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General Telephone Co. v. Equal Employment Opportunity Commission: Special Treatment for the EEOC

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GENERAL TELEPHONE CO. V. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION: SPECIAL TREATMENT FOR THE EEOC

INTRODUCTION

The Fifth and the Ninth Circuit Courts of Appeals reached different conclusions[1] about whether the Equal Employment Opportunity Commission (EEOC) must be certified as the class representative in suits brought in its name under section 706 of Title VII of the Civil Rights Act of 1964[2] as amended in 1972.[3] In *General Telephone Co. v. EEOC*,[4] the Supreme Court settled the conflict by affirming the Ninth Circuit's holding; thus, the EEOC may bring a section 706 action seeking relief for a group of aggrieved individuals without obtaining class certification pursuant to rule 23 of the Federal Rules of Civil Procedure.[5] The dissenters agreed with the Fifth Circuit court's reasoning in *EEOC v. D.H. Holmes Co*.[6] and would have reversed the appellate court's decision.[7]

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1. In EEOC v. D.H. Holmes Co., 556 F.2d 787, 797 (5th Cir. 1977), *cert. denied*, 436 U.S. 962 (1978), the court held that certification was required. In EEOC v. General Tel. Co., 599 F.2d 322, 333 (9th Cir. 1979), *aff'd*, 446 U.S. 318 (1980), the court held that certification was not required.

2. Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701-716, 78 Stat. 253 (1964) (current version at 42 U.S.C. §§ 2000a-2000h (1976)).

3. Equal Employment Opportunity Act of 1972, 42 U.S.C. §§ 2000a-2000h (1976).

4. 446 U.S. 318 (1980).

5. FED. R. CIV. P. 23 provides, in pertinent part:

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

6. 556 F.2d 787 (5th Cir. 1977), *cert. denied*, 436 U.S. 962 (1978).

7. 446 U.S. at 334.

I. TITLE VII AND THE EEOC

The EEOC was created by the Civil Rights Act of 1964 to ensure equality of employment opportunities by eliminating discrimination based on color, sex, religion, race, or national origin.[8] As originally conceived, the Commission could only conciliate, mediate, or persuade a business to change its employment practices.[9]

Two methods of judicial enforcement were available under the Act. Section 706 allowed an individual to seek an injunction against or back pay from an employer. Section 707 "pattern-or-practice" suits could be brought only by the Attorney General. The statute did not expressly include back pay as a remedy.[10] Only sixty-nine suits were brought between 1965 and the 1972 amendments,[11] and back pay was not awarded in a section 707 action until 1972.[12]

In 1972, Congress deemed it imperative to provide the EEOC with more effective enforcement powers to help reduce employment discrimination. As originally proposed, the amendments to the 1964 Act would have given the EEOC authority, comparable to that of the National Labor Relations Board (NLRB), to issue cease-and-desist orders.[13] As finally enacted, the amendments allowed the EEOC to bring civil suits in its own name in federal court under either section 706 or section 707.[14] A major reason for choosing the court system was the time factor; it was thought that the federal courts could provide relief more quickly than an administrative agency. Furthermore, the legislators believed that the rules and procedures of the federal courts would be more effective.[15]

The EEOC now has various opportunities to litigate. Under section 706, an individual must initiate the procedure by filing a charge with the

8. *See generally Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109 (1971).

9. Section 706(a), 78 Stat. 259 (1964) (currently at 42 U.S.C. § 2000e-5(a) (1976)), authorized an aggrieved individual to file a charge with the EEOC. After an investigation, if the EEOC found that there was "reasonable cause" to believe the charge was true, the Commission could use "informal methods of conference, conciliation, and persuasion" to settle the conflict. If the Commission were unsuccessful in achieving voluntary compliance, the charging party could bring suit against the employer; the EEOC, however, could not. The EEOC could only recommend to the Attorney General that a pattern-or-practice suit be brought.

10. Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, § 707, 78 Stat. 261 (1964) (prior to 1972 amendment).

11. 118 CONG. REC. 4080 (1972).

12. United States v. Georgia Power Co., 474 F.2d 906, 920-21 (5th Cir. 1973). *Georgia Power* was followed in other circuits, *e.g.*, EEOC v. Detroit Edison Co., 515 F.2d 301, 314 (6th Cir. 1975), *vacated*, 431 U.S. 951 (1977), and remains the standard for federal courts.

13. 118 CONG. REC. 3965-79, 4047-83 (1972) *reprinted in* SUBCOMM. ON LABOR, SENATE COMM. ON LABOR AND PUBLIC WELFARE, 92d Cong., 2d Sess., LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 118, 248, 279, 589, 645, 690 (1972) [hereinafter cited as 1972 LEGISLATIVE HISTORY]. For a thorough discussion of the legislative history of the Equal Employment Opportunity Act of 1972, see Bumpass, *The Application of Rule 23 of the Federal Rules of Civil Procedure to Actions Brought by the Equal Employment Opportunity Commission*, 29 CASE W. RES. L. REV. 343 (1979).

14. Equal Employment Opportunity Act of 1972 §§ 706-707, 42 U.S.C. §§ 2000e-5 to -6 (1976).

15. *See* 1972 LEGISLATIVE HISTORY, *supra* note 13, at 122, 201, 226, 229, 278, 549, 688, 690, 694, 697, 794-95, 797, 988-89, 1270-71, 1347, 1694.

Commission. During the ensuing 180 days, the EEOC alone may sue. Subsequently, the Commission may proceed only if the individual has not brought suit.[16] No time limit is imposed on the EEOC's authority to commence an action based on an individual's complaint.[17] If the charging party does sue, the EEOC may intervene with the permission of the court, and the suit may be expanded, at the discretion of the trial judge, to allow the EEOC to redress additional incidents of employment discrimination discovered in the original investigation.[18]

II. THE BACKGROUND OF *GENERAL TELEPHONE*

The EEOC, rather than the Attorney General, now brings the section 707 pattern-or-practice suits. The question of class certification in a section 707 action has not been carefully considered by a court.[19] The debate over class certification for the EEOC in section 706 actions has been raging for eight years; by statutory directive, all section 707 actions are to be conducted in accordance with the procedures set forth in section 706.[20] Interestingly, the debate has not touched section 707 suits. With the Court's decision in *General Telephone*, however, section 707 has become, as Senator Williams said during the 1972 debates, "a redundancy in the law."[21]

A. *The Facts*

Four women employed in the Beaverton, Oregon, facility of General Telephone Company of the Northwest, Inc. (General Telephone) filed charges with the EEOC alleging employment discrimination based on sex. Specifically, the employees claimed discrimination with respect to restric-

16. Equal Employment Opportunity Act of 1972 § 706, 42 U.S.C. § 2000e-5 (1976), provides:

> (a) The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title.
>
> (b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer . . . has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge . . . on such employer . . . within ten days, and shall make an investigation thereof . . . . If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge . . . . If the Commission determines 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 . . . . The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.

17. Occidental Life Ins. Co. v. EEOC, 432 U.S. 355 (1977).

18. *E.g.*, EEOC v. Missouri Pac. R.R., 493 F.2d 71 (8th Cir. 1974).

19. *See generally Certification of EEOC Class Suits Under Rule 23*, 46 U. CHI. L. REV. 690 (1979).

20. Equal Employment Opportunity Act of 1972 § 707(e), 42 U.S.C. § 2000e-6(e) (1976), provides: "All such actions [§ 707] shall be conducted in accordance with the procedures set forth in section 2000e-5 [§ 706] of this title."

21. 118 CONG. REC. 4081 (1972) (remarks of Sen. Williams); 1972 LEGISLATIVE HISTORY, *supra* note 13, at 1590.

tions on maternity leave and appointments to craft jobs and management positions. After investigating the charges, the EEOC sued General Telephone, its subsidiary, West Coast Telephone Company of California, Inc., and a local union of the International Brotherhood of Electrical Workers in April 1977.[22] The EEOC's complaint, brought under section 706(f)(1) of Title VII,[23] sought injunctive relief and back pay for all women who might have been affected by the alleged unlawful practices. Included in this category were all female workers, all female job applicants, and all women who might have applied for jobs but were dissuaded by the challenged activities. Presumably, 116 General Telephone facilities in five different states would be affected by the action. The EEOC did not call the suit a class action nor did it mention rule 23 in the complaint.[24]

In August 1977, the EEOC sought an order bifurcating the issue of class liability from the issue of individual damages, and the company requested dismissal of the "class action aspects" of the complaint. The district court referred the motions to a magistrate according to section 706(f)(5).[25] In his report, the magistrate listed three reasons for his recommendation that rule 23 should not apply to the EEOC's section 706 suits: (1) the EEOC has never been required to comply with rule 23 in section 707 suits and should be treated no differently in section 706 suits; (2) the statute gives the EEOC the authority to bring suit on behalf of a class; and (3) it is "undesirable and

22. EEOC v. General Tel. Co., 599 F.2d 322, 325 (9th Cir. 1979).

23. Equal Employment Opportunity Act of 1972 § 706(f)(1), 42 U.S.C. § 2000e-5(f)(1) (1976), states:

> 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) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge . . . . The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission . . . . If a charge filed with the Commission pursuant to subsection (b) of this section, is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge . . . the Commission has not filed a civil action under this section . . . the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) 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, cost, or security. Upon timely application, the court may, in its discretion, permit the Commission . . . to intervene in such civil action upon certification that the case is of general public importance. 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 (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

24. 446 U.S. at 321-22.

25. Equal Employment Opportunity Act of 1972 § 706(f)(5), 42 U.S.C. § 2000e-5(f)(5) (1976), provides:

> It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

impractical" to require EEOC compliance with rule 23.[26] The district court accepted the magistrate's recommendations, denied General Telephone's motion, and certified the question for interlocutory appeal.[27]

The Ninth Circuit Court of Appeals concluded that Title VII gives the EEOC standing to sue on behalf of discriminatees, and that Congress did not expressly mandate that a section 706 action comply with rule 23. The court also ruled that no distinction need be drawn between the procedures in section 706 and in section 707 actions.[28] Thus, since section 707 actions have never been subject to the strictures of rule 23, section 706 actions should not be so bound. In affirming the lower court's holding, the appeals court stated that "[t]he certification process would be time consuming and costly, and would serve no useful purpose in the final disposition of the case."[29]

The court's ruling conflicted with the Fifth Circuit's decision in *EEOC v. D.H. Holmes Co.*[30] and represents an area where a great amount of judicial time has been spent.[31] Accordingly, the Supreme Court granted certiorari and heard oral arguments in March 1980.[32]

B. *The Fifth Circuit's Position*

Before *Holmes*, five district courts considered the question raised in *General Telephone* and found rule 23 inapplicable to EEOC suits.[33] The Fifth Circuit Court of Appeals, however, reached the opposite conclusion in a comprehensive opinion.[34] Although the EEOC complaint in *Holmes* was not styled as a class action, the EEOC argued that the suit sought "broad relief for a class of persons."[35] After reviewing the 1972 legislative history and the history and purposes of rule 23, the court dismissed the EEOC's contentions that Congress had created a statutory class action independent of rule 23 and that the EEOC, which is never a member of the class suffering injury, could not comply with the rule.[36]

The Fifth Circuit expressed particular concern for the defendant's procedural rights, noting that the defendant company did not know, even eighteen months after the initial complaint was filed, "against whom and upon what ground precisely it must defend."[37] The EEOC's push for "class action

26. EEOC v. General Tel. Co., 599 F.2d 322, 325-26 (9th Cir. 1979).
27. *Id.* at 326.
28. *Id.* at 327-28, 333.
29. *Id.* at 334.
30. 556 F.2d 787 (5th Cir. 1977), *cert. denied*, 436 U.S. 962 (1978).
31. *See* note 48 *infra*.
32. 446 U.S. at 320.
33. EEOC v. CTS of Asheville, Inc., 13 Fair Empl. Prac. Cas. 852 (W.D.N.C. 1976); EEOC v. Vinnell-Dravo-Lockheed-Mannix, 417 F. Supp. 575 (E.D. Wash. 1976); EEOC v. Rexene Polymers Co., 10 Fair Empl. Prac. Cas. 61 (W.D. Tex. 1975); EEOC v. Lutheran Hosp., 10 Fair Empl. Prac. Cas. 1177 (E.D. Mo. 1974); EEOC v. Mobil Oil Corp., 6 Fair Empl. Prac. Cas. 727 (W.D. Mo. 1973). *But see* EEOC v. Datapoint Corp., 412 F. Supp. 406 (W.D. Tex. 1975), *aff'd in part*, 570 F.2d 1264 (5th Cir. 1978). *See generally* Reiter, *The Applicability of Rule 23 to EEOC Suits: An Examination of* EEOC v. D.H. Holmes Co., 28 SYRACUSE L. REV. 741 (1977).
34. EEOC v. D.H. Holmes Co., 556 F.2d 787 (5th Cir. 1977).
35. *Id.* at 793 (quoting brief of EEOC at 4).
36. *Id.* at 796.
37. *Id.*

discovery privileges without submitting to class action controls (and, in fact, resisting them)"[38] offended the court's sense of fair play.

The salient points in the court's interpretation of section 706 were two: (1) Congress did not expressly exempt the EEOC from compliance with rule 23 as it did the NLRB;[39] the EEOC has standing to sue to the same extent as aggrieved individuals;[40] and, (2) Congress has previously created federal actions with procedures different from the federal rules and could have done so in this instance.[41] The *Holmes* court maintained that a pattern-or-practice suit can be brought if class certification for the EEOC fails and systemic discrimination still seems to exist. Therefore, it concluded that the substantive rights of employees and job applicants would be protected.[42]

After *Holmes*, the EEOC continued its quest to pursue section 706 suits without class certification. Some courts followed the *Holmes* approach;[43] some ruled that the EEOC could never be a class representative so the rule obviously could not apply;[44] and one held that compliance with the rule would constitute interference with the congressionally created EEOC policies.[45] *EEOC v. Akron National Bank & Trust Co.*[46] held that a class action must be brought under section 707. The statutory design was far from obvious. Although Justice White, writing for the majority in *General Telephone*, stated that a "straightforward reading" of the statute dictates rule 23's inapplicability to the EEOC's section 706 actions,[47] many jurists across the nation might disagree.[48]

C. *Previous Title VII Decisions*

The Supreme Court's previous resolutions of Title VII procedural disputes foreshadowed the result in *General Telephone*. Major themes in Title

38. *Id.* at 795.
39. *Id.* at 794.
40. *Id.* at 795 n.12.
41. Special rules govern procedure under the Bankruptcy Act. *Id.* at 792 n.8.
42. *Id.*
43. *E.g.*, EEOC v. Page Eng'r Co., 17 Fair Empl. Prac. Cas. 1638 (N.D. Ill. 1978).
44. EEOC v. Stroh Brewery Co., 83 F.R.D. 17 (E.D. Mich. 1979); EEOC v. Whirlpool Corp., 80 F.R.D. 10 (N.D. Ind. 1978).
45. EEOC v. Federal Reserve Bank of St. Louis, 84 F.R.D. 337 (W.D. Tenn. 1979).
46. 78 F.R.D. 684 (N.D. Ohio 1978).
47. 446 U.S. at 324.
48. District court cases in which rule 23 was held to apply in § 706 actions brought by the EEOC include: EEOC v. Page Eng'r Co., 17 Fair Empl. Prac. Cas. 1638 (N.D. Ill. 1978); EEOC v. Akron Nat'l Bank & Trust Co., 78 F.R.D. 684 (N.D. Ohio 1978); Neidhardt v. D.H. Holmes Co., No. 72-2395 (E.D. La. 1976), *aff'd sub nom.*, EEOC v. D.H. Holmes Co., 556 F.2d 787 (5th Cir. 1977), *cert. denied*, 436 U.S. 962 (1978).

District court cases in which rule 23 was held inapplicable to § 706 suits brought by the EEOC include: EEOC v. Stroh Brewery Co., 83 F.R.D. 17 (E.D. Mich. 1979); EEOC v. Mid-City Care Center, 20 Empl. Prac. Dec. ¶ 30,275 (W.D. Tenn. 1979); EEOC v. Bumble Bee Seafoods Co., 19 Empl. Prac. Dec. ¶ 9160 (D. Ore. 1979); EEOC v. Singer Controls Co. of America, 80 F.R.D. 76 (N.D. Ohio 1978); EEOC v. Whirlpool Corp., 80 F.R.D. 10 (N.D. Ind. 1978); EEOC v. Schlueter Mfg. Co., 17 Fair Empl. Prac. Cas. 53 (E.D. Mo. 1978); EEOC v. General Tel. Co., 16 Fair Empl. Prac. Cas. 476 (W.D. Wash. 1977); EEOC v. Pinkerton's Inc., 14 Fair Empl. Prac. Cas. 1431 (W.D. Pa. 1977); EEOC v. CTS of Asheville, Inc., 13 Fair Empl. Prac. Cas. 852 (W.D.N.C. 1976); EEOC v. Vinell-Dravo-Lockheed-Mannix, 417 F. Supp. 575 (E.D. Wash. 1976); Stuart v. Hewlett-Packard Co., 66 F.R.D. 73 (E.D. Mich. 1975); EEOC v. Lutheran Hosp., 10 Fair Empl. Prac. Cas. 1177 (E.D. Mo. 1974).

VII cases have been the plenary power of federal courts in such actions, the restitutionary equitable relief available, and the public's interest in eliminating employment discrimination.[49]

Plaintiffs, whether individuals, a class, or the EEOC, have been given procedural advantages in prior cases. *Johnson v. Railway Express Agency, Inc.*[50] held that the plaintiff is not limited to Title VII in his search for relief; although other relief may be available, Title VII remedies remain independent of them. In a class action suit, *United Airlines, Inc. v. McDonald*,[51] the Supreme Court held that full relief may be awarded to plaintiffs without exhaustion of administrative remedies by unnamed class members. *Occidental Life Insurance Co. v. EEOC*[52] dealt with the time limits placed on the EEOC for filing a section 706 suit; the Court interpreted the statute as imposing no time limit on the EEOC's ability to file suit in federal court. In a strong dissent, Justice Rehnquist pointed out that where Congress is silent about a time period in a federal statute, the Court has traditionally applied the state statute of limitations. The Court, however, in its allegiance to the legislative mandate to eliminate employment discrimination through EEOC enforcement actions, treated the EEOC in a new and special way.

In a 1974 decision, the Supreme Court concluded that a union member subject to binding arbitration on employment matters may bring a section 706 action if the arbitration goes against his interests. The employer is bound by the arbitration agreement, according to the rationale in *Alexander v. Gardner-Denver Co.*,[53] but the employee has Title VII remedies available to him, which are not affected by a "binding arbitration" clause. Formerly, the Court had maintained that labor arbitration was the preferred means of settling industrial disputes and that the decision should be final, binding all parties.[54] The ruling in *Alexander*, as in other cases,[55] highlights the overriding importance the Court assigns to Title VII actions.

The Supreme Court will apparently stop short of allowing the EEOC to create new policies not in accordance with the Court's interpretation of the statutory design, however. *Mohasco Corp. v. Silver*,[56] for example, upheld the provision for filing within 300 days of the alleged discrimination. The EEOC was not allowed to manipulate the filing time for the charging party since the maneuver did not comport with the Court's literal reading of the statute and its interpretation of the legislative intent.[57]

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49. *E.g.*, Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975). *See also* United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976).

50. 421 U.S. 454 (1975).

51. 432 U.S. 385 (1977).

52. 432 U.S. 355 (1977).

53. 415 U.S. 36 (1974).

54. United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960). These decisions were implicitly affirmed in Dewey v. Reynolds Metal Co., 429 F.2d 324 (6th Cir. 1970), *aff'd by an equally divided court*, 402 U.S. 689 (1971).

55. *See* cases cited in note 49 *supra*.

56. 100 S. Ct. 2486 (1980).

57. Lower courts have treated the EEOC mandates liberally. They have consistently upheld departures from the statutory provision stating that "right to sue" letters will automatically

III. THE *GENERAL TELEPHONE* RATIONALE

In its affirmance of the Ninth Circuit's holding that rule 23 does not apply to the EEOC's section 706 suits, the majority, comprised of Justices Blackmun, Brennan, Marshall, Stewart, and White, relied on "the language of Title VII, the legislative intent underlying the 1972 amendments to Title VII, and the enforcement procedures under Title VII prior to the amendments."[58] Based on its understanding of the 1972 statute, the Court held that rule 23 is not applicable to an enforcement action, however it is characterized, brought by the EEOC to halt unlawful employment practices.

The Court stated that rule 23 was not designed to encompass an administrative enforcement action and that a distortion of the rule would result from applying it in section 706 actions. Its major concern was advancement of the public interest in preventing discrimination in employment opportunities. Without encumbering the agency by invoking the class action rule, the decision gives the EEOC the freedom to pursue its statutorily-defined objectives. The decision does not apply to other federal rules.[59]

The Court first outlined the procedure that an individual complainant and the EEOC must follow in a section 706 action. The authorization of back pay as a remedy should not, in the Court's opinion, trigger rule 23. Next, the Court examined the purpose of the 1972 amendments. Because the charging party retains certain private rights, such as intervening in the EEOC suit or bringing his own civil suit at the end of the EEOC's exclusive, 180-day jurisdiction, the Court inferred from the statutory language that the EEOC is not simply a representative of the discriminatee, as a class representative might be, but is a supplemental force for the private action and bears the primary litigation burden.

Repeating a theme sounded in many lower courts,[60] Justice White, writing for the majority, stated: "When the EEOC acts, albeit at the behest of and for the benefit of specific individuals, it acts also to *vindicate the public interest* in preventing employment discrimination."[61] In reviewing the pertinent legislative history, the majority found it "clear" that the EEOC should proceed in section 706 suits just as it proceeds in section 707 suits (that is, without rule 23 certification) and said it is "clear" that Senator Javits' reference to class suits in debate[62] was to the "availability of relief" and not to the "procedure" to be applied.

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be sent if the EEOC chooses not to sue. *E.g.*, Williams v. Southern Union Gas Co., 529 F.2d 483 (10th Cir.), *cert. denied*, 429 U.S. 959 (1976); EEOC v. Meyer Bros. Drug Co., 521 F.2d 1364 (8th Cir. 1975).

58. 446 U.S. at 323.

59. *Id.* at 334 n.16.

60. *See* cases cited in note 48 *supra*.

61. 446 U.S. at 326 (emphasis added).

62. The following remarks were made during the floor debate about transfer of enforcement power from the Attorney General to the EEOC, as provided in § 707. These remarks have been the subject of great debate in the district courts' review of the rule 23 certification issue in § 706 actions. Senator Javits said:

> These are essentially class actions, and if they [the EEOC] can sue for an individual claimant, then they can sue for a group of claimants.
>
> It seems to me that this is provided for by the rules of civil procedure in the Federal courts . . . . I have referred to the rules of civil procedure. I now refer specifically to rule 23 of those rules, which is entitled Class Actions and which give [*sic*] the

The second part of the opinion discussed rule 23. Neither the history nor the practical uses for this class action rule were considered; it was characterized as a stumbling block to the EEOC's enforcement responsibilities. The Court mentioned the problems of numerosity, typicality, and representativeness and again raised the "public interest" idea to justify its finding rule 23 undesirable in such suits. Although it noted the defendant employer's objective in seeking a judgment binding on all class members, the Court did not want to deviate from its interpretation of the statutory design.

Finally, the Court directed the lower courts to use their equitable powers to prevent double recovery or re-litigation by any individual receiving benefits. The importance of this admonition, more a suggestion than a mandate, cannot be overemphasized. The equitable powers of the federal courts will stand as the critical check on the EEOC's future actions.

Although well-organized, the majority's opinion failed to address the concerns of the dissenters, the Chief Justice, Justices Powell, Rehnquist, and Stevens. It did not discuss important policy considerations such as preventing piecemeal suits, saving time and money, and protecting defendant employers from inconsistent adjudications. The *Holmes* court considered the interests of both plaintiff and defendant and questioned whether a certification requirement would impose a burden on the EEOC.[63] The Supreme Court did not focus on these two ideas.

IV. THE IMPACT OF *GENERAL TELEPHONE*

A. *From the EEOC's Perspective*

The significance of *General Telephone* for the EEOC is that the federal courts now have a uniform rule to follow in section 706 actions brought by the EEOC on behalf of a group of individuals; that rule benefits the EEOC. For eight years, procedural questions flowing from the 1972 amendments have been argued. A critical one has now been decided.

According to the present EEOC Chairman, Eleanor Holmes Norton, the 1960's focused on law making, the 1970's focused on law development, and the 1980's will focus on law application.[64] Since procedure should allow substantive law to work, the EEOC can now utilize this new tool to proceed with its emphasis on "comparable pay for comparable work" and to accomplish its added tasks of enforcing the Equal Pay Act[65] and the Age Discrimination in Employment Act.[66] The *General Telephone* decision will allow the EEOC to direct its enforcement efforts against major employers practicing

opportunity to engage in the Federal Court in class actions by properly suing parties. We ourselves have given permission to the EEOC to be a properly suing party.
118 CONG. REC. 4081-82 (1972).

63. 556 F.2d at 795-97.

64. Brisbon, *Comparable Work Should Mean Comparable Pay*, 6 EQUATOR No. 7, at 3 (1980).

65. 29 U.S.C. § 206 (1976).

66. 26 U.S.C. §§ 621-634 (1976 & Supp. III 1979). *See* Reorg. Plan No. 1 of 1978, Exec. Order No. 12,106, 43 Fed. Reg. 19,807, *reprinted in* 42 U.S.C. § 2000e-4 (Supp. II 1978) *and in* 92 Stat. 3781 (1978).

systemic discrimination without encountering the procedural difficulties presented by class certification. A negative effect on settlement negotiations might result, however; an employer might be more likely to settle with the EEOC if the Commission were the certified class representative and the class members were bound by the settlement terms.[67]

The EEOC has consistently brought actions under section 706 for class-type relief even though section 707 was available. Perhaps because the statutory language of section 707 does not provide for back pay as a remedy, section 707 has not been used more extensively. Class certification has not been required in section 707 actions; this procedural wrangle could have been avoided by bringing a pattern-or-practice suit. Perhaps there was concern that the Supreme Court would follow a strict reading of the statute and not allow back pay. To be sure, the importance of back pay as a stimulus for employers to eliminate discriminatory employment practices cannot be overstated.[68] Furthermore, the burden of proof is different in section 706 and section 707 actions. As expressed in *Franks v. Bowman Transportation Co.*[69] and in *Teamsters v. United States*,[70] the section 706 burden of proof is met by demonstrating the existence of a pattern and practice of discrimination, which establishes a prima facie case. The burden then shifts to the employer to prove that the individuals involved were not in fact victims of discrimination. In a section 707 suit, however, when the government alleges a practice or pattern of discrimination, it must prove by a preponderance of the evidence that the discrimination is the employer's standard business practice.[71]

Whatever its motivation, the EEOC has finally accomplished its goal. In section 706 actions it can now avoid compliance with rule 23 class certification requirements.

B. *From the Employer's Perspective*

The Court's opinion in *General Telephone* reflects a lack of concern for the defendant employer's due process rights. The Federal Rules of Civil Procedure apply to every civil action not exempted by rule 81.[72] Since the NLRB is exempted,[73] so could the EEOC have been. The major concern expressed by the spokesman for General Telephone during the oral arguments was that without rule 23 procedures, an employee might decline an award obtained by the EEOC and bring a private suit against the employer to recover a larger award.[74] Another concern was the tremendous discovery powers available to the EEOC without certification. If a charging party files a complaint and the EEOC finds reasonable cause to believe discriminatory practices are taking place, the EEOC can use the liberal discovery techniques

67. B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1107 (1976).
68. *See* Edwards, *The Back Pay Remedy in Title VII Class Actions: Problems of Procedure*, 8 GA. L. REV. 781 (1974).
69. 424 U.S. 747 (1976).
70. 431 U.S. 324 (1977).
71. *Id.*
72. FED. R. CIV. P. 1.
73. FED. R. CIV. P. 81(a)(5).
74. 48 U.S.L.W. 3653, 3654 (Mar. 25-26, 1980).

allowed by the federal rules to gain access to all the employer's departments and branches.

The Supreme Court called on the trial courts to use their equitable powers. Certainly the employers have some protection from a frivolous suit because they can recover their attorney's fees in such an instance.[75] The EEOC should have been called on, though, to exercise care and reason in lodging its complaints. An overzealous claim, for example, was filed in *EEOC v. Delaware Trust Co*.[76] On the basis of one complaint filed by a female employee, the EEOC leveled a multi-faceted charge, limited neither by time nor by class of employee, against Delaware Trust. All personnel practices including hiring, recruitment, job classification, training, and promotion were mentioned, but none of the asserted flaws in these areas were described.[77] Without the constraints of rule 23 in a situation such as this, the courts will have to exercise firm and wise control over the boundaries of the case.

C. *Rule 23*

The class action rule was extensively revised in 1966, and rule 23(b)(2) was enacted in part to assure that the class action device would be available for enforcement of the civil rights statutes.[78] The Advisory Committee of the Judicial Conference submitted the changes to the Supreme Court; the revised rules took effect following the Court's approval and a congressional vote.[79] The Court in *General Telephone* was remiss in not reconciling its holding with the mandate in rule 1 that all civil actions shall be governed by the Federal Rules of Civil Procedure.[80]

Title VII promotes the concept of a class as individuals sharing a common characteristic that subjects them to harmful treatment, an "entity class" as one commentator describes it.[81] Title VII advocates a public policy forbidding employment discrimination against individuals because of their membership in such an entity class. As a member of such a class, an individual (or the EEOC) bringing suit on his own behalf because of discrimination based on his entity class characteristic seems also to be bringing suit on behalf of all who share that feature. Perhaps this explains why the courts have reshaped rule 23(b)(2) and why they have been fairly lenient in applying the rule's requirements of numerosity, typicality, and commonality.[82]

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75. *See* Christianburg Garment Co. v. EEOC, 434 U.S. 412 (1978).

76. 18 Fair Empl. Prac. Cas. 1521 (D. Del. 1979).

77. *Id.*

78. 3B J. MOORE FEDERAL PRACTICE ¶ 23.02[2.-6] (2d ed. 1980). *See also Developments in the Law—Class Actions*, 89 HARV. L. REV. 1319 (1976).

79. 39 F.R.D. 69 (1966) (amendments to Federal Rules of Civil Procedure).

80. FED. R. CIV. P. 1.

81. Note, *Antidiscrimination Class Actions under the Federal Rules of Civil Procedure: The Transformation of Rule 23 (b)(2)*, 88 YALE L.J. 868 (1979).

82. *Id.* For the Court's discussion of its treatment of rule 23 suits, see Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).

D. *The Public Interest*

Eliminating discrimination is undoubtedly in the public interest. The Supreme Court's major thrust in Title VII cases has been to vindicate that interest. For example, by liberally construing the filing provisions of section 706 in *Love v. Pullman*,[83] the Court aided litigants who might be unaware of the second filing required when an initial filing mistake is made. And, by reaffirming the independence of Title VII remedies available to aggrieved employees in *Johnson v. Railway Express Agency, Inc.*,[84] employees are more assured of full relief. With its decision in *General Telephone*, which removed the need for the EEOC to become certified as a class representative in section 706 actions, the Court has enabled the EEOC to function more efficiently in carrying out its statutory duties.

The public interest is served not only by the EEOC but also by private litigants. The private right of action has many public interest characteristics; among them are attorney's fees, affirmative action remedies, back pay, and appointment of counsel at the discretion of the court. A private litigant not only redresses his own injury but also serves the congressional policy of fighting employment discrimination. Certainly an aggrieved individual can serve as a class representative.[85] In *General Telephone*, the EEOC could have sought class certification. Had certification been denied, the Commission could have brought suit on behalf of the four individual charging parties.[86] One of the individuals could have served as a class representative. Alternatively, the EEOC could have brought a section 707 suit. The public interest could have been served without sidestepping the procedures outlined in the Federal Rules of Civil Procedure.

The public interest in eradicating job discrimination is only one of several. One of the overriding interests in our legal system is that of a fair trial for all parties. If a defendant's right to a suit conducted according to the federal rules can be set aside with such aplomb, the public interest in fair play in court is not served. The public has an interest in employers' providing jobs and achieving high levels of production, but it has no interest in having business earnings spent unnecessarily on piecemeal suits arising because an EEOC suit did not decisively settle an issue. In fact, the burden on the business community created by duplicative suits might well be something our economy cannot afford.

CONCLUSION

As George Orwell penned in *Animal Farm*, "all animals are equal, but some animals are more equal than others." The EEOC is treated as a "special animal" in *General Telephone*. Although the agency is not expressly exempted from complying with rule 23 in section 706 class type actions, the Supreme Court held that rule 23 was not meant to apply to such actions and

83. 404 U.S. 522 (1972).

84. 421 U.S. 454 (1975).

85. Senter v. General Motors Corp., 532 F.2d 511, 525 (6th Cir.), *cert. denied*, 429 U.S. 870 (1976). *See* East Tex. Motor Freight v. Rodriguez, 431 U.S. 395 (1977).

86. *See* note 23 *supra*.

would be distorted if it were. Fairness to the defendant employer should be supplied through the equitable powers of the federal courts rather than through this procedural safeguard. Undoubtedly this standard will be applied to other enforcement proceedings brought by federal agencies. After eight years of motions, arguments, and conflicting court decisions on this issue, the decision is welcomed for its finality.

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