

1-1-1974

# Class Actions under the Age Discrimination in Employment Act: The Question is Why Not?

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## Recommended Citation

Anne S. Emanuel, *Class Actions under the Age Discrimination in Employment Act: The Question is Why Not?*, 23 *Emory L.J.* 831 (1974).

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# CLASS ACTIONS UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT: The Question is "Why not?"

## I. INTRODUCTION

In 1967, Congress enacted the Age Discrimination in Employment Act<sup>1</sup> in order to "promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment."<sup>2</sup> Although the ADEA incorporates selected enforcement provisions of the Fair Labor Standards Act<sup>3</sup> and comes within the purview of the Labor Department, it bears near identity in purpose, and at times in phrasing, to Title VII of the Civil Rights Act.<sup>4</sup> The nature of the ADEA's relationship to the Civil Rights Act and the FLSA becomes important in the area of class actions because of the dichotomy in availability of class actions under the Civil Rights Act and the FLSA. Rule 23<sup>5</sup> class actions are liberally allowed under the Civil Rights Act,<sup>6</sup> while not permitted at all by § 16(b) of the FLSA.<sup>7</sup> It is the purpose of this comment to determine the proper construction of the ADEA vis-à-vis class actions.

## II. CLASS ACTIONS UNDER THE ADEA

Class actions face two hurdles within the ADEA. First, the Act provides that it be enforced in accordance with 29 U.S.C. § 216(b) (section 16(b) of the FLSA), which in turn provides that "[n]o employee shall be a party plaintiff to any such action 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."<sup>8</sup> Second, the

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<sup>1</sup>29 U.S.C. §§ 621-34 (Supp. 1974) [hereinafter referred to as the ADEA].

<sup>2</sup>29 U.S.C. § 621(b) (Supp. 1974).

<sup>3</sup>29 U.S.C. §§ 201-19 (1971) [hereinafter referred to as the FLSA]. The sections incorporated are 29 U.S.C. §§ 211(b), 216(b)(c)(d), 217 (1965).

<sup>4</sup>42 U.S.C. § 2000e *et seq.* (1971).

<sup>5</sup>FED. R. CIV. P. 23 (1973).

<sup>6</sup>See *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 719-20 (7th Cir. 1969); *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496, 498-99 (5th Cir. 1968).

<sup>7</sup>*Clougherty v. James Vernor Co.*, 187 F.2d 288, 290 (6th Cir.), *cert. denied*, 342 U.S. 814 (1951); *Pentland v. Dravo Corp.*, 152 F.2d 851, 853 (3d Cir. 1945).

<sup>8</sup>29 U.S.C. § 216(b) (1971).

ADEA prohibits commencement of an action by an individual unless the individual has given the Secretary of Labor sixty days' notice of intent to file such action, and the notice to the Secretary is filed within 180 days after the alleged unlawful practice occurred.<sup>9</sup> Neither provision prohibits a class action given judicial interpretation of the ADEA similar to that of Title VII; on the other hand, a literal application of the former will legally defeat Rule 23 class actions,<sup>10</sup> while a literal application of the latter will realistically defeat Rule 23 class actions.<sup>11</sup>

Inquiry into the advantages and disadvantages of a Rule 23 class action as compared to the procedure provided in the FLSA reveals that while the Rule 23 class action is not a panacea, it is nonetheless substantially more efficacious in terms of enforcement of the ADEA. Rule 23 allows a plaintiff with a small claim<sup>12</sup> to obtain counsel.<sup>13</sup>

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<sup>9</sup>29 U.S.C. § 626(d) (Supp. 1974):

(d) No civil action may be commenced by any individual under this section until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Such notice shall be filed—

(1) within one hundred and eighty days after the alleged unlawful practice occurred, or

(2) in a case to which section 633(b) of this title applies, within three hundred days after the alleged unlawful practice occurred or within thirty days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving a notice of intent to sue, the Secretary shall promptly notify all persons named therein as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

<sup>10</sup>Rule 23 expressly provides that members of the class will be bound without any appearance in or communication with the court. FED. R. Civ. P. 23(c)(3). To provide that no member of the class will be bound unless he files a written consent in the court in which the action is brought apparently denies Rule 23 class actions. Some courts refer to this situation as one in which Rule 23 is applicable, with additional conditions. *Bishop v. Jelleff Associates*, 5 E.P.D. ¶ 7995 (D.D.C. 1972). The writer believes it is more accurate to say Rule 23 is simply not applicable, since the statute by providing its own rule abrogates Rule 23. This was the position taken in *Hull v. Continental Oil Co.*, 58 F.R.D. 636 (S.D. Tex. 1973).

<sup>11</sup>A requirement that each member of the class have filed a notice of intent to file the action with the Secretary of Labor does not necessarily defeat class actions in that the action could still be prosecuted by a representative of the class, if the class met the other requirements of Rule 23 (Rule 23(a)(1), requiring that the class be so numerous that joinder is impractical, would normally be problematic in these circumstances). But such a provision realistically abrogates Rule 23's application in that it destroys any  *motive*  for proceeding as a class action; it operates as a stringent jurisdictional condition precedent that so decimates the potential class as to make proceeding as a class action meaningless.

<sup>12</sup>Many claims arising under the ADEA are relatively small. In a speech discussing

Arguably, section 16(b) does as well.<sup>14</sup> However, unlike Rule 23,<sup>15</sup> section 16(b) carries no notice provision, so that an attorney does not have available an effective means of finding potential plaintiffs. Thus the class will very likely be limited to those who hear of a pending action by word of mouth. This may well lead attorneys to decline to prosecute claims for individual plaintiffs.

The notice provisions of Rule 23 may be as valuable to the rest of the class as they are to the individual plaintiff. In Rule 23 class actions, each member of a class is bound, unless it is a b(3) class action and he has opted out.<sup>16</sup> In contrast, under the 16(b) procedure, where no notice is required, only the named plaintiffs are bound by a judgment—with the *caveat* that the stare decisis effect of the decision may in some circumstances be as damaging to future plaintiffs as res judicata or collateral estoppel.<sup>17</sup> So under section

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enforcement in the first six months after the Act, Mr. Robert Moran gave as examples a number of actions for \$400-\$500. Speech by Robert Moran, Wage-Hour Administrator, before National Council of Senior Citizens in Washington, D.C., June 5, 1969.

<sup>14</sup>The Supreme Court has recently recognized the necessity of class actions if small claims are to be successfully prosecuted:

A critical fact in this litigation is that petitioner's individual stake in the damage award he seeks is only \$70. No competent attorney would undertake his complex antitrust action to recover so inconsequential a sum. Economic reality dictates that petitioner's suit proceed as a class action or not at all.

*Eisen v. Carlisle & Jacquelin*, 94 S. Ct. 2140, 2144 (1974). See also *Dolgow v. Anderson*, 43 F.R.D. 472, 484-85 (E.D.N.Y. 1968), *rev'd and remanded on other grounds*, 438 F.2d 825 (2d Cir. 1970); Comment, *Developments in the Law of Federal Class Action Litigation—Catch 22 in Rule 23*, 10 Hous. L. Rev. 337, 343 (1973); Note, *Parties Plaintiff in Civil Rights Litigation*, 68 COLUM. L. REV. 893, 903 (1968).

<sup>15</sup>See *Bradford v. Peoples Natural Gas Co.*, 7 E.P.D. ¶ 9120 (W.D. Pa. 1973).

<sup>16</sup>Rule 23 has two notice provisions: the requirement in Rule 23(c)(2) for notice to class members in (b)(3) class actions, and the provision in Rule 23(d)(2) that the court may require notice to some or all members of the class in (b)(1) and (b)(2) class actions. FED. R. CIV. P. 23.

<sup>17</sup>The Supreme Court has recently ruled that in (b)(3) class actions "individual notice [must] be sent to all class members who can be identified with reasonable effort." (Emphasis supplied.) *Eisen v. Carlisle & Jacquelin*, 94 S. Ct. 2140, 2152 (1974). This represents an additional safeguard for class members in (b)(3) class actions. However *Eisen*, in combination with *Zahn v. International Paper Co.*, 414 U.S. 291 (1973) (requiring that each member of the class have the jurisdictional amount), may indicate a trend toward restraints on class actions. If that is the case it is unfortunate:

The class action is one of the few legal remedies the small claimant has against those who command the status quo. I would strengthen his hand with the view of creating a system of law that dispenses justice to the lowly as well as to those liberally endowed with power and wealth.

*Eisen v. Carlisle & Jacquelin*, 94 S. Ct. 2140, 2156-57 (1974) (Douglas, J., dissenting).

<sup>18</sup>Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 46

16(b) the members of the "class" are most unlikely to receive any notice of the suit—but likely to be affected by its outcome.

Additionally, Rule 23 is beneficial to the plaintiff in that a Rule 23 class action tolls the statute for the class. Also, under the ADEA, an injured party has only 180 days to give notice of the violation to the Secretary of Labor.<sup>18</sup> Therefore if a class action plaintiff "discovers" all complaints about the defendant, no one who has preserved his own cause of action will be without notice and an opportunity to opt out. And those who have not complained themselves may have their causes of action preserved by the class suit.<sup>19</sup>

Precisely because the Rule 23 class action is more beneficial to plaintiffs under the ADEA, it is more appropriate. The ADEA is a remedial act, intended to benefit directly an aggrieved group; effective remedies are, of course, essential to the realization of the Act's purpose. Further, like victims of racial discrimination, victims of age discrimination are by definition a class.<sup>20</sup> To the degree that the Rule 23 class action is more beneficial to the class protected by the

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(1967) [hereinafter cited as Frankel]; Weinstein, *Revision of Procedure; Some Problems in Class Actions*, 9 BUFF. L. REV. 433, 446-48 (1960). Perhaps the most serious probable effect on future plaintiffs is that, from a practical point of view, the fact that a previous plaintiff has lost an action against a particular defendant will deter most prospective plaintiffs.

<sup>18</sup>29 U.S.C. § 626(d) (1974).

<sup>19</sup>See *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 720 (7th Cir. 1969); *Local 186, International Paper Mill Workers v. Minnesota Mining & Mfg. Co.*, 304 F. Supp. 1284, 1295 (N.D. Ind. 1969). The development of awards of back pay in Title VII class actions where each discriminatee has not filed a complaint is treated in Comment, *Back Pay in Class Actions and Pattern or Practice Suits Under Title VII of the Civil Rights Act of 1964*, 23 EMORY L.J. 163 (1974).

<sup>20</sup>The Fifth Circuit has noted that "[r]acial discrimination is by definition class discrimination. . . ." *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496, 499 (5th Cir. 1968). That is true as well of age discrimination. The suitability of class actions for suits under the ADEA is exemplified in the facts of *Hodgson v. First Fed. Sav. & Loan Ass'n*, 455 F.2d 818 (5th Cir. 1972). In that case undisputed facts showed that for over a year, no one within the Act's protection was hired by defendant as a teller. Of the 35 persons who were hired as tellers, all were under 40; all but three were under 30. Another fact was that the job order on file with an employment agency called for teller trainees between the ages of 21 and 24. Also, defendant's representative wrote "too old for teller" on his interview notes with the 47 year old plaintiff. Finally, defendant admitted familiarity with the provisions of the ADEA. 455 F.2d at 821-23. A commentator has noted that the opinion implies that in age discrimination cases, as in Title VII cases, statistical proof of non-employment of persons 40 through 65 may constitute a prima facie case of violation of the ADEA. Note, 24 BAYLOR L. REV. 601, 606 (1972). See *Parham v. Southwestern Bell Tel. Co.*, 433 F.2d 421 (8th Cir. 1970), where statistics established a violation of Title VII.

Act, its availability in appropriate cases is more clearly mandated.<sup>21</sup> It should be noted that even though a Rule 23 class action is available, the court has a great degree of discretion in determining when it is appropriate,<sup>22</sup> and thus in controlling any potential abuse.

A. *§ 16(b) of the FLSA as Incorporated by § 626(b) of the ADEA*

In construing § 16(b) of the FLSA as the enforcement provision of the ADEA,<sup>23</sup> one necessarily observes that literal application is absolutely untenable. Because 16(b) was written as the enforcement provision for suits to recover minimum wage and overtime compensation, it provides exclusively for suits by employees. Yet the first sentence of the ADEA states its special concern with the plight of older workers attempting "to regain employment when displaced from jobs. . . ."<sup>24</sup> The ADEA clearly prohibits failure to hire an individual between the ages of 40 and 65 because of age, and gives a cause of action to aggrieved persons who never attain the status of an employee.<sup>25</sup> Therefore when § 16(b) of the FLSA is incorporated into the ADEA, the word "employee" must be read as "individual."

The core difficulty with section 16(b) vis-à-vis class actions is its requirement that consent in writing be filed with the court before any individual may be recognized as a party. This consent require-

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<sup>21</sup>The argument that Rule 23 class actions should be available under the ADEA to insure adequate enforcement of its provisions is buttressed by the fact that discrimination against the aged in employment is "still prevalent and, in fact, is increasing. There were more than 2500 violations found under the Act in the 1971 fiscal year, and it is estimated that this figure represents only a portion of the actual number of violations . . . ." Comment, *Discrimination against the Elderly: A Prospectus of the Problem*, 7 SUFFOLK U.L. REV. 917, 922 (1973). Yet as of 1971, only 80 suits had been filed. *Id.*

<sup>22</sup>Frankel at 39; Note, *Parties Plaintiff in Civil Rights Litigation*, 68 COLUM. L. REV. 893, 903-04 (1968).

<sup>23</sup>29 U.S.C. § 216(b) (1971) (§ 16(b) of the FLSA) reads:

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action 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. . . .

<sup>24</sup>29 U.S.C. § 621(a)(1) (Supp. 1974).

<sup>25</sup>29 U.S.C. §§ 623(a)(2), 626(c), 631 (Supp. 1974).

ment is a 1947 amendment to section 16(b), and in conjunction with the Portal-to-Portal Act<sup>28</sup> it represents congressional response to the extraordinary amount of litigation arising after the Supreme Court decision in *Anderson v. Mt. Clemens Pottery Co.*<sup>27</sup> In *Anderson*, an action brought under the FLSA, the Court held that workers were due compensation for time spent walking to work on the employer's premises and for time spent in additional activities preliminary to actual work.<sup>28</sup> As a result of that decision on June 10, 1946, between July 1, 1946, and Jan. 31, 1947, 1913 suits under the FLSA were filed in federal district courts, 1515 of which asked a total of \$5,785,204,606. The remaining 398 left the amount of damages to the determination of the court. And 62% of the suits were filed in January. In addition to being concerned about the staggering effect of this litigation on many industries, Congress was especially alarmed by an estimate that the federal government's potential liability under cost-plus-fixed-fee contracts was as high as \$1,400,000,000.<sup>29</sup> In response to this specter, Congress enacted the Portal-to-Portal Act.<sup>30</sup> Significantly, the ADEA did not incorporate section 56 of the FLSA,<sup>31</sup> one of the most stringent provisions of the Portal-to-Portal Act, and clearly a companion to section 16(b). Section 56 provides that the statute of limitations is not tolled for individual claimants until their consent is filed.<sup>32</sup> Had Congress intended to impose on ADEA claimants the stringent limitations imposed on FLSA claimants by the Portal-to-Portal Act, it presumably would have incorporated section 56 in the ADEA. The fact that Congress did not, coupled with the fact that the consent requirement in section 16(b) was enacted specifically to curtail available remedies under the FLSA,<sup>33</sup> supports an argument that it was not

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<sup>28</sup>29 U.S.C. §§ 216(b), 251-62 (1971).

<sup>27</sup>328 U.S. 680, *rehearing denied*, 329 U.S. 822 (1946).

<sup>28</sup>*Id.* at 691-93.

<sup>29</sup>H.R. REP. NO. 71, 80th Cong., 1st Sess. 4 (1947).

<sup>30</sup>*Id.* at 1.

<sup>31</sup>29 U.S.C. § 256 (1971).

<sup>32</sup>*Id.*

<sup>33</sup>H.R. REP. NO. 71, 80th Cong., 1st Sess. 3-6 (1947). The minority report criticized the bill, stating:

this bill makes very basic changes for the future as well as the past in the general enforcement and operation of the Fair Labor Standards Act. Bad cases make bad laws. . . . In order to proscribe the bad cases, a sweeping remedy is proposed that not only for practical purposes bars portal-to-portal suits, . . . but also emasculates the . . . Fair Labor Standards Act.

*Id.* at 9.

meant to have that same effect in the ADEA. Certainly there is no hint in the legislative history of the ADEA of any intention to limit available remedies.<sup>34</sup>

Nevertheless, one line of construction open to the courts is that the ADEA, like the FLSA, allows no Rule 23 class action. This is easily justified by reading party plaintiff in section 16(b) to mean every member of the class and not just the representatives,<sup>35</sup> and by adopting the case law that has developed under the FLSA. This is the position, somewhat summarily reached, of the trial courts in four out of the five cases that have reached the issue.<sup>36</sup>

The other line of construction is to read party plaintiff in section 16(b) to mean the representatives of the class.<sup>37</sup> This would allow a Rule 23 class action by obviating the need for written consents from every member of the class. One trial court has adopted this construction in a thorough opinion that looks to the purpose of the ADEA and recognizes its kinship to Title VII.<sup>38</sup>

In determining which line of construction is appropriate, a tenet of statutory construction comes into play. It is axiomatic that broad remedial acts should be liberally construed.<sup>39</sup> Congress and the

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<sup>34</sup>*Hearings on S. 830, 788, Before Subcommittee on Labor, Senate Committee on Labor and Public Welfare, 90th Cong., 1st Sess. (1967)* [hereinafter cited as *Senate Hearings*]; *Hearings on H.R. 3651, 3768, and 4221, Before General Subcommittee on Labor, House Committee on Education and Labor, 90th Cong., 1st Sess. (1967)* [hereinafter cited as *House Hearings*]; S. REP. No. 723, 90th Cong., 1st Sess. (1967); H. REP. No. 805, 90th Cong., 1st Sess. (1967).

<sup>35</sup>The sentence at issue reads: "No employee shall be a party plaintiff to any such action 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." 29 U.S.C. § 216(b) (1965). One possible interpretation is that party plaintiff refers to each potential member of the class; the other is that it refers only to the "representative parties" (in the terminology of Rule 23).

<sup>36</sup>*Burgett v. Cudahy Co.*, 361 F. Supp. 617, 622 (D. Kan. 1973). (*Burgett* held that Rule 23 was inapplicable and that written consents were required for each member of the class in the class action created by 216(b); *Hull v. Continental Oil Co.*, 58 F.R.D. 636 (S.D. Tex. 1973) (*Hull* also expressly held Rule 23 inapplicable, and distinguished Title VII class actions without discussion); *Bishop v. Jelleff Associates, Inc.*, 5 E.P.D. ¶ 7995 (D.D.C. 1972) (*Bishop* held Rule 23 was applicable, but that the class was limited to those individuals who filed consents); *Price v. Maryland Cas. Co.*, 5 E.P.D. ¶ 7997 (S.D. Miss. 1972) (*Price*, like *Bishop*, allows a class action with the class limited to those who have filed consents).

<sup>37</sup>See note 34, *supra*.

<sup>38</sup>*Blankenship v. Ralston Purina Co.*, 62 F.R.D. 35, 41 (N.D. Ga. 1973).

<sup>39</sup>See *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969); *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964).

courts agree that the ADEA is such an Act.<sup>40</sup> Thus, the court is authorized to effectuate the congressional intent with a liberal construction of the language of the Act.<sup>41</sup> The more liberal construction of the ADEA would be to treat it, in terms of procedural requirements, as Title VII has been treated.<sup>42</sup> This is particularly appropriate since the ADEA is, in a sense, a child of Title VII.<sup>43</sup> In 1964, Title VII directed the Secretary of Labor to report to Congress on age discrimination in employment and specifically required the report to offer suggested legislation.<sup>44</sup> This report, "The Older American Worker,"<sup>45</sup> led directly to the enactment of the ADEA.<sup>46</sup>

The most obvious counter-argument is that had Congress wanted the ADEA handled in the same manner as Title VII, Congress could have passed it as an amendment to the Civil Rights Act. Fortunately, the legislative history sheds light on Congress' reasons for putting the ADEA in Title 29 instead of Title 42. In the extensive hearings, two major reasons appear: one was that by 1967 the EEOC was already swamped with complaints of discrimination due to race and sex, and Congress feared that that overload would result in older workers getting short shrift under Title VII;<sup>47</sup> the other was that age discrimination was felt to be more a matter of ignorance than bigotry, and Congress felt that the ADEA should contain a significant educational component that would lack effectiveness in

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<sup>40</sup>Woodford v. Kinney Shoe Corp., 369 F. Supp. 911, 914 (N.D. Ga. 1973); see Hodgson v. First Fed. Sav. & Loan Ass'n, 455 F.2d 818 (5th Cir. 1972); *House Hearings* at 11.

<sup>41</sup>See Allen v. State Bd. of Elections, 393 U.S. 544 (1969); *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964).

<sup>42</sup>See, e.g., Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968); *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969); *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496 (5th Cir. 1968); *Woodford v. Kinney Shoe Corp.*, 369 F. Supp. 911, 915 (N.D. Ga. 1973).

<sup>43</sup>Several courts have recognized the kinship between Title VII and the ADEA. *Goger v. H.K. Porter Co.*, 492 F.2d 13, 15 (3d Cir. 1974); *Hodgson v. First Fed. Sav. & Loan Ass'n*, 455 F.2d 818 (5th Cir. 1972). The rationale of the relationship between the Acts was used to require exhaustion of state remedies under the ADEA:

The minor differences between section 633 and its counterpart under the 1964 Act are insignificant. . . . Moreover, the legislative history of the 1967 Act, though largely couched in terms identical to that of the statute, nonetheless is devoid of any intention of Congress to deviate from the basic philosophy of the 1964 Act. . . .

*Goger v. H.K. Porter Co.*, 492 F.2d 13, 16 (3d Cir. 1974).

<sup>44</sup>42 U.S.C. § 2000e-14 (1974).

<sup>45</sup>Wirtz, *The Older American Worker: Age Discrimination in Employment*, June, 1965.

<sup>46</sup>*Senate Hearings* at 26; *House Hearings* at 5, 6.

<sup>47</sup>*House Hearings* at 13.

Title VII.<sup>48</sup> Neither reason supports an argument that Congress intended remedies under the ADEA to be less than or different from those under Title VII.

Additionally, in placing the ADEA in the Wages and Hours Division of the Labor Department rather than the EEOC, Congress found reassurance in the fact that the Wages and Hours Division administers the "Equal Pay Act,"<sup>49</sup> which prohibits sex discrimination.<sup>50</sup> However a suit that can be brought under the Equal Pay Act can also be brought under Title VII, so that individuals discriminated against on the basis of sex may bring a Rule 23 class action,<sup>51</sup> leaving only the aged without this remedy.

The possibility that class actions could be denied to ADEA plaintiffs because of the language of the FLSA is especially ironic because the legislative history shows that the FLSA was chosen in order to facilitate private enforcement. The administration bill, when offered,<sup>52</sup> provided that the ADEA would incorporate the enforcement provisions of the National Labor Relations Act,<sup>53</sup> which, compared to the FLSA, retards access to the courts.<sup>54</sup> Precisely because Congress was interested in providing adequate personal remedies as well as putting teeth in the Act (and in avoiding the creation of an additional agency),<sup>55</sup> it chose the FLSA enforcement provisions.<sup>56</sup> Neither in the Congressional Record,<sup>57</sup> the Reports,<sup>58</sup> nor in the Hearings<sup>59</sup> is there *any* indication that Congress believed that incorporating § 16(b) of the FLSA would prohibit Rule 23 class actions under the ADEA. In fact the clearly expressed congressional

<sup>48</sup>*Id.*

<sup>49</sup>29 U.S.C. § 206(d) (1971), *amending* 29 U.S.C. § 206 (1965). Like the ADEA, the Equal Pay Act incorporates 29 U.S.C. § 216(b).

<sup>50</sup>*Senate Hearings* at 44.

<sup>51</sup>*E.g.*, *Maguire v. Trans World Airlines, Inc.*, 55 F.R.D. 48 (S.D.N.Y. 1972). Plaintiff was allowed a Rule 23 class action under the Civil Rights Act, but the court held Rule 23 inapplicable to the Equal Pay Act.

<sup>52</sup>*Senate Hearings* at 8-10; *House Hearings* at 3.

<sup>53</sup>29 U.S.C. § 151 *et seq.* (1973).

<sup>54</sup>*House Hearings* at 12-13.

<sup>55</sup>*Senate Hearings* at 27.

<sup>56</sup>*House Hearings* at 13.

<sup>57</sup>113 CONG. REC. 34738-55, 35053-57, 35133-34 (1967).

<sup>58</sup>S. REP. NO. 723, 90th Cong., 1st Sess. (1967); H. REP. NO. 805, 90th Cong., 1st Sess. (1967).

<sup>59</sup>*Senate Hearings; House Hearings.*

concern that adequate enforcement be provided,<sup>60</sup> the analogies drawn by Congress between age discrimination and those forms of discrimination prohibited by Title VII,<sup>61</sup> (albeit the recognition of differences as well), and the omission by Congress of § 56 of the FLSA,<sup>62</sup> all lead to the conclusion that there was no congressional intent to deprive victims of age discrimination of the right to pursue a class action under Rule 23.

### B. Section 626(d) of the ADEA

Given an interpretation of section 16(b)<sup>63</sup> as incorporated by the ADEA<sup>64</sup> that permits Rule 23 class actions, 29 U.S.C. § 626(d)<sup>65</sup> remains a potential barrier. The ADEA there provides:

No civil action may be commenced by any individual under this section until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Such notice shall be filed—(1) within one hundred and eighty days after the alleged unlawful practice occurred. . . .<sup>66</sup>

A strict interpretation of this provision would mean that each member of the class would have had to file a timely notice with the Secretary of Labor and would, for all practical purposes, defeat a Rule 23 class action. The five cases which reached this question have disagreed, two holding that each plaintiff must file with the Secretary of Labor,<sup>67</sup> the other three that only one plaintiff need file with the Secretary of Labor.<sup>68</sup>

The latter cases rely on *Bowe v. Colgate-Palmolive Co.*,<sup>69</sup> a leading Title VII case. In *Bowe* and other Title VII cases, the courts have

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<sup>60</sup>Senate Hearings at 44-47; House Hearings at 12-13.

<sup>61</sup>Senate Hearings at 29, 35.

<sup>62</sup>See note 33, *supra*, and accompanying text.

<sup>63</sup>29 U.S.C. § 216(b) (1965).

<sup>64</sup>29 U.S.C. § 626(b) (Supp. 1974).

<sup>65</sup>29 U.S.C. § 626(d) (Supp. 1974).

<sup>66</sup>*Id.*

<sup>67</sup>*Gebhard v. GAF Corp.*, 59 F.R.D. 504 (D.D.C. 1973); *Price v. Maryland Cas. Co.*, 5 E.P.D. ¶ 7997 (S.D. Miss. 1972). Neither court elaborates on its decision; *Gebhard* cites *Price* for the proposition that filing is a jurisdictional prerequisite. *Price* seems simply to have applied the statute literally.

<sup>68</sup>*Blankenship v. Ralston Purina Co.*, 62 F.R.D. 35, 42 (N.D. Ga. 1973); *Burgett v. Cudahy Co.*, 361 F. Supp. 617 (D. Kan. 1973); *Bishop v. Jelleff Associates, Inc.*, 5 E.P.D. ¶ 7995 (D.D.C. 1972).

<sup>69</sup>416 F.2d 711 (7th Cir. 1969).

implemented congressional policy, while refusing to allow procedural barriers to defeat valid claims, by holding that although the requirement that aggrieved persons file with the EEOC before suit is jurisdictional, it is satisfied when the representative of the class has raised with the EEOC an issue which he had standing to raise.<sup>70</sup> The 7th Circuit explained:

The purpose of the section . . . is to provide for notice to the charged party and to bring to bear the voluntary compliance and conciliation features of the EEOC. Also, . . . another important function . . . is to permit the EEOC to determine whether the charge is adequate. Finally, the charge determines the scope of the alleged violation and thereby serves to narrow the issues for prompt adjudication and decision. . . . Each of these purposes is served when *any* charge is filed and a proper suit follows. . . .<sup>71</sup> (Emphasis added.)

*Bowe* as well as other cases also point out that forcing each member of a class to file with the EEOC would not only serve no purpose but would also create even more of an administrative logjam.<sup>72</sup>

It is especially significant that the Labor Department position apparently is that only one plaintiff need file charges with them under the ADEA.<sup>73</sup> The courts have based crucial statutory interpre-

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<sup>70</sup>*Boudreaux v. Baton Rouge Marine Contracting Co.*, 437 F.2d 1011 (5th Cir. 1971); *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496 (5th Cir. 1968); *United States v. Georgia Power Co.*, 5 E.P.D. ¶ 7241 (N.D. Ga. 1973). *Accord*, *Belt v. Johnson Motor Lines, Inc.*, 458 F.2d 443 (5th Cir. 1972), where the plaintiffs filed a complaint with the EEOC, but not within ninety days of written requests for jobs as "over-the-road" drivers instead of as "city drivers." The district court held that the oral requests did not make the complaint to the EEOC timely, but the Fifth Circuit reversed and remanded, saying:

We cannot agree with the district court that a discriminatory labor practice may not be a continuing act. To so hold on the facts of this case would permit discriminatory acts to go unrebuked, a construction far too restrictive and alien to the liberal construction we have previously given the Civil Rights Act of 1964.

458 F.2d at 445.

<sup>71</sup>*Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 719 (7th Cir. 1969).

<sup>72</sup>*Id.* at 720; *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496, 498 (5th Cir. 1968).

<sup>73</sup>The writer attended a hearing on Feb. 5, 1974 on a motion for reconsideration in the case of *Blankenship v. Ralston Purina Co.*, 62 F.R.D. 35 (N.D. Ga. 1973). At that hearing, Mr. Woodson of the Labor Department stated on the record, when asked what the Labor Department's position was, "Our reaction is that your honor has ruled correctly in this area." The order to which he referred provided that only the representative party in a class action under the ADEA need file a charge with the Labor Department in order to satisfy the jurisdictional requirement, as well as that Rule 23 class actions are available under the ADEA. *Blankenship v. Ralston Purina Co.*, 7 E.P.D. ¶ 9104 (N.D. Ga. 1973).

tations in part on the opinion of the enforcing agency or related department in the past;<sup>74</sup> the Labor Department position should be a significant factor in determining the proper construction of the ADEA.<sup>75</sup>

C. *A Recommended Interpretation of the ADEA vis-à-vis Class Actions*

Statutory construction should effectuate congressional intent and the policy of the statute without, of course, doing violence to the language of the Act, which is ultimately controlling. Because of their close relationship,<sup>76</sup> the ADEA is properly construed in the light of Title VII cases despite its provision that it be enforced "in accordance with" section 16(b) of the FLSA.<sup>77</sup> That this phrase incorporates section 16(b) in the ADEA should not lead to a simplistic application of the case law under section 16(b) as part of the FLSA to developing litigation under the ADEA.<sup>78</sup>

In two important aspects, the ADEA has been construed in the light of civil rights cases as opposed to FLSA cases or to a strict interpretation of the ADEA itself. On the question of whether every plaintiff need file a complaint, several courts have turned to the

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<sup>74</sup>See, e.g., *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964). And the Supreme Court has stated:

When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. . . . "Particularly is this respect due when the administrative practice at stake 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.'"

*Udall v. Tallman*, 380 U.S. 1, 16 (1965), quoting *Power Reactor v. Electricians*, 367 U.S. 396, 408 (1961).

<sup>75</sup>On a question of coverage of the ADEA, one court in deciding with the Secretary of Labor noted, "The ruling by the Secretary of Labor is entitled to be given great weight by the court in deciding the proper interpretation of the Act, especially where, as here, the case is one of first impression." *Hart v. United Steelworkers*, 350 F. Supp. 294, 296 (W.D. Pa. 1972), vacated on other grounds, 482 F.2d 282 (3d Cir. 1973).

<sup>76</sup>See notes 42, 43, 44, 45, *supra*, and accompanying text. The Fifth Circuit has expressly recognized the kinship of the ADEA and Title VII. *Hodgson v. First Fed. Sav. & Loan Ass'n*, 455 F.2d 818 (5th Cir. 1972).

<sup>77</sup>29 U.S.C. § 626(b) (Supp. 1974).

<sup>78</sup>That a literal application is untenable is perhaps unwittingly demonstrated by the court in *Price v. Maryland Cas. Co.*, 5 E.P.D. ¶ 7997 (S.D. Miss. 1972). There the court found both individual notice to the Secretary of Labor and individual consents necessary under the ADEA, in what appears to be a strictly literal reading—yet they without comment read "employee" as "individual."

civil rights cases and followed their rationale.<sup>79</sup> Likewise, on the question of exhaustion of state remedies, courts dealing with ADEA cases have looked to civil rights litigation and espoused the approaches therein,<sup>80</sup> in this area to a plaintiff's detriment. Section 633(b)<sup>81</sup> of the ADEA could be interpreted to require that a plaintiff must file with the state first, or that only if a plaintiff does first file with the state must he wait sixty days from commencement of that action or until it is terminated. The latter interpretation, essentially reading section 633(b) as providing alternative remedies at the plaintiff's election, is clearly more favorable to plaintiffs. But the two courts to reach this issue have held that filing with the state is a jurisdictional prerequisite, and both have relied heavily on Title VII cases.<sup>82</sup>

Given that the ADEA is properly construed in the light of Title VII cases and not FLSA cases, the proper approach to the ADEA in the class action area is that adopted by the Fifth Circuit for Title VII class actions in *Oatis v. Crown Zellerbach Corp.*<sup>83</sup> and approved for the ADEA in *Blankenship v. Ralston Purina Co.*<sup>84</sup> The *Oatis* guidelines applied to the ADEA would provide: (1) the class must meet the requirements of Rule 23; (2) the issues raised by the party plaintiff or class representative are those he has standing to raise; and (3) individuals whose grievances fall within the charges filed by the party plaintiff or class representative need not file consents in order to be members of the class.<sup>85</sup> These rules incorporate necessary procedural requirements while avoiding creation of unnecessary rules that operate to bar appropriate relief; and they are easily applied to section 16(b) by reading party plaintiff as class representative.<sup>86</sup>

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<sup>79</sup>*Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969); *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496 (5th Cir. 1968).

<sup>80</sup>*Goger v. H.K. Porter Co.*, 492 F.2d 13 (3d Cir. 1974); *McGarvey v. Merck & Co.*, 5 E.P.D. ¶ 8644 (D.N.J. 1973).

<sup>81</sup>29 U.S.C. § 633(b) (Supp. 1974).

<sup>82</sup>*Goger v. H.K. Porter Co.*, 492 F.2d 13 (3d Cir. 1974); *McGarvey v. Merck & Co.*, 5 E.P.D. ¶ 8644 (D.N.J. 1973).

<sup>83</sup>398 F.2d 496 (5th Cir. 1968).

<sup>84</sup>62 F.R.D. 35 (N.D. Ga. 1973).

<sup>85</sup>*Id.*

<sup>86</sup>29 U.S.C. § 216(b) (1971) reads: "No employee shall be a party plaintiff to any such action unless he gives his consent in writing. . . ." The suggested construction is "No individual shall be a class representative to any such action unless he gives his consent in writing. . . ."

In the final analysis perhaps the simplest argument is the most persuasive. Since the language and history of the ADEA reveal no clear congressional mandate to allow or disallow Rule 23 class actions, either interpretation has rational support. Yet for the courts, in the *absence* of a clear congressional mandate, not to allow the class action remedy under the ADEA would put them in the untenable position of discriminating among forms of discrimination.

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