IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF ALABAMA

SOUTHERN DIVISION

UNITED STATES OF AMERICA, by RAMSEY CLARK, Attorney General, Plaintiff, v. H. K. PORTER COMPANY, INC., a Corporation, Defendant.	CIVIL ACTION NO. 67-363 PLAINTIFF'S MEMORANDUM IN OPPOSITION TO MOTIONS OF DEFENDANT COMPANY

Plaintiff respectfully submits:

I. DEFENDANT'S MOTION TO DISMISS SHOULD BE DENIED.

Defendant company's motion to dismiss asserts eight grounds "separately and severally". These grounds fall into three general categories of assertions: (1) that the complaint fails to state a claim on which relief can be granted, (2) that the complaint contains "conclusionary averments" rather than facts, and (3) that the relief prayed for is not specifically alleged and is not authorized by the Civil Rights Act of 1964.

1. The complaint states a claim on which relief can be granted. The defendant company's motion to dismiss the complaint for failure to state a claim upon which relief can be granted "has the effect of admitting the existence and validity of the claim as stated, but challenges the right of the plaintiff to relief thereunder." Leimer v. State Mut. Life Assur. Co., 108 F. 2d 302, 305 (8 Cir. 1940). The complaint "should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

Here, however, the allegations of the complaint, taken as true for this purpose, clearly state a triable claim of violation of Title VII of the Civil Rights Act of 1964. The complaint alleges the Court's jurisdiction and alleges that the defendant company is an employer engaged in an industry affecting commerce within the meaning of the Act. Then the complaint states that the defendant company is engaged in a pattern and practice of discrimination in employment against Negroes on account of their race in four respects, any one of which, if proved, would entitle the plaintiff to relief. They are: (a) classifying departments and job categories in such a manner as to provide higher paying jobs for white persons and lower paying jobs for Negroes, (b) failing to provide opportunities for advancement to Negroes on the same basis as opportunities for advancement are provided to white persons, (c) assigning Negroes to jobs in limited promotion lines, and (d) limiting, segregating and classifying employees in such a manner as to

deprive or tend to deprive Negroes of employment opportunities or otherwise adversely affect their status on account of their race. Each one of the foregoing is an unlawful employment practice and a violation of Section 703(a) of the Act. The complaint alleges that the pattern and practice is of such a nature and is intended to deny Negroes the full exercise of rights secured to them by Title VII. Finally, the complaint prays for the relief authorized by the provisions of Section 707 of the Act for prevention of such unlawful employment practices.

2. The complaint complies with the provisions of Section 707 of the Civil Rights Act and of Rule 8 of the Federal Rules of Civil Procedure.

Section 707(a) of the Civil Rights Act of 1964 provides:

> Whenever the Attorney General has 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 title, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

Rule 8 of the Federal Rules of Civil Procedure provides:

> (a) CLAIMS FOR RELIEF. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim

showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

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(e) PLEADING TO BE CONCISE AND DIRECT; CONSISTENCY. (1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(f) CONSTRUCTION OF PLEADINGS. All pleadings shall be so construed as to do substantial justice.

As courts have held, it is the clear policy of the Federal Rules to provide for notice pleading, bringing cases to issue, and liberal use of discovery thereafter and before trial. In Conley v. Gibson, 355 U.S. 41, 46-47 (1957) the Supreme Court reversed the dismissal of a complaint filed pursuant to the Railway Labor Act, 45 U.S.C. § 151, by Negro railroad employees for declaratory judgment, injunction, and damages against the union. The complaint, as paraphrased by the Court, alleged "that the Union had failed to represent Negro employees equally and in good faith." To sustain the order of dismissal the defendant union argued that the complaint had failed to set forth specific facts to support its general allegations of discrimination. The Court stated:

> The decisive answer to this is that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is "a short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. The illustrative forms appended to the Rules plainly demonstrate this. Such simplified "notice pleading" is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the

> basis of both claim and defense and to define more darrowly the disputed facts and issues. Following the simple guide of Rule 8(f) that "all pleadings shall be so construed as to do substantial justice," we have no doubt that petitioners' complaint adequately set forth a claim and gave the respondents fair notice of its basis. The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits. Cf. Maty v. Grasselli Chemical Co., 303 U.S. 197.

The defendant company urges that Section 707(a) of the Civil Rights Act of 1964 is a "special pleading" statute by virtue of its language requiring that the complaint filed by the Attorney General set forth "facts pertaining to such pattern or practice". Defendant argues in effect that Congress intended by Section 707(a) to carve Rule 8 out of the Federal Rules of Civil Procedure in cases brought by the Attorney General under that section.

There is no evidence in the Act itself or in the legislative history of the Act which suggests such an intention on the part of Congress or which suggests any reason for such an interpretation of the Act.

In United States v. Building and Construction Trades Council of St. Louis, AFL-CIO, et al., No. 66C58, U.S. District Court, E.D. Mo., the defendants made the same motion the defendant company makes here, to dismiss the complaint on the ground that it did not "set forth facts pertaining to such pattern or practice" as required by Section 707(a). The court denied the motion and in an opinion dated July 26, 1966, stated, "Concerning the required allegation of facts, we find nothing in the language of the statute to indicate an intention to alter established rules of pleading. The prime

requirement is still notice, and the present complaint is more than adequate in this regard. Established courses of discovery are available to allow the defendants to determine the precise details of the alleged 'pattern or practice.'"

3. The relief prayed for is sufficiently specific and is authorized by the Civil Rights Act. Rule 8 of the Federal Rules of Civil Procedure requires the complaint to contain a demand for judgment for the relief to which the plaintiff deems himself entitled. Section 707(a) of the Civil Rights Act authorizes the Attorney General to request in his complaint "such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described." In the present complaint plaintiff requests the Court to enjoin the defendant from the following acts and omissions: (a) classifying departments and job categories in such a manner as to provide higher paying jobs for white persons and lower paying jobs for Negroes, (b) failing to provide opportunities for advancement to Negroes on the same basis as opportunities for advancement are provided to white persons, (c) assigning employees to jobs in promotion lines on the basis of race, (d) limiting, segregating, or classifying employees in such a manner as to deprive or tend to deprive Negroes of employment opportunities or otherwise adversely affecting their status on account of race, and (e) failing or refusing to take reasonable steps to correct the effects of the

defendant company's past pattern and practice of racial discrimination in employment against Negroes.

Neither Rule 8 nor Section 707(a) requires or intends the acts sought to be enjoined to be pleaded specifically or with the particularity on which defendant's motion insists. Under the rules the prayer for relief is not intended to frame precise factual issues. Nor can the decree of a court of equity be limited by the terms of the prayer for relief. As was stated in Nagler v. Admiral Corporation, 248 F.2d 319, 328 (2 Cir., 1957), "It is clear that it is the duty of the court to grant the relief which the facts before it require; the legal theories which the parties may have suggested or relied on may be of help to the court, but do not control. (Citing cases.)"

The defendant company states that Title VII does not "authorize" an injunction against the defendant's engaging in any racially discriminatory employment practice. But Section 707(a) authorizes the Attorney General to request "such relief" including an injunction "as he deems necessary to insure the full enjoyment of the rights herein described." The rights include the right to be free from the various types of racially discriminatory employment practices which are made unlawful by Section 703(a).

Further, where a statute expressly authorizes a court of equity to issue an injunction, restraining order, "or other order" in a proceeding involving the public interest, the court's power is not limited to those types of relief which are specifically mentioned in the language of the statute but extends to the full

exercise of equity jurisdiction as may be necessary to grant complete relief and fulfill the purposes of the legislation.

Thus, Title VII authorizes the court to grant all of the relief requested by the complaint and such other orders as the evidence may show are necessary to grant full relief in the present case.

II. DEFENDANT'S MOTION FOR MORE DEFINITE STATEMENT SHOULD BE DENIED.

The defendant company moves for a more definite statement of the facts pertaining to its pattern and practice of discrimination in employment, the facts "on which the plaintiff relies" as constituting the defendant's pattern and practice of discrimination, and the defendant's acts against which the plaintiff seeks relief. Rule 12(e)

of the Federal Rules of Civil Procedure permits a motion for more definite statement where a "pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading." But in the present case the complaint states the facts sufficiently to meet the notice requirements of Rule 8, the matters alleged are within the defendant company's knowledge, there is no reason why the defendant cannot prepare and file an answer responsive to the complaint, and the purpose of the motion is to obtain discovery of plaintiff's evidence without resort to the discovery rules. The motion should be denied.

The complaint states the following facts pertaining to defendant's pattern and practice of discrimination against Negroes in employment: (a) The defendant company classifies departments and job categories in such a manner as to provide higher paying jobs for white persons and lower paying jobs for Negroes. (b) The defendant company fails to provide opportunities for advancement to Negroes on the same basis as it provides opportunities for advancement to white persons. (c) The defendant company assigns Negroes to jobs in limited promotion lines. (d) The defendant company limits, segregates, and classifies employees in such a manner as to deprive or tend to deprive Negroes of employment opportunities or otherwise adversely affect their status on account of their race.

All of the foregoing facts are within the defendant company's knowledge. The company knows the departments and the job categories at its own mill. It knows which jobs are held by its white employees and which jobs are

held by its Negro employees. It knows the rate of pay earned by each employee of each race. The defendant company knows how each of its employees arrived at his current job. The company knows whether the white employees obtained higher paying jobs and Negro employees obtained lower paying jobs as a result of its own racial discrimination. Thus, the defendant company can determine from its own knowledge whether the allegation of sub-paragraph (a) of paragraph 5 of the complaint is true and the defendant can draft its answer to that sub-paragraph accordingly.

The defendant can make a similar analysis of the facts alleged in each of the other sub-paragraphs (b), (c), and (d) of paragraph 5 and each of the other paragraphs of the complaint, drawing where necessary on facts contained in documents in its own office files or on facts within the knowledge of its own management, supervisory personnel, and other employees, to arrive at an answer which either admits or denies every allegation of the complaint.

Motions for more definite statement, like motions to strike, are not favored.

> Motions to strike and motions for a more definite statement are not generally favored in current Federal practice, in view of the availability of a variety of pretrial discovery procedures, and are rarely granted. Shore v. Cornell Dubilier Electric Corp., 33 F.R.D. 5 (D. Mass. 1963)

In Mitchell v. E-Z Way Towers, Inc., 269 F. 2d 126 (5 Cir. 1959) the Secretary of Labor filed a complaint against an employer alleging a violation of the Fair Labor Standards Act. The defendant moved to dismiss and for a more definite statement. The district court

dismissed the case. In reversing, the court of appeals considered not only the order of dismissal but also the ruling which would be required on defendant's motion for a more definite statement after remand. In its opinion the court stated:

> Upon the filing of a suit seeking an injunction, of course, the filing of defensive pleadings is essential to the Trial Court's fair consideration of the motion for preliminary injunction. Moreover, there are doubtless many cases which, because of its possession of the records of employment and payrolls and knowledge of its own operations, the defendant in the good faith required by the signing and filing of pleadings, F.R. Civ. P. 11, must admit coverage or violations or both. Upon such admission, of course, the likelihood of the issuing of a preliminary injunction or suitable declaratory order is greatly enhanced. If the time for filing defensive pleadings can be put off, as follows from the filing of a motion for more definite statement, any violations, if such exist, can continue without any effective protection for the employee so much the longer. And in any case, the time of likely trial will be postponed since most trial courts fix dockets on the basis of the case being at issue.
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> In such a situation it becomes important that great care must be used in passing on a motion for definite statement. In view of the great liberality of F.R. Civ. P. 8, permitting notice pleading, it is clearly the policy of the Rules that Rule 12(e) should not be used to frustrate this policy by lightly requiring a plaintiff to amend his complaint which under Rule 8 is sufficient to withstand a motion to dismiss. It is to be noted that a motion for more definite statement is not to be used to assist in getting the facts in preparation for trial as such. Other rules relating to discovery, interrogatories and the like exist for this purpose. Of course, the filing of defensive pleadings is not postponed by proceeding under these other rules.
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> Now, as to the application of the Rule to the case before us. We have the complete records; we have the complaints, essential features of which are set out in this opinion; we find no statement or testimony adduced on the hearing on the motion to indicate why the defendants, from their knowledge of their own records and payrolls as well as their operations, would

> be unable to either admit or deny the allegations concerning coverage and violations. On the record, there is nothing for the Trial Court's discretion to operate on. It is too plain to require elaboration that if the defendants did not in good faith believe that they had violated the act, or that their operations were subject, in whole or in part to the Act, they could say so by denying the allegations in the complaint, and an issue would be drawn. The same would be true if they entertained a genuine doubt whether from uncertainty in the interpretation of the law or the underlying facts as to coverage of one or more employees, or compliance either with record keeping or payment of requisite wages. More especially if they believed they had violated the Act they could say so, and they should be required to do so. As to any specific cases as to which the Secretary contended there was coverage and had been violations which the defendants wished to get further information about, they would have ample opportunity to follow Rules 26-37 for discovery. It was just detained evidentiary information which defendants sought in their motions, see note 3, supra (especially par. 2(a), (b) and par. (a)(b) of the prayer). This evidentiary detail was neither a proper part of the complaint under F.R. Civ. P. 8 nor was it needed to frame a response under Rule 12(e).

Similarly, in the present case the defendant company's motion, if granted, would require the plaintiff to plead evidence in spite of the clear policy of the Federal Rules to the contrary. Paragraph 2 of the defendant's motion for a more definite statement of the "fact or facts on which the plaintiff relies" makes clear the intended effect of the motion, to discover evidence through pleadings, rather than through the regular discovery procedures provided by the Rules.

III. DEFENDANT'S MOTION TO DISMISS FOR FAILURE TO JOIN PARTIES SHOULD BE DENIED.

Defendant's motion to dismiss for failure to join parties mistakes the subject matter of this case and the action to be taken by the court if it finds that either United Steelworkers of America, AFL-CIO, or Local Union No. 2250 is an indispensable party.

The subject of this action is the defendant company's violation of a duty not to discriminate in employment against a class of individuals because of their race or color. Therefore, as to the gravamen of the complaint, the unions are not indispensable parties. Cf. National Licorice Co. v. National Labor Relations Board, 309 U.S. 350, 362-363 (1940) and Conley v. Gibson, 355 U.S. 41 (1947). The company is independently liable for violations of its statutory obligation under Section 703 (a). The union's obligation arises out of Section 703 (c). The complaint alleges discrimination by the defendant company. The plaintiff has made no such allegations against either union and has none to make on the basis of presently available information.

The defendant company has raised an argument to the effect that the complete relief necessary to remedy the company's violation of Title VII cannot be granted without affecting the unions' interests. That argument rests on matters which are within the defendant company's knowledge. The nature of the relief required to remedy the discrimination and the extent to which such relief would involve the interests of one or both of the unions are based on facts available to the defendant company,

as the company has demonstrated by filing part of its agreement with the unions as Exhibit A in support of its motion. (We have moved in paragraphs 8 and 9 of our Rule 34 motion for the right to inspect the rest of the agreement.)

However, even if one or both of the unions were to be found indispensable to this case under Rule 19 of the Federal Rules of Civil Procedure, that Rule does not require dismissal of the complaint (either with or without leave being granted to the plaintiff to amend) as a result. Instead, the organization in question should become a party on the court's order. This procedure is implied by the provisions of Rules 19 and 21 and is reasonable in view of the circumstances which would arise if the complaint were dismissed.

Rule 19 (a) provides, if an indispensable party has not been joined in the action, "the court shall order that he be made a party." Rule 21 provides:

> MISJOINDER AND NON-JOINDER OF PARTIES
> Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

No pleadings should be required as between any party previously in the case and any new party added pursuant to Rule 19 and an order of the Court is all that is necessary.

The alternative, dismissal of the complaint with leave to amend, would delay bringing the case to issue between the original parties. It would require the plaintiff

to file an amended complaint naming as defendant one or more parties against whom the plaintiff has made no allegations of discrimination. Such a pleading would create no issues between the plaintiff and the new parties. It almost certainly would generate a motion on their part to dismiss for failure to state a claim (as occurred in this Court previously in the private suit, Muldrow v. H. K. Porter Co., Inc.). There is no provision of the Rules which suggests the correct disposition of that motion. Under the Rules the occasion for such a motion should never arise.

The defendant company's motion to dismiss for failure to join parties should be denied.

IV. DEFENDANT'S MOTION FOR COSTS SHOULD BE DENIED.

Defendant's various motions to dismiss and for a more definite statement should be denied, and the defendant company should be required to answer. Accordingly, its motion under the provision of Title VII allowing costs to a "prevailing party" also should be denied. Defendant's motion for costs anticipates a final disposition of the case and is premature at best.

MACON L. WEAVER
United States Attorney

DAVID L. NORMAN

THOMAS R. EWALD

BARRY H. WEINBERG
Attorneys
Department of Justice

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Plaintiff's Memorandum in Opposition to Motions of Defendant Company has been served by official United States air mail, postage prepaid, to Defendant's Attorneys of Record as shown below, on this the 25th day of July, 1967.

Attorneys for Defendant:

Lucien D. Gardner Jr.
William F. Gardner
Cabaniss, Johnston, Gardner & Clark
First National Bank Building
Birmingham, Alabama 35203

DAVID L. NORMAN
Attorney
Department of Justice
Washington, D.C. 20530