IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF GEORGIA
(ATLANTA DIVISION)

Civil Action No. 10309

CURTIS OTIS REESE, for
himself and all other
persons similarly situated,

Plaintiff

v.

ATLANTIC STEEL COMPANY,
a corporation, et al.,

Defendants

BRIEF IN SUPPORT OF MOTION TO DISMISS OF DEFENDANTS, UNITED STEELWORKERS OF AMERICA, AFL-CIO AND LOCAL NO. 2401 OF UNITED STEELWORKERS OF AMERICA

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I.

This brief is submitted in support of the Motion to Dismiss filed by the union defendants. Our pleading is designed to raise important questions going to (1) the initial jurisdiction of the court over the subject matter at this stage, and (2) the relation of national labor policy to litigation such as the present arising under the Civil Rights Act. (Herein referred to as the "Act.")

We are exploring new ground with respect to the necessity for, and form of compliance with the requirements of the Act, in particular § 706 (e), before suit may be filed. It is obvious, however, that Congress attributed considerable importance to the utilization of conciliation and voluntary compliance in advance of formal suit.[1] Once the Commission has found reasonable cause to believe a charge is true, the Commission is <u>required</u> to initiate

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1 Section 706(e) is not the only provision of the Act concerned with compliance without legal proceedings. A community relations service was also established in the Department of Commerce (Title X). Its major function is to facilitate voluntary compliance with the Act's provisions.

conciliation proceedings. If the Commission fails, within the statutory period, to arrange voluntary compliance, notice is given the alleged discriminatee. And then within thirty days after such notice, the aggrieved person may file his suit. Not before.

Until these steps have been taken; until the Commission has made its investigation of a charge, has determined that there is probable cause, has attempted and has failed to secure voluntary compliance with notice to the person aggrieved--the right to bring a civil rights case against the respondent named in the charge simply has not arisen. Jurisdiction in this court has not attached.

II.

In this complaint there is a total failure to allege facts to indicate that these jurisdictional requirements have been met. Indeed, it is the position of these defendants that such an allegation, even if made, could not be proved.

No allegation of timely filing after attempted conciliation was made in the complaint because no such conciliation was in fact had.

III.

It is our position that this action is defective in its present posture and should accordingly be dismissed for the following reasons:

First: The conciliation step to be taken by the Commission is a prerequisite to the institution of a civil action under the Act, and this action was brought without there having been any conciliation.

Second: The action was not filed within the time periods provided by the Act.

Third: The plaintiff has not exhausted the remedies available under the Union contract.

The legislative history of the procedural provisions of Title VII:

Since the defects in this case result from non-compliance with the procedural provisions of Title VII, it would be in order at the outset to discuss the legislative history of these provisions which govern the procedure before the Equal Employment Opportunity Commission and in the District

Courts.[2]

For the Court's convenient reference, we are attaching to this brief copies of the procedural provisions of the bills involved in the legislative history, these being as follows:

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2 The legislative history is discussed generally in the following sources:

House Report No. 914 on H.R. 7152 and Additional Views Thereto. 2 U.S. Code Cong. & Adm. News, 88th Cong., 1st Sess., pages 2391 et seq. (1963).

Michael I. Sovern, Legal Restraints on Racial Discrimination in Employment, pp. 61-62 (1966).

Richard K. Berg, Equal Employment Opportunity Under Civil Rights Act of 1964, 31 Brooklyn L. Rev. 62 (1964).

Francis J. Vaas, Title VII: Legislative History, 7 Boston Coll. Ind. & Comm. L. Rev. 431 (1966).

The Civil Rights Act of 1964 (BNA 1964).

Appendix A: H. R. 405, the Roosevelt bill.

Appendix B: H. R. 7152, the Administration bill as introduced.

Appendix C: H. R. 7152 as reported by the House Judiciary Committee.

Appendix D: The Mansfield-Dirksen compromise.

This legislative history begins on the opening day of the First Session of the 88th Congress in 1963 when Representative Roosevelt introduced H. R. 405, which dealt only with the subject of discrimination in employment and is generally known as "the nominal ancestor of Title VII."[3] This bill, as introduced and as reported by the House Education and Labor Committee, proposed to have the Commission perform the conciliation function and, if conciliation failed, adjudicate the matter through the holding of an administrative hearing.[4]

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3. 7 Boston Coll. Ind. & Comm. L. Rev. at 433.

4. House Report No. 570 on H. R. 405, 88th Cong., 1st Sess. (1963).

During the same Session, Representative Celler introduced H. R. 7152, which was the omnibus civil rights bill proposed by the Administration. This bill was referred to the House Judiciary Committee, of which Representative Celler was Chairman, and was under consideration there at the time that the House Labor Committee reported the Roosevelt bill.

The provisions of the Administration bill dealt with employment only to the extent of giving statutory authorization to President Kennedy's Executive Order applicable to discrimination in employment by Government contractors. Then, during the hearings on this Administration bill, Representative Roosevelt appeared as a witness and suggested that the Judiciary Committee should incorporate "into the omnibus civil rights bill the provisions of H. R. 405."[5]

This procedure was followed. The Subcommittee of the Judiciary Committee deleted the employment title of the Administration bill and inserted in its place the Roosevelt bill as

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5. Civil Rights Hearings before Subcommittee No. 5 of the House Committee on the Judiciary, 88th Cong., 1st Sess., at pages 2282-2290.

reported by the House Labor Committee.

However, the full Judiciary Committee did not adopt the Roosevelt bill's procedure of having the Commission adjudicate cases itself for the reason - as explained in the additional views to its Report - that "a substantial number of committee members preferred that the ultimate determination of discrimination rest with the Federal judiciary."[6] The Judiciary Committee instead adopted the procedure of having the Commission first perform the conciliation function and then, if conciliation failed, bring a civil action in the District Court. The bill as written by the Judiciary Committee provided further that if the Commission failed or declined to bring such civil action, the charging party could, with the permission of one member of the Commission, bring the civil action himself.

The bill was then reported to the House by the Judiciary Committee. There, following the debates and amendments, one of which is of considerable importance to this case - the bill was passed in February of 1964.

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6. Additional Views to House Report No. 914. 2 U.S. Code Cong. & Adm. News at page 2515.

It then entered the Senate. When the preliminary battle over the effort to refer the bill to Senator Eastland's Judiciary Committee was ended, the long debate began and continued until the votes necessary to invoke cloture were obtained by the bipartisan compromise offered by Senator Dirksen on behalf of himself and Senators Mansfield, Humphrey, and Kuchel.[7]

This compromise effected several modifications in the procedural provisions of the bill as passed by the House, these being as follows:

(1) The provision of the House bill for filing a charge with the Commission "on behalf of" a person claiming to be aggrieved was deleted.

(2) The provision of the House bill for the determination of reasonable cause preliminary to the conciliation step being made by "two or more members of" the Commission was deleted.

(3) There was added to the bill language to insure that the filing of a charge with the Commission and the conciliation process would be confidential.

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7. 110 Cong. Record 11926 (May 26, 1964). The cloture vote came on June 10.

(4) A section was added to provide for deferment by the Commission to the procedures of the State fair employment statutes and for charging parties to proceed first through the State procedures.

(5) The plaintiff in the civil action to be brought in the District Court if the Commission is not able to conciliate the charge was changed from the Commission to the charging party.

(6) The venue provisions were revised.

The bill was then passed by the Senate in June of 1964, agreed to by the House, and enacted as the Title VII provisions of the Act.

<u>The sequence of the procedural steps provided by the Act and in this case:</u>

The procedural steps which are established by the provisions of Title VII are as follows:

(1) The filing of the charge with the Commission within 90 days of the alleged unlawful employment practice.

(2) The investigation of the charge by the Commission.

(3) If it determines by such investigation that there is reasonable cause, "the Commission shall endeavor to eliminate any such alleged unlawful practice by informal methods of conference, conciliation, and persuasion."

(4) If the Commission has not been able to secure voluntary compliance by means of the conciliation step within 60 days after the charge was filed, it is then to so notify the charging party.

(5) The charging party may then institute a civil action in the District Court "within 30 days thereafter."

The sequence of events in this case, however, so far as we are informed, complied with neither the conciliation step nor the time periods provided by the Act.

The facts are that there was no conciliation at all at any time, not within the 60 day period, not thereafter, and not when this action was brought. We would not expect there to be any dispute about this fact, but if there should be, we are certainly ready to submit affidavits.

The fact is that we received our notice to sue — conciliation is secret. His quarrel is with EEOC not with us.

The complaint was filed in this Court on July 22, 1966 without there having been any effort at conciliation by the Commission.

<u>The emphasis in Congress on the importance of conciliation before the institution of a civil action:</u>

The intention that the conciliation step would be a

prerequisite to the institution of a civil action is further established through the very substantial and repeated emphasis that the Committee Report and the explanations of the bills in Congress placed on the importance of conciliation prior to the court action.

This was emphasized in the House even before the Celler amendment's deletion of the "in advance thereof" clause. For example, the Report of the House Education and Labor Committee on the Roosevelt bill stated that:

> "It is the intent of the Committee that maximum efforts be concentrated on informal and voluntary methods of eliminating unlawful employment practices before commencing formal procedures. Emphasis should be placed upon conference, conciliation, and persuasion throughout the proceeding with a view toward reaching a mutually satisfactory agreement for eliminating unlawful employment practices. Formal proceedings leading toward an order of the Commission should be pursued only when informal methods fail or appear futile." House Report No. 570 on H. R. 405, 88th Cong., 1st Session (1963).

Pre- private enforcement Then had public enforcement

Similarly, Representative Lindsay of the Judiciary Committee which reported the bill explained that the conciliation

step was designed to afford "due protection" to persons against whom charges were filed:

> "I hope Members will take the trouble to study title VII with some care, particularly the procedures that are spelled out at page 74 of the committee print. The procedures are carefully spelled out . . . in the event that there is a charge of discriminatory practices in a labor union, in an employment agency, or in management. Those procedures are designed to give due protection to everyone. <u>They command that there first be voluntary procedures</u>." 110 Cong. Record 1638 (February 1, 1964). (Emphasis Supplied)

At another point in the House consideration, Representative Lindsay had this to say in discussing the procedure before the Commission:

> "The order of progression is as follows: First is the charge . . . Then there may follow an investigation. The third step. . . sets in motion conciliation procedures . . . It is called voluntary compliance . . . unless this voluntary procedure is complied

with nothing further can happen." 110 Cong. Record 2565 (February 8, 1964).

This purpose of providing protection against the institution of a civil action without the opportunity for conciliation was reiterated when a Congressman questioned the reason for providing for conciliation by the Commission and was answered as follows:

> "Would the gentleman rather have a procedure where a majority of the Commission immediately may determine whether to take an employer into court, file a complaint and go into court?" 110 Cong. Record 2565 (February 8, 1964).

The legislative history in the Senate is equally emphatic that a civil action would not be brought before the Commission's conciliation step, and this was so both before and after the Mansfield-Dirksen compromise.

Senators Case and Clark were the floor managers of the Title VII sections of the bill, and Senator Case explained the relationship of the Commission's conciliation function to the institution of a civil action as follows:

"It is only after the methods of persuasion, conciliation, and sweetness fail that it is possible for the Commission to bring an action, which it must do de novo." 110 Cong. Record 7254 (April 8, 1964).

<u>The importance of conciliation as a prerequisite to the institution of a civil action</u>:

The reasons that the conciliation step was intended as a prerequisite to the institution of a court action are by no means merely technical. There are eminently practical and quite important reasons that a court action should not be brought until after there has been conciliation, and the legislative history shows that Congress was well aware of these reasons:

To begin with, both the filing of a charge and the conciliation step are confidential, and the Act is most careful to so insure in providing, in Section 706 (a), that "such charge shall not be made public by the Commission . . . Nothing said or done during and as part of such endeavors may be made public by the Commission without the written consent of the parties, or used as evidence in a subsequent proceeding." It was likewise emphasized in the Senate that "the

conciliation efforts must be conducted in confidence and not even the charge against the employer may be made public."[7] How is the π to know what to do or when to sue?

On the other hand, however, there is most assuredly nothing confidential about the filing of a lawsuit under the Civil Rights Act.

Obviously, therefore, having the conciliation step as a prerequisite to the institution of an action provides the assurance that the charged parties will have the opportunity to avoid both the publicity and expense of becoming defendants in a court action under Title VII.

The legislative intent that the Commission's conciliation step would be taken prior to the institution of a civil action is further evidenced in the provision of Section 706(e) which authorizes the Court to "stay further proceedings, for not more than

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7 Memorandum by staff member of the Senate Judiciary Committee at 110 Cong. Record 14331 (June 18, 1964).

APPENDIX B

H. R. 7152, The Administration

bill, as introduced.

employment practice, the Commission shall state its findings of fact and shall issue and cause to be served on such person and other parties an order requiring such person to cease and desist from such unlawful employment practice and to take such affirmative action, including reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the discrimination), as will effectuate the policies of the Act: *Provided*, That interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. Such order may further require such respondent to make reports from time to time showing the extent to which it has complied with the order. If the Commission shall find that the respondent has not engaged in any unlawful employment practice, the Commission shall state its findings of fact and shall issue and cause to be served on such person and other parties an order dismissing the complaint.

(k) Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the case may at any time be ended by agreement between the parties, approved by the Commission, for the elimination of the alleged unlawful employment practice on mutually satisfactory terms, and the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(l) The proceedings held pursuant to this section shall be conducted in conformity with the standards and limitations of section 5, 6, 7, 8, and 11 of the Administrative Procedure Act.

JUDICIAL REVIEW

SEC. 10. (a) The Commission shall have power to petition any United States Court of Appeals or, if the court of appeals to which application might be made is in vacation, any district court within any circuit or district, respectively, wherein the unlawful employment practice in question occurred, or wherein the respondent resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court to which petition is made a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and the order of the Commission. Upon such filing, the court shall conduct further proceedings in conformity with the standards, procedures, and limitations established by section 10 of the Administrative Procedure Act.

(b) Upon such filing the court shall cause notice thereof to be served upon such respondent and thereupon shall have jurisdiction of the proceeding and of the question determined therein and shall have power to grant such temporary relief or restraining order as it deems just and proper and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Commission.

(c) No objection that has not been urged before the Commission, its member, or agent shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.

(d) The findings of the Commission with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.

(e) If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Commission, its member, or agent, the court may order such additional evidence to be taken before the Commission, its member, or agent, and to be made a part of the transcript.

(f) The Commission may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and its recommendations, if any, for the modification or setting aside of its original order.

(g) The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals, if application was made to the district

Sec. 507. Section 105 of the Civil Rights Act of 1957 (42 U.S.C. 1975d; 71 Stat. 636), as amended by section 401 of the Civil Rights Act of 1960 (42 U.S.C. 1975d(h); 74 Stat. 89), is further amended by adding a new subsection at the end to read as follows:

"(i) The Commission shall have the power to make such rules and regulations as it deems necessary to carry out the purposes of this Act."

TITLE VI—NONDISCRIMINATION IN FEDERALLY ASSISTED PROGRAMS

Sec. 601. Notwithstanding any provision to the contrary in any law of the United States providing or authorizing direct or indirect financial assistance for or in connection with any program or activity by way of grant, contract, loan, insurance, guaranty, or otherwise, no such law shall be interpreted as requiring that such financial assistance shall be furnished in circumstances under which individuals participating in or benefiting from the program or activity are discriminated against on the ground of race, color, religion, or national origin or are denied participation or benefits therein on the ground of race, color, religion, or national origin. All contracts made in connection with any such program or activity shall contain such conditions as the President may prescribe for the purpose of assuring that there shall be no discrimination in employment by any contractor or subcontractor on the ground of race, color, religion, or national origin.

TITLE VII—COMMISSION ON EQUAL EMPLOYMENT OPPORTUNITY

Sec. 701. The President is authorized to establish a Commission to be known as the "Commission on Equal Employment Opportunity," hereinafter referred to as the Commission. It shall be the function of the Commission to prevent discrimination against employees or applicants for employment because of race, color, religion, or national origin by Government contractors and subcontractors, and by contractors and subcontractors participating in programs or activities in which direct or indirect financial assistance by the United States Government is provided by way of grant, contract, loan, insurance, guaranty, or otherwise. The Commission shall have such powers to effectuate the purposes of this title as may be conferred upon it by the President. The President may also confer upon the Commission such powers as he deems appropriate to prevent discrimination on the ground of race, color, religion, or national origin in Government employment.

Sec. 702. The Commission shall consist of the Vice President, who shall serve as Chairman, the Secretary of Labor, who shall serve as Vice Chairman, and not more than fifteen other members appointed by and serving at the pleasure of the President. Members of the Commission, while attending meetings or conferences of the Commission or otherwise serving at the request of the Commission, shall be entitled to receive compensation at a rate to be fixed by it but not exceeding $75 per diem, including travel time, and while away from their homes or regular places of business they may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by section 73b-2 of title 5 of the United States Code for persons in the Government service employed intermittently.

Sec. 703. (a) There shall be an Executive Vice Chairman of the Commission who shall be appointed by the President and who shall be ex officio a member of the Commission. The Executive Vice Chairman shall assist the Chairman, the Vice Chairman, and the members of the Commission and shall be responsible for carrying out the orders and recommendations of the Commission and for performing such other functions as the Commission may direct.

(b) Section 106(a) of the Federal Executive Pay Act of 1956, as amended (5 U.S.C. 2205(a)), is further amended by adding the following clause thereto:

"(52) Executive Vice Chairman, Commission on Equal Employment Opportunity."

(c) The Commission is authorized to appoint, subject to the civil service laws and regulations, such other personnel as may be necessary to enable it to carry out its functions and duties, and to fix their compensation in accordance with the Classification Act of 1949, and is authorized to procure services as authorized by section 14 of the Act of August 2, 1946 (60 Stat. 810; 5 U.S.C. 55a), but at rates for individuals not in excess of $50 a day.

APPENDIX C

H. R. 7152, as reported by the House Judiciary Committee

organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

(b) It shall be an unlawful employment practice for an employer, labor organization, or employment agency to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer or membership in such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on race, color, religion, or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion when religion is a bona fide occupational qualification for employment.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

SEC. 706. (a) There is hereby created a Commission to be known as the Equal Employment Opportunity Commission, which shall be composed of five members, not more than three of whom shall be members of the same political party, who shall be appointed by the President by and with the advice and consent of the Senate. One of the original members shall be appointed for a term of one year, one for a term of two years, one for a term of three years, one for a term of four years, and one for a term of five years, beginning from the date of enactment of this title, but their successors shall be appointed for terms of five years each, except that any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed. The President shall designate one member to serve as Chairman of the Commission, and one member to serve as Vice Chairman. The Chairman shall be responsible on behalf of the Commission for the administrative operations of the Commission, and shall appoint, in accordance with the civil service laws, such officers, agents, attorneys, and employees as it deems necessary to assist it in the performance of its functions and to fix their compensation in accordance with the Classification Act of 1949, as amended. The Vice Chairman shall act as Chairman in the absence or disability of the Chairman or in the event of a vacancy in that office.

(b) A vacancy in the Commission shall not impair the right of the remaining members to exercise all the powers of the Commission and three members thereof shall constitute a quorum.

(c) The Commission shall have an official seal which shall be judicially noticed.

(d) The Commission shall at the close of each fiscal year report to the Congress and to the President concerning the action it has taken; the names, salaries, and duties of all individuals in its employ and the moneys it has disbursed; and shall make such further reports on the cause of and means of eliminating discrimination and such recommendations for further legislation as may appear desirable.

(e) Each member of the Commission shall receive a salary of $20,000 a year, except that the Chairman shall receive a salary of $20,500.

(f) The principal office of the Commission shall be in the District of Columbia, but it may meet or exercise any or all of its powers at any other place. The Commission may establish such regional offices as it deems necessary, and shall establish at least one such office in each of the major geographical areas of the United States, including its territories and possessions.

(g) The Commission shall have power—

(1) to cooperate with and utilize regional, State, local, and other agencies, both public and private, and individuals;

(2) to pay to witnesses whose depositions are taken or who are summoned before the Commission or any of its agents the same witness and mileage fees as are paid to witnesses in the courts of the United States;

(3) to furnish to persons subject to this title such technical assistance as they may request to further their compliance with this title or an order issued thereunder;

(4) upon the request of any employer, whose employees or some of them refuse or threaten to refuse to cooperate in effectuating the provisions of this title, to assist in such effectuation by conciliation or other remedial action;

(5) to make such technical studies as are appropriate to effectuate the purposes and policies of this title and to make the results of such studies available to interested governmental and nongovernmental agencies.

(h) Attorneys appointed under this section may, at the direction of the Commission, appear for and represent the Commission in any case in court.

(i) The Commission shall, in any of its educational or promotional activities, cooperate with other departments and agencies in the performance of such educational and promotional activities.

PREVENTION OF UNLAWFUL EMPLOYMENT PRACTICES

SEC. 707. (a) Whenever it is charged in writing under oath by or on behalf of a person claiming to be aggrieved, or a written charge has been filed by a member of the Commission (and such charge sets forth the facts upon which it is based) that an employer, employment agency, or labor organization has engaged in an unlawful employment practice, the Commission shall furnish such employer, employment agency, or labor organization (hereinafter referred to as the "respondent") with a copy of such charge and shall make an investigation of such charge. If two or more members of the Commission shall determine, after such investigation, that reasonable cause exists for crediting the charge, the Commission shall endeavor to eliminate any such unlawful employment practice by informal methods of conference, conciliation, and persuasion and, if appropriate, to obtain from the respondent a written agreement describing particular practices which the respondent agrees to refrain from committing. Nothing said or done during and as a part of such endeavors may be used as evidence in a subsequent proceeding.

(b) If the Commission has failed to effect the elimination of an unlawful employment practice and to obtain voluntary compliance with this title, or in advance thereof if circumstances warrant, the Commission, if it determines there is reasonable cause to believe the respondent has engaged in, or is engaging in, an unlawful employment practice, shall, within ninety days, bring a civil action to prevent the respondent from engaging in such unlawful employment practice, except that the Commission shall be relieved of any obligation to bring a civil action in any case in which the Commission has, by affirmative vote, determined that the bringing of a civil action would not serve the public interest.

(c) If the Commission has failed or declined to bring a civil action within the time required under subsection (b), the person claiming to be aggrieved may, if one member of the Commission gives permission in writing, bring a civil action to obtain relief as provided in subsection (e).

(d) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this title. Such actions may be brought either in the judicial district in which the unlawful employment practice is alleged to have been committed or in the judicial district in which the respondent has his principal office. No such civil action shall be based on an unlawful employment practice occurring more than six months prior to the filing of the charge with the Commission and the giving of notice thereof to the respondent, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the Armed Forces, in which event a period of military service shall not be included in computing the six-month period.

(e) If the court finds that the respondent has engaged in or is engaging in an unlawful employment practice charged in the complaint the court may enjoin the respondent from engaging in such unlawful employment practice, and shall order the respondent to take such affirmative action, including reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), as may be appropriate. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled or was refused employment or advancement or was suspended or discharged for cause.

(f) In any case in which the pleadings present issues of fact, the court may appoint a master and the order of reference may require the master to submit with his report a recommended order. The master shall be compensated by the United States at a rate to be fixed by the court, and shall be reimbursed by the United States for necessary expenses incurred in performing his duties under this section. Any court before which a proceeding is brought under this section shall advance such proceeding on the docket and expedite its disposition.

(g) The provisions of the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other

purposes," approved March 23, 1932 (29 U.S.C. 101-115), shall not apply with respect to civil actions brought under this section.

(k) In any action or proceeding under this title the Commission shall be liable for costs the same as a private person.

EFFECT ON STATE LAWS

SEC. 708. (a) Nothing in this title shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title.

(b) Where there is a State or local agency which has effective power to eliminate and prohibit discrimination in employment in cases covered by this title, and the Commission determines the agency is effectively exercising such power, the Commission shall seek written agreements with the State or local agency under which the Commission shall refrain from bringing a civil action in any cases or class of cases referred to in such agreement. No person may bring a civil action under section 707(c) in any cases or class of cases referred to in such agreement. The Commission shall rescind any such agreement when it determines such agency no longer has such power, or is no longer effectively exercising such power.

INVESTIGATIONS, INSPECTIONS, RECORDS

SEC. 709. (a) In connection with any investigation of a charge filed under section 707, the Commission or its designated representative may gather data regarding the practices of any person and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as may be appropriate to determine whether the respondent has committed or is committing an unlawful employment practice, or which may aid in the enforcement of this title.

(b) With the consent and cooperation of State and local agencies charged with the administration of State fair employment practices laws, the Commission may, for the purpose of carrying out its functions and duties under this title and within the limitation of funds appropriated specifically for such purpose, utilize the services of State and local agencies and their employees and, notwithstanding any other provision of law, may reimburse such State and local agencies and their employees for services rendered to assist the Commission in carrying out this title.

(c) Every employer, employment agency, and labor organization subject to this title shall (1) make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed, (2) preserve such records for such periods, and (3) make such reports therefrom, as the Commission shall prescribe by regulation or order as reasonable, necessary, or appropriate for the enforcement of this title or the regulations or orders thereunder. The Commission shall, by regulation, require each employer, labor organization, and joint labor-management committee subject to this title which controls an apprenticeship or other training program to maintain such records as are reasonably necessary to carry out the purpose of this title, including, but not limited to, a list of applicants who wish to participate in such program, including the chronological order in which such applications were received, and shall furnish to the Commission, upon request, a detailed description of the manner in which persons are selected to participate in the apprenticeship or other training program. Any employer, employment agency, labor organization, or joint labor-management committee which believes that the application to it of any regulation or order issued under this section would result in undue hardship it may (1) apply to the Commission for an exemption from the application of such regulation or order, or (2) bring a civil action in the United States district court for the district where such records are kept. If the Commission or the court, as the case may be, finds that the application of the regulation or order to the employer, employment service, or labor organization in question would impose an undue hardship, the Commission or the court, as the case may be, may grant appropriate relief.

INVESTIGATORY POWERS

SEC. 710. (a) For the purposes of any investigation provided for in this title, the provisions of sections 9 and 10 of the Federal Trade Commission Act of September 16, 1914, as amended (15 U.S.C. 49, 50), are hereby made applicable to the jurisdiction, powers, and duties of the Commission, except that the provisions of section 307 of the Federal Power Commission Act shall apply with respect to

APPENDIX D

The Mansfield-Dirksen Compromise

religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

Other unlawful employment practices

SEC. 704. (a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

(b) It shall be an unlawful employment practice for an employer, labor organization, or employment agency to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment.

Equal Employment Opportunity Commission

SEC. 705. (a) There is hereby created a commission to be known as the Equal Employment Opportunity Commission, which shall be composed of five members, not more than three of whom shall be members of the same political party, who shall be appointed by the President by and with the advice and consent of the Senate. One of the original members shall be appointed for a term of one year, one for a term of two years, one for a term of three years, one for a term of four years, and one for a term of five years, beginning from the date of enactment of this title, but their successors shall be appointed for terms of five years each, except that any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed. The President shall designate one member to serve as Chairman of the Commission, and one member to serve as Vice Chairman. The Chairman shall be responsible on behalf of the Commission for the administrative operations of the Commission, and shall appoint, in accordance with the civil service laws, such officers, agents, attorneys, and employees as it deems necessary to assist it in the performance of its functions and to fix their compensation in accordance with the Classification Act of 1949, as amended. The Vice Chairman shall act as Chairman in the absence or disability of the Chairman or in the event of a vacancy in that office.

(b) A vacancy in the Commission shall not impair the right of the remaining members to exercise all the powers of the Commission and three members thereof shall constitute a quorum.

(c) The Commission shall have an official seal which shall be judicially noticed.

(d) The Commission shall at the close of each fiscal year report to the Congress and to the President concerning the action it has taken; the names, salaries, and duties of all individuals in its employ and the moneys it has disbursed; and shall make such further reports on the cause of and means of eliminating discrimination and such recommendations for further legislation as may appear desirable.

(e) The Federal Executive Pay Act of 1956, as amended (5 U.S.C. 2201-2209), is further amended—

(1) by adding to section 105 thereof (5 U.S.C. 2204) the following clause:

"(32) Chairman, Equal Employment Opportunity Commission"; and

(2) by adding to clause (45) of section 106(a) thereof (5 U.S.C. 2205(a)) the following:

"Equal Employment Opportunity Commission (4)."

(f) The principal office of the Commission shall be in or near the District of Columbia, but it may meet or exercise any or all its powers at any other place. The Commission may establish such regional or State offices as it deems necessary to accomplish the purpose of this title.

(g) The Commission shall have power—

(1) to cooperate with and, with their consent, utilize regional, State, local, and other agencies, both public and private, and individuals;

(2) to pay to witnesses whose depositions are taken or who are summoned before the Commission or any of its agents the same witness and mileage fees as are paid to witnesses in the courts of the United States;

(3) to furnish to persons subject to this title such technical assistance as they may request to further their compliance with this title or an order issued thereunder;

(4) upon the request of (i) any employer, whose employees or some of them, or (ii) any labor organization, whose members or some of them, refuse or threaten to refuse to cooperate in effectuating the provisions of this title, to assist in such effectuation by conciliation or such other remedial action as is provided by this title;

(5) to make such technical studies as are appropriate to effectuate the purposes and policies of this title and to make the results of such studies available to the public;

(6) to refer matters to the Attorney General with recommendations for intervention in a civil action brought by an aggrieved party under section 706, or for the institution of a civil action by the Attorney General under section 707, and to advise, consult, and assist the Attorney General on such matters.

(h) Attorneys appointed under this section may, at the direction of the Commission, appear for and represent the Commission in any case in court.

(i) The Commission shall, in any of its educational or promotional activities, cooperate with other departments and agencies in the performance of such educational and promotional activities.

Prevention of unlawful employment practices

SEC. 706. (a) Whenever it is charged in writing under oath by a person claiming to be aggrieved, or a written charge has been filed by a member of the Commission where he has reasonable cause to believe a violation of this title has occurred (and such charge sets forth the facts upon which it is based) that an employer, employment agency, or labor organization has engaged in an unlawful employment practice, the Commission shall furnish such employer, employment agency, or labor organization (hereinafter referred to as the "respondent") with a copy of such charge and shall make an investigation of such charge, provided that such charge shall not be made public by the Commission. If the Commission shall determine, after such investigation, that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such endeavors may be made public by the Commission without the written consent of the parties, or used as evidence in a subsequent proceeding. Any officer or employee of the Commission, who shall make public in any manner whatever any information in violation of this subsection shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000 or imprisoned not more than one year.

(b) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(c) In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State, which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty day during the first year after the effective date of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(d) A charge under subsection (a) shall be filed within ninety days after the alleged unlawful employment practice occurred, except that in the case of an unlawful employment practice with respect to which the person aggrieved has followed the procedure set out in subsection (b), such charge shall be filed by the person aggrieved within two hundred and ten days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(e) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) (except that in either case such period may be extended to not more than sixty days upon a determination by the Commission that further efforts to secure voluntary compliance are warranted), the Commission has been unable to obtain voluntary compliance with this title, the Commission shall so notify the person aggrieved and a civil action may, within thirty days thereafter, be brought against the respondent named in the charge (1) by the person claiming to be aggrieved, or (2) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged

unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Attorney General to intervene in such civil action. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (b) or the efforts of the Commission to obtain voluntary compliance.

(f) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this title.

Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the plaintiff would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28 of the United States Code, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice). Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex or national origin or in violation of section 704(a).

(h) The provisions of the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (29 U.S.C. 101–115), shall not apply with respect to civil actions brought under this section.

(i) In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under subsection (e), the Commission may commence proceedings to compel compliance with such order.

(j) Any civil action brought under subsection (e) and any proceedings brought under subsection (i) shall be subject to appeal as provided in sections 1291 and 1292, title 28, United States Code.

(k) In any action or proceeding under this title the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

SEC. 707. (a) 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.

(b) The district courts of the United States shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, and in any such proceeding the Attorney General may file with the clerk of such court a request that a court of three judges be convened to hear and determine the case. Such request by the Attorney General shall be accompanied by a certificate that, in his opinion, the case is of general public importance. A copy of the certificate and request for a three-judge court shall be immediately furnished by such clerk to the chief judge of the circuit (or in his absence, the presiding circuit judge of the circuit) in which the case is pending. Upon receipt of such request it shall be the duty of the chief judge of the circuit or the presiding circuit judge, as the case may be, to designate immediately three judges in such circuit, of whom at least one shall be a circuit judge and another of whom shall be a district judge of the court in which the proceeding was instituted, to hear and determine such case, and it shall be the duty of the judges so designated to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited. An appeal from the final judgment of such court will lie to the Supreme Court.

In the event the Attorney General fails to file such a request in any such proceeding, it shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

It shall be the duty of the judge designated pursuant to this section to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited.

Effect on State laws

SEC. 708. Nothing in this title shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title.

Investigations, inspections, records, State agencies

SEC. 709. (a) In connection with any investigation of a charge filed under section 706, the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this title and is relevant to the charge under investigation.

(b) The Commission may cooperate with State and local agencies charged with the administration of State fair employment practices laws and, with the consent of such agencies, may for the purpose of carrying out its functions and duties under this title and within the limitation of funds appropriated specifically for such purpose, utilize the services of such agencies and their employees and, notwithstanding any other provision of law, may reimburse such agencies and their employees for services rendered to assist the Commission in carrying out this title. In furtherance of such cooperative efforts, the Commission may enter into written agreements with such State or local agencies and such agreements may include provisions under which the Commission shall refrain from processing a charge in any cases or class of cases specified in such agreements and under which no person may bring a civil action under section 706 in any cases or class of cases so specified, or under which the Commission shall relieve any person or class of persons in such State or locality from requirements imposed under this section. The Commission shall rescind any such agreement whenever it determines that the agreement no longer serves the interest of effective enforcement of this title.

(c) Except as provided in subsection (d), every employer, employment agency, and labor organization subject to this title shall (1) make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed, (2) preserve such records for such periods, and (3) make such reports therefrom, as the Commission shall prescribe by regulation or order, after public hearing, as reasonable, necessary, or appropriate for the enforcement of this title or the regulations or orders thereunder. The Commission shall, by regulation, require each employer, labor organization, and joint labor-management committee subject to this title which controls an apprenticeship or other training program to maintain such records as are reasonably necessary to carry out the purposes of this title, including, but not limited to, a list of applicants who wish to participate in such program, including the chronological order in which such applications were received, and shall furnish to the Commission, upon request, a detailed description of the manner in which persons are selected to participate in the apprenticeship or other training program. Any employer, employment agency, labor organization, or joint labor-management committee which believes that the application to it of any regulation or order issued under this section would result in undue hardship may (1) apply to the Commission for an exemption from the application of such regulation or order, or (2) bring a civil action in the United States district court for the district where such records are kept. If the Commission or the court, as the case may be, finds that the application of the regulation or order to the employer, employment agency, or labor organization in question would impose an undue hardship, the Commission or the court, as the case may be, may grant appropriate relief.

(d) The provisions of subsection (c) shall not apply to any employer, employment agency, labor organization, or joint labor-management committee with respect to matters occurring in any State or political subdivision thereof which has a fair employment practice law during any period in which such

Such advisory and conciliation councils shall be composed of representative citizens resident of the area for which they are appointed, who shall serve without compensation, but shall receive transportation and per diem in lieu of subsistence as authorized by section 5 of the Act of August 2, 1946 (5 U.S.C. 73b-2), for persons serving without compensation. The Commission may make provision for technical and clerical assistance to such councils and for the expenses of such assistance. Members of such councils shall be exempt from the operation of title 18, United States Code, sections 281, 283, 284, 434, and 1914, and section 190 of the Revised Statutes of the United States (5 U.S.C. 99).

(i) Attorneys appointed under this section may, at the direction of the Commission, appear for and represent the Commission in any case in court.

(j) The Commission shall, in any of its educational or promotional activities, cooperate with other departments and agencies in the performance of such educational and promotional activities.

PREVENTION OF UNLAWFUL EMPLOYMENT PRACTICES

SEC. 9. (a) The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 5, 6, or 7.

(b) Whenever a written charge has been filed by or on behalf of any person claiming to be aggrieved, or a written charge has been filed by a member of the Commission, that any person subject to the Act has engaged in any unlawful employment practice, the Commission shall notify the person charged with the commission of an unlawful employment practice (hereinafter referred to as the "respondent") of such charge and shall investigate such charge and if it shall determine after such preliminary investigation that probable cause exists for crediting such written charge, it shall endeavor to eliminate any unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such endeavors may be used as evidence in any subsequent proceeding.

(c) If the Commission fails to effect the elimination of such unlawful practice and to obtain voluntary compliance with this Act, or in advance thereof if circumstances warrant, the Commission shall have power to issue and cause to be served upon the respondent a complaint stating the charges in that respect, together with a notice of hearing before the Commission, or a member thereof, or before a designated agent, at a place therein fixed, not less than ten days after the service of such complaint. No complaint shall issue based upon any unlawful employment practice occurring more than one year prior to the filing of the charge with the Commission unless the person aggrieved thereby was prevented from filing such charge by reason of service in the Armed Forces, in which event the period of military service shall not be included in computing the one-year period.

(d) The respondent shall have the right to file a verified answer to such complaint and to appear at such hearing in person or otherwise, with or without counsel, to present evidence and to examine and cross-examine witnesses.

(e) The Commission or a member or designated agent conducting such hearing shall have the power reasonably and fairly to amend any complaint, and the respondent shall have like power to amend its answer.

(f) All testimony shall be taken under oath.

(g) The member of the Commission who filed a charge shall not participate in a hearing thereon.

(h) At the conclusion of a hearing before a member or designated agent of the Commission, such member or agent shall transfer the entire record thereof to the Commission, together with his recommended decision and copies thereof shall be served upon the parties. The Commission, or a panel of three qualified members designated by it to sit and act as the Commission in such case, shall afford the parties an opportunity to be heard on such record at a time and place to be specified upon reasonable notice. In its discretion, the Commission upon notice may take further testimony.

(i) With the approval of the member or designated agent conducting the hearing, a case may be ended at any time prior to the transfer of the record thereof to the Commission by agreement between the parties for the elimination of the alleged unlawful employment practice on mutually satisfactory terms.

(j) If, upon the preponderance of the evidence, including all the testimony taken, the Commission shall find that the respondent engaged in any unlawful

Shows that there must be some enforcement schedule

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF GEORGIA
(ATLANTA DIVISION)

CURTIS OTIS REESE, for himself and all other persons similarly situated,	)	
Plaintiff	)	CIVIL ACTION NO. 10309
v.	)	
ATLANTIC STEEL COMPANY, a corporation, et al.,	)	
Defendants	)	

APPENDIX TO BRIEF OF DEFENDANTS

UNITED STEELWORKERS OF AMERICA, AFL-CIO AND LOCAL NO. 2401 OF UNITED STEELWORKERS OF AMERICA

APPENDIX A

H. R. 405 introduced by Representative Roosevelt

sixty days pending the termination of . . . the efforts of the Commission to obtain voluntary compliance."

It is obvious from this provision that Congress meant at the very least for the conciliation step to have been initiated before the charged party could be brought into court. Senator Humphrey, for example, explained that "Where a suit has been brought, the Court may stay proceedings up to 60 days, pending the termination of proceedings under state or local law or *further* efforts at conciliation by the Commission." 110 Cong. Record 12722 (June 4, 1964) (Emphasis supplied).

The importance of having at the least initiated conciliation before the lawsuit is brought is equally obvious. For otherwise, the protection which Congress intended would be entirely destroyed and replaced by a system of suing first and then later asking the defendants whether they would like to avoid what has already happened to them. In colloquial terms, it becomes a system of shoot first and ask questions later, and this is most certainly entirely contrary to the procedure intended by Congress.

The Title VII case before the Tennessee District Court:

The Court's opinion in the Hall v. Werthan Bag Co., case,[8] 251 F. Supp. 184, expresses the view that having conciliation before the civil action was designed to give charged parties the opportunity of avoiding the lawsuit.

The background was that the plaintiff who brought the suit had filed a charge with the Commission alleging that he and "other Negroes simiarly situated" had been denied equal training, wage increases, and transfer rights. The Commission "then attempted unsuccessfully to obtain what it considered voluntary compliance with the provisions of the title." When the suit was filed, another Negro employee sought to intervene, and the Court allowed him to do so on the theory that "while he had not proceeded through the Commission, the purpose of the requirement of resort to the Commission has already been served" by the charge filed by the plaintiff.

Since the Commission had taken the conciliation step in that case, the issue here was not directly before the Court for decision. However, it was raised by the Court's

8 Concerned with whether a suit under Title VII could be maintained as a class suit.

analysis of the right of an employee who has not proceeded through the Commission to intervene. In this analysis, the Court had this to say of the purpose of the conciliation process when the Commission has found reasonable cause:

> "It seems clear, therefore, that the requirement of resort to the Commission was designed to give a discriminator opportunity to respond to persuasion rather than the big stick of injunction. . . ."

The opinions of the commentators:

The commentators who have written on the issue here before the Court have likewise expressed the opinion that conciliation is required as a prerequisite to the institution of a civil action.

This is, for example, the explanation of the staff assistant to the Senate Labor Committee who was praised by the title's floor manager for his "outstanding work in perfecting the Senate bill and in advising the members of the Committee on Labor and Public Welfare on the relationship between the Senate bill and the House bill."[17] This staff member, now

17. Senator Clark at 110 Cong. Record 12596.

Deputy Solicitor of Labor, stated in discussing the procedures of Title VII at the New York University Conference on Labor last year that:

> "It is only where the state action, if any, has been invoked and has been non-productive and where federal conciliation has been unsuccessful that the aggrieved party is given access to the federal district courts to enforce his private right of action under the Title . . .
>
> "If the Commission decides the case has merit but fails in its effort to conciliate, the complainant may then pursue his private right of action." Edward D. Friedman, Racial Problems and Labor Relations: The Civil Rights Act in the Proceedings of the 18th Annual New York University Conference on Labor, pages 373 and 376 (1965).

IV.

In sum total, it is the clear teaching of the legislative history, from the first Committee Report and throughout the discussions in Congress, that "an attempt would have to be made to conciliate . . . before an action could be brought in the district court." It

labor relations arises under this Act, he need not exhaust his contractual remedies.

But allegation of discrimination as an element in a complaint should not and, we submit, does not, obviate the necessity of complying with the requirements of exhaustion of contractual and internal union remedies.

The contract which these defendants have negotiated is not discriminatory in terms. That is of considerable importance.

Indeed, plaintiff, in effect, wishes to avail himself of the benefits of that very contract. He claims loss or deprivation of those benefits (e.g. promotion). His claim but represents a cornfield variety of matters for whose vindication the grievance machinery of the contract is specifically designed.

Plaintiff, for no good reason, would simply skirt that procedure. Paragraph (8) of the complaint vaguely and obliquely attempts to explain failure to utilize the grievance machinery.[9] There is only the

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9 We are not concerned here with any specific contentions that the union fraudulently or collusively or in a manner discriminatory by race, administered the grievance procedure to plaintiff's detriment.

allegation that "The defendants, their officers, agents, servants or attorneys and those persons in active concert or participiation with them have failed or refused to effect the transfer of the plaintiff to the job which he desires, solely because he is a member of the Negro race." This falls far short of any allegation that plaintiff has filed any grievance, or has attempted to institute any grievance. It is not a charge that any official or agent of the union has been consulted with respect to a grievance or, if asked, has refused to entertain and process one. The fact is, once again the complaint fails to include a crucial allegation -- because the allegation, if made, could not be supported in fact.

Despite the absence of precise authority, some precedents, we submit, do illumine the Act's meaning. To construe it as completely unrelated to the doctrine of exhaustion of administrative remedies would be to depart from a long course of Supreme Court pronouncements in this area.

Over a number of years that Court has spelled out the principle that:

"As a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must attempt use of the contract grievance procedure agreed upon by employer and union as the mode of redress."

Republic Steel Corp. v. Maddox, supra, at 652, 616

And, further, the Court has noted that

"Congress has expressly approved contract grievance procedures as a preferred method for settling disputes and stabilizing the 'common law' of the plant. LMRA § 203(d), 29 U.S.C. § 173(d); § 201(c), 29 U.S.C. § 171(c) (1958 ed.). . . . And it cannot be said in the normal situation, that contract grievance procedures are inadequate to protect the interests of an aggrieved employee until the employee has attempted to implement the procedures and found them so.

"A contrary rule which would permit an

individual employee to completely side-
step available grievance procedures in
favor of a lawsuit has little to commend
it." Id., at 653; 616-617.

VI.

It has been the statutory policy for years that "Final Adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement."[10]

It is further the settled principle that an employee asserting claims which call into consideration an interpretation of the contract between his employer and his union must have exhausted his remedies under the contract, for "there can be no doubt that the employee must afford the Union the opportunity to act on his behalf." Republic Steel Corp. v. Maddox, supra.

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10 Section 203(d) of the Labor Management Relations Act, 29 U.S.C.A. § 173(d).

The issue, then, is the applicability of this settled law to actions brought under Title VII.

To present all aspects of the issue, we start with the holding of eight years ago that a suit asserting veteran's re-employment rights could be maintained although the plaintiff had not pursued the administrative and contractual remedies. McKinney v. M-K-T R. Co., 357 U.S. 265 (1958).

However, we would submit that there are at least three reasons that this case is not controlling here and that actions under Title VII, like all suits claiming racial discrimination in employment, should be subject to the settled legal principles.

First: To begin with, the decision of that case in 1958 antedated the authorities which have now firmly established the principle requiring that employees asserting claims to which the contract is applicable must first afford their Union the opportunity to act on their behalf.

It was not until 1960 that the Court decided the Steelworkers Trilogy[11] and there established the importance of the role of the Unions in handling and

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11 United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

adjusting "every and all disputes that arise under the agreement" through the grievance and arbitration procedure. This beginning was then followed by the cases which have reiterated the importance of the arbitration process[12] and by the culmination in last year's Republic Steel case of the principle requiring that the employee afford the Union the opportunity to act on his behalf.

Moreover, since the decision of the M-K-T case in 1958, it has been held that a suit by employees asserting rights created by federal statute and brought under the specific authority of federal statute is governed by this principle.

Thus, in Beckley v. Teyssier, 332 F. 2d 495 (9th Cir. 1964), employees brought suit against their employer under the Fair Labor Standards Act for overtime pay allegedly due under the Act together with the liquidated damages and attorneys' fees provided for by the Act.

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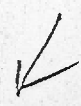
12 E.g., Teamsters Local 174 v. Lucas Flour Co., 369 U.S. 95 (1962), holding that a strike over a matter covered by the arbitration provision of the contract is a breach of contract even without a no-strike clause: Gunther v. San Diego and Arizona R. Co., ____ U.S.____, 15 L. Ed. 2d 308 (1965), holding that awards of the Adjustment Board are not reviewable; John Wiley & Sons v. Livingston, 376 U.S. 543 (1964), holding that the arbitration clause survives a merger and becomes binding on the successor employer.

The District Court stayed the action pending the disposition of arbitration proceedings under the Union contract and the Court of Appeals affirmed. In so holding, the Court of Appeals rejected the employees' argument that they could maintain an action seeking recovery under the Act and held that:

> "Appellants cite no provision of the Fair Labor Standards Act which precludes arbitration of claims arising under it . . .
>
> "It is clear to us that the claims of appellants are ones growing out of the relation of employer and employee and necessarily involve the application and interpretation of the contract provisions above quoted, and therefore fall squarely within Article V of the Collective Bargaining Agreement . . . ."



In an analogous vein, the Supreme Court held in Carey v. Westinghouse Electric Corp., 375 U.S. 261 (1964), that even though the matter at issue was governed by the National Labor Relations Act, it nevertheless should be resolved by the grievance and arbitration procedure of the Union contract.

Moreover, the Court concluded this holding with the consideration that by its decision, "the therapy of arbitration is brought to bear in a complicated and troubled area", and it hardly need be said that this consideration is most certainly applicable to claims of racial discrimination in employment conditions.

Second: If Congress had intended to override the statutory policy and to preclude the application of the settled law to claims asserted by employees under Title VII, it adopted no indication of such intent. The fact is that while Congress provided in another

title of the Act that the District Courts would have jurisdiction of actions brought thereunder without regard to the exhaustion of remedies principle, no such provision was placed in Title VII.

Thus, the sections of the public accommodations title concerning suits in the District Court provide that "The District Courts of the United States shall have jurisdiction of proceedings instituted pursuant to this Title and shall exercise the same without regard to whether the aggrieved party shall have exhausted any administrative or other remedies that may be provided by law" (Section 207(a)) and that "The remedies provided in this title shall be the exclusive means of enforcing the rights based on this title . . . ." (Section 207(b)).

It is thus obvious that Congress was well aware in enacting this Act of the principle of exhausting administrative remedies and was equally well aware of the way to preclude the application of this principle when it desired to do so.

The fact that no such provision was placed in Title VII is therefore compelling evidence that claims under this title are subject to the settled principle requiring

exhaustion of remedies under the Union contract.

Third: Still further evidence from the legislative history consists of the fact that there was offered an amendment to provide that the Commission would have exclusive jurisdiction over claims of racial discrimination in employment and that this amendment was rejected.

Senator Tower proposed an amendment providing that "the provisions of this title shall constitute the exclusive means whereby any department, agency, or instrumentality in the executive branch of the Government, or any independent agency of the United States, may grant or seek relief from, or pursue any remedy with respect to, any employment practice of any employer, employment agency, labor organization, or joint labor-management committee covered by this title, if such employment practice may be the subject of a charge or complaint under this title."[21]

However, this amendment was rejected by the Senate, and this fact points further to the conclusion that claims under Title VII are subject to the principle that the employees asserting them must have pursued their remedies under the contract.

Does not = It points to these personal remedy.

21. 110 Cong. Record 13650 (June 12, 1964).

VII.

The Act does not set up a super grievance machinery. Its implementation depends in large part upon the sympathetic participation of labor unions. Congress may be presumed to have remained silent in order not to depart from its prior approval of "contract grievance procedures."

The aims of the Act will be furthered by a construction that an aggrieved employee must attempt use of the contract grievance procedure before coming into Court.

VIII.

The purpose of the Act, in the long run, will be furthered (a) if regard is shown for non-legal voluntary procedures before jurisdiction of this court may be invoked, and (b) if contractual remedies are given an opportunity to function.

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CERTIFICATE OF SERVICE

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