Nos. 24810, 24813

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JAMES C. DENT AND UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, APPELLANTS

v.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, ET AL., APPELLEES

RUSH PETTWAY, ET AL., AND UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, APPELLANTS

v.

AMERICAN CAST IRON PIPE COMPANY, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

BRIEF FOR THE UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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I N D E X

C I T A T I O N S

Cases--Continued

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INTRODUCTION

These cases, as well as the three cases consoli-

dated with them for purposes of this appeal[1/], present a single question for decision by this Court. This question is whether alleged victims of deprivations of rights secured by Title VII of the Civil Rights Act of 1964 are barred from instituting suits under section 706(e) of that Act because the Equal Employment Opportunity Commission has not attempted to secure voluntary compliance from defendants. In other words, is EEOC conciliation a jurisdictional prerequisite to the filing of a private suit? As the agency charged with the administration of the pertinent statutory provisions in question, the Commission (EEOC) intervened below to present to the court its position with respect to this issue.

1/ Those three cases, to which the United States Equal Employment Opportunity Commission is not a party, are: John A. Hyler, et al. v. Reynolds Metal Co., et al., No. 24789; Alvin C. Muldrow, et al. v. H. K. Porter Co., Inc., et al., No. 24811; and Worthy Pearson, et al. v. Alabama By-Products Corp. et al., No. 24812.

STATEMENT OF FACTS

The Dent Case - James C. Dent filed suit in the District Court for the Northern District of Alabama on February 7, 1966. The suit, brought pursuant to section 706(e) and (f) of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5(e), (f), named as defendants the St. Louis-San Francisco Railway Company, Inc.; the Brotherhood of Railway Carmen of America; the General Chairman of the Brotherhood; and the Chairman of Local 60 of the Brotherhood. The complaint alleged, inter alia, that defendant Company had, on account of race, laid off plaintiff and other Negro employees, eliminated the job classifications in which they were employed, and excluded them from employment in and training programs for other job classifications; that the Company maintains racially segregated facilities; and that defendant Brotherhood maintains racially segregated locals--nos. 60 (all white) and 750 (all Negro)--as the exclusive bargaining representatives of employees of the defendant Company. These practices were alleged to be unlawful employment practices prohibited by Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., and the court was asked to enjoin their continuation and to issue

prescribed by the Act (R. 7,[3/] 19). As of the time suit was brought, on February 7, 1966, the Commission had yet been unable to undertake formal conciliation efforts.

Following the filing of suit by Dent and on March 23 and April 5, 1966, defendant Unions and Company, respectively, filed motions to dismiss (R. 10-11, 12-14). The Unions' motion was subsequently amended on July 25, 1966 and the Company's on April 13 and July 15, 1966 (R. 27, 15-17, 25-26). The Company's motion, as amended, relied, inter alia, on the ground that conciliation by the Commission was a condition precedent to suit (R. 16, 25-26). On May 16, 1966, the court granted a motion by the Commission to intervene in the action pursuant to Rule 24(b), Federal Rules of Civil Procedure (R. 24).

On March 13, 1967, the court filed its order and conforming opinion dismissing the complaint on the ground that "conciliation . . . is a jurisdictional

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3/ Although paragraph 6d of the Commission's Pleading in Intervention (R. 19) reflects the fact that the form notice mailed to Dent and dated January 5, 1966 indicated that the Commission had already engaged in formal conciliation efforts, in fact, no such efforts were made in this case. In ruling on the motion to dismiss, the district court, therefore, correctly assumed (R. 30) that no such efforts had been made.

prerequisite to the institution of a civil action under Title VII" (R. 42, 29-41). Notices of appeal were filed by plaintiff Dent on April 7, 1967, and by the Commission on May 8, 1967 (R. 43-44, 46-47).

The Pettway Case - Rush Pettway, Peter J. Wrenn, Alex Fitts, and Davis Jordan filed suit in the District Court for the Northern District of Alabama on May 13, 1966. The suit, brought pursuant to section 706(e) and (f) of the Civil Rights Act of 1964 alleged that defendant, American Cast Iron Pipe Company, limits the employment opportunities of plaintiffs and its other Negro employees in the apprenticeship and journeyman programs because of their race; maintains racially segregated facilities and recreational and charitable activities; and is organizationally structured and managed on a racially segregated basis. These practices were alleged to be unlawful employment practices prohibited by Title VII of the Civil Rights Act of 1964, and the court was asked to enjoin their continuation and to issue appropriate affirmative relief pursuant to section 706(g) of the Act (R. 163-169).

Prior to filing suit, plaintiffs, on November 22, 1965, had filed a charge with the Commission alleging

violations of Title VII by the defendant (R. 167, 183). A copy of the charge was served on defendant on November 22, 1965 (R. 183). On February 3, 1966, the Commission issued its determination that reasonable cause existed to believe that defendants had violated Title VII (R. 167, 183). By letter dated April 13, 1966--before the Commission was able to undertake formal efforts to achieve voluntary compliance--the Commission notified plaintiffs that it had been unable to obtain voluntary compliance within the period provided by the statute and that they were entitled to bring a judicial action within the time prescribed by the Act (R. 167, 183). As of the time suit was brought, on May 13, 1966, the Commission had yet been unable to undertake formal conciliation efforts.

Following the filing of suit and on June 2, 1966, the defendant filed a motion to dismiss (R. 170-175) which, inter alia, relied on the ground that the complaint failed to aver "compliance with all of the conditions precedent required to be met by Title VII of the Civil Rights Act of 1964 before a suit may be instituted and maintained" (R. 173, 170). On September 8, 1966, the court granted a motion by the Commission to

intervene in the action pursuant to Rule 24(b), Federal Rules of Civil Procedure (R. 181).

On March 13, 1967, the court filed its order, in conformity with the court's opinion in the Dent case, dismissing the complaint on the ground that "conciliation. . . is a jurisdictional prerequisite to the institution of a civil action under Title VII" (R. 186, 187, 29-41). Notices of appeal were filed by the plaintiffs on April 7, 1967, and by the Commission on May 8, 1967 (R. 187-188, 190).

SPECIFICATION OF ERROR

The district court erred in holding that conciliation or conciliation efforts by the Commission are a jurisdictional prerequisite to the institution of a civil action under sections 706(e) and (f) of the Civil Rights Act of 1964.

ARGUMENT

EEOC CONCILIATION EFFORTS ARE NOT PREREQUISITE TO FILING A SUIT UNDER SECTION 706(e) and (f) OF THE CIVIL RIGHTS ACT OF 1964

Introduction

The issue decided by the district court and presented in this appeal involves the judicial construction of statutory provisions which are administered by the Equal Employment Opportunity Commission and which directly concern the specific functions which the Commission is empowered and directed to perform.

The construction of section 706 of the Civil Rights Act of 1964 arrived at by the district court in these cases is directly contrary to that of the Commission as articulated in the Commission's rules and regulations and in various briefs filed by it in other cases raising the same issue. It has long been a settled rule that the practical interpretation of a statute by the agency charged by Congress with its administration or enforcement is entitled to great weight. Skidmore v. Swift, 323 U.S. 134, 137, 139-140 (1944); United States v. American Trucking Associations, Inc., 310 U.S. 534 (1940); Norwegian Nitrogen Products

Co. v. United States, 288 U.S. 294 (1933); United States v. Jefferson County Board of Education, 372 F. 2d 836, 856-858 (C.A. 5, 1966)[4/], aff'd on rehearing en banc, No. 23345 (March 29, 1967, slip op. p. 7); Chemical Workers Union v. Planters Mfg. Co., 259 F. Supp. 365 (N.D. Miss. 1966).

The Chemical Workers case is particularly in point because that case also involved the construction of section 706 of the Civil Rights Act of 1964 and the EEOC intervened to urge its interpretation of that provision. The court, which adopted the EEOC's interpretation, discussed the Supreme Court's decision in American Trucking in the following relevant terms (259 F. Supp. at 366-67):

4/ The Jefferson County cases were school desegregation cases under the Fourteenth Amendment in which the Court gave great weight to administrative guidelines, informally promulgated by the Department of Health, Education and Welfare, interpreting Title VI of the Civil Rights Act of 1964. The Court quoted from the Supreme Court's decision in Skidmore (323 U.S. at 139-140) as follows (372 F. 2d at 858):

> [The Administrator's policies] do determine the policy which will guide applicants for enforcement by injunction on behalf of the Government. Good administration of the Act and good judicial administration alike require that the standards of public enforcement and those for determining private rights shall be at variance only where justified by very good reasons. (Emphasis the Fifth Circuit's.)

> Questioned there was the Interstate Commerce Commission's interpretation of the word "employees" as used in the Federal Motor Carrier Act. . . . The Court, after noting that "[i]n any case such interpretations are entitled to great weight" observed (310 U.S. at 549. . .) that this is "peculiarly true here when the interpretations involve 'contemporaneous construction of a statute by 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' [citing Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294. . . (1933)]." Accord, Power Reactor Co. v. International Union of Electricians, 367 U.S. 396. . . (1961). The instant case is a clear example of what the court was referring to in the Trucking Associations case. (Emphasis added.)

The Statutory Framework

Section 706(a), 42 U.S.C. 2000e-5(a), after dealing with the receipt by the Commission of a charge of unlawful employment practice and service of such charge upon the respondent, provides as follows:

> [T]he Commission shall. . . make an investigation of such charge. . . . 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.

Section 706(e), 42 U.S.C. 2000e-5(e), then provides that

> If, within thirty days after a charge is filed with the Commission. . . (except that. . . such period may be extended to not more than sixty days upon a determination by the Commission that further efforts to secure voluntary compliance are warranted), the Commission has been unable to obtain voluntary compliance with this title, the Commission shall so notify the person aggrieved, and a civil action may, within thirty days thereafter, be brought against the respondent named in the charge. . . .

Conciliation efforts may be made after suit is brought, for section 706(e) goes on to provide that

> Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending. . . the efforts of the Commission to obtain voluntary compliance.

The basic philosophy of the statute is apparent from these provisions. Voluntary compliance is preferable to enforcement by court orders, and such efforts, as are possible, should be made to resolve matters by conciliation, both before and after suit is filed. However, private plaintiffs have a statutory right of action, and the period of limitation carefully enumerated in the provisions of section 706(e) set forth above demonstrate the concern of Congress that complaints under Title VII shall not be permitted to grow stale and the specific intent that the right of action accrues upon the expiration

of the specified time periods. Thus, the provision which permits the EEOC to extend, from 30 to 60 days, the period during which it may investigate and conciliate before issuing notice to the charging party is careful to state that such extension by the Commission may be for "not more than" 30 days. The Commission may continue its efforts beyond that period, but the charging party, having received notice, may also exercise his right of action once that period has passed. 5/

5/ Similarly, the provision which permits a court to stay the action pending efforts to secure voluntary compliance but which is careful to state that such a stay may be "for not more than sixty days" reflects Congress' intent to limit postponement of the right to judicial enforcement to a specified period of time.

Carefully specified time limitations are also contained in other provisions of section 706. Section 706(b) provides that a charge may not be filed with the Commission until after state or local fair employment practice agencies have had an opportunity to exercise their jurisdictions, but the period of deferral is specifically limited to 60, or in some cases 120, days. See also section 706(d) in which specific periods of limitation for filing charges with the Commission are imposed on aggrieved persons.

Thus, the clear sense of the structure of section 706 is that the right of aggrieved persons to proceed, without further delay, through the various levels of enforcement culminating in judicial proceedings is based upon the transpiration of the several time periods specifically enumerated by Congress.

There is nothing in the language of sections 706(a) or (e) which indicates that the plaintiff here is barred from maintaining an action under Title VII because of the Commission's failure to act. The triggering language of section 706(e), quoted supra, says nothing about exhaustion or initiation of conciliation efforts as a prerequisite to suit. The condition is simply that "the Commission has been unable to obtain voluntary compliance" within the sixty-day period. Here, the reason for that inability was the Commission's unexpectedly heavy caseload and small staff which prevented it from dealing with the charge in the statutory sixty-day period (R. 20, 184). In other cases it might decide that it had no legal basis for entering into conciliation efforts. In either situation, the statute leaves it up to the complainant to proceed on his own in court, if that is his choice.[6/] And it is apparent

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6/ It is true that section 706(e) assumes that the Commission will undertake its investigatory and conciliatory functions within the sixty day period preceding accrual of the aggrieved person's right to sue. But this conclusion, of course, is far different from and can not properly support a conclusion that failure by the Commission to undertake these functions during this period deprives the aggrieved person of his right to sue. Indeed, the court below acknowledged "that the 60 day time period provided for the investigation and conciliation of charges is properly to be accorded a directory rather than a mandatory construction" (R. 30). Although this statement was made in the course of resolving a somewhat different jurisdictional question, it supports the general proposition that this implied direction to attempt conciliation within 60 days in no way incorporates a jurisdictional prerequisite.

from the provision in section 706(e) allowing for a stay of judicial proceedings for up to sixty days pending Commission efforts to secure voluntary compliance that Congress recognized that suits would be instituted where conciliation by the Commission had not been accomplished but remained a possibility. 7/

The common sense reading of section 706(e) is, therefore, that the Commission is to be afforded an opportunity to examine a grievance under Title VII before it is taken to court to determine if it has merit and to resolve it informally if it can. The aggrieved party has the single obligation of following that procedure and submitting his claim to the Commission. If the Commission, having been afforded the opportunity to investigate and conciliate, does not accomplish both within sixty days, the complainant upon notice from the Commission may, if he chooses, go to court. At the same time the Commission may continue to investigate and initiate conciliation efforts.

7/ In connection with the "stay" provision in section 706(e), see infra, n. 10, p. 18.

The Case Law

The district court's holding that conciliation efforts by the Commission are a condition precedent to suit has been rejected, unanimously, by all other courts which have passed upon the issue. In Quarles v. Phillip Morris, Inc., C.A. No. 4544 (E.D. Va., April 11, 1967), the court, holding that EEOC efforts to conciliate are not a prerequisite to suit, stated (at p. 9):

> The plaintiff is not responsible for the acts or omissions of the Commission. He, and the members of his class, should not be denied judicial relief because of circumstances over which they have no control. The plaintiff exhausted administrative remedies and satisfied the requirements of the Act by filing a complaint with the Commission and awaiting its advice. He is not required to show that the Commission has endeavored to conciliate. To insist that he do so, would require him to pursue an administrative remedy which may be impossible to achieve. If the Commission makes no endeavor to conciliate, the remedy is ineffective and inadequate. 8/

In Mondy v. Crown Zellerbach Corp. and Hill v. Crown Zellerbach Corp., C.A. Nos. 66-242, 67-286 (consolidated cases) (E.D. La., July 26, 1967), the court,

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8/ Typed copies of the unreported decisions cited herein are attached as an Appendix. The page references are to the decisions as they appear in this Appendix.

holding that Commission efforts to conciliate as well as Commission service of the charge upon respondents and determination of reasonable cause are not prerequisites to suit, stated (at pp. 13-14):

> If Congress had truly intended that the E.E.O.C.'s attempt at conciliation should be a prerequisite to the possibility of a civil suit, all it had to do was clearly state its intention in the statute. We feel that this problem is properly treated as one of exhausting administrative remedies. These plaintiffs have decided to proceed under Title VII of the Civil Rights Act of 1964, and therefore they must do everything in their power to achieve their goals through the E.E.O.C. before going to court. But 42 U.S.C.A. §2000e-5(e) sets out only two requirements for an aggrieved party before he can sue: (1) he must file a charge with the E.E.O.C., and (2) he must receive the statutory notice from the E.E.O.C. that it has been unable to obtain voluntary compliance. There is nothing more that a person can do, and this Court will not ask that he be responsible for the Commission's failure to conciliate, as that body's inaction is beyond the control of the charging party. To bar a party from bringing a suit because the E.E.O.C. has shirked its statutory responsibility would indeed be to provide a hollow remedy and to inflict an undeserved penalty upon an innocent person.

Accord, Moody v. Albemarle Paper Co., C.A. No. 989 (E.D. N.C., July 5, 1967) (Commission efforts to

conciliate not a prerequisite to suit[9]); Bowe v. Colgate-Palmolive Co., C.A. No. NA66-C-20 (S.D. Ind., June 30, 1967), pp. 9-10 (conciliation efforts not a prerequisite to suit); Anthony v. Brooks, C.A. No. 9947 (N.D. Ga., June 12, 1967) (conciliation efforts not a prerequisite to suit[10]); Evenson v.

9/ In Moody, the court stated (at pp. 4-5):

> After an aggrieved party has filed a written complaint with the Equal Employment Opportunity Commission and has received notice from the Commission that voluntary compliance within sixty days from receipt of the complaint by the Commission has not been affected, no further formal efforts toward conciliation by the Commission are necessary to open the district courts to a private civil action by the complainant against a respondent named in the charge theretofore filed with the Commission.

10/ In Anthony, the Commission had made no attempt at conciliation prior to suit. After suit was brought the court invoked the "stay" provision in section 706(e) and ordered conciliation procedures to commence. Although these procedures proved unsuccessful, the court rejected defendants' motion to dismiss for failure to commence the procedures prior to suit, stating (at p. 4):

> [I]n the court's view, the granting of such opportunities is sufficient to withstand any legal attack for failure of the Equal Employment Opportunity Commission to do so originally.

Northwest Airlines, C.A. No. 3961 (E.D. Va., March 17, 1967) (conciliation efforts not a prerequisite to suit); Robinson v. P. Lorillard Co., C.A. No. C-141-G-66 (M.D. N.C., January 26, 1967) (Commission determination concerning reasonable cause not a prerequisite to suit)[11/];

11/ In Robinson, suit was filed before the Commission had made a determination concerning reasonable cause but after the 60 day period had expired and the charging party had received the statutory notice. The motions by defendants Company and unions to dismiss the complaint under Rule 12, F.R.C.P., referred to in paragraphs 3 and 4 of the court's memorandum of January 26 (see Appendix), relied, inter alia, on this ground and this issue was briefed and argued before the court. Since Commission conciliation under section 706 can only occur after an affirmative determination of reasonable cause has been made, and in Robinson, therefore, the Commission did not and could not have engaged in conciliation efforts prior to suit, the court's ruling in Robinson is, necessarily, a ruling that conciliation efforts are not prerequisite to suit.

Note the factual distinction between absence of a Commission determination concerning reasonable cause and a Commission determination that no reasonable cause exists. It is the former which was involved in Robinson and the latter which the lower court in the instant cases referred to in its opinion (R. 34, n. 17) and is discussed infra, n. 21, p. 34.

Ward v. Firestone Tire & Rubber Co., 260 F. Supp. 579 (W.D. Tenn., 1966)[12]; see Chemical Workers Union v. Planters Mfg. Co., 259 F. Supp. 365 (N.D. Miss. 1966)[13]; Hall v. Werthan Bag Corp., 251 F. Supp. 184

12/ In Ward, the court granted defendants' motion to strike the allegation in the complaint that the Commission had found reasonable cause. Presumably, if a finding concerning reasonable cause is a jurisdictional prerequisite, the court would have denied that motion. Moreover, in Ward, the court, in commenting that plaintiff need not bring his suit within 90 days after filing the charge but only within 30 days from receiving EEOC notice, relied upon the following consideration (at 580):

> [It] would be anomalous in that plaintiff would in a sense be penalized becuuse of the failure of the Commission to perform its statutory duties within the time allowed.

13/ In Chemical Workers, plaintiffs' suit had been filed prior to an EEOC determination concerning reasonable cause. The court did not refrain from exercising jurisdiction and, indeed, described with approval the procedural history leading to suit (259 F. Supp. at 366):

> On February 17, 1966, the individual plaintiffs were informed by the Commission's Director of Compliance that the Commission had thus far been unable to resolve the dispute and that sixty days had elapsed since the filing of the charge thereby allowing the institution of court proceedings. (Emphasis added.)

(M.D. Tenn. 1966).[14] Cf. Mickel v. South Carolina State Employment Service, No. 11,069, (C.A. 4,

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14/ In Hall, the court, in ruling that a member of plaintiff's class could properly join in a class action brought under Title VII, held that an affirmative finding of reasonable cause by the EEOC was not a prerequisite to suit. The court stated (251 F. Supp. at 188):

> Consideration of the constitutional problems arising from a construction of the title as prohibiting access to the courts to unsuccessful complainants before the Commission makes it particularly compelling to construe it so as to give effect to the clear legislative intent in spite of the possible ambiguity of the language.

The reliance pladed by the court below on the Hall case (R. 39-40) is misplaced. Hall examined the right of an individual to intervene in a pending class action filed under section 706 where the individual had not previously filed a charge with the Commission. The Court upheld the right of the individual to intervene in such circumstances, but indicated that if a question of individual, affirmative relief--as opposed to injunctive relief--arose, prior resort to the Commission was required. In this regard see Bowe v. Colgate-Palmolive Co., supra, at pp. 8-10, where the court relied on the Hall case to hold that even for purposes of qualifying for individual affirmative relief, prior Commission conciliation efforts are not a jurisdictional prerequisite.

May 3, 1967).[15]

The emphasis placed by the courts in Quarles and Crown Zellerbach on the unfairness which would result to aggrieved persons from a requirement that

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15/ The issue in Mickel was whether plaintiff could maintain an action against the defendant without even having filed a charge against that defendant with the EEOC. The Court of Appeals for the Fourth Circuit, affirming the judgment of the district court, quite properly held that the plaintiff cannot simply ignore the plain language of Title VII and sue the defendant without first making resort to the EEOC. The issue presented here was neither present nor decided in Mickel. The one passage in the opinion which bears on this issue at all appears consistent with our position and that of the cases cited above (at p. 6):

> It seems clear from the language of the statute that a civil action could be brought against the respondent named in the charge filed with the Commission only after conciliation efforts had failed or, in any event, after opportunity had been afforded the Commission to make such efforts. (First emphasis the court's; second emphasis added.)

The phrase to which emphasis has been added evidently contemplates the institution of suit in conditions other than the failure of conciliation and implies a situation, like that in the instant case, in which plaintiff, by first filing his charge with EEOC, affords the Commission an opportunity to conciliate, which opportunity, however, is for some reason not availed of by the Commission. This reading of the quoted language is supported by the last paragraph of the opinion in which the court properly relies, not on whether the Commission but on whether plaintiff fulfilled his duties under section 706.

before filing suit they must wait until the Commission is able to undertake conciliation efforts, is paralleled by Supreme Court decisions in which persons allegedly aggrieved by the deprivation of rights under federal or state law have been allowed to maintain judicial actions without first pursuing statutarily provided administrative remedies. These decisions have emphasized the presence of any one of three factors--the agency's lack of power to make legally binding adjudications or issue coercive sanctions; undue delay in the administrative proceedings; or doubt that the aggrieved person can actually invoke the administrative remedy.

Thus, in United States Alkali Export Ass'n. v. United States, 325 U.S. 196 (1945), the Department of Justice had instituted a civil anti-trust action under the Sherman Act against two incorporated export associations. The Webb-Pomerene Act of 1918 created certain exemptions from the Sherman Act for exporters and required them to file reports with the Federal Trade Commission. The Webb-Pomerene Act also directed the F.T.C. to investigate apparent violations of the Sherman Act by exporters, to make recommendations to

exporters for the readjustment of their businesses in accordance with law, and, if compliance was not secured by such recommendations, to refer its findings and recommendations to the Attorney General for such action thereon as he deemed proper. In that case, there had been no investigation, attempted conciliation, or referral by the F.T.C. before suit was brought, and the defendants contended that such administrative action was a condition precedent to suit. In rejecting this contention the Court emphasized that (325 U.S. at 206):

> [W]hile [Congress] empowered the Commission to investigate, recommend and report, it gave the Commission no authority to make any order or impose any prohibition or restraint or make any binding adjudication with respect to these violations.

See also 325 U.S. at 210; McNeese v. Board of Education, 373 U.S. 668, 675 (1963), involving alleged racial segregation in public schools in Illinois, where the Court quoted with approval from the Alkali decision and held that resort to an existing administrative remedy was not a condition precedent to suit partly because the administrator's "'only function. . . is to investigate, recommend and report'. . .".

Cases in which the factor of undue delay in administrative proceedings was relief upon by the Supreme Court in ruling that those proceedings were not prerequisites to suit were Walker v. Southern Ry., 385 U.S. 196 (1966), and Smith v. Illinois Bell Telephone Co., 270 U.S. 587 (1926).[16] The factor of

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16/ In Walker, the Supreme Court was confronted with the question whether a discharged railroad employee who accepted his discharge as final could bring an action for damages in a State court or whether he must pursue an administrative remedy under the collective bargaining agreement. The agreement was covered by the Railway Labor Act and, under the statute, the dispute was ultimately subject to compulsory arbitration before the National Railroad Adjustment Board. In resolving this question, the Court noted (385 U.S. at 198) that proceedings before the Board were substantially delayed because of the Board's heavy caseload and resulting backlog. This delay was the sole reason given by the Court for holding that the judicial remedy was available to petitioner.

Similarly, in Smith the Supreme Court rejected an exhaustion of administrative remedies argument where the agency ". . . for a period of two years, remained practically dormant." The Court held that, under those circumstances the injured party ". . . is not required indefinately to await a decision of the rate-making tribunal before applying to a federal court for equitable relief." 270 U.S. at 591-592.

See also Meredith v. Fair, 298 F. 2d 696, 703 (C.A. 5, 1962), where this Court noted that an individual must be able to invoke judicial enforcement of his right to a desegregated education without having to incur administrative delays until he is, perhaps, past caring about it; Southeastern Oil Florida, Inc. v. United States,

(continued on following page)

doubt whether the aggrieved person can actually invoke the administrative remedy was emphasized by the Court in McNeese v. Board of Education, supra.

The basic rationale underlying these Supreme Court decisions is compellingly present in the instant case. Indeed, all three factors variously emphasized by the Court in these cases merge here. First, like the F.T.C., the EEOC's powers are limited to investigation, conciliation and referral and do not extend to the issuance of binding adjudications or the imposition of coercive sanctions. Second, to require charging parties to await the undertaking of conciliation efforts by the Commission will be to require undue delay in an area where delays will often have extremely oppressive effects on individuals least able to endure them. An aggrieved person under Title VII must already incur substantial periods of delay before seeking enforcement of his rights in the federal courts. In a jurisdiction

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16/ (continued from preceding page)

115 F. Supp. 198, 200 (Ct. Claims, 1953), where the court granted relief after an administrative official failed for more than two years to act on a claim under a government contract, saying that judicial relief is available ". . . where the administrative appeal procedure provided for in [the] contract is, in fact, inadequate or unavailable."

qualifying for deferral under section 706(b), he is not permitted to file his charge with EEOC for two to four months.[17/] Then he must postpone his suit for 60 days to give the Commission an opportunity to secure voluntary compliance. And it should be remembered that once suit is filed, he may be required to wait for 60 additional days while the court stays proceedings pending Commission efforts to secure voluntary compliance. Add to this the

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17/ Senator Clark, Senate Democratic floor leader for Title VII, recognized the burden imposed on victims of discrimination by the deferral requirement of section 706(b) (110 Cong. Rec. 12595) (June 3, 1964):

> In many a case I fear that the end result will be that justice delayed is justice denied, and the unfortunate individual would never get the job to which he was entitled because the whole employment situation could well have changed in the meantime.

And see Ethridge v. Rhodes, 65 LRRM 2331, 2335 (No. 67-53) (S.D. Ohio, May 17, 1967), where the court, speaking of section 706 of Title VII, stated:

> In view of the requirement that the state administrative remedy be sought before use of the federal administrative remedy. . . the delay in administration is compounded. Thus, the federal administrative remedy also lacks any sort of speedy effectiveness.

often lengthy delays incurred in litigating claims in the heavily burdened federal district courts, and it becomes apparent that for reasons of elementary fairness further delays must be avoided wherever possible. Third, under Title VII, aggrieved persons have no control over the processing of charges by the Commission, nor can they compel the Commission to undertake conciliation efforts. It would be onerous to force them to exhaust a remedy which they may be unable to invoke.

Other Policy Considerations

There are other undesirable consequences of the construction adopted by the court below. First, it would impose on courts the obligation to judge whether in each case EEOC has attempted to conciliate prior to suit.[18] Such a judgment necessarily entails an inquiry into the steps taken by both EEOC and respondents during the conciliation process. Clearly, this conflicts with the intention expressed in section 706(a) that conciliation efforts are not to be made public "or used as evidence in a subsequent proceeding." Second, a charging

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18/ If, as defendants urge, such an attempt is a jurisdictional prerequisite, this judgment must be made even though the parties fail to raise the point.

party who incurs the cost of bringing suit after receiving notice that EEOC has made efforts at conciliation, could find his suit dismissed becuase of facts not available to him when he sued. Third, we submit that courts will be unable to formulate an appropriate, uniform standard to determine when an effort to conciliate has been made for purposes of permitting suit. The court below did not endeavor to formulate such a standard, contenting itself with the ruling (R. 37) that "some effort. . . however minimal" is required. The formulation of any uniform standard would be very difficult for the variety of existent factual situations, from which such a standard would have to be drawn, is great. The formulation of an appropriate standard would be self-defeating. To be content with a truly "minimal" effort would render virtually meaningless the very objective which the court below sought to accomplish--the achievement of conciliation prior to and, therefore, instead of, a suit; to require the completion of significant and substantive conciliation endeavors would put a premium on recalcitrance by respondents--the less they cooperate with the

Commission, the better opportunity they would have for avoiding suit.[19/]

The Legislative History

The legislative history of Title VII further demonstrates the incompatibility between the intent of Congress and the construction adopted by the district court. It reflects a dominant intent to create federal, judicially enforceable rights, allowing such complaints as can be swiftly disposed of by conciliation to be so settled, but preserving the right to sue in cases where prompt nonjudicial resolution cannot be accomplished.

19/ The court's opinion in the Evenson case, supra, reflects the futility of trying to formulate an appropriate application of the ruling by the court below. After stating its agreement with the Commission's position (at p. 6) that the only thing plaintiffs

> have to do under the Act is to show that voluntary compliance has not been accomplished within the said sixty-day period. To require more would be to deny a complainant the right to seek redress in the courts, resulting wholly from circumstances beyond her control.,

the court in Evenson went on to observe (at pp. 6-7) that a Commission representative discussed the charge with a representative of the Company "prior to December 16, 1965 for the purpose, among others, of urging the company to comply with the Act." This discussion, as the court realized, could not have constituted the conciliation efforts directed by Section 706(a) since

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The lower court's reliance (R. 31-32) on the fact that when the Civil Rights Bill of 1963 (H.R. 7152) reached the Senate an attempt to conciliate was a jurisdictional prerequisite to suit, is misplaced. Under the bill which reached the Senate, the EEOC, not the charging party, had the responsibility for enforcement by means of civil suit. Under such a scheme, it was logical to require the Commission not only to commence but to complete its primary function of conciliation. In the Senate, this apsect of the bill was drastically revised. Hall v. Werthan Bag Corp., 251 F. Supp. 184, 186 (M. D. Tenn. 1966), describes the essential legislative history:

> As originally drafted, the enforcement provisions of Title VII were patterned after the provisions of the National Labor Relations Act: the Equal Employment Opportunity Commission was to have authority to issue cease-and-desist orders and to seek enforcement of those orders in the Courts, and the emphasis was upon protection of the public interest and upon obtaining broad compliance with the provisions of the title.

19/ (continued from preceding page)

it occurred during and as part of the Commission's investigation of the charge which necessarily precedes the finding of reasonable cause and the commencement of statutory conciliation. And yet the court seems to have cited this "discussion" by way of arguing alternatively that even if conciliation efforts by the Commission are a prerequisite to suit, the investigatory endeavor by the Commission would have to be accepted as sufficient. In the instant cases, the suits were also instituted following Commission investigation of the charges.

> Congressional machinery, however, turned the enforcement provisions of Title VII inside out. The Commission was stripped of the authority to issue orders by the House Judiciary Committee and stripped of its power to prosecute court actions by the leadership compromise in the Senate. The emphasis shifted toward the vindication of individual rights and the burden of enforcement shifted from the Commission to the person aggrieved. (Emphasis added.)

See also, Note (1965) 32 U. Chicago L. R. 430, 432-5.

This shift in underlying philosophy from the House-passed version to the essentially "private rights" statute ultimately enacted by the sponsors of the bill, demonstrates the Congressional concern that the complainant must have a right to his day in Court. Senator Javits, one of the principal sponsors of the statute, described the relation between Commission and Court in some detail (110 C.R. 14191, June 17, 1964):

> [T]he Commission does not have to find that the complaint is a valid one before the complainant individually can sue or before the Attorney General can bring a suit to establish a pattern or practice of discrimination. The Commission may find the claim invalid; yet the complainant still can sue, and so may the Attorney General, if he finds reasonable cause for doing so. In short, the Commission does not hold the key to the courtroom door. The only thing this title gives the Commission is time in which to find that there has been a violation and time in which to seek conciliation.
>
> * * * *

> Mr. President, this provision gives the Commission time in which to find that there exists in the area involved a pattern or practice, and it also gives the Commission time to nofity the complainant whether it has or has not been successful in bringing about conciliation.
>
> * * * *
>
> But Mr. President, that is not a condition precedent to the action of taking a defendant into court. A complainant has an absolute right to go into court, and this provision does not affect that right at all. (Emphasis added.) 20/

20/ The court in Hall relied on these remarks as an authoritative indication of legislative intent and stated (251 F. Supp. at 188):

> It seems clear. . . that the requirement of resort to the Commission was designed to give a discriminatory opportunity to respond to persuasion rather than coercion, to soft words rather than the big stick of injunction; that the requirement was not designed to serve as a screen to prevent frivolous complaints from reaching the courts.

Professor Sovern's statement in his book Legal Restraints on Racial Discrimination in Employment (1966), p. 82, which was cited by the court below (R. 35, n. 18), is inaccurate. Sovern relied on Senator Ervin's statement that "the Commission holds the key to the courthouse door which cannot be unlocked for the aggrieved party's benefit unless the Commission finds that there is reasonable cause to believe the employer guilty of the charge of discrimination. . ." Ervin's statement is, of course, almost literally contradicted by Javits', who was one of the Bill's sponsors. See Labor Board v. Fruit Packers, 377 U.S. 58, 66 (1964) ("It is the sponsors that we look to when the meaning of the statutory words is in doubt.") And Sovern's opinion that jurisdiction is dependent upon a finding of reasonable cause has also been rejected by Werthan Bag and subsequent cases. Accordingly, it is Javits' statement to which the Court must turn in seeking the Congressional intent.

While the Senator's remarks were addressed to the question of whether a Commission determination concerning reasonable cause was a prerequisite to the claimant's right to sue, they necessarily support the proposition that conciliation efforts by the Commission are not a prerequisite to suit.[21/]

21/ See discussion supra, n. 11, p. 34. Even if Javits' statement is unjustifiably read as limited to the situation in which EEOC has made a determination that no reasonable cause exists (see R. 34, n. 17), it still supports our position. It would be anomalous to provide prompt judicial access to one with a weaker claim while to deny such access to one with a more meritorious claim.

The statements from the Congressional debate on the Senate Compromise measure which are quoted by the court below (R. 33, 34) shed little light on the specific question before the Court. They indicate a legislative preference for compliance by conciliation rather than through court proceedings, if possible, and recognize that the charging party must give EEOC an opportunity to conciliate before bringing his suit. But they do not indicate how Commission failure to attempt conciliation within the 60 day period was intended to affect the private remedy.

At other states of the Senate debate, Senator Saltonstall remarked (110 C.R. 12690, June 4, 1964):

> The [EEOC] is given a maximum of 60 days in which to obtain voluntary compliance. . . . If they are not able to do so, the aggreived party in the case may file an action in the Federal district court.

And Senator Humphrey remarked (110 C.R. 14188, June 17, 1964):

> The individual may proceed in his own right at any time. He may take his complaint to the Commission, he may bypass the Commission, or he may go directly to court.

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On July 2, 1964, the day on which the House of Representatives voted in favor of the Civil Rights Bill as amended by the Senate and the Bill became law, Congressman Celler outlined for his colleaques the Senate amendments. These remarks, which immediately preceded the final vote for passage, contained the following relevant statement concerning section 706(e) of Title VII (110 C.R. 15896):

> The Equal Employment Opportunities Commission is given a maximum of 60 days in which to obtain voluntary compliance with the provisions of the law. If they are not able to do so, the aggrieved party in the case may file an action in the Federal district court in which the practices has occurred. (Emphasis added.)

This statement stresses the limitation placed upon the period provided for possible pre-suit conciliation and, in so doing, expresses Congress' concern that the right to sue not be postponed beyond the 60 days. 22/

21/ (continued from preceding page)

Although we believe that this statement by Senator Humphrey goes too far, and therefore would not quarrel with its characterization by the lower court as "discredited" (R. 35, n. 18), it nevertheless serves to contradict any suggestion that Senator Humphrey, by his comment on the stay provision in section(e) (see R. 38 including n. 25) or otherwise, intended conciliation efforts to be a prerequisite to suit.

22/ This statement by Celler particularly serves to discredit the reliance placed by the court below (R. 32-33) on the House approved amendment sponsored by Celler when the Bill was initially being considered by the House.

The Senate also added to the Bill, as enacted, the provision in section 706(e) which authorizes the courts to stay proceedings pending conciliation efforts (110 C.R. 11933, May 26, 1964). In so doing, Congress recognized that, because of the severance of the conciliation process from the enforcement function, law suits would be filed in cases in which conciliation remained to be accomplished; and Congress provided the courts with a procedure in section 706 with which to resolve this problem.[23/]

23/ The lower court's reliance (R. 38) on the phraseology of the stay provision in section 706(e) as well as on the different phraseolohy of the referral provision in section 204(d) of the same Act is misplaced. To repeat, we do not quarrel with the proposition that Congress, in section 706, believed and desired that the Commission would engage in conciliation during the 60 day period following filing of the charge. As we have shown, however, this proposition can not properly support the lower court's ruling that the failure of the Commission to do this in anyway interferes with the private party's right to sue at the end of this period. Nor is it significant that the referral procedure provided in Title II of the Act may be worded differently from section 706(e) inasmuch as a plaintiff suing under Title II is not required to first resort to the conciliating agency at all.

We would point out, in addition, that it is not even necessary to read the literal language of the stay provision in section 706(e) as the lower court reads it. Indeed, in terms of grammatical structure and the principle that words of one part of a statute should be read in conjunction with the words of other parts of the

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The Commission's Regulations

The court below incorrectly described the Commission's amended regulation of November 4, 1966 as providing "that the notice to the charging party advising him that he may file the civil action will not be issued 'prior to efforts at conciliation with respondent' " (R. 37). The court erroneously concluded, therefore (R. 37), that "the Commission has by administrative construction now adopted the procedure" required by the court's ruling. In referring to the Commission's amended regulation (Section 1601.25a of the Commission's regulations, 31 Fed. Reg. 14255), the court below failed to include the phrase which immediately follows the quoted portion, to wit:

> . . . except that the charging party or the respondent may upon the expiration of 60 days after the filing of the charge or at any time thereafter, demand in writing that such notice issue, and the Commission shall promptly issue such notice to all parties.

23/ (continued from preceding page)

same statute, we submit that the better reading of this provision is to limit the word "termination" to the phrase concerning state or local proceedings. Grammatically, the application of "termination" to the phrase concerning Commission conciliation would more properly be accomplished by either adding "of" before "the efforts of the Commission to obtain voluntary compliance" or deleting the "the" at the beginning of that phrase. And it will be noted that the word "terminated" consistently appears in prior parts of section 706 (i.e., subsections (b), (d) solely in connection with state or local proceedings.

In fact, not only is this amended regulation of November 4, 1966 and the history by which it came into effect completely consistent with the Commission's position in the instant cases, but they clearly reflect that position and the underlying statutory policy upon which that position rests.

Until July 29, 1966 the relevant Commission regulation (section 1601.21) merely stated that following a determination finding reasonable cause to exist, the Commission "shall within the limitations of time set forth in section 706(e) of Title VII, endeavor to eliminate such practice by informal methods of conference, conciliation, and persuasion."

Faced with an unexpected workload which made impossible any meaningful investigation and conciliation within these time limits, the Commission on July 29, 1966 repealed this regulation. This change constituted recognition of the fact that the Commission's caseload had been seriously underestimated, and that the hard lessons of experience were proving that the Commission would not be able to comply with its former regulation. This had no impact upon the administration of the Act

so far as the prospective plaintiff's right to sue was concerned, as the Commission continued to notify charging parties of their right to proceed to court after the expiration of the 60 day period even where conciliation had not been undertaken or completed.

The amendment of November, 1966, establishing the current regulation, provides that the Commission will ordinarily withhold statutory notification to the charging party of his right to bring suit, until after investigation and the conclusion of the conciliation effort. However, as noted above, the rule continues to preserve the right to sue guaranteed the charging party by further providing that upon the expiration of the 60 day period, the charging party may exercise his absolute right to receive the notification at this earlier time.[24/] Thus, it

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24/ The current regulation, as amended on November 4, 1966, provides in full (29 CFR 1601.25, 1601.25a):

> §1601.25 Notice to respondent and aggrieved person.
>
> In any instance in which the Commission is unable toobtain voluntary compliance as provided by Title VII it shall so notify the respondent and the aggrieved person or persons. Notification to an aggrieved person shall include:

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is evident that the amended regulation, while seeking to allow time to "give a discriminator opportunity to respond to persuasion rather than coercion," (Hall v. Werthan Bag Corp., 251 F. Supp. 184, 188 (M. D. Tenn., 1966), recognizes and preserves the right to prompt adjudication, and gives the parties, in effect, an option between early suit or additional pre-suit

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24/ (continued from preceding page)

(a) A copy of the charge.

(b) A copy of the Commission's determination of reasonable cause.

(c) Advice concerning his right to proceed in court under section 706(e) of Title VII.

§1601.25a Processing of cases; when notice issues under §1601.25.

(a) The time for processing all cases is extended to 60 days except insofar as proceedings may be earlier terminated pursuant to §1601.19.

(b) Notwithstanding the provisions of paragraph (a) of this section, the Commission shall not issue a notice pursuant to §1601.25 prior to a determination under §1601.19, or where reasonable cause has been found, prior to efforts at conciliation with respondent, except that the charging party or the respondent may upon the expiration of 60 days after the filing of the charge or at any time thereafter demand in writing that such notice issue, and the Commission shall promptly issue such notice to all parties.

(c) Issuance of notice pursuant to §1601.25 does not terminate the Commission's jurisdiction of the proceeding, and the case shall continue to be processed.

conciliation efforts by the Commission.[25/]

25/ The lower court's reference (R. 37 including n. 24) to the opinion letter from the Commission's General Counsel is also inaccurate. In the first place, that letter was not addressed to the question before the Court but to whether the 30 day period of limitations for filing suit in section 706(e) requires suit to be filed within 30 days after expiration of the 60 days allowed the Commission to investigate and conciliate or within 30 days after receipt by the aggrieved of the statutory notification. Second, this letter was written on November 17, 1965--shortly after the Commission began functioning and before it realized that, as the result of an unexpectedly large number of charges, it would be unable to perform its conciliation functions within the 60 days. Therefore, the letter incorrectly assumed that the exercise of such function would be made during the 60 day period. The letter's recognition that the aggrieved party may sue at the end of this period is reflected by the immediately preceding portion of this letter, not quoted by the court below, which stated

> Of course, the Commission has an obligation to send such notice within a reasonable time after the expiration of the sixty-day period--or, after an earlier disposition of the charge,

as well as by the immediately succeeding portion of this letter, also not quoted by the court below, which stated

> he [the aggrieved person] should not be penalized by delay on the part of the Commission.

Third, this letter was an informal expression of opinion by a single attorney and was not a formal opinion approved by the Commission. In fact, such an opinion by the Commission, dealing with the question treated by the letter, was issued November 23, 1965 and consciously omitted the phrase in that letter relied on by the court below. Reprinted in Commerce Clearing House, Employment Practices Guide, ¶17,252.32, 1st ¶.

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Conclusion

The construction of the statute contended for by EEOC--that plaintiff's claim ripens upon the receipt of the statutory notice after the expiration of the 60 days--is entirely faithful to the words of the statute,

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25/ (continued from preceding page)

Fourth, and most important, during this same period the Commission issued other formal opinions more closely related to the question before the Court which specifically affirmed the right of the aggrieved person to institute suit following the 60 day period although the Commission had been unable to undertake its pre-conciliation functions during that period. Thus,

> Where the Commission is unable to conduct a complete investigation or issue its findings during the statutory period, or where the Commission finds no reasonable cause to believe the charge is true, the charging party can nonetheless file a suit pursuant to section 706(e). Reprinted in CCH, Employment Practices Guide, ¶17,252.32, 2d ¶.

Accord, the opinion reprinted in CCH, Employment Practices Guide, ¶17,251.083.

In sum, Commission expressions on the question before the Court have always been consistent with the position taken in the instant cases.

avoids forfeitures or undue delay without falut and other injustices, and gives effect to the Congressional policy in favor of conciliation where possible and speedy adjudication where necessary. No one is out of court. Conciliation remains possible and the court may upon request stay proceedings for 60 days to secure it. The plaintiff is in a position to litigate the merits if conciliation fails; the defendant has his day in court but is not shielded from that day forever by the EEOC's caseload or other administrative delays or considerations extraneous to the central issue--plaintiff's right guaranteed by Congress to be free from unlawful racial discrimination.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgments of the district court be reversed.

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