



1973

# Early Access to Investigations of Employment Discrimination: *H. Kessler & (and) Co. v. Equal Employment Opportunity Commission*

Gary John Manny

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## Recommended Citation

Gary John Manny, *Early Access to Investigations of Employment Discrimination: H. Kessler & (and) Co. v. Equal Employment Opportunity Commission*, 27 Sw L.J. 872 (1973)  
<https://scholar.smu.edu/smulr/vol27/iss5/7>

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## Early Access to Investigations of Employment Discrimination: *H. Kessler & Co. v. Equal Employment Opportunity Commission*

An employee of *H. Kessler & Co.* instituted a complaint in 1970 with the Equal Employment Opportunity Commission charging job discrimination on the basis of race and sex. The Commission issued to Kessler a demand for access to evidence<sup>1</sup> in order to effectuate its statutory obligation to investigate charges and determine if reasonable cause existed to believe the allegations were true.<sup>2</sup> In response, Kessler filed a petition in federal district court to have the demand set aside.<sup>3</sup> Kessler argued that it should not be forced to comply with the demand for the reason, *inter alia*,<sup>4</sup> that the Commission intended to release the information received by it to the complaining employee, in violation of the non-disclosure provisions of title VII of the Civil Rights Act of 1964.<sup>5</sup> The federal district court denied Kessler's motion to set aside the demand. However, it ruled that the Commission could not reveal any results of its investigation to either party or either party's counsel prior to subsequent court proceedings under the Act.<sup>6</sup> The Court of Appeals for the Fifth Circuit affirmed, but granted a request for rehearing en banc.<sup>7</sup> *Held, affirmed in part and reversed in part, remanded for further proceedings:* The nondisclosure provisions of title VII of the Civil Rights Act of 1964 do not prohibit the Commission from divulging to the parties or their attorneys information it obtains during an investigation of a claim of unlawful discrimination. *H. Kessler & Co. v. Equal Employment Opportunity Commission*, 472 F.2d 1147 (5th Cir.), *cert. denied*, 412 U.S. 939 (1973).

### I. ENFORCING EQUAL OPPORTUNITY IN EMPLOYMENT

Even though several major amendments were enacted in 1972, the basic statutory provisions to secure equal opportunity in employment are contained in the Civil Rights Act of 1964<sup>8</sup> which created the Equal Employ-

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<sup>1</sup> Civil Rights Act of 1964, Pub. L. No. 88-352, title VII, § 710(a), 78 Stat. 264, *as amended*, 42 U.S.C. § 2000e-9 (Supp. II, 1973). The 1972 amendment replaced the original demand procedure and permits the EEOC to issue subpoenas for information and witnesses under the same authority exercised by the National Labor Relations Board. *See* 29 U.S.C. § 161 (1970).

<sup>2</sup> 42 U.S.C. § 2000e-5(b) (Supp. II, 1973).

<sup>3</sup> Civil Rights Act of 1964, Pub. L. No. 88-352, title VII, § 710(c), 78 Stat. 264, *as amended*, 42 U.S.C. § 2000e-9 (Supp. II, 1973).

<sup>4</sup> Other reasons cited by Kessler for refusing to comply with the demand were rejected by the trial court. Kessler had claimed the information requested (1) was not relevant, (2) had been previously supplied in another form, and (3) would be difficult and onerous to obtain. *H. Kessler & Co. v. EEOC*, 53 F.R.D. 330, 332-33 (N.D. Ga. 1971).

<sup>5</sup> 42 U.S.C. § 2000e-5(b) (Supp. II, 1973), *amending* 42 U.S.C. § 2000e-5(a) (1970); 42 U.S.C. § 2000e-8(e) (1970).

<sup>6</sup> *H. Kessler & Co. v. EEOC*, 53 F.R.D. 330, 341 (N.D. Ga. 1971).

<sup>7</sup> *H. Kessler & Co. v. EEOC*, 468 F.2d 25 (5th Cir. 1972).

<sup>8</sup> 42 U.S.C. §§ 2000e to 2000e-15 (1970), *as amended*, 42 U.S.C. §§ 2000e to 2000e-17 (Supp. II, 1973). The broad goals of title VII are the elimination of discrimination in employment or employment-related activities against any individual "because of such individual's race, color, religion, sex, or national origin . . ." 42 U.S.C. § 2000e-2 (1970). Unlawful employment practices are not limited to those

ment Opportunity Commission (EEOC).<sup>9</sup> The EEOC's administrative functions consist of receiving charges of discrimination, conducting investigations, conciliating disputes, and soliciting voluntary compliance from the alleged violator where reasonable cause is found to exist. Prior to 1972, as a final resort, the EEOC could only certify the controversy for suit by the complaining party; now the EEOC may itself bring suit.<sup>10</sup>

Filing a charge alleging an unfair employment practice, as defined in the Act<sup>11</sup> and by the regulations of the EEOC,<sup>12</sup> invokes the Commission's administrative processes.<sup>13</sup> Charges can be filed by a member of the EEOC, by an aggrieved individual, or any person on his behalf.<sup>14</sup> Originally, charges had to be made within ninety days after the violation occurred.<sup>15</sup> The courts, however, have given this requirement liberal interpretation, thus expanding the statute of limitation.<sup>16</sup>

After receiving the charge, the EEOC investigates all relevant circumstances and gathers evidence pertaining to the complaint.<sup>17</sup> A determination that there is reasonable cause to believe that the complaint has validity is necessary to enable the EEOC to embark upon methods of "conference, conciliation, and persuasion"<sup>18</sup> to obtain a co-operative agreement in ending the unfair practice. Before 1972 failure of the alleged offender to negotiate or compromise with the EEOC exhausted the active role of the agency. Consequently, the incentives to settle the dispute with this administrative body were slight under the original statute.

Should the administrative procedures of the EEOC yield no satisfactory results,<sup>19</sup> only two methods were available to secure judicial determination

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committed by an employer, *id.* § 2000e-2(b), but also discriminatory actions by employment agencies and labor organizations, *id.* § 2000e-2(c).

<sup>9</sup> 42 U.S.C. § 2000e-4(a) (Supp. II, 1973). The EEOC consists of five members, appointed by the President, with the advice and consent of the Senate for five-year terms.

<sup>10</sup> 42 U.S.C. §§ 2000e-5(b), (e), (f) (Supp. II, 1973).

<sup>11</sup> 42 U.S.C. § 2000e-2 (1970), *as amended*, 42 U.S.C. § 2000e-2 (Supp. II, 1973).

<sup>12</sup> 29 C.F.R. §§ 1604-07 (1973).

<sup>13</sup> The courts have uniformly given broad interpretations to the formalities required for the filing of charges. *See, e.g.*, Graniteville Co. (Sibley Division) v. EEOC, 438 F.2d 32 (4th Cir. 1971) (informal letter charge will suffice); Sanchez v. Standard Brands, Inc., 431 F.2d 455 (5th Cir. 1970) (EEOC charge form, incorrectly filled out, remains valid); Georgia Power Co. v. EEOC, 412 F.2d 462 (5th Cir. 1969) (defect is curable by amendment).

<sup>14</sup> 42 U.S.C. § 2000e-5(b) (Supp. II, 1973).

<sup>15</sup> 42 U.S.C. § 2000e-5(d) (1970).

<sup>16</sup> *See, e.g.*, Belt v. Johnson Motor Lines, Inc., 458 F.2d 443 (5th Cir. 1972) (continuing course of discrimination); Culpepper v. Reynolds Metal Co., 421 F.2d 888 (5th Cir. 1970) (invoking remedies under employment contract tolls time limitation for filing charge with EEOC); Antonopulos v. Aerojet-General Corp., 295 F. Supp. 1390 (E.D. Cal. 1968) (extenuating circumstances justify delay in filing).

<sup>17</sup> 42 U.S.C. § 2000e-5(a) (1970). The statute also contains an elaborate procedure for deferral by the EEOC to state or local agencies administering their own fair employment laws. However, jurisdiction is retained so the EEOC may intervene in the event no resolution is achieved within varying time limits. 42 U.S.C. §§ 2000e-5(b)-(e) (Supp. II, 1973).

<sup>18</sup> 42 U.S.C. § 2000e-5(a) (1970).

<sup>19</sup> Though the Act does not directly require it, the courts have held that aggrieved persons seeking to invoke their title VII rights must make their charges to the EEOC and await its administrative determination before bringing suit in federal district court. *See, e.g.*, Johnson v. Seaboard Air Line R.R., 405 F.2d 645 (4th Cir. 1968), *cert. denied*, 394 U.S. 918 (1969); Jenkins v. United Gas Corp., 400 F.2d 28 (5th Cir. 1968); Oatis v. Crown Zellerbach Corp., 398 F.2d 496 (5th Cir. 1968).

of the issue before the 1972 amendments. The Attorney General of the United States could institute suit in federal district court when there was "reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this [statute] . . . ." <sup>20</sup> Alternatively, the aggrieved individual's recourse, after the unsuccessful efforts of the EEOC to exact voluntary compliance, was to bring a private lawsuit in federal court. <sup>21</sup> Before 1972 the EEOC was required to issue a notice of eligibility to sue, when requested, after sixty days had elapsed from the presentation of the charge. <sup>22</sup> Further, the complainant actually had but thirty days from that notice to bring suit in the courts. <sup>23</sup>

The Equal Employment Opportunity Act of 1972 <sup>24</sup> substantially amended the original statute as to both administrative proceedings and enforcement activities. In general, the applicable time periods in the Act were expanded in most instances. For example, the applicant is now allowed 180 days from the time of the alleged violation to file a charge, instead of the previously allowed ninety days. <sup>25</sup> Additionally, where the finding of reasonable cause by the EEOC had a somewhat indefinite time limit in the past, <sup>26</sup> the amendment now requires that the determination be made within 120 days "so far as practicable." <sup>27</sup>

The most far-reaching innovation contained in the 1972 amendments was the vesting of enforcement power in the EEOC beyond its administrative procedures. The amended Act now permits the EEOC to initiate court action on behalf of complaining individuals. <sup>28</sup> In addition, the EEOC now maintains concurrent jurisdiction with the Attorney General to file "pattern and practice" suits and will succeed solely to that authority in 1974. <sup>29</sup> Before it may bring suit, the EEOC must first substantiate that there is reasonable cause to believe the complaint and it is unable to procure a conciliation agreement. However, it need wait only thirty days from the filing of the charge. <sup>30</sup> The employee bringing the charge is permitted to intervene in the civil action of the EEOC. <sup>31</sup>

The aggrieved individual may still enforce his own rights in court. Since the EEOC is not required to sue, even upon finding reasonable cause or failing to conciliate, its conduct does not preclude the private suit. When

<sup>20</sup> 42 U.S.C. § 2000e-6(a) (1970).

<sup>21</sup> 42 U.S.C. § 2000e-5(e) (1970).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> Pub. L. No. 92-261, 86 Stat. 103 (codified in scattered sections of 42 U.S.C.).

<sup>25</sup> 42 U.S.C. § 2000e-5(e) (Supp. II, 1973), *amending* 42 U.S.C. § 2000e-5(d) (1970).

<sup>26</sup> The time limit in the original statute was not specified; however, it could have been no more than sixty days, because at the end of that period the EEOC was obligated to issue, when asked, the notice of right to sue. 42 U.S.C. § 2000e-5(e) (1970).

<sup>27</sup> 42 U.S.C. § 2000e-5(b) (Supp. II, 1973).

<sup>28</sup> 42 U.S.C. § 2000e-5(f) (Supp. II, 1973). The EEOC may not sue a government, government agency, or political subdivision, but must refer the case to the Attorney General who may initiate suit.

<sup>29</sup> 42 U.S.C. §§ 2000e-6(c), (e) (Supp. II, 1973).

<sup>30</sup> 42 U.S.C. § 2000e-5(f) (Supp. II, 1973).

<sup>31</sup> *Id.*

no reasonable cause is found by the agency, or after 180 days have elapsed since submission of the complaint, the individual's right to sue accrues; however, the EEOC must issue an authorization. The employee has ninety days from receipt of notification to file pleadings in federal district court, rather than thirty days in the unamended Act.<sup>32</sup> The EEOC is empowered to intervene in the private suit upon a showing that the "case is of general public importance."<sup>33</sup>

## II. BALANCING THE CONFLICTING INTERESTS

*Favorable Treatment of Complainants.* Throughout the history of title VII, the private individual has been charged with the prime responsibility for protecting his own interests. To assist the individual in meeting this burden, the courts, as well as the EEOC, have demonstrated a willingness to construe broadly and liberally the statute's procedural requirements in order to give every advantage to the aggrieved applicant.<sup>34</sup> Of course, prior to 1972 the overwhelming justification for this position lay in the lack of enforcement power in the EEOC. Even though Congress had expressed the national goal of fair and equal employment opportunity, it had created an administrative agency with virtually no authority, leaving "[e]nforcement of the rights of aggrieved parties . . . exclusively in the federal courts."<sup>35</sup> The aggrieved individual, although preserving his own opportunity for an impartial determination of his complaint, was, in a much broader sense, acting as a private attorney general in an area "with heavy overtones of public interest."<sup>36</sup> In pursuing an independent remedy, the private litigant was advancing national policy where no other competent agency existed to effectuate the goal.

Since the paramount issues finally depend upon judicial decision, the individual is not limited to any prior resolution of the problem through his employment contract or the administrative procedures of the EEOC. Only in the narrowest of circumstances will an arbitration award, pursuant to an employment contract, be binding upon the courts as dispositive of the controversy. In any event, it will not preclude the filing of a case, for a court must decide whether or not to defer to the arbitration results.<sup>37</sup> Similarly, the absence of a reasonable-cause finding by the EEOC, or its failure

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

<sup>33</sup> *Id.*

<sup>34</sup> See, e.g., *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 460-61 (5th Cir. 1970): "[C]ourts construing Title VII have been extremely reluctant to allow procedural technicalities to bar claims brought under the Act. Consequently, courts confronted with procedural ambiguities in the statutory framework have, with virtual unanimity, resolved them in favor of the complaining party."

<sup>35</sup> *Choate v. Caterpillar Tractor Co.*, 402 F.2d 357, 359 (7th Cir. 1968); see *Pettway v. American Cast Iron Pipe Co.*, 411 F.2d 998 (5th Cir. 1969); *Jenkins v. United Gas Corp.*, 400 F.2d 28 (5th Cir. 1968).

<sup>36</sup> *Jenkins v. United Gas Corp.*, 400 F.2d 28, 33 (5th Cir. 1968); see *Edmonds v. E. I. du Pont de Nemours & Co.*, 315 F. Supp. 523 (D. Kan. 1970).

<sup>37</sup> See, e.g., *Rios v. Reynolds Metals Co.*, 467 F.2d 54 (5th Cir. 1972); cf. *Newman v. Avco Corp.*, 451 F.2d 743 (6th Cir. 1971). Several decisions are to the effect that arbitration awards do not control subsequent court adjudication in any manner. See, e.g., *Malone v. North Am. Rockwell Corp.*, 457 F.2d 779 (9th Cir. 1972).

either to begin or conclude a conciliation agreement with a recalcitrant employer will not limit the employee's option to institute suit.<sup>38</sup>

The advent of the 1972 amendments in no way detracts from the basic premise of relying upon the courts for enforcement of the Act, but now the EEOC may also bring the court contest.<sup>39</sup> The congressional intent was to shift the burden of initiating enforcement proceedings from the individual to the public, through the agency of the EEOC. But, while expressing the conviction that private actions should become the exception under the new statutory scheme,<sup>40</sup> Congress was unwilling to eliminate completely the private lawsuit. Congress acknowledged that the development of the law had benefited from the private litigation, and realized that the problem of fair employment was so immense that the EEOC could not reasonably be expected to control the entire field immediately.<sup>41</sup>

Two other specific provisions which had been enacted to assist the complainant financially and to encourage him to bring suit were retained by the 1972 amendments. Courts are still authorized to appoint attorneys for the aggrieved individual "in such circumstances as the court may deem just," and they may permit the commencement of the suit without payment of fees, costs, or security.<sup>42</sup> Reasonable attorney fees may be awarded to the prevailing party in the suit.<sup>43</sup>

*Public Non-Disclosure.* Title VII of the Civil Rights Act of 1964 contains three specific prohibitions on the disclosure of information obtained during the course of the EEOC's administrative proceedings. The first forbids the EEOC to make public the charge filed by the complaining party.<sup>44</sup> The second provides that "[n]othing said or done during and as a part of such informal endeavors [i.e., the EEOC's efforts to obtain voluntary compliance through a conciliation agreement] may be made public by the Commission . . . without the written consent of the persons concerned."<sup>45</sup> The third prohibition states that "[i]t 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."<sup>46</sup> Violations are punishable as mis-

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<sup>38</sup> See, e.g., *Flowers v. Laborers Local 6*, 431 F.2d 205 (7th Cir. 1970); *Fekete v. United States Steel Corp.*, 424 F.2d 331 (3d Cir. 1970).

<sup>39</sup> 42 U.S.C. § 2000e-5(f) (Supp. II, 1973).

<sup>40</sup> H.R. REP. No. 238, 92d Cong., 1st Sess. 11-13 (1971); S. REP. No. 415, 92d Cong., 1st Sess. 23-24 (1971).

<sup>41</sup> *Id.* To a great extent the fear that the EEOC would be unable to handle the volume of complaints has been borne out. The EEOC has estimated that it would have a backlog of 52,000 complaints at the end of Fiscal Year 1973 (June 30, 1973). It anticipated an additional 45,000 new charges during Fiscal Year 1974. *Hearings on Departments of State, Justice, and Commerce, the Judiciary and Related Agencies Appropriations for 1974 Before a Subcomm. of the House Comm. on Appropriations*, 93d Cong., 1st Sess., ser. 2/974, pt. 4, at 852 (1973). The EEOC expected to have undertaken approximately 100 suits during Fiscal Year 1973, while private suits had numbered approximately 2000. *Id.* at 889, 899.

<sup>42</sup> 42 U.S.C. § 2000e-5(f) (Supp. II, 1973).

<sup>43</sup> 42 U.S.C. § 2000e-5(k) (1970).

<sup>44</sup> 42 U.S.C. § 2000e-5(b) (Supp. II, 1973).

<sup>45</sup> *Id.*

<sup>46</sup> 42 U.S.C. § 2000e-8(e) (1970).

demeanors, carrying a potential fine or imprisonment upon conviction.<sup>47</sup>

The intent of Congress to proscribe "the making available to the general public of unproven charges"<sup>48</sup> is plain on the face of the non-disclosure sections. In the entire statutory fair employment plan these provisions are the only clear concessions for the protection of the alleged wrongdoer. However, even part of these guarantees were eroded by *Smith v. Universal Services, Inc.*<sup>49</sup> where the Fifth Circuit held in a case of first impression that the EEOC's investigative report and findings should have been admitted in evidence at a trial commenced by an aggrieved individual after the EEOC had failed to conciliate his grievance. While agreeing that the statute did not specifically mandate the admission, the court reasoned that it likewise did not prohibit its use. Though the report contained both facts and conclusions which the trial court must itself evaluate as any other evidence in a de novo proceeding, "to ignore the manpower and resources expended on the EEOC investigation and the expertise acquired by its field investigators in the area of discriminatory employment practices would be wasteful and unnecessary."<sup>50</sup> Finally, the report was permitted, although admittedly hearsay in character, as an exception to the hearsay rule.

The EEOC has long maintained that allowing the complainant or his attorney access to its investigative files, even prior to court proceedings, is in no way inconsistent with the statutory language of the Act and comports with the legislative policy of permitting the aggrieved party every opportunity to secure judicial enforcement of his claim. This position is expressed in the EEOC's current regulations,<sup>51</sup> but is more specifically found in a memorandum, prepared by the General Counsel of the EEOC, to provide guidance for field offices.<sup>52</sup> It states that the EEOC's investigative report may be made available to the charging party's counsel after the statutory period for investigation and conciliation has expired, no more than sixty days under the original law,<sup>53</sup> but now 180 days.<sup>54</sup> The rationale is to permit the attorney to decide whether "the facts justify the commencement of a civil action . . . and, if so, to obtain information relevant to drafting the complaint. Before a report is made available, counsel must agree that it will not be used for any other purpose . . . ."<sup>55</sup>

<sup>47</sup> 42 U.S.C. § 2000e-5(b) (Supp. II, 1973); 42 U.S.C. § 2000e-8(e) (1970).

<sup>48</sup> 110 CONG. REC. 12723 (1964) (remarks of Senator Humphrey).

<sup>49</sup> 454 F.2d 154 (5th Cir. 1972). The decision was rendered without reference to the general public disclosure prohibition. See text accompanying note 46 *supra*. The court merely concluded that the EEOC's investigative report and findings did not have application to the ban on disclosure of conciliation efforts. 454 F.2d at 156-57 n.1; see text accompanying note 45 *supra*.

<sup>50</sup> 454 F.2d at 157. *Contra*, *Heard v. Mueller Co.*, 464 F.2d 190 (6th Cir. 1972); *accord*, *Cox v. Babcock & Wilcox Co.*, 471 F.2d 13 (4th Cir. 1972).

<sup>51</sup> 29 C.F.R. § 1601.20 (1973): "This provision does not apply to such earlier disclosures to the charging party, the respondent, witnesses, and representatives of interested Federal, State, and local agencies as may be appropriate or necessary to the carrying out of the Commission's functions . . . ." Generally, the courts have accorded the regulations of the EEOC "great deference," as expressive of congressional intent. *Griggs v. Duke Power Co.*, 401 U.S. 424, 434 (1971).

<sup>52</sup> The memorandum is reproduced in the *Kessler* opinion, 472 F.2d at 1149.

<sup>53</sup> See note 26 *supra*.

<sup>54</sup> 42 U.S.C. § 2000e-5(f) (Supp. II, 1973).

<sup>55</sup> 472 F.2d at 1149.

III. H. KESSLER & Co. v. EQUAL EMPLOYMENT OPPORTUNITY  
COMMISSION

After determining that only the more general of the nondisclosure provisions, which provides that no employee or officer may make public any information obtained by the EEOC prior to any proceeding,<sup>56</sup> was applicable to the facts, the court in *Kessler* concluded that the question was whether disclosure to parties or their attorneys is the equivalent of "public." In replying negatively to the question, the court relied upon legislative history, statutory construction, and policy. In aid of its argument, the court admitted that although there is "scant legislative history . . . available with respect to this particular portion of the Act [that history which exists] appears to support the position expressed by the Commission in its regulation."<sup>57</sup> In the congressional debates which preceded passage of title VII, the sponsor of the compromise proposal which became law stated that the bans intended were those on "publicizing and not on such disclosure as is necessary to the carrying out of the Commission's duties under the statute."<sup>58</sup> In addition, the Senate version of the 1972 amendments contained a ban on divulgence of records or papers to anyone except Congress, government agencies, or for use before a court or grand jury.<sup>59</sup> In leaving the original provisions intact in 1972, the court reasoned, Congress considered and rejected the more rigid restrictions the Senate proposal would have created.

"To make public" is not defined in the statute, but a reading of the other two prohibitions on disclosure indicated to the court that "public" did not include parties to a controversy. The first section provides that "charges shall not be made public."<sup>60</sup> However, by terms of the statute the EEOC is required to furnish a copy of the charge to the employer before beginning its investigation.<sup>61</sup> The remaining section prohibits anything said or done during the conciliation procedure to be made public "without the written consent of the parties . . .,"<sup>62</sup> thus implying that both parties would know of the proceedings. The court concluded that all three provisions should be reconciled to be consistent, and since two sections exclude parties from the term "public," the other should as well.

The court's policy justifications for the holding presented the most compelling arguments. The court rested its policy considerations, and in fact its entire decision, on certain initial presumptions and conclusions. First, "the complaining person is, almost by definition, a person in impecunious

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<sup>56</sup> 42 U.S.C. § 2000e-8(e) (1970). The court noted, but did not decide, that the term "proceeding" is not defined and could be susceptible to interpretation as applying to the EEOC's conciliation functions. If so, any disclosure of information after that "proceeding" would not be prohibited by the statute's language. 472 F.2d at 1151-52 n.3. The court, however, assumed that "proceeding" must refer to presentation of a court case.

<sup>57</sup> 472 F.2d at 1150; see note 51 *supra*.

<sup>58</sup> 110 CONG. REC. 12723 (1964) (remarks of Senator Humphrey).

<sup>59</sup> S. REP. NO. 415, 92d Cong., 1st Sess. 55-56 (1971).

<sup>60</sup> 42 U.S.C. § 2000e-5(b) (Supp. II, 1973).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*



circumstances . . . ."<sup>63</sup> Second, the private litigant's position in employment discrimination suits is essential.<sup>64</sup> Third, there is a "very limited time that is given to the charging party to file suit after the Commission notifies him that it has been unable to obtain voluntary compliance (30 days) . . . ."<sup>65</sup> The opinion foreshadowed its ultimate conclusion by insisting that "it is obvious that the charging party literally needs all the help he can get in order to procure counsel, convince him that a right of action truly exists with evidence to support it, and prepare and file suit within the statutory period . . . ."<sup>66</sup>

With this background the court questioned how the complainant could ever have "more than a suspicion of discrimination without access to [the EEOC's investigative data] . . . ."<sup>67</sup> Assuming that the charging party has no more than mere conjecture that he was the subject of an unfair employment practice, the majority maintained that the difficulty of persuading an attorney to undertake a case was practically insurmountable. Evidence was cited to support the contention that attorneys are reluctant to assume the complexities of a title VII suit under the most favorable conditions, for the subject area involves problems "not common to more frequently litigated areas of the law."<sup>68</sup> Even the allowance of legal fees to the prevailing contestant would be of small consequence when an attorney could not be found and when the aggrieved party had nothing to substantiate his claim.

The dissent objected to the holding, relying in main part upon the court's initial per curiam decision<sup>69</sup> which had declared that the legislative history on the point of public disclosure was "simply too general to be helpful,"<sup>70</sup> and also that the language of the statute was clear and did not require interpretation. In rejecting the majority's policy arguments the dissent disputed any allegation that "limiting publication of information to the parties, as well as the general public, hindered the function or purpose of the statute. Rather, these portions of the Act are intended to insure that those directly involved . . . can fully and in good faith participate . . . uninhibited by any threat that their statements and actions will be released . . . ."<sup>71</sup> The dissenting justices stressed the point that any disclosure, particularly when expressly denied by the statute, would destroy any prospects of obtaining unlitigated compliance, "the touchstone for settlement of alleged violations of this Title of the Civil Rights Act . . . ."<sup>72</sup>

<sup>63</sup> 472 F.2d at 1149.

<sup>64</sup> *Id.* The court quotes *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 460 n.1 (5th Cir. 1970): "The importance of the private litigant in the context of Title VII cannot be overemphasized."

<sup>65</sup> 472 F.2d at 1149-50.

<sup>66</sup> *Id.* at 1150.

<sup>67</sup> *Id.* at 1152.

<sup>68</sup> *Petete v. Consolidated Freightways*, 313 F. Supp. 1271, 1272 (N.D. Tex. 1970); *see Edmonds v. E. I. du Pont de Nemours & Co., Inc.*, 315 F. Supp. 523 (D. Kan. 1970).

<sup>69</sup> *H. Kessler & Co. v. EEOC*, 468 F.2d 25 (5th Cir. 1972).

<sup>70</sup> *Id.* at 27.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* While voluntary compliance may be the ideal resolution of the conflict, the ability of the EEOC or the complainant to initiate a civil suit apparently provides the actual basis for settlement in most cases.

## IV. CONCLUSION

The major problem with the *Kessler* decision is that it ignored the effect of the 1972 amendments. The majority merely asserted the opinion that "the provisions with which we are here concerned were left intact [by the amendments] . . .,"<sup>73</sup> and the dissent never mentioned the extensive alterations. While it is certainly true that the non-disclosure portions were left unchanged, the conceptual framework on which the court postulated its decision underwent substantial revision. Although recognizing that the individual interest should be retained by the continued practice of permitting private litigation, the intent of Congress in vesting the EEOC with enforcement power in the federal courts was to place the burden of promoting equal opportunity in employment upon that public agency.<sup>74</sup>

The decision can be rationalized only as an interim measure to allow the continuance of an established precedent during a transitional period, for once the EEOC is able to fulfill its obligations under the new law, virtually all of the court's policy underpinnings will be destroyed. The poverty of the employee will make no difference if the EEOC brings suit; similarly, the procurement of counsel will not be a factor. Certainly the importance of protecting the individual's rights will not have changed, but the moving party in most instances will be the EEOC rather than the aggrieved person. And even assuming that the EEOC will never be truly effective because of fiscal limitations or simply the enormity of the undertaking,<sup>75</sup> the *Kessler* court ignored the fact that the amendments expand the period in which to bring suit after notice from thirty to ninety days.<sup>76</sup> The longer time period in conjunction with the broad discretionary authority of the court to appoint counsel<sup>77</sup> dispels, at least in part, the policy reasoning of the court that the EEOC reports are needed to meet a short deadline for filing suit or to convince an attorney to take the case.

Absent policy considerations, the statutory construction and legislative history arguments of the court are seemingly tortured and superficial reasons upon which to base the holding. For, even conceding that Congress expressly excepted parties from the prohibitions on public disclosure in two sections of the statute, it does not follow that any intent to do likewise can be found on the face of the Act which affects the section in controversy.<sup>78</sup> Internal consistency, if important at all, is more validly served by interpreting "public" in its ordinary sense to include anyone outside the EEOC, subject only to the plain exceptions modifying the sections in which the distinctions appear. Then, too, legislative history is normally not invoked unless the meaning of the statute is unclear. Nowhere is it contended that the language used by Congress was ambiguous, but even if it

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<sup>73</sup> 472 F.2d at 1150.

<sup>74</sup> See text accompanying notes 39-41 *supra*.

<sup>75</sup> See note 41 *supra*.

<sup>76</sup> 42 U.S.C. § 2000e-5(e) (1970), as amended, 42 U.S.C. § 2000e-5(f) (Supp. II, 1973).

<sup>77</sup> See text accompanying note 42 *supra*.

<sup>78</sup> See text accompanying note 46 *supra*.