original expectation that private suits would be the exceptional method of enforcement rather than the rule.²⁶ Unfortunately, however, the groups discriminated against are often reluctant to assert their rights. They are less able to deal with the rigors and delay of the detailed EEOC charge procedure,²⁷ and because they lack the resources to endure lengthy litigation,

20. See, e.g., N.Y. Times, June 7, 1973, at 67, col. 1; U.S. COMMISSION ON CIVIL RIGHTS, THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT: ONE YEAR LATER II (1971).

See also testimony of William H. Brown, Chairman, EEOC, in *Hearings on H.R. 1746 Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 92d Cong., 1st Sess. 79 (1971) [hereinafter cited as *Hearings*].

21. As part of the compromise ending the filibuster against the Civil Rights Act of 1964, the EEOC was shorn of the power to issue cease and desist orders. See, e.g., H. REP. NO. 914, 88th Cong., 2d Sess., in U.S. CODE CONG. & AD. NEWS 2411, 2426 (1964).

22. Such a proposal was embodied in S. 2453, introduced in 1969, but the bill died. The EEOC was given power to bring suit in 1972. At that time several speakers again urged that the EEOC be accorded power to issue cease and desist orders. See, e.g., testimony of Howard A. Glickstein, Staff Director, U.S. Commission on Civil Rights, *Hearings*, *supra* note 20, at 104.

23. The budget for the EEOC for 1971 was \$16 million, for 1972, \$22.8 million, for 1973, \$30.6 million. U.S. OFFICE OF MANAGEMENT AND BUDGET, THE BUDGET OF THE U.S. GOVERNMENT 1973, at 428-29 (1972). The projected fiscal 1974 budget is \$43 million, but \$4.6 million of this is to go to state and local agencies, most of which have limited effectiveness because they lack power to sue. U.S. OFFICE OF MANAGEMENT AND BUDGET, BUDGET OF THE U.S. GOVERNMENT 1974, SPECIAL ANALYSES 185 (1973). More of the Budget has been and continues to be earmarked for administration and conciliation. The part of the Budget allocated for filing of amicus briefs and litigation was \$1 million in 1972, \$5.2 million in 1973, and \$9.3 million in 1974. *Id.* at APPENDIX 877.

24. Spokesmen for the NAACP and National Organization of Women detect a decline in the federal commitment to equal employment opportunity under the Nixon administration. N.Y. Times, Sept. 26, 1972, at 26, col. 4.

25. EEOC has never been able to investigate and conciliate more than a fraction of its caseload. EEOC Chairman Brown stated that as of June 30, 1971, the case backlog was almost 32,000 and that the average delay before the Commission could complete action on a complaint was eighteen months to two years. *Hearings on S. 2515, S. 2617, H.R. 1746 Before the Subcomm. on Labor of the Sen. Comm. on Labor and Public Welfare*, 92d Cong., 1st Sess. 493 (1971).

Little change in EEOC's performance has been apparent since the 1972 amendments. Wall St. J., Feb. 12, 1973, at 4, col. 5. EEOC's use of its power to bring suit has been ineffective. Wall St. J., April 3, 1972, at 1, col. 5. Fewer than 100 cases were filed in the first year.

26. See, e.g., *Hall v. Werthan Bag Corp.*, 251 F. Supp. 184, 186 (M.D. Tenn. 1966). See also S. REP. NO. 415, 92d Cong., 1st Sess. 17 (1971).

27. See, e.g., *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 462-63 (5th Cir. 1970). Many Title VII plaintiffs who would have standing to sue lose it for failure to comply

they are more easily "bought off" by defendant employers, thus frustrating the use of the class action as a broad-based antidiscrimination device. Oftentimes they fear the employer's physical and economic reprisals.²⁸ These characteristics discourage effective prosecution of complaints.

Recognizing this, EEOC has sought to broaden the scope of the private enforcement action. In particular EEOC has extended standing to white employees complaining of discrimination directed not at them but at their black co-workers, on the theory that Title VII protects the total work environment and that any employee forced to work in an environment affected by discrimination has suffered the injury requisite to make him an "aggrieved person."²⁹ EEOC has also relied on its power to investigate and conciliate on all matters "like or related to the charge" to initiate company-wide investigations and settlement agreements upon the filing of a single charge.³⁰

The courts generally have recognized the importance assumed by private enforcement actions under Title VII and have construed their mandate broadly.³¹ The private plaintiff in Title VII litigation is said to act as a private attorney general because he is seeking to enforce "public rights."³² Activist courts have also justified a broad concept of standing with the observation that plaintiffs suffer under disadvantages

with Title VII procedural prerequisites. For example, EEOC must often ask the complainant for more information because the charges are incompletely stated. Failure to supply the requested information results in dismissal.

28. Congress' concern that complainants were subject to such reprisals led it to enact § 706(b), which grants any individual power to sue on behalf of aggrieved persons with their permission. CONF. REPORT ON H.R. 1746, EQUAL OPPORTUNITY ACT OF 1972, 92d Cong., 2d Sess.; 118 CONG. REC. H 1862 (daily ed. Mar. 8, 1972).

29. The first EEOC decision addressing this question, in 1969, held that the whites could file charges, but that they were not members of the blacks' class. E.E.O.C. Decision No. 70-09, 2 CCH EMPL. PRAC. GUIDE ¶ 6026 (1969). Later in 1969 the EEOC held that a white co-worker was injured by discrimination aimed directly at the blacks because the situation was "a term and condition" of the white's employment and terms and conditions of employment were protected by the Act. E.E.O.C. Case No. YSF 9-108, 2 CCH EMPL. PRAC. GUIDE ¶ 6030 (1969). In 1970 EEOC explicitly held that the work environment is protected by the Act and that whites as well as blacks are injured by a discrimination-charged work environment. E.E.O.C. Decision No. 71-909, 2 CCH EMPL. PRAC. GUIDE ¶ 6193 (1970) (an employer is "obliged under this Act to maintain a working atmosphere free of racial intimidation or insult. Failure to take steps reasonably calculated to maintain such an atmosphere violates the Act." *Id.* at 4329).

30. See Act § 709(a), 42 U.S.C. § 2000c-8(a) (1970).

31. See *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 460-61 n.1 (5th Cir. 1970). See also *Culpepper v. Reynolds Metal Co.*, 421 F.2d 888 (5th Cir. 1970); *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711 (5th Cir. 1970); *Holliday v. Railway Express Co.*, 306 F. Supp. 898 (N.D. Ga. 1969).

32. The Supreme Court took this position in *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 401 (1968), a Title II suit, and its reasoning was extended to Title VII in *Oatis v. Crown Zellerbach*, 398 F.2d 496, 499 (5th Cir. 1968); *Jenkins v. United Gas Corp.*, 400 F.2d 28, 32 (5th Cir. 1968); and *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 715 (5th Cir. 1970). See *Affeldt, Title VII in the Federal Courts—Private or Public Law*, 14 VILL. L. REV. 664 (1969).

inherent in their situation.³³ The courts have not extended standing, however, to those who are not discriminated against, even though Title VII uses the same "aggrieved person" language in the grant of jurisdiction to EEOC and to the courts, largely because the EEOC is an administrative body not subject to the same constitutional "case or controversy" strictures as the courts.

Nevertheless, the courts have expanded the scope of individual standing in private suits in several ways. The original prohibition of suit for prospective injuries has been dropped.³⁴ Suit can also be brought even though EEOC may not have found cause to believe that discrimination had occurred.³⁵

Court decisions from 1967 to 1972 have also expanded principles governing class standing and standing to represent a class. The courts have permitted ever-greater deviation between the situation of the representative and that of the class at large in determining the manageability of the class³⁶ and the adequacy of the representative's protection of the class interest.³⁷

II

Several decisions, however, seem directly to contravene the trend toward expansive standing in class actions. In *Huff v. N.D. Cass & Co.*³⁸ the Fifth Circuit Court of Appeals affirmed a district court holding

33. See, e.g., *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 467 (5th Cir. 1970).

34. See *Cypress v. Newport News Gen. & Nonsectarian Hosp. Ass'n*, 375 F.2d 648, 656 (4th Cir. 1967); *Carr v. Conoco Plastics*, 295 F. Supp. 1281, 1289 (N.D. Miss. 1969), *aff'd*, 423 F.2d 57, 65 (5th Cir. 1970).

35. See, e.g., *Beverly v. Lone Star Lead Construction Corp.*, 437 F.2d 1136, 1158 (5th Cir. 1971); *Fekete v. United States Steel Corp.*, 424 F.2d 331 (3d Cir. 1970), *rev'g* 300 F. Supp. 22 (W.D. Pa. 1969). *But see* *Green v. McDonnell-Douglas Corp.*, 299 F. Supp. 1100, 1102 (E.D. Mo. 1969); *Chavez v. Rust Tractor Co.*, 2 E.P.D. ¶ 10,171 (D.N.M. 1969).

36. At first class actions were forbidden unless the injuries suffered by members of the class were practically identical. See, e.g., *Ward v. Luttrell*, 292 F. Supp. 165 (E.D. La. 1968). In later cases larger classes were permitted that were much less homogeneous. In *Harvey v. International Harvester Co.*, 5 E.P.D. ¶ 7961 (N.D. Cal., Aug. 17, 1972), a single black plaintiff was permitted to represent all blacks, chicanos, orientals, and American Indians who had been, were presently, or might be employed by the defendant at his plant and who had been, were, or might be affected by the defendant's discriminatory employment practices. See *Taylor v. Safeway Stores, Inc.*, 333 F. Supp. 83 (D. Colo. 1971) (discharged employee granted standing to bring class action challenging racial discrimination in all Safeway stores in the state).

37. Originally the class representative had to be in precisely the same situation as the members of the class he sought to represent. See *Chavez v. Rust Tractor Co.*, 2 E.P.D. ¶ 10,171 (D.N.M. 1969) (employee denied standing to represent the class of applicants who had not been hired); *Hovan v. Capital Fish Co.*, 1 E.P.D. ¶ 9979 (N.D. Ga. 1969) (discharged employees denied standing to represent present employees).

By 1972 this narrow position had been abandoned. Former employees were permitted to represent present employees, see, e.g., *Johnson v. Georgia Hwy. Express Inc.*, 417 F.2d 1122, 1124 (5th Cir. 1969), as could applicants, see, e.g., *Carr v. Conoco Plastics*, 295 F. Supp. 1281, 1289 (N.D. Miss. 1969), *aff'd*, 423 F.2d 57, 65 (5th Cir. 1970).

38. 468 F.2d 172, *rehearing granted*, 468 F.2d 172 (5th Cir. 1972).

that a discharged employee could not represent present employees in a class action alleging discriminatory employment practices. The district court had refused to allow the class action to proceed until it had determined whether the plaintiff's individual complaint was meritorious, a clear and surprising departure from customary procedure in class actions.³⁹ *Huff* was relied upon by the Sixth Circuit Court of Appeals in *Heard v. Mueller Co.*,⁴⁰ in which an employee discharged during the pendency of the suit was denied leave to amend his complaint to make it a class action. The court reasoned that the employee was not a proper representative of the class of black employees of the company since he was not seeking reinstatement and his individual claim was moot.⁴¹ Finally, in *Cooper v. Allen*,⁴² plaintiff, an applicant for a municipal position as a golf professional, sought to bring a class action challenging the use of an allegedly discriminatory employment test for twenty municipal jobs of which golf pro was one. The court of appeals, judging the class improperly broad, declined to allow the suit to proceed on this basis. It restricted the class to applicants for the golf pro position alone.⁴³ It is not yet possible to determine whether these decisions portend a reversal of the trend toward liberalization of standing or are merely aberrational.⁴⁴

39. Rule 23(c)(1) of the Federal Rules of Civil Procedure directs that a determination be made as soon as practicable whether the action may properly be maintained as a class action. This commonly necessitates a hearing to determine the plaintiff's adequacy as a class representative under Rules 23(a)(3) & (4). What makes *Huff* remarkable is the standard it applied in making that determination. A class action generally is permitted to proceed as long as plaintiff's individual claim is not frivolous. See *Parham v. Bell Telephone Co.*, 433 F.2d 421 (8th Cir. 1970). See generally Blecker, *Is the Class Action Rule Doing the Job?*, 55 F.R.D. 365, 370 (1972). The district court in *Huff*, by contrast, refused to allow plaintiff to proceed until he demonstrated that he was entitled to prevail on his individual claim. Thus it tried his claim and proceeded to judgment before the determination under Rule 23(c)(1) was made. See *Cox v. Babcock & Wilcox Co.*, 5 E.P.D. ¶ 6977 (4th Cir. 1972).

40. 464 F.2d 190 (6th Cir. 1972).

41. Mootness of the class representatives' individual claim subsequent to the filing of the complaint does not generally preclude maintenance of the suit as a class action. See *Hackett v. McGuire Bros.*, 445 F.2d 442 (3d Cir. 1971) (pensioners whose claims were moot held to have standing to represent class including present employees); *Parham v. Southwestern Bell Telephone Co.*, 433 F.2d 421 (8th Cir. 1970); *Rosen v. Public Service Electric & Gas Co.*, 409 F.2d 775 (3d Cir. 1969); *Jenkins v. United Gas Corp.*, 400 F.2d 28 (5th Cir. 1968).

42. 467 F.2d 836 (5th Cir. 1972).

43. Several prior cases have held that all employees of a plant or a company form a manageable class. See, e.g., *Johnson v. Georgia Hwy. Express, Inc.*, 417 F.2d 1122 (5th Cir. 1969); *Jenkins v. United Gas Corp.*, 409 F.2d 775 (3d Cir. 1969); *Harvey v. International Harvester Co.*, 5 E.P.D. ¶ 7961 (N.D. Cal. 1972) (plaintiff allowed to represent a class challenging company-wide discrimination in many job categories).

The court sought to distinguish these plant-wide or company-wide class actions on the ground that they were cases of intentional discrimination, whereas the discrimination in *Cooper* was unintentional. In *Griggs v. Duke Power Co.*, 401 U.S. 24 (1971), however, the Supreme Court held that the absence of discriminatory intent by an employer does not redeem an otherwise unlawful employment practice. See also *Rogers v. E.E.O.C.*, 454 F.2d 234 (5th Cir. 1971).

44. Rehearing has been granted in *Huff*, 468 F.2d 172, and applied for in *Cooper*. Neither has been relied upon sufficiently to indicate how broadly they will be applied.

The subsequently decided case of *Trafficante v. Metropolitan Life Insurance Co.*⁴⁵ in the related field of housing discrimination law suggests, nevertheless, that *Huff*, *Heard*, and *Cooper* will have limited influence in the future. *Trafficante* was an individual action by tenants of an apartment complex who alleged that their landlord discriminated against nonwhite applicants by manipulating the waiting list for apartments, delaying action on applications, and using discriminatory acceptance standards. The tenants, a black and a white, filed complaints with the Secretary of Housing and Urban Development as "persons aggrieved" under the Civil Rights Act of 1968.⁴⁶ They claimed that the landlord's discrimination cost them the social benefits of living in an integrated community, deprived them of business and professional advantages that would have accrued from living with members of minority groups, and caused them to be stigmatized as residents of a "white ghetto." The tenants filed suit in district court after HUD was unable to secure voluntary compliance. The court dismissed the complaint for want of standing and the Court of Appeals for the Ninth Circuit affirmed. In a short opinion for the Court, Justice Douglas held that petitioners had standing to sue.

The analogy to employment discrimination suggests itself immediately. An employee who is not the subject of discrimination might nevertheless be injured by discriminatory employment practices directed at others insofar as he is deprived of the benefits of a nondiscriminatory work environment. In fact the statutory fair housing provisions invoked in *Trafficante* are functionally identical to the employment discrimination provisions of Title VII. Both include a list of practices deemed to be discriminatory⁴⁷ and provide for enforcement procedures including private actions by "persons aggrieved" by the allegedly discriminatory practice.⁴⁸ Until the 1972 amendments were added to Title VII, the enforcement procedures were virtually identical. Neither HUD nor EEOC had any enforcement powers of their own. Enforcement was carried out through private suits or pattern and practice suits brought by the Attorney General. This lack of public enforcement power was a factor to which Justice Douglas attached great importance in *Trafficante*.⁴⁹

45. 409 U.S. 205 (1972), *rev'g* 322 F. Supp. 352 (N.D. Cal.), *aff'd*, 446 F.2d 1158 (9th Cir. 1971).

46. 42 U.S.C. § 3610(a) (1970) provides in relevant part:

Any person who claims to have been injured by a discriminatory housing practice or who believes that he will be irrevocably injured by a discriminatory housing practice that is about to occur (hereafter "person aggrieved") may file a complaint with the Secretary

47. Compare 42 U.S.C. §§ 3604-06 (1970) with Act §§ 703-04.

48. Compare Act § 810(a)(d), 42 U.S.C. § 3610(c)(d) (1970), with Act § 706.

49. 409 U.S. at 211.

The 1972 amendments, which conferred power on EEOC to bring suit, seem to destroy the symmetry between the two legislative schemes. EEOC's power to sue, however, should make no difference in the resolution of the standing question for Title VII litigation. An individual is no less aggrieved by a practice because an administrative agency is also given the power to attack the practice in court. Moreover, the total public enforcement power is no greater under Title VII than under § 810 of the Civil Rights Act of 1968 (1968 Act). The only difference between the two acts lies in the agency charged with public enforcement.⁵⁰ The rationale of *Trafficante* applies with equal force to Title VII. The Court emphasized the enormity of the task of assuring fair housing and the modern legislative pattern of enforcing public rights through private attorneys general.⁵¹

In fact, in giving content to the "person aggrieved" language of the 1968 Act, the Court referred to a lower court precedent from Title VII case law,⁵² thus supporting the notion that the enforcement sections of the two statutes ought to be construed *in pari materia*.

The fact that the statutory frameworks are identical, however, does not automatically compel acceptance of a work environment claim. The indirect harm of discrimination in housing arguably has a greater impact than the indirect harm flowing from discrimination in the work environment. A white employee might have more difficulty proving that he was stigmatized by working in a plant which discriminated against blacks in promotion policy than would a tenant completely denied the society of blacks by his landlord. Similarly, it would be more difficult to prove deprivation of business and professional advantages in the employment situation. On the other hand, Americans spend a large proportion of their waking hours in their work environments and the psychological effects of employment discrimination may be substantial. Moreover, it is doubtful that any principled distinction can be drawn between the injuries suffered in the work and the housing situations. The *Trafficante* Court formulated the injury as the "loss of important benefits from inter-racial associations,"⁵³ a formulation which is broad enough to encompass the typical instance of employment discrimination.

50. Title VII is administered by EEOC while the Civil Rights Act of 1968 is administered by the Housing Section of the Civil Rights Division of the Department of Justice. There is a difference in manpower between the two. The Housing Section has fewer than two dozen lawyers, while the EEOC has about 150, including lawyers in its regional branches.

51. 409 U.S. at 211.

52. *Hackett v. McGuire Bros. Inc.*, 445 F.2d 442 (3d Cir. 1971). 409 U.S. at 209.

53. 409 U.S. at 210.

Although *Trafficante* did not rest on the legislative history of the 1968 Act, the Court cited statements of the bill's proponents that the indirect subjects of discrimination "had an interest in ensuring fair housing, as they too suffered."⁵⁴ Similarly there is some evidence in the legislative history of Title VII that Congress was legislating against a problem whose effects it recognized as national, though of course discrimination affects members of minority groups most adversely.⁵⁵

Trafficante also noted that the 1968 Act had been consistently construed by HUD to accord standing to complainants in petitioners' position and that such construction is "entitled to great weight."⁵⁶ Giving the same weight to EEOC's position on standing⁵⁷ in Title VII cases would further suggest adoption of the work environment injury theory.

Once it is clear that *Trafficante* applies in the Title VII context, it is necessary to fix its parameters. *Trafficante* suggested that relief was available to any member of the same "housing unit"⁵⁸ but would presumably not extend to tenants residing in other projects owned by the same landlord. The closest analogy to "housing unit" in the employment context is probably "plant" or "plant complex." There is no reason to define the employment environment any more narrowly on the ground that discrimination in one department of a large industrial enterprise does little to taint the environment in the rest of the plant. Workers from diverse departments come into contact at meals and company social functions. The injury is clearly not restricted merely to the particular locus of the discriminatory practice. The analogous argument for a narrow definition of the housing unit was implicitly rejected by *Trafficante*. In fact, insofar as the stigmatization argument

54. *Id.*

55. See the statement of President John F. Kennedy in U.S. CODE CONG. AND ADMIN. NEWS, 88th Cong., 2d Sess. 2368 (1964). Discrimination was felt to be a problem for the entire nation in a moral and ideological sense as well. See HOUSE REP. No. 914, *id.* at 2394.

56. Although there is evidence that Congress intended only a supplemental role for private actions, this cannot be taken to evince an intention that standing in such actions be narrowly construed. The Court in *Trafficante* quoted with approval a statement in *Hackett v. McGuire Bros., Inc.*, 445 F.2d 442, 446 (3d Cir. 1971), that Congress intended to define standing "as broadly as is permitted by Article III of the Constitution." Similarly, when it amended the Act in 1972 to empower EEOC to institute suits, Congress specifically retained the private action. Though it hoped recourse to such an action would be the exception rather than the rule, it noted that all avenues had to be left open to insure quick and effective relief. 118 CONG. REC. H 1862-63 (daily ed. March 8, 1972).

On balance there is little evidence in the legislative history to suggest that Congress desired to limit private enforcement or disapproved of the courts' liberalization of standing. The latter is of peculiarly judicial concern and since there was no discussion of the question, it may well be that Congress was content to leave further development of standing to the courts.

57. See note 29 *supra*.

58. 409 U.S. at 211.

applies, the injury might extend far more broadly if a company developed a nationwide reputation as a discriminator, since discriminatory practices in New York might injure an employee in San Francisco if he were working for a firm identified as a discriminator.

The immediate benefits of such a work environment injury policy would be two-fold.⁵⁹ It would increase the number of potential plaintiffs by enabling management and co-workers not directly discriminated against to sue. A work environment injury policy would grant standing to plaintiffs less likely to become ensnared by the rigors of EEOC procedure and would encourage their participation in Title VII enforcement. This may result in recapture of some complaints which presently are lost through faulty drafting, favorable individual settlements, and failure to comply with EEOC procedure. Hence an increase in the number of suits could be expected.

More importantly, acceptance of the work environment injury concept would magnify the effect of each suit. The injunctive relief granted in an individual suit would necessarily be very broad, since any discriminatory practice engaged in by the employer would tend to create a discriminatory work environment. Such practices would include discriminatory discharges, seniority schemes, job categories, promotion policies, hiring policies, and all other terms and conditions of employment, including policies of sex discrimination.⁶⁰

The logic of work environment injury also suggests broader class actions. If an individual is considered to have suffered by having to work in a discriminatory environment, every one of his co-workers, including those who are directly injured by the discrimination, shares a common injury, and thus they constitute a class under Rule 23. All classes become completely homogeneous. Past class actions, on the other hand, were allowed to proceed on the theory that persons directly injured by various discriminatory practices had at least that much in common, though the nature of their injuries differed. The court would be spared the problem of ruling whether heterogeneous discriminatory practices directed at different groups are similar enough to sup-

59. *Trafficante's* effect is not yet discernible in the housing field, so experience offers little guidance.

Extension of the *Trafficante* rationale to give standing to individuals to protest discriminatory work environments would avoid the difficulties caused by *Huff*, *Heard*, and *Cooper*, since injunctive relief granted on the individual complaint would also benefit fellow workers not parties to the suit.

60. See *Bailey v. Patterson*, 323 F.2d 207 (5th Cir. 1963), *cert. denied*, 376 U.S. 910 (1964), and *Potts v. Flax*, 313 F.2d 284, 289-90 (5th Cir. 1963), which state that relief runs in favor of all persons similarly situated regardless of whether the suit is brought as a class action or as an individual suit.

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port a class action if the practice complained of was simply the employer's maintenance of a discriminatory environment. Thus the court in *Cooper* would have lacked the option of treating each of the twenty job classifications as requiring a separate suit. In *Huff and Heard*, any *present* employee would have had standing to attack the discriminatory practices.

A liberal policy toward class actions would not force the defendant to defend without adequate notice of the scope of the claims against him, since he will have been put on notice of all such claims during the prior administrative complaint process before the EEOC.⁶¹ This problem is also avoided by proper application of the notice requirements of Rule 23.⁶² Moreover, liberalized class action standing need not subject the courts to overly complicated litigation. Section 706(f)(5) of Title VII sets up special mechanisms to make Title VII litigation more manageable.⁶³

The Supreme Court's reasoning in *Trafficante* seems to require by analogy the acceptance of a work environment conception of injury and the consequent extension of standing to sue to any employee whose employer practices discrimination, both as an individual and as a class representative. The class action is likely to have the greater impact on employer behavior, because it permits the court to grant large-scale retrospective relief. In either case, the tools for a significant strengthening of the private enforcement action are now at hand. Together with EEOC's recently broadened enforcement powers, they may hasten the demise of employment discrimination in the United States.

61. Act § 706(b).

62. FED. R. CIV. P. 23(c)(1).

63. The section provides that the court can appoint a master to handle back pay and other damage claims, so that the court need decide only the questions of law. These need not be more complicated for a large class than for a small class. Section 706(f)(5), 42 U.S.C. § 2000e-5(f)(5). In fact, broad suits are actually more efficient from the court's point of view than a myriad of smaller suits, because they allow the court to deal with the whole pattern and practice of discrimination at once, instead of in small pieces. Knowledge that broad suits may be easily brought against patterns and practices of discrimination will deter some offenders from engaging in discriminatory practices so that the Act to an extent will be self-enforcing.