7-16-1980

Dissent of Commissioner J. Clay Smith, Jr., on the Approval for Litigation of the Case Of Darlene Bartek V. The Kent Upholstery Co., Inc., on the Issue of Successor Company Liability

J. Clay Smith Jr.

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DISSENT OF COMMISSIONER J. CLAY SMITH, JR., ON THE APPROVAL FOR LITIGATION OF THE CASE OF DARLENE BARTEK v. THE KENT UPHOLSTERY CO., INC., ON THE ISSUE OF SUCCESSOR COMPANY LIABILITY

On July 8, 1980, the General Counsel sought this Commission's approval for litigation of a case entitled, Darlene Bartex v. The Kent Upholstery Co., Inc. Bartex was a sex discrimination case in which the alleged act of discrimination occurred at a time in which the Kent Upholstery Co., Inc., was not owned by the present owners. The proposed suit, however, was brought solely against Kent Upholstery, Inc.

Upon query as to whether or not the present owners of the defendant company had continued the acts of discrimination which were commenced by its previous owners, it was indicated that no consideration had been given to that issue.

Since the legal issue of successor liability was not presented to the Commission for evaluation before litigation against respondent was approved by the majority for litigation,* I dissented for the following reasons:

Courts have long held that a successor company is liable for acts of discrimination committed by its predecessor only when certain standards are met. Those standards were articulated by the Sixth Circuit in EEOC v. MacMillan Bloedel Containers, Inc., 503 F.2d 1086 (6th Cir. 1974), and by the Ninth Circuit in Slack v. Havens, 522 F.2d 1091 (9th Cir. 1975).

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* After the Commission meeting, staff from the General Counsel's Office indicated that the previous owners may be joined in the suit when filed in court.

In MacMillan and Slack the Courts of Appeals held that the following criteria must be met in order for a successor company to be held liable for discriminatory acts of its predecessor: (1) whether the successor company had notice of the charge; (2) the ability of the predecessor to provide relief; (3) whether there has been a substantial continuity of business operations; (4) whether the new employer uses the same plant; (5) whether he uses the same or substantially the same workforce; (6) whether he uses the same or substantially the same supervisory personnel; (7) whether the same jobs exist under substantially the same working conditions; (8) whether he uses the same machinery, equipment and methods of production; and (9) whether he produces the same product.

Under the facts presented, since these factors were not presented to the Commission for its evaluation, there is a great possibility that it has authorized enforcement action against the wrong party. Hence, I respectfully dissent.

J. Clay Smith, Jr.
Commissioner
July 16, 1980

cc: The Commission
General Counsel
Executive Secretariat
Official Commission Minutes