7-1-1980

Dissent of Commissioner J. Clay Smith, Jr. Re: Vote of the Equal Employment Opportunity Commission on the Issues of Contribution under Title VII and the Equal Pay Act on July 1, 1980

J. Clay Smith Jr.

DISSENT OF COMMISSIONER J. CLAY SMITH, JR.
RE: VOTE OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
ON THE ISSUES OF CONTRIBUTION UNDER TITLE VII
AND THE EQUAL PAY ACT ON JULY 1, 1980

The views of the members of the EEOC were requested on the above captioned issues by the Department of Justice. Justice will represent the interest of the U.S. Government in a matter before the Supreme Court raising the contribution issues.

On July 1, 1980, the General Counsel brought two major issues before the Commission for consideration and approval. In broad terms, the first issue presented was whether as a matter of policy the EEOC opposes the right of an employer to sue a union for contribution where both parties' joint conduct may result in a violation of Title VII. The second issue presented the same question as it relates to violations of the Equal Pay Act. On the first issue the majority voted not to support a policy of contribution (with Commissioners Smith and Walsh dissenting). On the second issue the majority voted not to support a policy of contribution (with Commissioner Smith, alone, dissenting). Because of the importance of these questions, I submit my views for the official minutes for association with my dissents and to be associated with any communications supported by the majority transmitted to the Department of Justice, or elsewhere.

BACKGROUND

Two years ago the Commission approved the General Counsel advancing the position that a party found guilty of violating Title VII had a right to contribution against any other party who participated in the wrong-doing. The Commission took this position in an amicus curiae brief in Northwest Airlines, Inc. v. Transportation Workers Union of America, 606 F.2d 1350 (D.C. Cir. 1979). Citing prominent authority, the EEOC's brief stated:

> "/G/eneral principles of justice require that in the case of a common obligation, the discharge of it by one of the obligors without proportionate payment from the other, gives the latter an advantage to which he is not equitably entitled." (Commission brief at p. 20)

Nothing has changed in law or in fact which warrants the Commission reversing this original position. Indeed, our position is stronger now than when the Commission first endorsed the principle of contribution since the only two Courts of Appeals which have considered the issue have both ruled that Title VII defendants have a right to contribution from other parties responsible for the discrimination. See Northwest Airlines, Inc. v. Transportation Workers Union of America, 606 F.2d 1350 (D.C. Cir. 1979) and Glus v. Murphy, _____ F.2d _____, (3rd Cir.)(No. 79-1507, 1508), decided June 27, 1980.

Both Courts of Appeals held that contribution furthers the mission of Title VII in eliminating invidious employment discrimination. The Title VII statutory scheme and EEOC implementing regulations were designed with the expectation that if a union jointly participates in an unlawful employment practice it would be held monetarily liable. See EEOC Compliance Manual, Sec. 201.5(b) (Employers as aggrieved persons).

In the Glus decision, supra, Judge A. Leon Higginbotham pointed out that the very terms of Title VII establish that unions are to be held financially liable with employers for unlawful acts. As his opinion points out, while Section 703(a) of Title VII, 42 U.S.C. 2000e-2(c)(3) holds a union liable not only for discriminatory actions in which it independently engages but also when it "cause/s/ or attempt/s/to cause an employer to discriminate against an individual . . . ." The backpay provision of Title VII, 42 U.S.C. 2000e-5(g) is applicable to unions and employers alike.

Judge Higginbotham opined:

> "These provisions reflect a statutory policy that the responsibility for monetary relief should be borne by both unions and employers to the extent that they are responsible for violations of Title VII. A right of contribution would achieve this goal. (emphasis added) In contrast, a holding that there is no right of contribution under Title VII

> would release some individuals from liability." Glus v. Murphy, supra at p. 14, slip opinion.

In addition to this language, Judge Higginbotham provided five other independent and important policy considerations supporting the majority opinion of the court which are too persuasive for me to cast my lot with the majority of the Commission on the Title VII issue:

1. Policy: Joint Elimination of Discrimination. Quoting Albermarle Paper Co. v. Moody, 422 U.S. 405, 417-418 (1975), Judge Higginbotham stated,

> It is the reasonably certain prospect of a backpay award that "provide/s/ the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practice and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominous page in this country's history." Id. at 15 (slip opinion).

2. Policy: Vigilance During Collective Bargaining. Judge Higginbotham stated,

> Under a rule of contribution "/b/oth union and employer will know that they both must be vigilant to eschew unlawful discrimination and that the employee's predilections as to whom to sue will not insure either immunity from the mandates of the law." Ibid. (emphasis added)

3. Policy: Contribution Favors Conciliation. Judge Higginbotham stated,

> A right of contribution would also serve the Title VII policy of favoring conciliation and settlement of these claims. "/C/ooperation and voluntary compliance . . .

> /a/re the preferred means for achieving" the goal of equality of employment opportunities. Ibid.

4. Policy: Prevents Unjust Enrichment. Judge Higginbotham stated,

> Further, the contribution rule prevents a plaintiff from becoming unjustly enriched either by collusive activity with one of the defendants, or by threatening one defendant that the suit will be brought only against it, thereby forcing an unjustified settlement. Id. at 16.

5. Policy: Contribution is Consistent with Congressional Intent. Judge Higginbotham stated,

> A right of contribution would implement the congressional intent to hold both unions and employers liable for unlawful employment practice and would aid the conciliation and settlement goals of Title VII. Ibid.

Historically, the Commission has successfully argued in the Appellate Courts that the backpay provision of Title VII is prophylactic. See Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975). By that I mean backpay is a preventative tool. When an employer or union becomes aware that other institutions are making backpay awards for violations of anti-discrimination statutes, these persons have notice that if they violate the law, they too are reasonably certain to be subject to monetary liability. Under contribution, unions as well as employers recognize that they have to actively work to eliminate discrimination because even if no charge is filed against it, a party to a collective bargaining agreement can still seek contribution from the other for past violations of law. Absent contribution, if a union is not charged because of lack of knowledge, inadvertence

or design, the union may enjoy immunity.

The Commission majority reasoned, inter alia, that contribution is inconsistent with the fact that some unions may aid the Commission in proving employer violations. Implicit in the majority's argument is the assumption that unions aid charging parties and the Commission in eliminating discrimination. However, as the history of Title VII reveals, the majority of unions have not been in the vanguard in fighting discrimination. See, United Steelworkers of America v. Weber, 443 U.S. 36 (1979), which tolls against the position taken by the majority. The opening text of the Weber opinion (which the EEOC applauded) states: that "blacks /have/ long been excluded from craft unions[1/] . . . . " Footnote 1 is revealing:

> [1/] Judicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice. See, e.g., United States v. International Union of Elevator Contractors, 538 F.2d 1012, (CA3 1976); Associated General Contractors of Massachusetts v. Alshuler, 490 F.2d 9 (CA1 1973); Southern Illinois Builders Association v. Ogilve, 471 F.2d 680, (CA7 1972); Contractors Association of Eastern Pennsylvania v. Secretary of Labor, 442 F.2d 159, (CA3 1971); Local 53 of International Association of Heat & Frost, etc. v. Vogler, 407 F.2d 1047, (CA5 1969); Buckner v. Goodyear, 339 F.Supp. 1108, (ND, Ala. 1972), aff'd without opinion, 475 F.2d 1287, (CA5 1973). See also, United States Commission on Civil Rights, The Challenge Ahead: Equal Opportunity in Referral Unions

58-94 (1976), (summarizing judicial findings of discrimination by craft unions); G. Myrdal, An American Dilemma (1944) 1079-1124; R. Marshall and V. Briggs, The Negro and Apprenticeship (1967); S. Spero and A. Harris, The Black Worker (1931); United States Commission on Civil Rights, Employment 97 (1961). State Advisory Committee, United States Commission on Civil Rights, 50 States Report 209 (1961); Marshall, "The Negro in Southern Unions," in The Negro and the American Labor Movement (ed. Jacobson, Anchor 1968) p. 145; App. 63, 104."

See also, R. C. Weaver, Negro Labor (Harcourt, Brace & Co., N.Y., 1946); Norgren, Webster, et al., Employing The Negro In American Industry (Industrial Relations Counselors, Inc., N.Y., 1959) (Mono. No. 17); Van Deusen, The Black Man in White America (The Associated Pub., Inc. 1938) (with particular reference to Chaps. V and VI).

The fact of the matter is that there are some unions which are good on equal employment opportunity issues and some which are bad. Norgren, Webster, Employing The Negro In American Industry, supra at 145; Marshall & Briggs, The Negro and Apprenticeship, cited in United Steelworkers of America v. Weber, supra 35, n.1. Simple justice demands, the principles of equity cry out, and the badges of history urge that no party to a collective bargaining agreement which violates the law should be placed in a preferred status as a matter of administrative

discretion, equity or distributive justice in connection with the contribution issue. As applied to unions, that is what both United States Courts of Appeals which have considered the issue have ruled; that was the Commission's and the General Counsel's original position; and that is what makes the most sense in the fair and effective enforcement of Title VII and other anti-discrimination statutes. Any other result impedes justice and rewards the most discriminatory and recalcitrant unions which for one reason or another have not been sued by the charging party. Civil Rights policy considerations weigh heavily in favor of the principle of contribution. Accordingly, I respectfully dissent from the majority's position to restrict the right.*/

/s/

J. Clay Smith, Jr.
Commissioner
July 7, 1980

cc: The Commissioners
General Counsel
Executive Secretariat

---

*/ Based upon principles of equity, the view expressed above is the reason why I dissented on the contribution issue as it relates to the Equal Pay Act. It is within the general equitable powers of the Federal courts to impose joint and several liability on a union or employer for violation of the Fair Labor Standards Act.