ORIGINAL

In the

Supreme Court of the United States

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)	
PETITIONER,	)	
V.	)	No. 79-1068
ASSOCIATED DRY GOODS CORPORATION,	)	
RESPONDENT.	)	

Washington, D.C.
November 3, 1980

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Petitioner,

v. No. 79-1068

ASSOCIATED DRY GOODS CORPORATION,

Respondent.

Washington, D.C.

Monday, November 3, 1980

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 2:02 o'clock p.m.

APPEARANCES:

BARRY SULLIVAN, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C. 20530; on behalf of the Petitioner.

ROGER S. KAPLAN, ESQ., 261 Madison Avenue, New York, New York 10016; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in the Equal Employment Opportunity Commission v. Associated Dry Goods Corporation.

Mr. Sullivan.

ORAL ARGUMENT OF BARRY SULLIVAN, ESQ.,

ON BEHALF OF THE PETITIONER

MR. SULLIVAN: Mr. Chief Justice, and may it please the Court:

This case is here on on certiorari from the United States Court of Appeals for the 4th Circuit. The question presented is a narrow but important question of statutory construction regarding Title VII of the Civil Rights Act of 1964.

The question is whether Section 706(b) and 709(e) of Title VII which prohibit the Commission from disclosing investigatory information to the public prior to the filing of a suit prohibit disclosures of such information to persons immediately involved in Commission proceedings.

This is a narrow question in two senses. First, the textual question is a narrow one, whether the words of the statute, "making public," includes persons who are immediately involved in administrative proceedings. Secondly, in context, in Section 709(e) of the statute, it is clear that the prohibition on making public this information applies only to prelitigation disclosure, to disclosures that are made prior to

the time that the Title VII action is brought.

Therefore, the question is not whether disclosures of information may occur, even to the public, but the timing of those disclosures. The question is an important question for purposes of the administration of Title VII, because the answer to the question, whether the charging parties and attorneys and respondents and material witnesses are members of the public within the meaning of the statute will impact on the Commission's administration of the statute in investigation, conciliation, and reasonable cause determination, virtually at every stage of the Commission's processing of charges of employment discrimination.

The facts of this case may be briefly stated. In November, 1971, and continuing through June, 1973, seven charges of employment discrimination were filed with the Commission against the Joseph Horne Company, a Pittsburgh retailer, and the subsidiary of respondent, Associated Dry Goods. These charges alleged discrimination -- these charges were filed by seven women. In six of the cases sex discrimination was charged. In the seventh charge, which was also filed by a woman, racial discrimination was charged. Three of the charges also charged retaliation.

In February, 1974, the Commission met. It began its investigation by asking the Joseph Horne Company to produce certain evidence that the Commission thought relevant to

these charges. Basically, the evidence that was requested was information pertaining to the Company's personnel practices and employment files and other information relating to the departments of the employer in which these seven charging parties were employed.

Horne declined the Commission's request for this information on the ground that the Commission would not guarantee at that point that information thus collected would not be disclosed to charging parties or their attorneys or to witnesses during the course of the proceedings. Thereafter, negotiations followed. They were eventually unsuccessful.

The Commission in October, 1974, issued an administrative subpoena for purposes of acquiring much the same information. In June, 1975, Associated brought this action in the Eastern District of Virginia, asserting that the Commission's disclosure policies violated Sections 706(b) and 709(e). Subsequently the Commission brought an action itself to enforce its subpoena in the Western District of Pennsylvania. The two suits were subsequently consolidated in the Eastern District of Virginia; the District Court enforced subpoena, but held that disclosure to the parties and to attorneys would do violence to the statutory scheme because it would affect conciliation and settlement, and therefore held that the parties were included within the public for purposes of this statute.

In October, 1979, the Court of Appeals affirmed by

divided vote. The question the Court of Appeals determined was whether disclosure to charging parties and attorneys prior to suit violates Section 706(b) and 709(e). The Court held that it did. Judge Hall dissented in the Court of Appeals.

QUESTION: The Court primarily held it violated 709(e), didn't it?

MR. SULLIVAN: I believe, Mr. Justice --

QUESTION: That's certainly the statutory provision upon which respondent primarily relies.

MR. SULLIVAN: That is correct.

QUESTION: So that you don't really accurately state the question, that the question is a 709(e) question, not a 706(b) and 709(e) question.

MR. SULLIVAN: I recognize that is what Respondent asserts, Mr. Justice. However, the text of the opinion of the Court of Appeals is quite clear in relying on both of the sections.

QUESTION: So if it was right on either one, we could affirm?

MR. SULLIVAN: I think that would be correct although I don't think that the 4th Circuit was correct on either one.

QUESTION: You're talking about Judge Winters' opinion?

MR. SULLIVAN: Yes, Your Honor. Judge Hall dissented

noting that the decision of the majority was not based on statutory construction, but was based on policy ground, namely, the fear that disclosure to charging parties and their attorneys would contribute to litigation.

The Judge also noted that the practical effect of the decision was to require charging parties to file lawsuits in order to determine whether their charges had any merit, and that the practical effect was simply to delay disclosure to the parties, not to deny disclosure.

I should also note, however, that in one respect Judge Hall did not agree with the Commission in that Judge Hall believed that disclosure of materials in related case files which the Commission believes is appropriate was not valid.

The decision of the 4th Circuit simply does not come to grips with the problem that's presented in this case. The Court of Appeals held that charging parties and attorneys were members of the public, but at the same time the Court found that certain disclosures could be made to the parties during the administrative process. The Court of Appeals said that information could not be disseminated to the parties in haec verba but that the Commission could say to the parties, it has been reported that, or it has been said that, and then effectively convey the information that was contained in the file.

We believe that does not come to grips with the

problem that's presented in this case because Section 709(e) prevents disclosure to the public in any manner whatever. The solution of the 4th Circuit, while it may be an appropriate solution in some respects, is not a solution to the problem of statutory construction that's presented in this case. The real question that has to be decided with respect to Section 709(e) and with respect to Section 706(b) is whether the phrase, "making public" is meant to include persons who are directly involved in the administrative proceedings.

Moreover, we submit that the 4th Circuit's construction of the statute, the definition of "making public" which was accepted by the courts below, is erroneous in any event. Although "public" is not defined in this statute, we believe that when Sections 706(b) and 709(e) are read together as they must be, and in light of legislative history, that the prohibition of public disclosure means the prohibition of disclosing information to the general public. As Senator Humphrey said in the legislative debates, this is a ban on publicizing.

However, the meaning of the statute is even more clear when these provisions are read against the statute as a whole. The Commission has the duty to investigate and to determine reasonable cause, and to attempt to settle disputes through informal means of conciliation, conference, and persuasion. It would be impossible for the Commission to successfully and effectively undertake and complete these statutory

duties if they could not disclose material to charging parties and to material witnesses when necessary.

It is particularly obvious in the investigation stage when the Commission is presented with a charge of discrimination which it must attempt to investigate in order to determine whether reasonable cause exists to believe that a violation of the statute occurred.

The respondent here asserts that nondisclosure to the parties would forward the investigation because respondents or employers would be more likely to come forward with information. While that may be true, two points must be made: the Commission has compulsory process and can enforce its subpoenas in court, so essentially the respondent is saying that employers will come forward with the information that they're required by statutes to come forward with in any event.

Secondly, even if the information were produced by employers more freely, the difficulty is that all of the information that they might provide simply would not advance the investigation if that material could not be tested during the investigation. The investigation requires more than the receipt of one-sided information. It requires the Commission to go out and try to verify that information and determine its truth.

With respect to the reasonable cause determination the same principles apply. The quality of that determination

can be no greater than the quality of the investigations which led to it.

QUESTION: Mr. Sullivan, what is the standard which you are proposing to us that should be followed in the determination of this issue?

MR. SULLIVAN: Mr. Justice, I believe --

QUESTION: Certainly you want to cover the charging parties and witnesses. Has the Commission been consistent in its approach to this problem over the years?

MR. SULLIVAN: Yes, it has, Mr. Justice Blackmun. The Commission first formulated regulations to deal with this problem in 1965 and with very minor changes those regulations have been in effect since then.

QUESTION: Well, initially, didn't they speak of authorizing disclosure where appropriate or necessary to the carrying out of the Comission's functions?

MR. SULLIVAN: That is correct, Mr. Justice Blackmun.

QUESTION: And what is it that -- now, I get back to my first question -- what are you proposing now that is distinct from that old approach?

MR. SULLIVAN: I don't think that it's distinct at all. The language that is now in the regulation is slightly different in that it says, "where disclosure is deemed necessary for securing appropriate relief." When that change was made, when it was published in the Federal Register, it was

published with the notation that no substantive change was intended.

QUESTION: Yes, but sometimes we run into trouble with that. The new standard speaks of relief. Is the Commission authorized to assist litigants in their quest for relief?

MR. SULLIVAN: I don't believe that -- that question is not easy to answer, Mr. Justice. The Commission in terms is authorized to cooperate with individuals. That authorization occurs in Section 2000(e)(4)(g) of the enumeration of the Commission's powers. However, I wouldn't rely on that exclusively. As you are aware, the Commission has the right to bring a civil complaint itself in meritorious cases. And if the Commission had sufficient resources it could obviously bring a civil action in every case that was brought before it in which the charging parties' charge was deemed to have sufficient merit to go forward.

However, it can't do that because it doesn't have the administrative resources to do it, and therefore the Commission's enforcement of Title VII depends in large part on private actions being brought. If an action were being brought by the Commission itself in a Title VII case, clearly the investigative files that were in its possession would be things that the Commission could use in framing the complaint. And if the charging party is acting effectively as a private attorney general, I think that it's implicit in the statutory

framework that that person should also have access to the materials.

QUESTION: In every case? In other words, Mr. Sullivan, is it your submission that the provisions of the present regulation, 1601.22, allows the Commission to disclose before legal action any of this information to charging parties or their attorneys, respondents or their attorneys, but to witnesses only where disclosure is deemed necessary for securing appropriate relief? Do you think the "where" modifies only "witnesses"?

MR. SULLIVAN: I think that's correct. That would be consistent with my understanding. I think that it's important --

QUESTION: Because of the lack of a comma after the word witnesses?

MR. SULLIVAN: Yes. I think that it's important to understand that there are really two kinds of disclosures that go on during the course of the administrative process. One is the kind of disclosure that goes on during conciliation or investigation, and those are by and large limited disclosures in which the Commission is trying to investigate and conciliate the charge, and in effect is filtering the information to the parties as it deems necessary to forward those goals.

However, the Commission also gives the charging party in effect a last clear chance in prelitigation disclosure

to see what's in the case file in order to make a determined and reasoned decision as to whether to go forward with the case. And when the attorney who's representing the charging party at that point is able to make that determination, the Commission believes that the overall purposes of Title VII are well served, because the attorney is more likely to persuade the charging party at that point that a meritorious case isn't worth bringing, and also that a meritorious case is worth bringing.

QUESTION: Of course, for the former alternative, I suppose the attorney could ask the respondent for authority to disclose the information and ask the respondent directly to make the disclosure, couldn't he?

MR. SULLIVAN: I suppose that is a twist.

QUESTION: Suppose respondent would be motivated to do so?

MR. SULLIVAN: Assuming that what was in the file left no shadow of a doubt that the case had no merit.

QUESTION: Well, or was persuasive in favor of settlement, which is a hypothesis that you're working in?

MR. SULLIVAN: I think that's possible. I don't think that would be a reasonable -- I don't think that it would be necessary to construe the statute as requiring that, and I also don't think that it would be reasonable for the Commission to effectively delegate its authority to show files to

respondents, because I think that might cause problems in more cases than it would ease, so I --

QUESTION: Well, 709(e) is a criminal statute.

MR. SULLIVAN: That's correct.

QUESTION: And it doesn't provide any defense, even if it's done with consent of one or more of the interested parties.

MR. SULLIVAN: That's correct.

QUESTION: No, but the hypothesis is that the company would be persuaded that if the information were disclosed, then the company could surely disclose it without any violation of the statute test. The restriction only operates against the Commission, doesn't it?

QUESTION: That's right.

MR. SULLIVAN: Of course it would be impossible for the charging party in those circumstances, if that were the construction of the statute, to know whether it was being given all of the material that was actually in the investigative file.

QUESTION: Well, the Commission could say, there is more information in the file. They could say that. There's nothing in the statute to prohibit the Commission from telling the charging party whether or not there's been full disclosure.

MR. SULLIVAN: That's true. I think that it's very important to emphasize that what is at issue here is not simply

the way in which the Commission has chosen to structure its investigations or to structure its administrative processes. But what is at issue is the very ability of the Commission to effectively fulfill its statutory mandate. I'd like to reserve the remainder of my time.

MR. CHIEF JUSTICE BURGER: Mr. Kaplan.

ORAL ARGUMENT OF ROGER S. KAPLAN, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. KAPLAN: Mr. Chief Justice and may it please the Court:

The question before you is whether the EEOC special disclosure rules and regulations conflict with Section 709(e) of Title VII and foster litigation contrary to the intent of Congress. The answer, we believe, lies --

QUESTION: Well, really, if we find they conflict with 709(e) of Title VII, that's the end of our inquiry, isn't it?

MR. KAPLAN: Yes, I believe so.

QUESTION: Whether or not they foster litigation, whether or not 709(e) is wise or unwise, is none of our business, is it?

MR. KAPLAN: Well, I believe that if they do conflict with Section 709(e), yes --

QUESTION: If 709(e) is part of what your brother simply just called the statutory mandate of the Commission,

then that is its mandate, not to disclose.

MR. KAPLAN: It is not to disclose. The answer, we think, lies in the rationale for the rules as stated in the rules themselves. A reading of Section 709 which gives proper scope to the text and purpose of the Act, and a rule prescribed by Congress for this agency is not an answer which is found in the EEOC briefs in this case.

I think it would be helpful to start by looking at the statute and then consider the rules, and then examine why the rules cannot be reconciled with the statutory provision. 709(e) prohibits any officer or employee of the Commission from making public in any manner whatever any information obtained by the Commission pursuant to its investigative authority prior to suit.

In our view this language is clear and sweeping, and does not not admit of exceptions. Public disclosure of any sort is banned. The Commission, though, seeks to avoid the ban by carving out a rather large exception for charging parties and others, saying that they are not members of the public, except that its own rules belie this intention.

First of all, the rules state who can see investigative files. Most simply, they allow a charging party, after 180 days, to see his investigative file. But the charging party, and his lawyer if that may be the case, aren't the only ones who can see files. Aggrieved persons can see their files.

Those filing on behalf of aggrieved persons can see the files. Representatives of EEOC-funded groups, such as the Mexican-American Legal Defense and Education Fund, can see the files for the purpose of referring cases to private counsel for litigation.

Finally, the Commission argues that witnesses to Title VII proceedings may see the files. What they can see, of course, further expands the scope of disclosure. A charging party may see his own file, to be sure. But he may also see related files. These are files that according to the Commission allege a similar base of discrimination against the same employer.

For example, someone that's alleging national origin discrimination in one plant, let's say it's a clerical employee, that person may examine the file of another national origin claimant for the same employer in a different plant, maybe even in a different state, working as a factory mechanic. They may even see unrelated files where in the Commission's view the treatment accorded one group is probative of the treatment accorded the charging party.

The disclosure thus authorized by these rules can grow to vast proportions when we're dealing with a sizeable company employing many employees. Now, what is worse, I think, is the unauthorized disclosures. Once these people obtain the information in these files, they can give the contents to

anyone they please. Now, the record in this case suggests that the EEOC says it cannot prevent this secondary disclosure, can only ask the recipients not to give it out. We think that the Commission knows better. We think that a proper interpretation of 709(e) bars publication to the charging party in the first place, and that eliminates the problem of the secondary disclosures.

Thus, in our view, really, this Court need not reach the precise issue of whether a particular charging party is a member of the public with respect to his own file, because clearly the totality of the rules which are sought to be enforced here authorize disclosure to the public.

Now even if the Court, though, reaches the narrow question, we think that the results should be the same, that the rule should be rejected. The EEOC's contention seems to be grounded on an analogy between Section 706 and 709. They say that since disclosure is contemplated between the parties under 706, the same contemplation should be followed with respect to 709.

I think the answer lies in the different congressional concerns that lay behind these statutes, these two sections. 706 deals with charges in conciliation information. Now, it seems elementary to me that these types of information have to be communicated as between the originator and the charged party or vice versa. Certainly someone who's being accused of a

violation of Title VII is entitled to know that he's being accused of that violation. This gives the agency jurisdiction; gives the respondent notice. It justifies the intrusion of this government agency on the private affairs of a corporation and its employees. I think it smacks of due process.

Conciliation is also in a sense a fancy word for negotiating an agreement. In order to reach a meeting of the minds there obviously has to be communication on a two-way street, and I think Congress recognized this, so that there is some contemplated disclosure under 706 as between the parties to a proceeding. But what about 709? 709 deals with investigations.

QUESTION: But even on your first point, are you suggesting that the conciliation process contemplates any kind of compulsory disclosure by either party?

MR. KAPLAN: No, sir, not at all. In fact, that's one of the elements that I was about to address. There is a question of volition which I will come to in a minute.

QUESTION: Would you question that disclosure would facilitate conciliation -- laying aside the strictures of the statute, whatever they may be?

MR. KAPLAN: Well, it -- not the disclosure advocated by my brother, but the disclosure which the charging party or the respondent wishes to have communicated to the other side. It is a question of negotiating an agreement and

what that person thinks is to his best advantage in achieving a negotiated settlement.

QUESTION: Well, does that amount to saying that while litigation is conducted in a goldfish bowl, conciliation is to be conducted some other way?

MR. KAPLAN: Well, yes, I do believe that conciliation must be conducted privately in order to give the parties an opportunity to consider various proposals and look at them without the pressure of public view on what they are doing.

QUESTION: Is it a question of privacy or a question of conciliation being conducted with full knowledge of all the facts? It can be private too, can't it?

MR. KAPLAN: It can be -- well, it should be conducted in private, yes. But the question, the objective in a conciliation is remedy. How shall we achieve equal employment opportunity and overcome whatever discrimination has been found? And I think that's a significant consideration, because under the statutory scheme conciliation occurs after the Commission has made a determination of reasonable cause. The issue of liability for administrative purposes has thus been resolved, and since that determination also under the Commission's policy authorizes suit by the Commission should it desire to do so, there is a sufficient clout to impel a respondent to try to reach agreement before any legal action is taken. I don't think it is necessary for a conciliation

agreement to reexamine the whole investigatory record as the Commission would have it under these rules. It is sufficient that appropriate information be exchanged to enable the parties to reach appropriate settlement. The determination can determine the extent of liability.

QUESTION: Now, do you take the position that you don't have full disclosure in a conciliatory matter? How can it be conciliatory without full disclosure? How can you?

MR. KAPLAN: Well, I think it's quite possible, Your Honor. I think it's the disclosure that is needed to accomplish the purpose of reaching agreement. Not all the disclosure --

QUESTION: Isn't it full disclosure?

MR. KAPLAN: No, I don't believe that's absolutely necessary, not to the extent of disclosing particular documents in the investigative file, the nitty-gritty of the investigation conducted by the Commission.

QUESTION: Doesn't that prompt people to give it?

MR. KAPLAN: Pardon me?

QUESTION: Suppose you're representing a business firm, and they negotiate -- the people on the EEOC say, we have information that you are charged with discriminating against three female employees. And them saying, we now have a charge; but, we have admissions from your staff that that is true. Well, wouldn't the second one persuade you faster

than the first one?

MR. KAPLAN: Well, if they are --

QUESTION: Wouldn't it?

MR. KAPLAN: Well, Your Honor is talking now about disclosure to the person whose agents have contributed to -- have made these statements. I am not suggesting that the Commission cannot show a charging party who has given a statement a copy of his own statement. That I don't think is really the issue here. Nor am I suggesting that the employers can't call up the Commission and say, listen, we gave you a seniority roster the other day. I'd like to have a copy; I forgot to make one.

These originated with the parties themselves, so I don't see a problem in that sort of disclosure. It's the communication of the basic investigative data to the other side. And in response to the question, I don't think it's necessary to get into that sort of detail in executing agreement. I mean, if this is what the Commission is telling the employer -- listen, we've got the goods on you, and if we have to go to the suit on this, we're going to make it stick -- well, I think that's, you know, that's fine. They can make that sort of representation to the employer who gave that information.

QUESTION: Wouldn't it be within the authority of the Commission acting under its statutory authority to have a

regulation that any information disclosed to the charging party or a complainant could not be made public without the approval of the Commission? That is, to have a regulation that would implement Section 709(e)?

MR. KAPLAN: To the extent that it --

QUESTION: That would meet your problem, wouldn't it? That it would become public and be available to competitors and so forth?

MR. KAPLAN: Well, I don't think a regulation that simply tracks the language of the statute is particularly necessary. I certainly, you know, wouldn't personally have an objection to that sort of regulation. But I do think when this regulation goes beyond the statute and starts in fact legislating, as we perceive this regulation to be doing, then I think the Commission has gone too far and has exceeded its statutory mandate.

I think the statute is pretty clear on its face and doesn't need particular elaborations.

QUESTION: Which particular words are you now relying on?

MR. KAPLAN: I'm referring, Your Honor, to the --

QUESTION: "Shall be unlawful to make public"?

MR. KAPLAN: I'm concerned with the disclosure prior to the filing of any proceeding under the title. I think that's where we are -- the thrust in this case is directed.

It seems to me that the language is sufficient to implement the policies that Congress intended to include in here. So I don't believe that there's an additional regulation that is essential here. I hope I haven't --

QUESTION: Well, now, specifically I gather that you think the provision in Regulation 1601.22 does not apply to "such earlier disclosures to charged employees" et cetera, is beyond the authority of the Commission under 709(e) or of 706(b)?

MR. KAPLAN: Yes, Your Honor. I don't think they have that right to carve out the exception. There has been no delegation by Congress for them to tamper with the statute in that regard. What they have done, if I just may continue one second, it seems to me, is carve out an exception and then legislate within it. And I think that's where they're at fault.

QUESTION: Going back to 709(e), would it not serve the purposes of the statute, that is, to protect against a general public disclosure, if the Commission provided in a rule or regulation that this early disclosure would be on condition that it's disclosed only to the party for the purposes of conciliation and could not be made public by that person? Would that not carry out the protective aspects of 709(e)?

MR. KAPLAN: I don't believe it would, Your Honor. I think that ultimately the charging party is in fact a member of the public and so that even the disclosure to him is

improper.

QUESTION: Of course, he's a member of the public but he's a member of the public different from all other members of the public in the sense that he claims to have a complaint and may have a valid complaint that calls for a remedy.

MR. KAPLAN: He may, he may not. It's a judgment, though, I think, that Congress has made in terms of what rights this person ought to have. And it has given him rather substantial rights. However, it has drawn a line at one place, and the line it has drawn is the filing of an action, as we read this statute. And thus to give him this disclosure before that occurs is simply not what Congress intended. If the EEOC has problems with this statute -- and from what, the comments of my learned opponent, he seems to suggest that they have, in terms of administering the statute -- the remedy does not lie to my mind in cutting statutory corners or, indeed, in asking the courts to approve this kind of shorthand approach.

Rather, it lies in going back to Congress and saying, we can't function under the rules that you've given us; do something else. And if they can persuade them, fine. If they can't, they will have to just live with the situation as it is. It seems to me that the charging party, though, as the EEOC has made clear, in fact is an agent of disclosure which is going to result in a general dissemination of information, and in fact he receives information from a variety of sources, even

looking at his own file, because there is commingling or consolidation which occurs in these cases.

I would like to just point out that there are other aspects of the statute which call attention to the distinct, intense, "had." I think reference was had earlier to the volitional element which I touched upon. Certainly no one compels a party to file a charge or engage in conciliation. As counsel has mentioned, there is some compulsory element in terms of investigative information, and Congress might properly take consideration of that in imposing a stricter limitation on the use of that information. That might be the case with 706-type information.

The duration of the ban on disclosure also suggests different purposes. Conciliation information which is traditional settlement type of information is put on a permanent ban. It cannot be used in litigation later on. I think this conforms to general understanding on settlement information throughout the law. On the other hand, investigative data which Congress recognized might be of use to the charging party, or indeed, essential in this Title VII suit, is made available once he files his action. I don't think it's too much to ask, or that it was arbitrary of Congress to impose the requirement at the filing of suit.

Finally, I would like to just address briefly some of the considerations of the EEOC in trying to justify

this rule. They say that these rules help their investigation or their conciliation. I think the statements in the rules themselves contain the negation of that argument. "The stated purpose of these rules is to cooperate with private Title VII litigants and to lend assistance in framing proper court complaints." I think that's as clear as can be. That has nothing to do with investigation, it has nothing to do with conciliation, it has to do with litigation. If that isn't clear enough, I think the reference to Kessler in the EEOC special disclosure rules furthers that conclusion.

"The charging party literally needs all the help he can get," said the Court in Kessler, in order to procure counsel, convince him that a right to action truly exists with evidence to support it, and to prepare and file suit within the statutory time period. This goes to litigation. It has nothing to do with the investigation or conciliatory functions. In fact, if it were investigation that the Commission were concerned with, why does it put a bar on the disclosure to employers, of the information in these files? And yet that prohibition is in the special disclosure rules.

Obviously, it's not concerned with having employers verify the statements of the complainants. In short, I really think these rules are going to harm these processes. As in this case, the employer knows this information is going to be turned over to his probable adversary. He's not going to be

willing to turn over vast amounts of employment data. Rather, what will probably happen is he'll sit back, wait for subpoena enforcement proceedings, and then in the context of those proceedings seek to get a protective order which he probably was entitled to under the statute in the first place.

Now, will the Commission get its data eventually through these court proceedings? In most cases I suspect it will; the definition of relevancy in investigations is quite broad. But in the meantime, what happens? There are long delays, there is needless expense, there is needless acrimony developed in terms of the administration, and meanwhile the charging party gets frustrated, says, this government agency is no better than any other I've dealt with, retains a private lawyer and files suit.

Now, that's not what Congress wanted in Title VII. It wanted the peaceful resolution of Title VII complaints through the agency's own processes, investigation, determination, conciliation, cooperation, conference, and persuasion.

QUESTION: And why aren't those purposes served by disclosure?

MR. KAPLAN: Because, Your Honor, the effect of the disclosures will be to impede the submission of the information to the Commission in the first place from the person who has it, the employer. Because he's going to be concerned, as Associated and Horne's were in this case, that that information

is going to be turned around and used against them in a lawsuit by that charging party. And let us remember, it is primarily the function of the Commission to enforce the law.

QUESTION: Well, very soon after that, the information is obtainable, is it not, and may be used against them by the charging party?

MR. KAPLAN: After suit is filed, Your Honor, it may be obtained and used. But this is again, as I pointed out, is essentially a congressional decision. There are lines drawn. It sometimes may seem a little arbitrary, I suppose, to the charging party, saying, I can't get it on the 179th day because that time limit hasn't expired but on day 181 all I have to do is march into the Commission office with a complaint saying "filed" on it, "U. S. District Court," and I can get the information.

But also, there is the fact that the employer can get protection through the courts by taking a hard line, essentially, in these proceedings, because he knows he's not going to get the protection from the Commission. So I'm not sure that this type of turnover facilitates the resolution of Title VII complaints in the manner that Congress intended.

Finally, I think that the section-by-section analysis of Title VII provides -- further supports the conclusion that Congress did not want this kind of disclosure. It states pretty clearly that recourse to the private lawsuit will be

the exception and not the rule, and that the vast majority of complaints will be handled through the offices of the EEOC.

So -- true -- Congress gave the EEOC additional some additional authority in 1972 to put some teeth into the statute. But its essential, overriding purpose remains the same. It wanted the Commission to resolve these complaints to the extent possible through its own offices rather than through private litigation. And the reason is quite clear. I think this Court has recognized in some of its earlier decisions, the Commission is a public agency acting in the public interest. It is not fundamentally concerned with the private interest of the private litigant and his narrow concerns. It is trying to achieve overall compliance with the law.

And it is important to further that interest. The rules are not calculated to do that. They are calculated to short circuit the statutory process, force complainants out of the administrative process and into private lawsuits, and impede the functions of the Commission as Congress intended them. For those reasons we ask that you affirm the decision of the Court of Appeals. Thank you.

MR. CHIEF JUSTICE BURGER: Thank you. Do you have anything further, Mr. Sullivan?

MR. SULLIVAN: I will be brief, Your Honor.

ORAL ARGUMENT OF BARRY SULLIVAN, ESQ.,

ON BEHALF OF THE PETITIONER -- REBUTTAL

MR. SULLIVAN: I would like first to comment on the possibility of a flood of litigation that will arise from the Court's upholding of the Commission's construction of the statute.

What I think is remarkable in this case is the fact that the Commission has been enforcing its understanding of the statute according to these regulations for the last 16 years, and as a matter of fact very, very few suits have been brought to resist the Commission's understanding of the statute.

QUESTION: You're saying that for these years they have been making this early disclosure?

MR. SULLIVAN: I'm sorry, Mr. Chief Justice?

QUESTION: For all these years, they've been making the early disclosure that's now prohibited?

MR. SULLIVAN: That's correct. True, and --

QUESTION: And no one has been prosecuted under the statute? Under 709(e) they would be subject to prosecution if --

MR. SULLIVAN: To my knowledge there have been no prosecutions under the statute. However, there has also been no flood of employer litigation going into court to try to stop the Commission from enforcing the statute in this way.

QUESTION: There are two or three. There's a decision of the Court of Appeals for the District of Columbia, isn't there, which says that the regulation is contrary

to 709(e).

MR. SULLIVAN: That's correct, Your Honor. That case --

QUESTION: If the law is against the Commission, why would anybody need to go any further?

MR. SULLIVAN: Well, that -- there are three cases, Your Honor. There are two cases which are against the Commission on defense on grounds that are not raised in this case.

QUESTION: So once you do it once successfully that's the end of it; that's what the law is in that Circuit.

MR. SULLIVAN: And in the 5th Circuit the law is to the contrary. However, those -- the decision of the Court of Appeals for the 7th Circuit in Burlington and the Court of Appeals for the District of Columbia Circuit are cases that, as we point out in our brief, distinguishable, and do not in any way relate to the precise issue that's involved here. those cases involved Commissioner charges. They did not involve single employee charges.

QUESTION: Mr. Sullivan, in any of these cases has the question ever arisen as to whether the employer has an implied private cause of action under the statute to institute litigation of this kind?

MR. SULLIVAN: I don't believe it has, Mr. Justice Stevens.

QUESTION: Does the Government concede there is such

an implied --

MR. SULLIVAN: Well, we have, we will concede for the purposes of this case that because jurisdiction hasn't been briefed, or the cause of action hasn't been briefed, we will concede that the court below had jurisdiction probably under a theory like Chrysler v. Brown, relying on the Administrative Procedure Act, and in general --

QUESTION: It is true that the exclusive provision in the statute relating to nondisclosure is a criminal penalty. That's -- it is using it basically. That's the only prohibition on the remedy as to --

MR. SULLIVAN: That's correct. However, I would assume that in an appropriate case this issue could be raised, as my opponent has said, in an action that the Commission might bring to enforce a subpoena.

QUESTION: But this was both a declaratory judgment action and resistance to a subpoena, wasn't it?

MR. SULLIVAN: That's correct, Mr. Justice Stevens.

QUESTION: Mr. Sullivan, would you look at the Joint Appendix at page 20 and help me a bit with the facts. Perhaps you'd better look first at page 19, which is an exhibit to the complaint? The interrogatory?

MR. SULLIVAN: Yes, Mr. Justice Powell.

QUESTION: Are they the interrogatories filed by the Commission?

MR. SULLIVAN: This is an attachment to the Exhibit A, I believe, which is on page 17 and page 18, and these are the questions that were initially asked by the Commission of Joseph Horne. Subsequently the questions were refined a bit and as they appear in the rider to the subpoena, they are reproduced at pages 40 through 42 of the Appendix.

QUESTION: Looking for the moment at the original ones, how many stores did those questions implicate? It says, list the number of stores. Then, for each attach a roster of each store having a tea room and food service. And then dropping on down to 17, a roster of all food service personnel. I think that goes back either to '71 or '69, with personnel information on each. And then in 19, it requires a very extensive disclosure, apparently of a host of people who weren't involved in any way as charging parties. Is that correct? And are we talking about hundreds of people, or dozens, or thousands, or what?

MR. SULLIVAN: Well, I haven't reviewed the materials that were actually produced in response to the subpoena so I'm not certain of what the answer actually is.

QUESTION: Would it make any difference whether there were two or three thousand people they wanted the records of?

MR. SULLIVAN: I'm sorry, I didn't hear the last question.

QUESTION: Would it make any difference as to whether the information that would be sought and ultimately, perhaps, reach the public included just the charging parties and with whom they worked, or perhaps several hundred or several thousand other employees?

MR. SULLIVAN: Well, I think that the answer in this case is that there are very few stores that are actually involved, but I'm not certain.

QUESTION: Apparently the Commission didn't know, because it asked the employer to list the number of stores the respondent has in Western Pennsylvania.

MR. SULLIVAN: That's correct.

QUESTION: So we don't know --

MR. SULLIVAN: We don't know.

QUESTION: -- the answer.

QUESTION: And we don't know how many people there are.

MR. SULLIVAN: We don't know how many people there are. However, I think that it's fair to say that in any Title VII case information has to be acquired concerning the whole class, whatever that relevant classification might be. It might be the members of a particular department in a department store such as the tea room, or it might be several tea rooms might be amalgamated under one administration in four stores. So that there's always the necessity for going beyond the

immediate facts that the charging party has raised. Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 2:57 o'clock p.m., the case in the above-entitled matter was submitted.)

CERTIFICATE

North American Reporting hereby certifies that the attached pages represent an accurate transcript of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

No. 79-1068

Equal Employment Opportunity Commission

v.

Associated Dry Goods Corporation

and that these pages constitute the original transcript of the proceedings for the records of the Court.

BY: William J. Wilson

William J. Wilson