IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 77-1965

UNITED STATES OF AMERICA,

Plaitntiff-Appellant

v.

PIMA COUNTY COMMUNITY COLLEGE DISTRICT, et al.,

Defendants-Appellees

On Appeal from the United States District Court
for the District of Arizona

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the district court erred in holding that the Attorney General may not bring a pattern or practice suit under section 707 of the Civil Rights Act of 1964, as amended, against a public employer.

2. Whether the district court erred in dismissing the amended complaint of the United States brought under section 706 of the Civil Rights Act of 1964, as amended.

STATEMENT

A. The Pattern or Practice Complaint Under Section 707

1. Procedural History

On December 19, 1975, the United States filed a complaint[1/] alleging that the Pima County Community College District, the District's Governing Board, and Pima College officials had engaged in a pattern or practice of resistance to the full enjoyment of rights secured by Title VII of the Civil Rights Act of 1964.[2/] Specifically, the United States alleged that defendants had discriminated against eight employees[3/] with respect to the terms and conditions of their employment and had ultimately dismissed five of these individuals because they had filed discrimination charges with the Equal Employment Opportunity Commission.[4/] The United States also alleged that defendants had dismissed a sixth employee[5/] because of her association with one of the other employees who had opposed the College's employment practices.[6/]

1/ R. 1-8.

2/ R. 6.

3/ The eight were Mae Handler, Cecilia Vindiola, Cynthia Brysh, Rita Finchum, Alexis Thompson, Jacquelyn Smith Alma Seward and Arturo Cervantes, R. 5, 6.

4/ *Id.*

5/ Jacquelyn Smith. *Id.*

6/ R. 5.

Jurisdiction was alleged under 42 U.S.C. §2000e-6(b) 7/ and 28 U.S.C. §1345. 8/ The United States sought preliminary and permanent injunctive relief. 9/

After filing an answer, 10/ defendants filed a motion to dismiss pursuant to Rule 12(b)(6), F.R. Civ. P. 11/ They contended that on March 24, 1974, the authority to bring a pattern or practice suit under section 707 was transferred to EEOC, and that the Attorney General, therefore, lacked authority to bring this suit. 12/

2. The District Court's Order 13/

On March 22, 1976, the district court granted defendants' motion to dismiss the complaint, holding that, by virtue of the 1972 amendments to Title VII, the Attorney General no longer had authority to bring a pattern or practice suit against a governmental agency:

> The statute is unequivocal. Since March 24, 1974, the sole federal agency authorized to bring a pattern and practice suit against an employer, either private or public, is the Equal Employment Opportunity Commission. 14/

7/ Section 707(b) of the Civil Rights Act of 1964.

8/ R. 1.

9/ R. 6-7.

10/ R. 10.

11/ R. 12-13.

12/ R. 14.

13/ R. 130-133.

14/ R. 130-131.

Section 707(c), 42 U.S.C. 2000e-6(c), which was added by the 1972 amendments, provides for the transfer to EEOC on March 24, 1974 of "the functions of the Attorney General under this section." The district court held that

> [t]he "function" of the Attorney General under Section 2000e-6 was to bring pattern and practice suits. Subsection (c) clearly relieves the Attorney General of that authority and vests it in the Commission. Subsection (c) refers exclusively to that section and does not in any manner alter the enforcement scheme set out in the remainder of Title VII where the Attorney General is given authority to act. 15/

The court held that EEOC has the authority under section 706 to bring suit based upon an individual charge of discrimination in the private sector. Section 706(f)(1) provides that the Attorney General may bring suit based upon an individual charge of employment discrimination in the public sector.

> However, when a pattern or practice of employment discrimination is alleged, then Congress has clearly expressed its direction that only one agency, the Commission, bring such an action either in the private sector or the public sector. The reason appears clear from a reading of the amendment and its history that it was designed to eliminate duplication of efforts, the over-lapping of authority and to standardize procedures. A common sense reading and application of the various sections of the Act as it now stands, indicates effectiveness of such design. The Attorney General is not authorized to bring a pattern and practice suit as was done in this case, authority to do so was revoked by the passage of the 1972 amendment. 16/

15/ R. 131.

16/ R. 133 (emphasis in original).

Judgment was entered on March 22, 1976 on the court's order of dismissal.[16/]

B. The Amended Section 706 Complaint

1. Procedural History

On April 5, 1976, the United States filed a motion to amend the judgment of March 22 so as to permit the United States to file an amended complaint under section 706 within twenty days.[17/] On October 6, 1976, the district court entered an order granting the motion of the United States.[18/] The court did not stipulate a time limit within which the amended complaint must be filed. However, the court agreed with defendants' assertions[19/] that the amended complaint should not duplicate issues raised in private actions then pending in the district court.[20/]

16/ R. 134.

17/ R. 135-136.

18/ R. 149-150. Although the United States had filed a motion under Rule 59, F.R. Civ. P., to amend the judgment, the district court construed the motion as one seeking leave to file an amended complaint pursuant to Rule 15(a). The court noted (R. 149) that "[t]he plaintiff's mistake or confusion is understandable in light of the fact that the Clerk entered a judgment following this Court's Order of March 22, 1976, dismissing the complaint in this case. Since only the complaint was dismissed and not the action, the Clerk improperly entered judgment."

19/ R. 141-144.

20/ R. 150.

The United States filed an amended complaint on November 24, 1976.[21/] In this complaint, the United States alleged that five employees had filed discrimination charges with EEOC,[22/] that defendants had retaliated against these five and a sixth employee because they had filed charges with EEOC or had otherwise engaged in activities protected by Title VII,[23/] and that all six persons had filed charges with EEOC alleging retaliation in violation of the Act.[24/] The United States alleged that timely notice of the charges had been served on defendants, that EEOC had unsuccessfully attempted to secure a conciliation agreement acceptable to EEOC, and that the Commission had referred the matters to the Attorney General pursuant to section 706(f)(1), 42 U.S.C. 2000e-5(f)(1).[25/] Jurisdiction was alleged under 42 U.S.C. 2000e-5(f) and 28 U.S.C. 1345.[26/]

21/ R. 151-157.

22/ R. 154. These were Cynthia Brysh, Cecilia Vindiola, Alma Seward, Rita Finchum and Mae Handler.

23/ R. 154-155. The sixth employee allegedly discharged in retaliation for filing a charge with EEOC was Jacqueline Smith.

24/ R. 155.

25/ R. 155-156.

26/ R. 152.

On December 10, 1976, defendants filed a motion[27/] to strike the amended complaint on the grounds that it was untimely[28/] and "ignore[d] the admonition of the Court in that four of the six individuals named in the Amended Complaint have litigation already pending in this Court."[29/] The district court granted the motion to strike in an order that was entered on January 25, 1977.[30/]

The United States filed a notice of appeal on March 25, 1977.[31/]

2. The District Court's Opinion[32/]

The district court, in granting defendant's motion to strike the amended complaint, held that the amended complaint

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27/ R. 158.

28/ R. 159.

29/ Id.

30/ R. 176-178.

31/ R. 179. As of the filing of this brief, the district court has not yet entered a separate judgment pursuant to Rule 58, F.R. Civ.P. The district court clerk's office has refused to enter such judgment, presumably because of the district court's earlier statement that judgment should not have been entered following the court's order of March 22, 1976. See n. 18, supra. After the notice of appeal was filed, the United States filed a motion for a judgment nunc pro tunc as of January 25, 1977. The entry of such judgment is within the power of the district court, Venable v. Meyers, 500 F.2d 1215 (9th Cir. 1974). The district court has not yet acted on the motion of the United States. Even if the district court ultimately enters a separate judgment dated after the date of the notice of appeal, this will not affect the jurisdiction of this Court to hear this case. Curtis Gallery & Library, Inc. v. United States, 388 F.2d 358 (9th Cir. 1968); Ruby v. Secretary of the Navy, 365 F.2d 385 (9th Cir. 1966) (en banc), cert. den. 386 U.S. 1011 (1967).

32/ R. 176-178.

was filed twenty-nine days late, the twenty-day period from the date of the court's order of October 6 having expired on October 26, 1976. The court also held that the amended complaint duplicated issues raised in pending private cases.[33/]

> Since the Order of October 6, 1976, granted the motion and it is clear that the motion itself limits the right to amend, the amended complaint is not timely. Also, since it was clear that any amended complaint should not be duplicitous, the amended complaint should be stricken.

ARGUMENT

Summary

The United States is appealing both the initial dismissal of the section 707 pattern or practice suit and the court's subsequent dismissal of the amended complaint under section 706.

1. Prior to 1972, the Attorney General had the independent authority to bring pattern or practice suits against private employers, the only employers then subject to Title VII. The 1972 amendments to Title VII extended coverage to state and local governments and, for the first time, gave EEOC authority to enforce the Act through litigation, both in suits based on individual charges and in pattern or practice actions.

In transferring to EEOC the Attorney General's pattern or practice functions under section 707, Congress transferred only

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33/ R. 177-178.

that authority which the Attorney General enjoyed at the time the transfer provision was enacted, i.e., the authority to bring pattern or practice suits against private employers. The Report of the Senate Committee on Labor and Public Welfare, issued at a time when the Attorney General had authority only to sue private employers, stated that the bill transferred the "present section 707 functions from the Attorney General to the Commission."[34/] Other committee statements and remarks made on the floor of Congress indicate that this was the intention of Congress in transferring the Attorney General's authority to EEOC.

At the time the transfer provision was proposed, a clearly defined distinction existed between enforcement by EEOC through cease and desist authority in the private sector and enforcement by the Attorney General through litigation in the public sector. Later, on the floor of the Senate, an amendment was adopted which gave EEOC the power to bring suit against private employers. The Attorney General retained the authority to sue in the public sector. However, the transfer provision of what ultimately became section 707(c) was not amended, and an ambiguity thereby resulted concerning the functions of the Attorney General. The Committee

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34/ S. Report No. 92-415, 92nd Cong., 1st Sess, p. 28 (1971) (hereinafter referred to as "Senate Report"), reprinted in Legislative History of the Equal Employment Opportunity Act of 1972, prepared by the Senate Subcommittee on Labor of the Committee on Labor and Public Welfare, p. 437 (hereinafter cited as "Legislative History").

Report remains the most authoritative source for resolving this ambiguity.

The legislative scheme created by the 1972 amendments provides that EEOC has independent authority in the private sector and the Attorney General independent authority in public sector pattern or practice cases. That is the only interpretation of section 707 which effectuates the purpose of the statute. One literal reading of sections 706 and 707 would yield the result that neither EEOC nor the Attorney General could bring pattern or practice suits against public employers, a result contrary to Congress' intent. Nor should the statute be read as the district court read it -as conferring authority on EEOC to bring such suits, since this would be contrary to the explicit provision in section 706(f)(1) that EEOC not sue public employers.

Once the premise is accepted that the Attorney General may bring pattern or practice suits in the public sector, the conclusion that follows is that this authority is independent of any action by EEOC and does not depend upon a referral of charges from EEOC. The authority for such a suit derives not from section 706(f)(1), but from section 707(a), which has no administrative prerequisites. Section 707(e), which requires EEOC to engage in administrative conciliation, applies <u>only</u> to EEOC and has no application to public sector pattern or practice suits, in which EEOC has no role.

2. The district court also erred in dismissing the amended complaint under section 706. The delay in filing the amended complaint was necessitated by the need to review the underlying allegations, since six months had elapsed between the filing of the motion to amend and the granting of that motion. Moreover, in the absence of prejudice to defendants, the amended complaint should not have been dismissed for untimeliness. EEOC v. Exchange Security Bank, 529 F.2d 1214, 1216 (5th Cir. 1976); EEOC v. Kimberly-Clark Corp., 511 F.2d 1352, 1360 (6th Cir. 1975).

Even if the United Stated had, in fact, filed an untimely amended complaint, the alleged victims of illegal discrimination should not have been deprived of their legal remedy for reasons beyond their control. Dent v. St. Louis-San Francisco Ry. Co., 406 F.2d 399, 403 (5th Cir. 1969); Choate v. Caterpillar Tractor Co., 402 F.2d 357, 361 (7th Cir. 1968).

Nor should the amended complaint have been dismissed for duplicating allegations made in private suits. The private parties who had filed charges with EEOC had not been issued right-to-sue letters, and, therefore, it was held that they could not bring suit under Section 706. Their only recourse, once the Attorney General brought suit, was to intervene in the Attorney General's suit. See Section 706(f)(1).

I. THE TRANSFER PROVISION OF THE 1972 AMENDMENTS TRANSFERRED TO EEOC ONLY SUCH AUTHORITY AS THE ATTORNEY GENERAL ENJOYED PRIOR TO 1972; THIS INCLUDED ONLY PATTERN OR PRACTICE AUTHORITY AS TO PRIVATE EMPLOYERS.

A. The pre-1972 statutory scheme. 35/

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, *et seq.*, was enacted "to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin." *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). Prior to the 1972 amendments, Title VII applied to the employment practices of any employer "engaged in an industry affecting commerce who has twenty-five or more employees...." 36/ However, the Act explicitly excluded the employment practices of states and political subdivisions of states. 37/ The Act made it unlawful for private employers, unions and employment agencies to discriminate in employment opportunities on the basis of race, color, religion, sex, or national origin. 38/

35/ The original 1964 Act, as it existed prior to the 1972 amendments, is reprinted in Legislative History pp. 1923 *et seq.*

36/ Section 701(b), 42 U.S.C. 2000e(b), Legislative History at p. 1923.

37/ Section 701(b), 42 U.S.C. 2000e(b)(1), *id.*

38/ Section 703(a)-(d), 42 U.S.C. 2000e-2(a)-(d), Legislative History at pp. 1925-1926.

The enforcement mechanism established by the 1964 Act provided roles for private individuals, the Equal Employment Opportunity Commission, and the Department of Justice. EEOC, which was created by the 1964 Act, 39/ was given the power under section 706 to investigate charges that an employer, union or employment agency had engaged in an unlawful employment practice as defined by the Act. A charge could be filed with EEOC either by the person claiming to be aggrieved by such practice or by a member of the Commission. 40/ EEOC was directed to attempt to conciliate such charges after a finding of reasonable cause:

> If the Commission shall determine, after such investigation, that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. 41/

If EEOC was unable to obtain voluntary compliance, it was required to notify the aggrieved individual, who could then file suit in federal district court. 42/

39/ Section 705(a), 42 U.S.C. 2000e-4(a), Legislative History at p. 1928.

40/ Section 706(a), 42 U.S.C. 2000e-5(a), Legislative History at p. 1929.

41/ Id.

42/ Section 706(e), 42 U.S.C. 2000e-5(e), Legislative History at p. 1930. In the case of a Commissioner's charge, suit could be filed by any person whom the charge alleged to be aggrieved. Id.

Upon timely application, the court could permit the Attorney General to intervene in cases which were certified by him to be of general public importance. 43/

Section 707 of the 1964 Act provided for enforcement by the Attorney General through pattern or practice litigation. The Attorney General could bring a section 707 suit

> whenever [h]e ha[d] reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this title, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described,.... 44/

Prior to the 1972 amendments, it was well settled that the Attorney General could bring a section 707 pattern or practice suit without complying with any of the section 706 procedural requirements applicable to EEOC. "The only prerequisite for the Attorney General to bring a civil action under §2000e-6 [section 707] is that he have reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of discrimi-

43/ Id.

44/ Section 707(a), 42 U.S.C. 2000e-6(a), Legislative History at p. 1931.

nation." United States v. Masonry Contractors Ass'n. of Memphis, Inc., 497 F.2d 871, 876 (6th Cir. 1974). See also United States v. Jacksonville Terminal Co., 451 F.2d 418, 438 (5th Cir. 1971), cert. den. 406 U.S. 906 (1972); United States v. International Ass'n of Bridge, Structural and Ornamental Iron Workers, 438 F.2d 679, 680-682 (7th Cir.), cert. den. 404 U.S. 830. (1971). Unlike section 706, section 707 was designed "to provide the government with a swift and effective weapon to vindicate the broad public interest in eliminating unlawful practices, at a level which may or may not address the grievances of particular individuals." United States v. Allegheny-Ludlum Industries, Inc., 517 F.2d 826, 843 (5th Cir. 1975), cert. den. sub nom. N.O.W. v. United States, 425 U.S. 944 (1976). Prior to the 1972 amendments, the Attorney General had brought approximately seventy pattern or practice suits against private employers under section 707, directly affecting over 275,000 employees.[45/]

B. The 1972 Amendments

In the Equal Employment Opportunity Act of 1972, P.L. 92-261, Congress amended Title VII in several important respects. The definition of "person" for purposes of coverage under the Act[46/] was amended to include

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45/ Legislative History, p. 1581 (remarks of Sen. Brock).

46/ Section 707(a), for example, authorizes suits against "any person or group of persons."

"governments, governmental agencies, [and] political subdivisions," 47/ and the term "employer" no longer excluded states or political subdivisions of states. 48/

Sections 706 and 707 were amended to reflect changes in the methods of enforcing the Act. Under section 706, whenever a charge is filed by an allegedly aggrieved individual or by a Commissioner, EEOC must serve notice of the charge on the respondent and then investigate the charge. After investigation, EEOC must make a determination whether there is reasonable cause to believe that the charge is true. If no reasonable cause is found, the charge must be dismissed and the complainant and respondent notified of the dismissal. If EEOC finds reasonable cause, it must "endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." 49/

If, within thirty days 50/ after a charge is filed with EEOC, the Commission has been unable to secure a

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47/ Section 701(a), 42 U.S.C. 2000e(a).

48/ Section 701(b), 42 U.S.C. 2000e(b). In addition, coverage was extended to employers with fifteen or more persons, rather than twenty-five as provided in the 1964 Act.

49/ Section 706(b), 42 U.S.C. 2000e-5(b).

50/ Section 706(e), 42 U.S.C. 2000e-5(e), provides that a charge must be filed with EEOC within 180 days of the alleged unlawful employment practice.

conciliation agreement, the Commission may bring a civil action against any respondent "not a government, governmental agency, or political subdivision...."51/ Under the 1964 Act, EEOC had only administrative powers; the 1972 amendments gave EEOC authority to sue private employers under Section 706.52/

51/ Section 706(f)(1), 42 U.S.C. 2000e-5(f)(1).

52/ H.R. 1746, as reported to the House of Representatives by the Committee on Labor and Public Welfare, provided that if EEOC were unable to obtain voluntary compliance, it would hold an administrative hearing and, if it determined that the respondent had engaged in an unlawful employment practice, issue an order requiring the respondent to cease and desist from such practice and to take affirmative action to remedy the violation. EEOC could enforce its orders in the appropriate federal court of appeals. See H.R. 1746 as reported to the House of Representatives, Legislative History at pp. 37-42. See also H.R. Rep. No. 92-238, 92nd Cong., 1st. Sess. 8-11 (1971), Legislative History at pp. 68-71 (hereinafter "House Report"). During the floor debates in the House, the "Erlenborn Bill" was introduced (Legislative History at pp. 141-147) and adopted (id., p. 315). The bill substituted litigation by EEOC in district court for cease and desist authority.

Similarly, S. 2515, as reported by the Senate Committee on Labor and Public Welfare, granted EEOC cease and desist powers. See Legislative History at pp. 381-389. See also S. Rep. (supra n. 34) at 17-23, Legislative History at pp. 426-432. During the Senate debates, S. 2515 was amended to give EEOC authority to bring suit. See Legislative History at pp. 1499-1504 (text of Amendment No. 884) and p. 1557 (amendment adopted).

However, EEOC may not bring a section 706 suit against a public employer:

> In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. 53/

Similarly, EEOC may apply for temporary or preliminary relief in cases involving private employers; the Attorney General may so act in cases involving public employers. 54/ EEOC may intervene in a civil action brought by an aggrieved individual against a private employer; the Attorney General may intervene when such a person sues a public employer. 55/

Thus, it is clear that the Attorney General may bring suits against governmental bodies upon referral from EEOC of section 706 charges. The question is

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53/ Section 706(f)(1), 42 U.S.C. 2000e-5(f)(1). The aggrieved individual may intervene in a civil action brought by EEOC or the Attorney General. If EEOC dismisses the charge or if no suit is filed by EEOC or the Attorney General within 180 days after a charge is filed, an aggrieved individual may file his own suit within 90 days after notification by EEOC or the Attorney General. Id

54/ Section 706(f)(2), 42 U.S.C. 2000e-5(f)(2).

55/ Id.

whether this is the only way the Attorney General may bring suit, or whether he retains any independent authority to bring section 707 pattern or practice suits.

As noted above, 56/ section 707(a) of the 1964 Act provided that the Attorney General could bring suit whenever he had reasonable cause to believe that a person was engaged in a pattern or practice of resistance to the full enjoyment of rights secured by the Act. That provision, and section 707(b), were left intact by the 1972 amendments. 57/ However, the 1972 Amendments added new subsections 707(c), (d) and (e), 42 U.S.C. 2000e-6(c), (d) and (e). These subsections provide in pertinent part:

> (c) Effective two years after the date of enactment of the Equal Employment Opportunity Act of 1972, [58/] the functions of the Attorney General under this section shall be transferred to the Commission, together with such personnel, property, records, and unexpended balances . . . unless the President submits, and neither House of Congress vetoes, a reorganization plan pursuant to chapter 9, of title 5, United States Code, inconsistent with the provisions of this subsection. [59/] The Commission shall carry out such functions in accordance with subsections (d) and (e) of this section.

56/ See pp. 14-15, *supra*.

57/ See Legislative History at pp. 1889-1909 for the Committee Print showing the changes made by the 1972 Amendments to Title VII of the Civil Rights Act of 1964.

58/ The date of enactment was March 24, 1972.

59/ No reorganization plan was submitted.

> (d) Upon the transfer of functions provided for in subsection (c) of this section, in all suits commenced pursuant to this section prior to the date of such transfer, proceedings shall continue without abatement, all court orders and decrees shall remain in effect, and the Commission shall be substituted as a party for the United States of America, the Attorney General, or the Acting Attorney General, as appropriate.
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> (e) Subsequent to the date of enactment of the Equal Employment Opportunity Act of 1972, the Commission shall have authority to investigate and act on a charge of a pattern or practice of discrimination, whether filed by or on behalf of the person claiming to be aggrieved or by a member of the Commission. All such actions shall be conducted in accordance with the procedures set forth in section 706 of this Act.

C. The Legislative History of the 1972 Amendments Indicates That Congress Intended to Transfer to EEOC Only That Authority Which the Attorney General Enjoyed Prior to 1972.

Section 707(c) provides that on March 24, 1974, the Attorney General's functions under Section 707 were to be transferred to EEOC. However, at the time section 707(c) was enacted (i.e., on March 24, 1972), the only function enjoyed by the Attorney General was to bring section 707 pattern or practice suits against private employers. The legislative history shows that the transfer was limited to those functions which the Attorney General had prior to the date of the 1972 amendments, i.e., pattern or practice functions vis a vis private employers.

As originally introduced in September 1971, S. 2515 would have extended Title VII coverage to public employers. However, all enforcement was to be centered in EEOC, which could issue cease and desist orders that would be enforceable in the courts of appeals.[60/] The Attorney General's functions under section 707 were to be transferred to EEOC on the date of enactment. No distinction was made between enforcement as to public employers and enforcement as to private employers.[61/]

The bill was modified in committee in two important respects. First, as reported out of committee in October 1971, the bill exempted state and local employers from EEOC's cease and desist authority. Under the modified enforcement scheme, actions against private employers were to be handled administratively by EEOC with recourse to the courts of appeals; actions against public employers were to be handled by the Attorney General through district court litigation.[62/] Secondly, the bill as reported out of committee allowed a two-year retention of the Attorney General's section 707 authority.[63/] But, as noted above, the committee had by this time already distinguished between enforcement in the private sector and enforcement in the public sector and, in its report of October 28, 1971, it explicitly provided that only that authority which the Attorney General enjoyed at that time

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60/ See n. 52, p. 17, supra.

61/ Legislative History at pp. 157-187.

62/ S. Rep., supra n. 34, at 17-23, 25, Legislative History at 426-432, 434.

63/ S. Rep., supra n. 34, at 28-29, Legislative History at 437-438.

was to be transferred to EEOC:[64/]

> The authority to bring "pattern or practice" suits directly in the district courts, as provided by section 707 of the present law, is amended by section 5 of the bill which transfers the present section 707 functions from the Attorney General to the Commission.

At that time, the Attorney General had authority only to bring pattern or practice suits against private employers.

Public sector suits could not be transferred to EEOC because by that time there was an express provision in section 706 reserving such litigation to the Attorney General and because the EEOC did not have any litigation authority.

The provision which gave EEOC power to bring suit against private employers but retained the Attorney General's authority to sue public employers was later added by amendment (No. 884) during the floor debates in the Senate.[65/] This version of the bill was ultimately enacted. Thus, as of that point, EEOC was given a litigation program. However, after that point, the legislative history does not indicate whether only private sector (*i.e.* "present") or both public and private sector jurisdiction was to be transferred from the Attorney General to EEOC. Therefore, what had been a clearly defined distinction became an ambiguity,

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64/ S. Rep., *supra* n. 34, at 28, Legislative History at 437 (emphasis added).

65/ *Id.* at 1499-1557.

and the Senate Committee Report, quoted above, remains the most authoritative source for the resolution of this issue.

Moreover, in describing the transfer of authority under section 707, the Senate Committee Report stated:

> In providing for the transfer of the authority under section 707, the committee has, however, retained jurisdiction in the Department of Justice for the first 2 years after enactment of the bill to bring "pattern or practice" suits where necessary. The committee believes that this will safeguard the important "pattern or practice" power, while at the same time providing for a smooth and efficient transfer of that authority. 66/

If the purpose of the transition period was to provide for the orderly transfer of authority by allowing the Department of Justice to complete the cases it had brought prior to 1972, it would make little sense for the transfer to include pattern or practice authority over governmental units. The Department of Justice did not have

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66/ S. Rep., *supra* n. 34, at 28, Legislative History at p. 437.

From March 24, 1972 to March 24, 1974, the Attorney General and EEOC had concurrent authority to bring section 707 suits against private employers. See Senate Report p. 28, Legislative History at p. 437. Pursuant to section 707(d), EEOC was substituted as plaintiff after March 24, 1974 in section 707 cases brought by the Attorney General against private employers prior to that date. See *e.g.*, *EEOC v. United Airlines, Inc.*, 515 F.2d 946 (7th Cir. 1975).

As the Supreme Court noted in *International Brotherhood of Teamsters v. United States*, No. 75-636, ___ U.S. ___, 45 U.S.L.W. 4506, 4507 n. 1 (decided May 31, 1977) (emphasis added):

> Section 707 was amended by §5 of the Equal Employment Opportunity Act of 1972... to give the Equal Employment Opportunity Commission., rather than the Attorney General, the authority to bring "pattern or practice" suits under that section against private-sector employers.

authority to bring such cases prior to March 24, 1972; there would be no reason to give the Attorney General this new authority and simultaneously provide for taking it away.

The Senate bill provided for concurrent authority during the two-year period

> since the committee intends that the Commission's administrative cease-and-desist enforcement authority will not be used exclusively to resolve individual complaints but will also include the elimination of "patterns or practices" of discrimination wherever its investigation of a charge discloses the existence of such employment situations. 67/

In discussing EEOC's authority to issue cease and desist orders in pattern or practice cases, and the elimination of the Attorney General's authority to bring such cases, the committee must have been referring only to actions against private employers, since the committee was explicit in its desire to prohibit EEOC from issuing cease and desist orders against public employers.

Representative Erlenborn, sponsor of the bill as originally passed by the House of Representatives, and one of the House conferees, 68/ spoke on the floor of the House in favor of the conference report on H.R. 1746 and the coverage of state

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67/ S. Rep., *supra* n. 34, at 28-29, Legislative History at pp. 437-438.

68/ The Senate Conference Report, S. Rep. No. 92-681, 92nd Cong., 2nd Sess. (1972) is reprinted in Legislative History at pp. 1800-1820. The House Conference Report, H.R. Rep. No. 92-899, 92nd Cong., 2nd Sess. (1972) is reprinted in Legislative History at pp. 1822-1842.

and local governmental employees. He stated his belief that the transfer provision applied only to private sector enforcement efforts.

> In the extension of this authority to State and local employees, it was also made clear that the Attorney General would have the authority to bring the action in court rather than the attorneys for the Commission. This was made explicit in the bill as it was passed in the other body. Besides this, there is a transfer of jurisdiction for pattern or practice matters from the Attorney General to the Commission in a phase program over the next two years.
>
> I think we should make it clear that at least this conferee believes it was the intention of the conference that in the case where a pattern or practice action is brought against State and local officials that suit should be brought by the Attorney General rather than by the Commission. There seems to be a conflict here, a conflict of jurisdiction going to the Commission by the suits against local units of government, that the authority to bring them rests in the Attorney General. I believe the latter should take precedence in the pattern or practice actions against a unit of local or State government, it should be brought by the Attorney General. I believe that was the intention of the conference.
>
> * * *
>
> The point I am trying to make is the apparent conflict between this and the transfer of the pattern or practice jurisdiction that the Attorney General <u>now</u>

> exercises. It is my feeling that the conferees intended that the Attorney General have the pattern or practice jurisdiction as it affects the State and local units of government. 69/

The district court's decision is inconsistent with the Congressional intention that the Attorney General retain independent pattern or practice jurisdiction under section 707 in cases involving state and local government bodies.

Sections 707(c), (d) and (e), when read together, indicate that in all cases in which EEOC has pattern or practice authority, EEOC must adhere to the procedural requirements of section 706 before filing suit. However, section 707(c) does not explicitly distinguish between suits against public and private employers, and the anomaly of construing section 707(c) to require the transfer to EEOC of all pattern or practice authority is made clear by section 707(d). If the district court's construction of section 707(c) and (d) were correct, then all pattern or practice suits initiated by the Attorney General prior to March 24, 1974 should have been transferred to EEOC on that date. The transfer would have included all pattern or practice suits initiated by the Attorney General against public employers between March 24, 1972 (the date he acquired authority as to public employers) and March 24, 1974. But a transfer to EEOC of those

69/ Remarks of Rep. Erlenborn (March 8, 1972), Legislative History at pp. 1858, 1860 (emphasis added).

cases would have been inconsistent with the rationale of section 706(f)(1), which prohibits EEOC from suing public employers, and with the legislative history of the 1972 amendments.

Both the language of section 706(f)(1), which requires EEOC to refer cases against public employers to the Attorney General, and the history of the amendments indicate Congress' intention to limit EEOC's litigative function to suits against private defendants and to preclude litigation by EEOC against state and local governments. During the Senate debates on S. 2515, after the Senate had substituted litigation by EEOC for cease and desist powers,[70/] Senator Williams introduced an amendment which, like the present language of section 706(f)(1), provided that EEOC could bring suit against "any respondent not a government, governmental agency, or political subdivision named in the charge." Charges against those public respondents must be referred to the Attorney General "who may bring

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70/ See pp. 21-22, supra.

a civil action against such respondent in the appropriate United States District Court." 71/

Senator Dominick, speaking in favor of the amendment, stated the reason for giving the Attorney General, rather than EEOC, the authority to sue public employers:

> I, of course, heartily support that idea... [I]t just does not seem right, and did not seem right in committee, that any agency of the Federal Government, as such, should have the right to sue, whether it be a State, city, town, school district, sanitation district, or whatever it might be, alleging that their employment practices were illegal.
>
> It would seem to me, if we are going to provide grievance procedures for these employees it ought to be within the Justice Department so that the respondent government unit is dealing with one of the Federal Government's most respected and objective departments. 72/

The Senate Committee had also recommended that the Attorney General bring suit against public employers. At the time the bill was in committee, it provided cease and desist powers for EEOC. 73/ Senator Williams explained why the Committee bill limited those powers to charges involving private employers:

> First, there was the strong feeling that cases of discrimination by State and local government agencies should be handled by the full force of the United States of America acting directly through the Attorney

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71/ Legislative History at pp. 894-895 (debates of January 25, 1972).

72/ Id. at 898.

73/ See pp. 21-22, supra.

> General. By placing the full weight of the U.S. district courts behind equal employment opportunity in State and local governments, the committee bill provided the necessary machinery to insure that State and local government agencies fulfill the promise of equal rights.
>
> In addition, the special enforcement procedure when State and local government agencies are respondents provides the necessary power to achieve results without the needless friction that might be created by a Federal executive agency issuing administrative orders to States and localities. 74/

Thus, the district court's construction of section 706 as granting to EEOC the authority to bring pattern or practice suits against public employees is contrary to the rationale of the statutory scheme.

II. THE LEGISLATIVE SCHEME PROVIDES THAT EEOC SHALL HAVE INDEPENDENT AUTHORITY IN THE PRIVATE SECTOR AND THE ATTORNEY GENERAL INDEPENDENT AUTHORITY IN PUBLIC SECTOR PATTERN OR PRACTICE CASES.

Prior to 1972, Title VII applied only to private employers. The 1972 amendments eliminated the exclusion for states and political subdivisions of states and amended the term "person" to include governments, governmental agencies, and political sub-divisions. 75/ Thus, since March 24, 1972, Title VII has applied to both public and private employers.

74/ Legislative History at 895-896. During the House hearings, then-Deputy Assistant Attorney General David L. Norman testified that if the Subcommittee retained the cease and desist features of H.R. 1746, the Attorney General should enforce the Act as to state and local governments. Hearings before the General Subcommittee on Labor of the House Committee on Education and Labor, 92nd Cong., 1st Sess., pp. 35, 38 (1971).

75/ Section 701(a), 42 U.S.C. 2000e(a).

Both before and after the 1972 amendments, Title VII differentiated between the enforcement of individual rights and enforcement through pattern or practice suits. Prior to 1972, EEOC processed individual charges against private employers under section 706, but EEOC could not bring suit under 706. Prior to 1972, the Attorney General initiated pattern or practice suits against private employers. The 1972 amendments retained the dichotomy between individual and pattern or practice enforcement and also differentiated between enforcement in the private sector and enforcement in the public sector.

In the private sector, it is clear that EEOC has the entire Title VII litigation responsibility, both as to individual charges and pattern or practice suits. 76/ Under section 706, EEOC processes charges of employment discrimination filed by individuals or a Commissioner. If EEOC's conciliation efforts fail, the Commissioner may, in the case of a non-governmental respondent, bring a civil action in federal district court. 77/

76/ The Attorney General has enforcement responsibility vis a vi[s] private employers under authorities other than Title VII. See, e.g., Executive Order 11246, as amended by Executive Order 11478, which requires non-discrimination in employment by federal contractors and subcontractors. Section 209 of the Order provides for referrals to the Department of Justice for purposes of bringing suit under the Order. See also the State and Local Federal Assistance Act of 1972 (Revenue Sharing), 31 U.S.C. 1221, 1242.

77/ Section 706(f)(1), 42 U.S.C. 2000e-5(f)(1).

EEOC also has pattern or practice responsibility in the private sector. Section 707(c) provides that EEOC may act on pattern or practice charges; i.e., it may bring a section 707 pattern or pactice suit based on pattern or practice charges filed with the Commission. However, before filing suit, EEOC must follow the notice and conciliation procedures prescribed in section 706:

> Subsequent to the date of enactment of the Equal Employment Opportunity Act of 1972, the Commission shall have authority to investigate and act on a charge of a pattern or practice of discrimination, whether filed by or on behalf of a person claiming to be aggrieved or by a member of the Commission. All such actions shall be conducted in accordance with the procedures set forth in section 706 of this Act.

Section 707(e). Thus, in the private sector, EEOC may bring suits based on both individual and pattern or practice charges. In both situations, the Commission must follow the procedures of section 706 prior to bringing suit.

In the public sector, there is no dispute that the Attorney General has the entire litigation responsibility in suits based on individual charges filed either by the aggrieved party or a Commissioner. Section 706(f)(1) provides that if EEOC is unable to secure an acceptable conciliation agreement from a governmental respondent, it "shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court." The dispute in this case concerns the authority of the Attorney General to bring pattern or practice suits in the public sector.

There are three possibilities as to federal enforcement efforts in pattern or practice public sector suits: (1) the statute may be read as providing that no federal agency now has authority to bring a pattern or practice suit against a public employer; (2) the statute may be read as the magistrate read it-- as authorizing only EEOC to bring pattern or practice suits against public employers; or (3) the statute may be read as authorizing only the Attorney General to bring pattern or practice suits against public employers.

We shall demonstrate that the first two interpretations are inconsistent with the statutory scheme and the legislative history. Only the third interpretation effectuates the statutory purposes and provides an orderly enforcement scheme whereby all private sector suits -- both individual and pattern or practice -- are brought by EEOC, and all public sector suits -- both individual and pattern or practice -- are brought by the Attorney General. This interpretation is not precluded by the plain language of the statute. If, as we have argued, the Attorney General has retained the authority under section 707(a) to bring pattern or practice suits against public employers, this is an independent grant of authority which is derived from section 707(a) alone and is wholly defined by the terms of that section. It is distinct from EEOC's administrative enforcement efforts under section 706 and does not depend on a referral of section 706 charges from EEOC. Nor is this authority under section 707(a) qualified by section 707(e), which, on its face, applies only to EEOC's enforcement responsibilities.

The first interpretation -- that neither the Attorney General nor EEOC has pattern or practice authority as to public employers-- would be based on the premise that by virtue of section 707(c), the Attorney General can no longer bring a pattern or practice suit under section 707(a) and EEOC, which must follow the procedures of section 706 before filing any suit, may not bring a section 707 suit against a public employer because that would be contrary to section 706(f)(1).

This interpretation ignores the importance Congress placed on extending Title VII coverage to public employees and on putting those employees on an equal footing with private employees. Cf. Chandler v. Roudebush, 425 U.S. 840 (1976). It would have been incongruous for Congress to provide that the federal government may bring suits against public employers under section 706(f)(1), (individual cases), but that no such cases may be brought involving more serious section 707 problems (patterns or practices of discrimination). Cf. United States v. Georgia Power Co., 474 F.2d 906 (5th Cir. 1973).

In its Report on H.R. 1746, the House Committee on Education and Labor described the problem of discrimination as it existed among governmental employees and the need to provide effective enforcement machinery:

> Presently approximately 10.1 million persons are employed by State and local governmental units. This figure represents an increase of over 2 million employees since 1964. Indications are that the number of employees in State and local government will continue to increase, perhaps even more rapidly.... All State and local government employees would under the bill have access to the remedies available under the Act.
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> * * *
>
> The problem of employment discrimination is particularly acute and has the most deleterious effect in these governmental activities which are most visible to the minority communities (notably education, law enforcement, and the administration of justice) with the result that the credibility of the government's claim to represent all the people equally is negated.
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> * * *
>
> While an individual has a right of action in the appropriate court if he has been discriminated against [under the Fourteenth Amendment], the adequacy of protection against employment discrimination by State and local governments has been severely impeded by the failure of the Congress to provide Federal administrative machinery to assist the aggrieved employee. 78/

78/ House Report pp. 17-18, Legislative History at pp. 77-78.

Similarly, the Senate Report on S. 2515 discusses the need for extending coverage to public employees:

> The Committee believes that employees of State and local governments are entitled to the same benefits and protections in equal employment as the employees in the private sector of the economy....
>
> Discrimination by government ... serves a doubly destructive purpose. The exclusion of minorities from effective participation in the bureaucracy not only promotes ignorance of minority problems in that particular community, but also creates mistrust, alienation, and all too often hostility toward the entire process of government.
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> * * *
>
> The Committee believes that it is an injustice to provide employees in the private sector with the assistance of an agency of the Federal Government in redressing their grievances while at the same time denying assistance similar [sic] to State and local government employees. 79/

The Committee cited reports by the United States Commission on Civil Rights 80/ documenting the conclusion that discrimination in state and local governments is more pervasive than in the private sector.

During the Senate debates on S. 2515, the Senate considered a proposed amendment 81/ which would have

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79/ S. Rep., supra n. 34, at 9, 10-11, Legislative History at pp. 418, 419-420.

80/ "For All the People... By All the People - A Report on Equal Opportunity in State and Local Government" (1969) and "Mexican Americans and the Administration of Justice in the Southwest" (1970), cited in Legislative History at p. 419, excerpts reprinted at id., pp. 1117-1138.

81/ Amendment No. 812, Legislative History at pp. 877-878.

eliminated the extension of coverage to state and local governments. Speaking in opposition to the amendment, Senator Williams described the extension of coverage to public employees as "one of the most vital provisions of S. 2515," and expressed the view that "[a]t this time in our country's history, it should be beyond question that the employees of State and local governments are entitled to the same benefits and protections in equal employment as are employees in the private sector." 82/ The amendment was defeated. 83/

A construction of section 707 which permitted neither EEOC nor the Attorney General to initiate pattern or practice suits against public employers would also be inconsistent with the fact that the amendments clearly contemplated that for the two-year period following enactment, the Attorney General would enjoy pattern or practice authority as to both public and private employers. A determination that for the two-year period following enactment, both EEOC and the Attorney General had authority to bring pattern or practice suits against public and private employers, but that the authority to bring such suits against public employers then lapsed entirely would be contrary to the intent of Congress to provide full protection for public employees.

82/ Senate debate of January 31, 1972, Legislative History at p. 113. See also id. at 1166-1167 (remarks of Sen. Taft), 1167-1168 (remarks of Sen. Javits).

83/ Id. at 1176.

The second interpretation is that EEOC, rather than the Attorney General, now has the authority to bring pattern or practice suits against public employers. This was the interpretation adopted by the court below and by the district courts in United States v. Fresno Unified School District, 412 F. Supp. 392 (E.D. Cal. 1976), appeal pending No. 76-2539 (9th Cir.); and United States v. Pompano Beach, S.D. Fla., No. 76-6059 (decided July 8, 1976) (claims under other statutes still pending).

That interpretation ignores the clear Congressional intent to restrict EEOC's dealings with state and local governments. Congress' determination that EEOC's dealings with state and local governments should be limited was expressed both during the debates on proposed cease and desist powers for EEOC and after Congress had substituted litigation powers for cease and desist authority. 84/

Thus, the only interpretation that is consistent with the purposes and structure of the statutory scheme is that the Attorney General has authority to bring pattern or practice suits against public employers under section 707(a).

84/ See discussion at pp. 27-29, supra.

This interpretation is not precluded by the language of the statute, if, as we have argued,[85/] section 707(c) is construed as transferring to EEOC only those functions which the Attorney General enjoyed prior to the 1972 amendments, namely, pattern or practice authority as to private employers.

The remaining issue is whether the Attorney General's authority under section 707(a) vis a vis public employers is self-starting, or whether it depends on EEOC's prior performance of the procedures prescribed for EEOC under section 707(e).[86/]

The Attorney General's duties under section 707(a) are explicitly enumerated in that section and are not made dependent upon prior administrative proceedings. The Attorney General, before he brings a pattern or practice suit, must have "reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to

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85/ See pp. 20-27, supra.

86/ In its recent report on the Enforcement of Equal Opportunity and Antidiscrimination Laws in Public Broadcasting, the Subcommittee on Communications of the House Committee on Interstate and Foreign Commerce stated that, as to Title VII enforcement, the Department of Justice had enforcement responsibility "[u]pon referral from EEOC where [a] complaint involves State or local government or on its own initiative where State agencies are engaged in a pattern or practice of employment discrimination" Report No. 95-12, 95th Cong., 1st. Sess., p. 3 (1977) (emphasis added).

However, the district courts in United States v. State of South Carolina, D.S.C., No. 75-1610 (decided April 14, 1977) (three-judge court), notice of appeal filed June 13, 1977; United States v. Board of Education of the Garfield Heights City School District, N.D. Ohio, No. C 75-689 (decided October 5, 1976), appeal pending No. 77-3012 (6th Cir.); and United States v. State of North Carolina, E.D. N.C., No. 75-0328-Civ-5 (decided January 27, 1977), appeal pending No. 77-1614 (4th Cir.), held that the Attorney General may bring pattern or practice suits against public employees, but only on referral of charges by EEOC.

the full enjoyment of any of the rights secured by [Title VII], and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights [therein] described." That is the only prerequisite for a pattern or practice suit brought by the Attorney General. United States v. Masonry Contractors Ass'n., 497 F.2d 871, 876 (6th Cir. 1974).

The determination of reasonable cause is the only qualification placed on the Attorney General's authority under section 707(a). That authority is in no way limited by the requirement of section 707(e) that EEOC, before filing a pattern or practice suit, adhere to the administrative requirements of section 706. Section 707(e) applies only to EEOC and, thus, has no relevance to section 707(a) suits against public employers, as to whom EEOC has no litigation responsibility.

The United States does not take issue with the argument that, before EEOC brings a pattern or practice suit under section 707(e), it must follow the procedures of section 706(f)(1). But on its face, section 707(e) applies only to EEOC. It has no applicability to the Attorney General, who, as we have demonstrated, derives his pattern or practice authority from section 707(a).

Although section 707(e) seems, on its face, to apply all of the provisions of section 706(f)(1) to EEOC's pattern or practice suits, the Court of Appeals for the Fifth Circuit has recognized that section 707(e) cannot incorporate every procedural prerequisite of section 706 (f)(1). United States v. Allegheny-Ludlum Industries, Inc., 517 F.2d 826, 843-844 (5th Cir. 1975), cert. den. sub nom. N.O.W. v. United States, 425 U.S. 944 (1976). Rather, each provision of section 706(f)(1) must be examined in light of the purposes of the statutory scheme. At issue in Allegheny-Ludlum was the incorporation in section 707(e) of the "intervention as of right provision" of section 706(f)(1).87/ The Court held that there was "no legislative history evincing a favorable congressional attitude toward unconditional private intervention in government 'pattern or practice' litigation," and, "in the absence of an express provision for intervention we choose to follow its signals." Id. at 844. Similarly, since there is no legislative history reflecting Congress' intention that public sector pattern or practice suits be preceded by EEOC conciliation efforts, and in the absence of an express referral requirement in Section 707(a), this Court should not read a conciliation and referral requirement into this section.

87/ The statute provides:

> The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision.

Moreover, it would make little sense to require EEOC referrals under Title VII when the same Congress which enacted the 1972 amendments to Title VII has permitted the Attorney General to bring analogous actions on an independent basis under section 8(g) of the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. 1242. See also section 518(c)(3) of the Crime Control Act of 1973, 42 U.S.C. 3766(c)(3). The district court stated that the 1972 amendments to Title VII were "designed to eliminate duplication of effort, the overlapping of authority and to standardize procedures."[88/] Yet, under the district court's interpretation of Title VII, EEOC and the Attorney General would have authority to conduct simultaneous investigations of public employers -- EEOC under Title VII and the Attorney General under the Crime Control and State and Local Assistance Acts. The retention by the Attorney General of independent section 707 authority would effectuate Congress' intention to eliminate the overlapping authority.[89/]

88/ R. 133.

89/ Legislative History at p. 74.

III. THE DISTRICT COURT ERRED IN DISMISSING THE AMENDED COMPLAINT BROUGHT UNDER SECTION 706

A. The Timeliness Issue

On April 5, 1976, after the district court had dismissed the section 707 complaint, the United States filed a motion to amend the judgment so as to permit the United States to file an amended complaint under 706 within twenty days. The district court did not act on that motion until October 6, 1976, and, in granting the motion, did not specify a date by which an amended complaint was to be filed. 90/

On November 24, 1976, after rechecking the facts underlying the original complaint to ensure that the allegations contained therein were still accurate and complete, the United States filed an amended complaint. 91/

In moving to strike the amended complaint, defendants did not allege that any prejudice was caused them by the forty-nine day period between the granting of the motion to amend and the filing of the amended complaint; nor did the district court, in dismissing the amended complaint, suggest that there was any prejudice. In the absence of prejudice to defendants, the district court abused its discretion in dismissing the amended complaint for alleged untimeliness. <u>EEOC</u> v. <u>Exchange Security Bank</u>, 529 F.2d 1214, 1216-17 (5th Cir. 1976); <u>EEOC</u> v. <u>Kimberly-Clark Corp.</u>, 511 F.2d 1352, 1360 (6th Cir. 1975).

90/ R. 149-150.

91/ R. 151-157.

92/ See R. 159.

In EEOC v. Exchange Security Bank, supra, the court of appeals reversed the district court's dismissal of an application by EEOC to enforce a subpoena issued twenty-one months after a discrimination charge was filed, where the application was not made by EEOC until a year and a half after the respondent had refused to comply with the subpoena. The court of appeals held that because there was nothing in the record to show prejudice from the delay, the application for enforcement should not have been dismissed. Moreover, the court of appeals held that, even assuming prejudice to defendants, "something more than time alone would be required to sustain a finding that the ... delay was unreasonable." 529 F.2d at 1217. The court held that because there was no suggestion that the delay had resulted from "slothfulness, lethargy, inertia or caprice," and in the "absence of proof of a dilatory attitude" on the part of the government, the district court had erred in finding unreasonable delay. Id.

Similarly, in EEOC v. Kimberly-Clark Corp., supra, the court of appeals held that EEOC's failure to give notice to respondent that conciliation had failed did not prejudice respondent, and the underlying charges could, therefore, form a basis for EEOC's suit (511 F.2d at 1360-61):

> When an agency neglects to follow a procedural rule but its failure inflicts no significant injury on the party entitled to observance of the rule, the error does not prevent further administrative or judicial action. Instead, the error should be considered harmless.... This is the rule especially when the agency is not itself adjudicating but is conducting pre-adjudication activities.

The amended complaint in this case alleged that six persons had filed charges with EEOC against the college, and that these charges had been referred to the Attorney General by EEOC under section 706(f)(1) after conciliation attempts had failed. 93/ By dismissing the amended complaint, the district court eliminated the only means by which the statutory rights of these persons could be enforced. Once the Attorney General brings a suit under section 706 on behalf of persons who filed charges with EEOC, such persons may not bring their own suit, but may intervene in the Attorney General's suit. 94/ Thus, even if the amended complaint had, in fact, been untimely filed, the alleged victims of illegal discrimination should not have been deprived of their legal remedy for reasons that were not in their control but which depended on the activities of the federal agency charged with enforcing Title VII. See Dent v. St. Louis-San Francisco Ry. Co., 406 F.2d 399, 403 (5th Cir. 1969); Choate v. Caterpillar Tractor Co., 402 F.2d 357, 361 (7th Cir. 1968).

93/ R. 154-156.

94/ See Section 706(f)(1), 42 U.S.C. 2000e-5(f)(1).

B. The Duplication Issue

The district court erred in holding that the amended complaint improperly duplicated matters that were the subject of private suits by four of the six parties whose charges had been referred to the Attorney General by EEOC for suit under section 706(f)(1). 95/ On December 27, 1976, the district court held that it was without jurisdiction to decide three of these private suits, since the respective plaintiffs had not received right-to-sue letters under section 706(f)(1) and dismissed the Title VII claims of the charging parties in those consolidated suits 96/ as "precipitous." The fourth charging party who brought her own suit (Cynthia Brysh) had, in fact, been issued a right-to-sue letter in December 1974. 97/

95/ The private suits were Brysh v. Pima County Community College District, No. CIV-74-200-TUC-JAW-WCF and No. CIV-75-26-TUC-JAW-WCF; Handler v. Pima County Community College District, No. CIV-75-57-TUC-WCF; Smith v. Pima County Community College District, No. CIV-75-93-TUC-WCF; and Vindiola v. Pima County Community College District, No. CIV-75-94-TUC-WCF.

96/ The Handler, Smith and Vindiola Title VII charges were dismissed.

97/ On April 20, 1977, the district court dismissed Ms. Brysh's complaints because of her failure to comply with rules regarding pretrial discovery and preparation of proposed pretrial orders.

The district court relied on EEOC v. Missouri Pacific Railroad Co., 493 F.2d 71 (8th Cir. 1974) in holding that the Attorney General could not duplicate issues raised by private charging parties.[98/] In Missouri Pacific, however, the court of appeals held that when a charging party has been issued a right-to-sue letter and then has filed suit under section 706, EEOC may not bring its own suit, but is relegated to its statutory right of intervention under section 706. In the present case, however, only Ms. Brysh was issued a right-to-sue letter. The other charging parties were not issued such letters, and the district court held that their suits had been improperly brought. Therefore, no barrier existed to the Attorney General's suit under section 706.

98/ R. 150, 177.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed and the case remanded for trial.

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