



10-1980

Equal Employment Opportunity Commission (EEOC) v. Associated Dry Goods Corp.

Lewis F. Powell Jr.

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9709(e) forbids EEOC from making "public in any manner whatsoever" info. obtained during investigation of complaints. ~~CA7 & DC Circuit~~ CA4, following

disclosure pre-trial ~~of~~ to complaining parties & their attys. Resp.

Both sides rely on language of HHH (p8) to effect that ~~the~~ disclosure ^{might} apply only to extent necessary to further ~~the~~ ^{common} investigative function - e.g. disclosing facts with charging

BENCH MEMORANDUM

TO: Mr. Justice Powell
FROM: Peter Byrne
DATE: November 1, 1980
Parties & witnesses to extent necessary to determine whether to institute suit, but doesn't authorize pre-litigation disclosure of EEOC's investigative files. See 8, 9-11.

RE: No. 79-1068, EEOC v. Associated Dry Goods Corp. (CA4)
(Title VII case - disclosure of pre-litigation investigation by EEOC to complaining employer & their attys)

Question Presented

Do §§ 706(b) and 709(e) of Title VII prohibit the EEOC from disclosing, prior to litigation, information obtained during administrative investigation of charges to parties involved in the charges?

Disclosure, pre-litigation, of investigative files is core issue. If allowed Resp argues this would:

Section 709(e) makes it unlawful for any person at EEOC "to make public in any manner whatever" information obtained through a Commission investigation prior to the institution of a suit based on the investigation; criminal penalties are provided. Section 706(b) provides that nothing learned by the Commission during informal conciliation meetings shall "be made public by the Commission, ... or used as evidence

1. Encourage litigation, in which employer would be disadvantaged
2. Discourage employers from making info. available to EEOC
3. In effect be a "public disclosure," or no way to keep it confidential.

in a subsequent proceeding." The word "public" in the two provisions is nowhere defined in Title VII, and the parties here argue about whether the term embraces parties who have filed the charge at issue with the Commission, the respondent employers and witnesses. For many years, EEOC has interpreted these provisions to allow it to disclose to parties to the controversy investigatory information before any suit is commenced. This policy is embodied in 29 C.F.R. §§ 1601.22 and 1601.17(d) and § 83 of the EEOC Compliance Manual.

conflict Three circuits have held that "public" does include parties to the action and that EEOC cannot divulge the information to them, Burlington Northern, Inc. v. EEOC, 582 F.2d 1097 (7th Cir. 1978) (per Pell, J.), cert. denied 440 U.S. 930 (1979); Sears Roebuck & Co. v. EEOC, 581 F.2d 941 (D.C. Cir. 1978) (per Lumbard, J.); and the Fourth Circuit in the present case per Winter, J. The Fifth Circuit held otherwise, H. Kessler & Co. v. EEOC, 472 U.S. 1147 (5th Cir. 1973) (en banc) (per Tuttle, J.), cert. denied 412 U.S. 939 (1974). These opinions have relied to some extent on the scanty legislative history, but primarily have been decided in accord with the courts' views of the proper working of the Title VII enforcement scheme.

Title VII provides interlocking administrative and judicial processes. An aggrieved employee files a charge of employment discrimination with the Commission. The Commission must then undertake an investigation; it is aided by wide ranging investigatory and subpoena powers. As part of its

investigative procedure, the Commission now schedules fact-finding conferences with the parties, where they can present their versions of the facts, define the issue and learn the chances for a negotiated settlement. These investigatory conferences are designed to speed resolution of charges and, according to the Commission, have been very successful. If the EEOC subsequently finds reasonable cause to believe that a violation has occurred, it must enter into conciliation discussions with the employer in an attempt to remedy the situation. The accord reached will often result in company-wide compliance plans. If conciliation fails, the EEOC may file suit in the DC. Also, the party who initially filed the charge with EEOC may individually bring suit in the DC 180 days after filing the charge, regardless of whether EEOC has acted within that time.

The practical controversy centers on the effects of disclosure to complainants on the investigation, the conciliation, subsequent litigation and collateral interests.

It should be kept in mind that investigative information may be disclosed under § 709(e) once a lawsuit has commenced, but that information volunteered during conciliation is never made available for litigation under 706(b). EEOC claims that divulging certain information is necessary to questioning parties and witnesses during the investigation, that it is crucial to adequate give and take at the investigatory conference, that it is helpful in allowing the parties to evaluate the desirability of a settlement, and that it keeps

*Info.
may be
disclosed
once suit
is commenced*

meritless lawsuits out of the courts because the complainant will have a more realistic perception of the merit of his case. CA5, in Kessler, added that prelitigation disclosure aids usually indigent plaintiffs by providing them with enough ammunition to convince lawyers to take their case for contingent fees. Resps and the other CAs argue that disclosure to putative litigants is an open invitation to a lawsuit and thus creates a disincentive to pursue conciliation, the Congressionally favored mechanism of dispute resolution in Title VII cases. Also, since EEOC has no means to prevent the parties from further disclosing usually sensitive information, the employer is injured collaterally, just the result Congress wished to avoid by including §§ 706(b) and 709(e). Moreover, the threat of this danger hampers conciliation because the employer will resist turning over information that may reach competitors and customers. This is what the parties claim is at stake in this case.

The facts of this case are unisnfulctive. EEOC received several complaints of race and sex discrimination at Horne, a subsidiary of resp. Beginning its investigation, EEOC served interrogatories on resp, who refused to comply absent assurances from EEOC that none of the information would be turned over to the charging parties, their attorneys or others. EEOC refused on the basis of its policy of disclosing to parties contemplating litigation. After some maneuvering, resp filed suit in the DC seeking declaratory and injunctive relief from a subpoena duces tecum. The DC held that 29 C.F.R.

Info will reach
- public
- presumably
the result
Congress
wished
to avoid

Resps
argue

Employer
will
resist
delivery of
info.

Facts
not
helpful

§§ 1601.20 and 1601.17(d) and the rules set out in § 83 of the EEOC Compliance Manual were void to the extent that they authorize EEOC to disclose to charging parties any information in investigative files. The only disclosure addressed by the DC was prelitigation disclosure of a charging parties file and "related files" to a party that contemplates bringing a private action; the DC did not address limits on disclosure incident to investigations.

CA7
4BCC+
cm

CA4 affirmed. To a large extent CA4 relied on the reasoning offered in the Sears and Burlington cases. Those cases held that §§ 709(e) and 706(b) require that EEOC release no investigative data to anyone outside the government. The release of the data would encourage private litigation to the detriment of the comprehensive conciliation scheme favored by Congress. Moreover, the lack of any effective means for preventing charging parties from further disseminating the information would injure the employer and discourage him from cooperation in conciliation. CA4 did address one further argument of EEOC renewed here. EEOC argued that prohibiting it from disclosure would restrict from obtaining corroboration of previously obtained information during its investigation. CA4 answered that "such corroboration may easily be obtained without violating the statutory restrictions by interrogating those employees on the basis that "it has been said" or "it has been reported" without providing them with letter and verse of the employer's contentions or the specific identity

Reasoning of cases denying disclosure

of the representative of the employer advancing the contention."

Judge Hall dissented. He emphasized the narrow scope of the EEOC disclosure rules: disclosure is permitted only in connection with contemplated litigation, no disclosure is made before the 90 day period within which a private suit may be brought absent compelling need, and identities of witnesses and all information concerning settlement offers are expunged. Moreover, the information can be released under the statute once suit has been filed; thus the EEOC rules accomplish no more than allowing access to investigatory material 90 days, at most, earlier than otherwise. He also accused the majority and the Sears and Burlington courts of unduly disparaging the value of private litigation in the Title VII enforcement scheme, a valuable alternative to conciliation.

*Disclosure
Rule
limited
in
scope*

Because the factual basis in the instant case is so sparse, I will briefly describe the facts in Sears, to indicate what sometimes will be at stake. That case was initiated by a special nationwide complaint against the giant retailer. Sears provided extensive information to EEOC about the sexual, racial, and ethnic makeup of approximately 30% of its workforce. Sears also provided data to EEOC concerning recruitment, evaluation, promotion, compensation, etc., and details about its affirmative hiring efforts. Later, during the investigatory conference, Sears provided more data about 420,000 employees, prepared for settlement discussions. No agreement was reached. Two Sears employees, who intended to

*Facts in
Sears*

*Data
provided
by
Sears*

** of the employment policies.*

file a private Title VII action, then requested disclosure of this information from EEOC. EEOC indicated that it would accede. Later it issued a report finding reasonable cause to believe that Sears had violated the Act. The report was 250 pages and contained analysis of much of the data given by Sears. EEOC sent this report to some private charging parties, indicating that a more complete decision would follow. Sears received injunctive relief from disclosure. It should be noted that this case does not involve any nationwide complaint, a situation where EEOC's disclosure may properly be more curtailed than when it acts on an individual charge.

II.

Petr argues first that the language and legislative history of Title VII indicate that the "public" does not include the parties and witnesses. § 706(a) provides that the "charges shall not be made public". It would be absurd to think that Congress intended that the charge itself not be disclosed to the charging party and the respondent. § 706(a) provides that matters revealed during conciliation may not be made public "without the consent of the persons concerned." Obviously, here Congress did not intend that the "public" would include the parties to the dispute. § 709(e) must be construed to the same effect as § 706, because each embodies a similar policy and each uses the term "public".

The legislative history is sparse, but a comment by Senator Humphrey, a sponsor of the disclosure provisions, is revealing. Referring to §§ 706(a) and 709(e) he said:

H H H's
statement
(See Resp's
interpretation
of his
statement)

It should be noted that this is a ban on publicizing and not on such disclosure as is necessary to ~~to~~ the carrying out of the Commission's duties under the statute. Obviously, the proper conduct of an investigation would ordinarily require that the witnesses be informed that a charge had been filed and often that certain evidence had been recieved. Such disclosure would be proper. The amendment is not intended to hamper Commission investigations or proper cooperation with other State and Federal agencies, but rather is aimed the making available to the general public of unproven charges. 110 Cong. Rec. 12723 (1964).

Petr argues that Senator Humphrey's remarks state a general distinction between the parties and the public at large.

Resp argues that § 709(e)'s language is broad and sweeping, admitting of no exceptions. Also the provision should be construed in light of the well established practice in the government that sensitive data is not disclosed to private litigants. Sears, 581 F.2d 947. The NLRB, for example will not open its files to private claimants. Amici argue that Congress knew how to make exceptions to the non-disclosure principle when it wished; § 709(d) explicitly states that EEOC "shall furnish upon request" records to state and local agencies. As to Senator Humphrey's remarks, resp and amici stress that the Senator only approved disclosure necessary to carry out the EEOC's functions, not the wholesale disclosure of investigative files to charging parties that the EEOC allows. Moreover, disclosure to charging parties is not necessary to EEOC investigations, if it were the Commission's rules would also permit disclosure to employers. They do not.

*Resp's
argument*

Petr next argues that EEOC has interpreted the disclosure provisions consistently since 1965, and that this contemporaneous interpretation by the agency charged with administering the statute is entitled to great deference from a court. Power Reactor Co. v. Electricians, 357 U.S. 396, 408 (1961). Moreover, Congress may be understood to have acquiesced in this interpretation, because it extensively revised Title VII in 1972, but made no material changes in the public disclosure provisions. Resp argues tthat EEOC did not adopt the disclosure rules until 1975, and has not been consistent in its interpretation. Also, this Court should not presume Congressional acquiescence in an administrative construction of a complex statute, absent some explicit indication of knowledge. SEC v. Sloan, 434 U.S. 103, 118-20 (1978). Amici add that the only judicial interpretation of the rules in 1972 had held them void as contrary to the statute. See H.Kessler & Co. v. EEOC, 53 F.R.D. 330 (N.D. Ga. 1971). EEOC has no particular expertise in interpreting a provision that deals with public disclosure. In any event, EEOC's interpretation is entitled to no deference because it is opposed to the plain meaning of tthe statute.

Resp offers another argument for voiding the EEOC rules. It claims that the rules are "substantive", and that Title VII gives the agency no power to formulate substantive rules. Petr replies that § 713(a) of Title VII gives EEOC power to formulate procedural rules, and the disclosure rules govern EEOC procedures. Simply because the rules affect substantive

*Resps
say
Rule is
invalid*

rights does not mean that they lose their essentially procedural character. Ranger v. FCC, 294 F.2d 240, 244 (D.C.Cir. 1961). Even if the rules are substantive, they are valid interpretive rules, providing the agency's interpretation of the organic law, to which some deference should be paid. See Nashville Gas Co. v. Satty, 434 U.S. 136, 142 n.4 (1977).

III.

The above statutory analysis provides the boundaries of the policy debate about how much disclosure EEOC may make to parties. It establishes that the statute contemplates some limited disclosure of investigatory information to allow EEOC to carry on its essential tasks of investigation and conciliation. This principle stems from EEOC's arguments about the language of the statute, which can be read as excluding the parties from the term "public" when their notification and cooperation is essential to performance of EEOC's task. Senator Humphrey's explanation of the purpose of the provisions supports the principle. Thus, construction of the prohibitions must avoid the evil the provisions were designed to avoid, publicizing embarrassing or confidential information, while permitting EEOC to fulfill efficiently its duties. I will attempt to apply this principle to the various kinds of disclosures EEOC makes.

Policy debate
The principle that should govern const.

The EEOC identifies three categories of disclosure that it claims are essential to its function. First, it argues that successful investigation requires direct disclosure of information to the parties. This involves not only

Three categories of disclosures

corroboration from witnesses, but successful resolution of the investigatory conference. There, disclosure is necessary to narrow the factual issues and achieve a basis for settlement. Second, EEOC must provide a factual basis for its reasonable cause determinations, so affected parties will be aware of the scope of the problem that EEOC has discovered. These disclosures are arguably necessary for EEOC. Resp does not argue against them, and indeed they are only involved in this case because EEOC believes that they will be implicated by a reading of "public" which excludes the parties.

The fighting issue is prelitigation disclosure of EEOC investigative files to charging parties. ^{to aid their decision whether to sue EEOC's file} The problem here is that aiding private litigants is not a clear duty of EEOC. EEOC claims that this disclosure prevent meritless litigation and allow the party access to the information without having to file suit. It will be remembered that the §709(e) allows disclosure once suit is filed. Resp points to numerous evils attached to this practice. The disclosure is very broad, encompassing both the entire file on the party's charge and data generated in similar investigations against the same employer. The evil is compounded because the EEOC has no means to keep the information from going beyond the charging parties once revealed to them. All this fuels litigation in derogation of conciliation.

At present, I find it difficult to evaluate these arguments. My tentative view is that prelitigation disclosure of files to charging parties violates § 709(e). That provision forbids

↓ Disclosure of EEOC investigative files pre-litigation violates 709(e)

public disclosure prior to the commencement of litigation. Here, EEOC plainly is disclosing prior to litigation, and the only question is whether this is public disclosure. EEOC would have it that disclosure to parties is never public disclosure, and argue that the public either always does or does not include the parties. I am inclined to reject this focus of analysis and treat "public disclosure" or "make public" as a single term, the interpretation of which should be based on Senator Humphrey's advice that the provision not be interpreted to prevent EEOC from effectively performing its function. Giving private litigants prelitigation discovery is not one of its functions. } *yes*

The attraction of this analysis is that it is functional and eliminates the employers' (and the CAs') chief identified abuse in the process. At the same time, the Court can approve generally EEOC disclosures that are incident to investigation and conciliation without approving particular practices not presented in this case. The touchstone should be that this incidental disclosure is not "public disclosure", because at that time communication with the parties is an essential to performance of EEOC's duties.

Still, the policy issue is finely balanced and the statute provides room for differing interpretations. Two law review notes I have consulted reach opposing conclusions. The policy question turns on how the court values private Title VII litigation compared to EEOC conciliation. Views differ on whether prelitigation disclosure discourages meritless

litigation or whether it creates incentives to abandon
conciliation for the courts.

*Disclosure of investigational files - particularly
~~purposes to~~ interrogatories. Resp.
declined after EEOC refused to agree
not to disclose.*

Involved primarily 5706(b) & 709(2)

Sullivan (S G's office)

Q is not whether disclosure may be made. Q is limited to timing of disclosure - e.g. whether investigative info. may be disclosed to charging partner, their attys & witnesses prior to instituting suit. Indemnification was filed

The off info. sought have been employment files

Q is a.

Facts - see J. Morhige's op. - A17a of Retention.

Justice Stewart read the EEOC's Regulation. Sullivan agreed that it applies differently (more limited) ~~to~~ as to disclosure to witnesses as compared with disclosure to charging partner & counsel

Kaplan (Resp.)

"Conciliation" is a fancy name
for "reaching an agreement".

Key words are "to make public". Would
have been clearer if prohibition were vs
disclosure to any "person".

Agrees with CAS

Mr. Justice Brennan Reagan

Mr. Justice Stewart Reagan
706(G) + 704(L) both involved.

But interrogatory of EEOC went too far

Mr. Justice White

Reverence

Statute is ambiguous

Mr. Justice Marshall

Reverence

Mr. Justice Blackmun

Reverence

Mr. Justice Powell

Out (my form filed Complaint
& participated in trial. Altho the
form is not in case now, I'll
be more comfortable staying out.
I listened to argument, thinking
my vote may be necessary
to decide case. My vote was not
necessary.

Mr. Justice Rehnquist

Out - missed oral
argument.

Mr. Justice Stevens

Affirm

CA 4 is right.

Sally - check to see whether 2

Supreme Court of the United States
Washington, D. C. 20543

*remained
out of their
case. 2/20*

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

December 19, 1980

Re: No. 79-1068 EEOC v. Associated Dry Goods Corp.

Dear Potter:

Would you please note in this case that I took no part in the consideration or decision of it.

Sincerely,

W

Mr. Justice Stewart

Copies to the Conference

Route Potter: ✓

December 29, 1980

79-1068 EEOC v. Associated Dry Goods

Dear Potter:

Please show on the next draft of your opinion that
I took no part in the decision of this case.

Sincerely,

Mr. Justice Stewart


lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

January 8, 1981

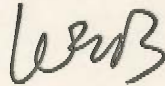


RE: 79-1068 - EEOC v. Associated Dry Goods Corp.

Dear Potter:

I join.

Regards,



Mr. Justice Stewart

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 14, 1981

Re: No. 79-1068 - EEOC v. Associated Dry Goods Corp.

Dear Potter:

As you know, I was waiting for John's dissent. That dissent reveals that his disagreement with what will be the Court's opinion is far sharper than mine. I therefore shall write briefly. What I have to say will be around shortly but not before Friday's Conference.

Sincerely,

H.A.B.-

Mr. Justice Stewart

cc: The Conference

