July 2015

Title VII, Equal Employment Opportunity Commission, Disclosure Policy, Equal Employment Opportunity Commission v. Associated Dry Goods Corp

Kenneth L. Wittenauer

CIVIL RIGHTS

Title VII • Equal Employment Opportunity Commission • Disclosure Policy

Equal Employment Opportunity Commission v. Associated Dry Goods Corp.

101 S. Ct. 817 (1981)

In *Equal Employment Opportunity Commission v. Associated Dry Goods Corp.*,[1] the Supreme Court finally resolved the conflict surrounding the disclosure policy of the Equal Employment Opportunity Commission (EEOC) under Title VII of the Civil Rights Act of 1964.[2] The question before the Court was whether the prelitigation disclosure of information in a Commission file to the charging party, the employee, is a "public" disclosure within the meaning of the statutory restrictions which proscribe disclosure of the contents of EEOC files.[3] The Court held that the term "public" under sections 706(b)[4] and 709(e)[5] of Title VII does not include charging parties.[6] Thus, the Commission may release investigative and conciliatory information obtained from the employer to the aggrieved employee even before the filing of a lawsuit. Justice Stewart, speaking for the majority, further narrowed this holding by permitting the EEOC to reveal only the information found in the charging party's file and prohibiting the release of information from the files of other parties who have brought claims against the same employer.[7]

---

[1] 101 S. Ct. 817 (1981).

[2] Pub. L. No. 88-352, §§ 701-716, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000e - 2000e-17 (1976)).

[3] 101 S. Ct. at 819.

[4] Section 706(b) of Title VII, 42 U.S.C. § 2000e-5(b) (1976) states, in relevant part:

> Whenever a charge is filed by or on behalf of a person claiming to be aggrieved . . . the Commission shall serve a notice of the charge . . . on such employer . . . within ten days and shall make an investigation thereof . . . . Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. . . . If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both.

[5] Section 709(e) of Title VII, 42 U.S.C. § 2000e-8(e) (1976) states:

> It shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding under this subchapter involving such information. Any officer or employee of the Commission who shall make public in any manner whatever any information in violation of this subsection shall be guilty, of a misdemeanor and upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than one year.

[6] 101 S. Ct. at 822.

[7] *Id.* at 825.

The case arose over the enforcement of an EEOC subpoena. Between 1971 and 1973, seven employees filed discrimination charges against their employer, the Joseph Horne Company, a division of the respondent, Associated Dry Goods Corporation, and the EEOC sought pertinent evidence.[8] Pursuant to 42 U.S.C. § 2000e-5(b), the Commission began investigating the charges by serving interrogatories on Horne which requested statistical information relating to personnel practices.[9] Horne refused to answer the interrogatories without assurance from the EEOC that the answers would not be disclosed to the charging parties or their attorneys.[10] The Commission refused such assurance and stated that its policy was to disclose to charging parties both their own case files and related case files of other parties.[11] Horne continued to withhold the requested information and the Commission subpoenaed the material. When the Commission rejected Horne's petition for revocation of the subpoena, respondent filed this suit in the district court[12] asking that the Commission's limited disclosure practices be declared invalid under Title VII and that the Commission be enjoined from enforcing its subpoena.[13]

The district court held that the Commission's disclosure of confidential information to charging parties violated the Title VII scheme of negotiation and settlement and would encourage private litigation.[14] The provisions in the EEOC Compliance Manual governing special disclosures[15] were found invalid and the district court enforced the subpoena on the condition that the Commission treat charging parties as part of the "public" to whom

---

[8] *Id.* at 820.

[9] As amended in 1972, Title VII contemplates a two-step process. First, upon receiving complaints of discrimination against an employer, the EEOC conducts an investigation to determine whether probable cause exists. The EEOC was given broad subpoena power enabling it to obtain information regarding the general employment practices of the employer. Upon a finding of probable cause, the EEOC enters into negotiations with the employer seeking possible remedies. If the negotiations fail, then the Commission may file suit. Employees also have a right to file suit 180 days after filing a complaint with the Commission if no conciliation has been reached, or within 90 days after the Commission's notice that it will not file suit. 42 U.S.C. §§ 2000e-1-2000e-17 (1976).

[10] 101 S. Ct. at 820.

[11] *Id.* at n. 3. The Court referred to the general disclosure policy of the Commission which provides that neither the charge nor information obtained pursuant to § 709 of Title VII shall be made public. However, earlier disclosures are allowed to charging parties, their attorneys or witnesses "where disclosure is deemed necessary for securing appropriate relief." 29 C.F.R. § 1601.22 (1978).

[12] Associated Dry Goods Corp. v. Equal Employment Opportunity Comm'n, 454 F. Supp. 387 (E.D. Va. 1978).

[13] 454 F. Supp. at 389.

[14] 454 F. Supp. at 391. The District Court felt that the EEOC's primary statutory duty was to "attempt conciliation" and that private lawsuits would hinder such attempts. *See,* Sears, Roebuck & Co. v. Equal Employment Opportunity Comm'n, 581 F.2d 941 (D.C. Cir. 1978).

[15] *See* 1 EEOC COMPL. MAN. (BNA) §§ 83.3, 83.5 (1979).

information from the files could not be disclosed.[16] The court of appeals affirmed the district court's judgment.[17]

The Supreme Court's decision resolved a conflict that has split the federal circuit courts and the EEOC into opposite camps over the question of whether aggrieved employees are members of the "public" for purposes of Title VII's confidentiality provisions.[18] The Fifth Circuit held in *H. Kessler & Co. v. Equal Employment Opportunity Commission*[19] that an employee and his attorney could obtain investigative information prior to filing suit. Stressing the importance of the private litigant, *Kessler* found the open disclosure policy of revealing the identity of the parties and the information obtained during the EEOC investigation consistent with the language of Title VII and its legislative history.[20] Five years later, in *Sears, Roebuck & Co. v. Equal Employment Opportunity Commission*,[21] the District of Columbia Circuit distinguished and rejected *Kessler* and denied Sears employees access to investigative information until after suit had been filed. The Seventh Circuit in *Burlington Northern, Inc. v. Equal Employment Opportunity Commission*[22] followed *Sears* and restricted claimant access to EEOC files. *Burlington* further held that a charging party could obtain only such investigatory information as is "directly relevant"[23] to his particular claim. The Fourth Circuit, in the companion to the present case, *Equal Employment Opportunity Commission v. Joseph Horne Co.*,[24] agreed with *Sears* and *Burlington*[25] and denied the charging employee access to Commission information until after a suit has been initiated.

Amid judicial turmoil, the EEOC developed procedural guidelines to best effectuate its interpretation of Title VII policies. The Commission's procedural regulations[26] permit the disclosure of the investigative files of the individual and of individuals with similar charges against the same employer even before a lawsuit has been filed. However, the EEOC has been forced to restrict access to its files in those jurisdictions which follow

---

[16] 454 F. Supp. at 390-391.

[17] Equal Employment Opportunity Comm'n v. Joseph Horne Co., 607 F.2d 1075 (4th Cir. 1979).

[18] *See* Comment, *Disclosure of E.E.O.C. Files to Title VII Litigants*, 54 N.Y.U. L. REV. 1013 (1979); Comment, *Access to E.E.O.C. Files Concerning Private Employers*, 46 U. CHI. L. R. 477 (1978); Comment, *The Meaning of "Public" in Section 709(e) of the 1964 Civil Rights Act and Access to Information Gathered by the E.E.O.C.*, 67 KY. L. J. 430 (1978-79).

[19] 472 F.2d 1147 (5th Cir.) (en banc), *cert. denied* 412 U.S. 939 (1973).

[20] *Id.* at 1152.

[21] 581 F.2d 941, 947-948 (D.C. Cir. 1978).

[22] 582 F.2d 1097, 1100-1101 (7th Cir. 1978), *cert. denied* 440 U.S. 930 (1979).

[23] *Id.* at 1101.

[24] 607 F.2d 1075 (4th Cir. 1979).

[25] *Id.* at 1077.

[26] *See* 29 C.F.R. §§ 1601.22 and 1610.17(d); 1 EEOC COMPL. MAN. (BNA) § 83 (1979).

Sears while maintaining a more liberal disclosure policy in the remaining jurisdictions.[27]

In an attempt to reconcile these decisions, Justice Stewart looked first to the language of Title VII and to the procedures and policies of the EEOC and stressed the balance between Title VII's "administrative and judicial means of eliminating employment discrimination."[28] While recognizing the role of the Commission in conciliation attempts, the Court also found that "Title VII makes private lawsuits by aggrieved employees an important part of its means of enforcement."[29] The Court rejected the *Sears* and *Burlington* decisions which were premised upon a concept of private litigation as the "ugly stepchild" in the Title VII scheme.[30]

The Court next examined the language of Title VII, section 706(b) which states that "charges shall not be made public."[31] Justice Stewart reasoned that since both the employee and the employer are well aware of the charges, then the term "public" cannot logically include these parties.[32] The Court argued that for the sake of symmetry the same "public" in section 709(e) also must not include the parties to the agency proceeding.[33]

This argument for symmetry, however, ignored the important differences between sections 709(e) and 706(b) of Title VII.[34] The section 709(e) ban on disclosure primarily protects investigative file information. The EEOC has the power to subpoena the information it requests and, though employer cooperation is helpful, it is not essential to the EEOC's exercise of its investigatory power.[35] Once an employee files suit, then all of the investigatory information can be released and used as evidence in the employee's lawsuit.[36] Therefore, section 709(e) merely delays the release of suit information which the employee eventually will obtain.

---

[27] *See* text accompanying notes 21-24, *supra.*

[28] 101 S. Ct. at 820.

[29] *Id.* at 821.

[30] *See* Equal Employment Opportunity Comm'n v. Joseph Horne Co., 607 F.2d 1075, 1079 (4th Cir. 1979) (Hall, J., concurring in part and dissenting in part).

[31] 100 S. Ct. at 822.

[32] *Id.*

[33] Although reaching different results, the *Kessler* and *Sears* courts both expressed the view that in the interest of symmetry the term "public" should be given a consistent definition throughout the various sections of Title VII. In *Kessler* the Fifth Circuit held that it would be "anomalous" to give different meanings to the three instances of identical language in the same statute. 472 F.2d at 1151. In *Sears,* the District of Columbia Circuit spoke of the symmetry of §§ 709(e) and 706(b) and argued that the same policy of non-disclosure should apply to both. 581 F.2d at 948.

[34] *See* the district court opinion in Sears, Roebuck & Co. v. Equal Employment Opportunity Comm'n, 435 F. Supp. 751, 756 (D.D.C. 1977); Comment, *The Meaning of "Public" in Section 709(e) of the 1967 Civil Rights Act and Access to Information Gathered by the EEOC,* 67 KY. L. J. 430, 431 n.11 (1978-1979); Comment, *Disclosure of EEOC Files to Title VII Litigants,* 54 N.Y. U. L. REV. 1013, 1024 (1979).

[35] *See* 42 U.S.C. § 2000e-8(a) (1976), which gives the EEOC the right to inspect and copy any relevant evidence in the hands of the party being investigated.

[36] *See, supra* note 5, 42 U.S.C. § 2000e-8(e) (1976).

In contrast, the section 706(b) ban on disclosure exists for the protection of conciliatory information and is essential to the performance of the EEOC's conciliatory function. The conciliation ban *permanently* bars the evidentiary use of file information in a trial "without the written consent of the persons concerned."[37] The protection afforded conciliation file information is designed to facilitate a free and open negotiating atmosphere.[38] Since participation in the conciliation process is entirely voluntary, the EEOC has no power to require the submission of any statistical data during the course of discussions,[39] as it may when investigating charges under section 709(e). Most certainly, the employer would be reluctant to compile information for the Commission if the employee could subsequently use this same information in a lawsuit against the employer. Under the threat of disclosure employers might simply refuse to cooperate with the EEOC.

Justice Stewart recognized the importance of limiting the disclosure of investigative information to parties so that unnecessary litigation may be avoided. The Court contended that the Commission could force the hand of the parties by disclosing certain information to enable the parties to better evaluate their own strengths and weaknesses. In effect, this would enhance the Commission's ability to negotiate between the parties.[40] On the other hand, the Court pointed to the position of the impecunious employee, unable to obtain prelitigation investigative information by way of his own limited resources.[41] When forced to agree to a Commission settlement, the employee is in the difficult position of having to waive his right to file suit without knowing the essential facts of the Commission's investigations.[42]

The Court, however, refused to acknowledge the need for the voluntary exchange of information vital to the conciliation proceedings between the EEOC and the employer. From its inception in 1965, Title VII enforcement has depended largely upon informal conciliation and negotiation proceedings between the EEOC and the private employer.[43] This emphasis was reinforced by the 1972 amendments which granted the EEOC power to file suit against the employer and prohibited the aggrieved employee from

---

[37] *See supra* note 4, 42 U.S.C. § 2000e-5(b) (1976).

[38] *See* Sears, Roebuck & Co. v. Equal Employment Opportunity Comm'n, 435 F. Supp. 751, 759 (D.C. 1977), aff'd in part, rev'd in part on other grounds, and remanded, 581 F.2d 941 (D.C. Cir. 1978).

[39] *See supra* note 4, 42 U.S.C. § 2000e-5(b) (1976). During the initial stages, the proceedings are "informal."

[40] 101 S. Ct. at 824.

[41] *Id.*, n. 19.

[42] *Id.*, n. 18.

[43] *See* Comment, *Access to EEOC Files Concerning Private Employers*, 46 U. CHI. L. REV. 477, 488 (1978) (citing Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974)).

filing suit until 180 days after filing charges with the Commission.[44] The protection afforded conciliation file information is of vital importance in facilitating open negotiations. For the sake of symmetry, the Court has avoided a distinction between sections 706(b) and 709(e) that would allow the exchange of information and at the same time promote full disclosure during conciliation.

The Court attempted to evaluate the limited legislative history of Title VII and its disclosure restraints in support of its position on disclosure.[45] Citing the comments of Senator Humphrey,[46] a co-sponsor of the bill, Justice Stewart contended that the disclosure provisions were applicable only to the general public, not to the charging parties. The remarks of Senator Humphrey pertain to the section 706(b) prohibition on making public the actual "charges" of discrimination.[47] As noted by the Court, the parties themselves will already be aware of the charges. For purposes of the confidentiality provisions, however, the Senator's rather ambiguous statement does not readily apply to investigative and conciliatory information. Neither comments of Senator Humphrey nor of any other Congressman actually discussed the scope of these provisions.[48]

Justice Stewart also relied on congressional silence to buttress his argument that Congress could have amended Title VII if it were dissatisfied with the Commission's disclosure policy.[49] However, this silence may also be interpreted as an indication that Congress intended strict application of its non-disclosure provisions and that only following an express intent to amend its provisions would disclosure be allowed.

The Court upheld the *Kessler* rationale and allowed disclosure of sections 706(b) and 709(e) information, while at the same time, narrowed this holding so that information in the files of other employees with charges against the same employer could not be released.[50] According to the EEOC Compliance Manual, materials from other case files can be released to an aggrieved employee once certain confidential information and names have been expunged.[51] Using the same legislative history and statutory analysis,

---

[44] *See supra* note 9.

[45] 101 S. Ct. at 822.

[46] Senator Humphrey stated, "This is a ban on *publicizing* and not on such disclosure as is necessary to the carrying out of the Commission's duties under the statute . . . . The amendment is not intended to hamper Commission investigations . . . but rather is aimed at the making available to *the general public* of unproven charges." 110 CONG. REC. 12723 (1964) (emphasis added by the Court at 101 S. Ct. at 823).

[47] 101 S. Ct. at 823.

[48] *See*, Comment, *Access to EEOC Files Concerning Private Employers*, 46 U. CHI. L. REV. 477-484 (1978).

[49] 101 S. Ct. at 823, n. 17. The decision noted that Congress had declined to make anything but minor changes in the disclosure rules in its 1972 amendments to Title VII. The Court contended that this reveals Congressional approval of Commission activity.

[50] *Id.* at 825.

[51] *See*, 1 EEOC COMPL. MAN. (BNA) § 83.7(c) (1979).

Justice Stewart found that "there is no reason why the charging party should know the content of any other employee's charge, and he must be considered a member of the public with respect to charges filed by other people. With respect to all files other than his own, he is a stranger."[52] However, the Court further found that "statistics and other information about an employer's general practices" may be placed in full or in summary form in each individual's file.[53] What the Court has taken away with one hand it has given with the other. The employee will still be entitled to see valuable statistical information that in effect has been gathered from the files of other employees.

Justice Blackmun, concurring in part and dissenting in part, reasoned that the Commission should be required to justify any disclosure by demonstrating that such is "necessary to carry out its duties."[54] This practical approach would allow limited disclosure so that the Commission could more effectively attempt to settle charges. However, Justice Blackmun refused to agree with the majority in its handling of the dispute over disclosure of information to parties who are contemplating litigation. Looking to the language of Title VII, Justice Blackmun found no statutory authority which supported allowing the charging parties access to case files as a means of evaluating their position before filing a lawsuit.[55]

Justice Stevens dissented on the grounds that the disclosure of investigative information to the charging parties was tantamount to disclosing such information to the public.[56] The dissent pointed to the absence of a statutory sanction against charging parties for disclosing EEOC information. According to the EEOC Compliance Manual, the parties agree to sign form 167, which prohibits further disclosure, before the information will be released.[57] However, there are no provisions in the Manual for enforcement of this agreement nor any penalty for its breach. The dissent asserted that the parties remain free to disclose the information to whomever they please and remarked that "it seems fanciful to me that Congress intended to prohibit direct disclosure while permitting indirect disclosure."[58] Justice Stevens stated that if Congress had intended the parties to be excluded from the term "public", then it would have provided sanctions against their release of information, similar to those provided against the Commissioners.[59] Justice Stevens contended that the Court misconstrued the plain meaning of the Statute.

---

[52] 101 S. Ct. at 825.

[53] *Id.*

[54] *Id.* at 826 (Blackmun, J., concurring in part and dissenting in part).

[55] *Id.*

[56] *Id.* at 826-27 (Stevens, J., dissenting).

[57] See 1 EEOC COMPL. MAN. (BNA) § 83.4 (1979).

[58] 101 S. Ct. at 826 (Stevens, J., dissenting).

[59] *Id.* at 827.

CONCLUSION

The Court's decision in *Associated Dry Goods* acts as a reaffirmation of the Fifth Circuit's decision in *Kessler*. While an open disclosure policy has been adopted, the EEOC will have to restrict the access of related employee files to aggrieved individual employees. The Court expressed concern with the importance of the private right of action under Title VII, where the charging party acts as a "private attorney general"[60] whose purpose is to further effectuate the ban on employment discrimination. However, the balance between administrative and judicial functions of the EEOC may have been disrupted by the army of "attorney generals" which the Court has enlisted. With full disclosure of conciliatory information, the individual employee wields a powerful weapon. The effectiveness of this weapon eventually may be eliminated, however, if employers refuse to cooperate with the EEOC in voluntarily providing the ammunition of statistical information during prelitigation conciliation and negotiation attempts.

KENNETH WITTENAUER

CONSTITUTIONAL LAW

Container Legislation • Equal Protection • Commerce Clause

Minnesota v. Clover Leaf Creamery Company, 101 S. Ct. 715 (1981)

THE PROBLEMS of litter, solid waste, and natural resource depletion are often inexorably linked to the liquid manufacturing and packaging industry. Legislative efforts to ameliorate these problems may therefore involve various controls of containers.[1] When states enact container legislation, however, terms must be carefully chosen to avoid conflict with both state and federal constitutions.[2]

In *Minnesota v. Clover Leaf Creamery Co.*,[3] the United States Supreme Court struck down an equal protection challenge to state legislation banning certain containers in the milk industry. The Court's approach to this challenge is striking; equally significant is the Court's departure from its usual

[60] *Id.* at 824.

[1] *See generally* Greef & Martin, *Beverage Container Legislation: A Policy and Constitutional Evaluation*, 52 TEX. L. REV. 351 (1974).

[2] The most frequent challenges involve claimed violations of the Due Process, Equal Protection and Commerce clauses.

[3] 101 S. Ct. 715 (1981).