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THE MEANING OF "PUBLIC" IN SECTION 709(e) OF THE 1964 CIVIL RIGHTS ACT AND ACCESS TO INFORMATION GATHERED BY THE EEOC

INTRODUCTION

Title VII of the Civil Rights Act of 1964[1] forms the basis of a comprehensive federal program[2] guaranteeing equal employment opportunities.[3] Under Title VII, all employment discrimination based on race, color, religion, sex, or national origin is prohibited.[4] A two-pronged enforcement mechanism is utilized, which combines private litigation by an aggrieved party with conciliation and litigation efforts by the Equal Employment Opportunity Commission[5] (hereinafter referred to as EEOC or Commission). An aggrieved person must first file a charge with the EEOC;[6] the EEOC then investigates and, if it finds that probable cause exists to believe that Title VII has been violated, it attempts to eliminate the discrimination by "informal methods of conference, conciliation and persuasion."[7] If a settlement is not reached within 180 days of the date the charge was filed, the person charging discrimination may bring a private action against the employer.[8] To aid the charg-

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[1] 42 U.S.C. § 2000e—e-17 (1976).

[2] Other federal sources of legal protection for equal employment opportunities include: The National Labor Relations Act, 29 U.S.C. §§ 151-69 (1976); The Equal Pay Act, 29 U.S.C. § 206(d) (1976); The Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-34 (1976); The Vocational Rehabilitation Act of 1973, 29 U.S.C. §§ 701-94 (1976); The Vietnam Era Veterans Readjustment Act of 1974, 38 U.S.C. §§ 2011-14 (1976). *See also* Exec. Order No. 11,141, 3 C.F.R. § 179 (1964); Exec. Order No. 11,246, 3 C.F.R. § 339 (1964).

[3] Forty-six states have fair employment practice laws supplementing Title VII. *See* Connolly & Connolly, *Equal Employment Opportunities: Case Law Overview*, 29 MERCER L. REV. 677, 682 & n.21 (1978).

[4] 42 U.S.C. § 2000e-2 (1976).

[5] The Equal Employment Opportunity Commission consists of five Commissioners and a general counsel appointed by the President, subject to approval by the Senate. 42 U.S.C. § 2000e-4(a), (b) (1976).

[6] The charge must be filed within 180 days of the date upon which the discriminatory act occurred. 42 U.S.C. § 2000e-5(b) (1976).

[7] *Id.*

[8] *Id.* § 2000e-5(f)(1). The EEOC can also bring a civil action if the conciliation attempts fail. The charging party can bring a private action at any one of three junctures in the administrative process: after a determination of no reasonable cause; after a finding of reasonable cause, a failure of conciliation and a determination that the case will not be litigated by the EEOC; and, at any point 180 days after the charge was filed if the Commission has not filed an action or entered into a conciliation

ing party's determination of whether to bring a private action, the EEOC, pursuant to its own regulation, permits disclosure to the complaining party or his attorney of information obtained during its administrative investigation of the claim of employment discrimination.[9] However, section 709(e) of the Civil Rights Act of 1964 prohibits making *public* any information obtained by the Commission during its administrative investigation of the charge prior to the institution of a private Title VII action by the aggrieved party.[10] The federal circuit courts of appeal have experienced difficulty in reconciling these two positions. The problem presented is whether the Commission's release of investigatory information[11] to the charging

agreement to which he is a party. The private action must be brought within 90 days after receiving the statutory notice of right to sue letter from the Commission. *Id.*

[9] 29 C.F.R. § 1601.20 (1977). 42 U.S.C. § 2000e-12(a) (1976) authorizes the Commission to promulgate procedural regulations in conformity with the Administrative Procedure Act. The EEOC adopted its disclosure rule pursuant to this authority. Before releasing the file to the charging party the Commission deletes any confidential or irrelevant information. EEOC COMPL. MAN. (CCH) ¶ 1788.

[10] It shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding under this subchapter involving such information. Any officer or employee of the Commission who shall make public in any manner whatever any information in violation of this subsection shall be guilty, of a misdemeanor and upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than one year.

42 U.S.C. § 2000e-8(e) (1976).

[11] Section 709(e) deals only with information acquired by the EEOC during its investigation of the charge. Section 706(b), 42 U.S.C. § 2000e-5(b) (1976), prohibits disclosure by the Commission of anything said or done during the settlement efforts without written consent of the persons concerned. The D.C. Circuit in Sears, Roebuck and Co. v. EEOC, 581 F.2d 941 (D.C. Cir. 1978), raises a troublesome point about the relationship between § 706(b) and § 709(e). Pointing out that both sections prohibit disclosure to the "public", it asserts that they both should be given the same meaning. 581 F.2d at 948. However, there are strong policy reasons for prohibiting disclosure of settlement materials which are not applicable to the disclosure of investigatory files. Most important is that if the settlement process is to function effectively an employer must be able to negotiate without fear of anything he might inadvertantly reveal being disclosed to the charging party. *Id.* Moreover, an employer who is fearful of such information being revealed to a prospective plaintiff can resist the conciliation process. *Id.* (quoting Sears, Roebuck and Co. v. EEOC, 435 F. Supp. 751, 759 (D.D.C. 1977)). On the other hand, such an employer would not be able to resist the EEOC's investigative efforts. *See* notes 45-47 and accompanying text *infra* for a discussion of this point. So, while disclosure of settlement materials might disrupt and perhaps end such negotiations, it is unlikely that disclosure of information contained in the investigatory file would have a similar impact on the EEOC's investigation and its ability to obtain the

party prior to his institution of a private action is an unlawful disclosure to the "public" under the nondisclosure provision contained in section 709(e).

In *H. Kessler & Co. v. EEOC*[12] the Fifth Circuit, sitting *en banc,* addressed the question and held that disclosure to a charging party and his attorney of the party's file prior to the institution of a legal proceeding was not prohibited. The question arose again five years later when the District of Columbia Circuit in *Sears, Roebuck and Co. v. EEOC*[13] and the Seventh Circuit in *Burlington Northern, Inc. v. EEOC*[14] disagreed with the *Kessler* court and held that the term "public" did encompass the charging party and his attorney and thus refused to allow disclosure.

This comment focuses on this split in the circuits over the

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information. Thus, it may be necessary to interpret § 706(b) and § 709(e) differently, despite the similarity of the language and the desire for symmetry.

[12] 472 F.2d 1147 (5th Cir. 1973), *cert. denied,* 412 U.S. 939 (1973).

[13] 581 F.2d 941 (D.C. Cir. 1978). Sears was attempting to prevent the disclosure of its consolidated national file to an unspecified number of charging parties. The *Sears* court declined to follow the *Kessler* court's decision to whatever extent it was inconsistant with the *Sears* holding. However, it noted that the cases were "not necessarily inconsistent," due to the difference in the sizes of the proposed disclosures involved in the two cases. 581 F.2d at 947-48.

[14] 582 F.2d 1096 (7th Cir. 1978). Burlington Northern brought this action to enjoin the disclosure of its EEOC national investigatory file to a number of individual charging parties who had instituted suit. As a result, the Seventh Circuit did not have to decide the issue whether disclosure to the charging party and his attorney prior to litigation constituted "making public" the information. However, the court stated its holding broadly, clearly intending that disclosure should be prohibited to charging parties before suit is filed: "[W]e hold, as . . . in *Sears, Roebuck,* that individual charging parties are members of the public under § 709(e) to whom investigatory materials may not be disclosed prior to the institution of judicial proceedings." *Id.* at 1100. Regarding disclosure after the instigation of a Title VII proceeding, the court held that the Commission may only disclose that information which is "directly relevant to the individual plaintiff's claims." *Id.* at 1101. The plaintiffs in *Burlington Northern* had brought class action suits and sought information "relevant to the allegations of discrimination against the broader class." *Id.* By limiting the amount of information that could be disclosed after the filing of a Title VII suit to only that information which is relevant to the individual plaintiffs, the court gave the word "public" as it appears in § 709(e) a narrow definition indeed. Thus, the court absolutely prohibited the disclosure of information to a charging party before his suit is filed and only permitted limited disclosure after his suit is filed.

Moreover, the court refused to distinguish the Fifth Circuit's holding in *Kessler* on the basis of the vast difference in the size of the proposed disclosures in the two cases. *Id.* at 1100-01. Interestingly, the EEOC has the practice of deleting any irrelevant or confidential matters from the file prior to releasing it to the charging party and his attorney. EEOC COMPL. MAN. (CCH) ¶ 1788.

question of whether, for purposes of section 709(e) of the Civil Rights Act of 1964, disclosure by the EEOC of its investigative files to a charging party and his attorney amounts to making the information public. The issue will be addressed through an examination of the *Kessler, Burlington Northern,* and *Sears* opinions, the sources upon which they were based, and some practical considerations of the disclosure question.

I. EEOC CONCILIATION V. PRIVATE LITIGATION

Because of the lack of legislative history concerning section 709(e),[15] the *Burlington Northern* and *Sears* courts considered the section in terms of its relation to the statutory scheme for enforcing Title VII and the impact that disclosure would have on that scheme.[16] Specifically, they focused on which prong of the enforcement mechanism—private litigation or the conciliation process—Congress intended to be the primary means for obtaining equal employment opportunity.[17] The *Sears* and *Burlington Northern* courts explored the question of Congressional intent in some depth and found that the EEOC, through its conciliation and litigation efforts, was intended to be the primary enforcer of Title VII.[18] Moreover, both courts thought that disclosure of the investigative file would encourage private litigation. Because they felt that private litigation would hinder the EEOC's efforts, they concluded that Congress did not intend to undercut its primary enforcement mechanism by permitting disclosure.[19]

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[15] 472 F.2d at 1151. *See* Vaas, *Title VII: Legislative History,* 7 B.C. INDUS. & COM. L. REV. 431, 457 (1966).

Although both the *Kessler* and *Sears* courts discussed the legislative history of § 709(e), their efforts are not convincing. The *Kessler* court points to an ambiguous statement Senator Humphrey made while introducing the compromise amendment which eventually became Title VII. 472 F.2d at 1150. The *Sears* court, without citing any source, states that Congress' intention in enacting § 709(e) was to prevent disclosure of sensitive data to persons outside the government. 581 F.2d at 947.

[16] *Burlington Northern,* 582 F.2d at 1099-1100; *Sears,* 581 F.2d at 946.

[17] The Fifth Circuit in *Kessler* never directly confronted the question of which prong Congress intended to serve as the primary enforcement mechanism. Rather, the court discussed and built its argument around the importance of the private litigant. 472 F.2d at 1149.

[18] *Sears,* 581 F.2d at 946; *Burlington Northern,* 582 F.2d at 1099-1100.

[19] *Sears,* 581 F.2d at 946; *Burlington Northern,* 582 F.2d at 1100.

A. *The Legislative Record*

To determine Congressional intent, the *Burlington Northern* court first looked to the legislative history of Title VII.[20] It concluded that the "primary responsibility for insuring equal employment opportunity" was lodged with the EEOC.[21] However, the legislative record is not as clear as the court would have it appear. For example, the court points to a statement in the section-by-section analysis of the bill amending Title VII[22] as indicative of Congressional intent to make conciliation the primary method of enforcement: " 'It is hoped that recourse to the private lawsuit will be the exception and not the rule, and that the vast majority of complaints will be handled through the offices of the EEOC.' "[23] The next sentence in the analysis, however, casts a completely different light on the quoted language: "[A]s the individual's rights to redress are paramount under the provisions of Title VII it is necessary that all avenues be left open for quick and effective relief."[24] In addition, there are frequent instances throughout the legislative record of conflicting statements by Congressmen as to the proper interpretation of the statutory language.[25] Also, because both Title VII of the Civil Rights Act of 1964 and the Equal Employment Opportunity Act of 1972 were completely changed after leaving committee,[26] the committee reports provide little guidance.

What then can be gleaned from the legislative record? Although Congress considered comprehensive settlements through conciliation an important part of Title VII enforcement and the most desirable method for resolution of employ-

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[20] 582 F.2d at 1099-1100.

[21] *Id.*

[22] H.R. 1746, 92d Cong., 2d Sess. (1972). H.R. 1746 was enacted as the Equal Employment Opportunity Act of 1972, 86 Stat. 103 (1972).

[23] 582 F.2d at 1100 (quoting 118 CONG. REC. 7565 (1972)).

[24] 118 CONG. REC. 7565 (1972).

[25] For example, Senator Ervin, 110 CONG. REC. 14188 (1964), and Representative Celler, *id.* at 2566, interpreted § 706(f)(1) to mean that a charging party could not bring a private action until the EEOC had terminated its conciliation efforts. Senator Javits, *id.* at 14191, and Senator Humphrey, *id.* at 14188, stated that § 706(f)(1) did not require the charging party to wait until the conciliation process had ended to bring his action.

[26] Vaas, *supra* note 15, at 457; Sape & Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972,* 40 GEO. WASH. L. REV. 824, 836-45 (1971-72).

ment discrimination disputes,[27] it also recognized the inherent limitations of voluntary conciliation.[28] Indeed, the primary impetus behind the enactment of the Equal Employment Opportunity Act of 1972 was Congressional dissatisfaction with conciliation as the primary means of enforcing Title VII.[29] The House Committee's report on H.R. 1946 stated: "It has been the emphasis on voluntariness that has proven to be most detrimental to the successful operation of Title VII."[30]

Congress did not, as suggested by the Seventh Circuit in *Burlington Northern,* view the individual litigant's right to file a private action merely as an escape hatch from " 'the administrative quagmire' which could develop if a case could not promptly be processed by the Commission."[31] Instead, Congress considered private litigation an important part of the Title VII enforcement mechanism.[32] Moreover, in adopting the Equal Employment Opportunity Act of 1972, Congress recognized that "aggressive individual litigants had made substantial contributions to the development of Title VII law and that their actions should not be curtailed."[33] Although the legislative record is not complete, it is fair to conclude that Congress did not intend to discourage and hinder private litigation until the conciliation process was complete. Thus, the Seventh and District of Columbia Circuits' emphasis on the primacy of the EEOC's efforts and the need to discourage private litigation which might hinder these efforts appears to be unfounded.

B. *Statutory Restrictions on the Private Action*

Further evidence of Congressional intent regarding the relationship between the private action and EEOC conciliation is provided by an examination of restrictions on private litigation.[34] The charging party must first give the EEOC an oppor-

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[27] 118 CONG. REC. 7563 (1972).

[28] H.R. REP. No. 238, 92d Cong., 1st Sess. 1, 9, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 2137, 2144.

[29] *Id.* at 3, 9.

[30] *Id.* at 9.

[31] 582 F.2d at 1099 (quoting in part H.R. REP. No. 238, *supra* note 28, at 2148).

[32] 118 CONG. REC. 7565 (1972); Sape & Hart, *supra* note 26, at 879.

[33] Sape & Hart, *supra* note 26, at 879. *See* Belton, *Title VII of the Civil Rights Act of 1964: A Decade of Private Enforcement and Judicial Development,* 25 ST. LOUIS U. L.J. 225, 229-30 (1975).

[34] None of the opinions examined these restrictions or the reasons behind them.

tunity to perform its investigatory and conciliatory functions.[35] Thus, before the aggrieved party can bring a Title VII action he must first file a charge with the EEOC and allow the Commission 180 days[36] to conciliate or file its own action.[37] Moreover, section 706(f)(1) provides that the EEOC can petition a court to stay a private action for sixty days "pending further action of the Commission to obtain voluntary compliance."[38] However, once these time restrictions on the right to private litigation have expired there is no indication in the statutory language that Congress intended to subordinate the private action to the conciliation process.

Furthermore, while considering the 1972 amendments to Title VII, Congress had evidence before it that the EEOC was, in the majority of cases, unable to complete its investigatory and conciliatory tasks within the 180 day period.[39] Congress could have extended the restrictive period if it had been concerned that the Commission should be allowed to complete the conciliation process without having its efforts "undercut" by private litigation. Interestingly, it chose not to extend the restrictive period.[40] Indeed, the Education and Labor Committee of the House, when discussing private actions pursuant to Title VII, stated: "It would . . . be appropriate for the individual to institute a court action where the delay is occasioned by administrative inefficiencies. The primary concern must be protection of the aggrieved person's system to seek a prompt remedy in the best manner possible."[41]

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[35] EEOC v. General Electric Co., 532 F.2d 359, 364 (4th Cir. 1976); Sanchez v. Standard Brands, 431 F.2d 455 (5th Cir. 1970).

[36] 42 U.S.C. § 2000e-5(f)(1) (1976). If the state in which the discriminatory act occurred has a recognized fair employment practices agency, the EEOC must defer the charge to it for 60 days. *Id.* § 2000e-5(d) (1976). The 180 day restriction on private actions begins running after 60 days or after termination of proceedings by the state agency, whichever is earlier. *Id.* § 2000e-5(f)(1) (1976). Thus in many instances the charging party must wait 240 days before bringing his private action.

[37] 42 U.S.C. § 2000e-5(f)(1) (1976). If the Commission does bring an action based on the charge, the charging party can intervene. Similarly, the Commission can intervene in an action brought by the charging party if the case is of general public importance. *Id.*

[38] *Id.*

[39] H.R. REP. No. 238, *supra* note 28, at 2147-48.

[40] Indeed, Congress has taken steps to aid the private litigant in bringing his action. The court may appoint an attorney for the litigant and allow him to bring the action without payment of fees, costs, or security. 42 U.S.C. § 2000e-5(f)(1) (1976).

[41] H.R. REP. No. 238, *supra* note 28, at 2148.

II. PRACTICAL ASPECTS OF DISCLOSURE

A. *Effect On Employer Cooperation With EEOC Investigations*

Both the *Sears* and *Burlington Northern* courts asserted that disclosure would hinder the Commission's investigative efforts since employers would be tempted to resist EEOC requests for information if they knew the material would be turned over for use in a private action.[42] Such fears are without substance. Section 709(e) prohibits the disclosure to the "public" of investigatory materials only up to the time a Title VII action is filed.[43] Employers are aware that regardless of how the courts define "public" the investigatory materials will be turned over to a charging party once he files a private Title VII action.[44] Thus, in most instances there would be no added impetus for an employer fearful of the materials being turned over to a charging party to resist the Commission's investigation, because a charging party is allowed to obtain them before bringing an action. It is only in the case of a charging party who will not bring an action without access to his Commission file that an employer has any incentive to resist EEOC requests for information. But it seems doubtful that such a speculative incentive would prompt an employer to resist disclosure. Even if it did, given the broad scope of the Commission's investigative power,[45] its subpoena power,[46] and the courts' willingness to uphold these subpoenas,[47] employer resistance to EEOC requests for information would prove fruitless.

The *Burlington Northern* and *Sears* courts were also concerned that the Commission's use of its coercive power to meet employer resistance might inject "unnecessary adversariness into the process of dealing with employment practices."[48] Such

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[42] *Sears*, 581 F.2d at 946; *Burlington Northern*, 582 F.2d at 1100.

[43] 42 U.S.C. § 2000e-8(e) (1976).

[44] *Id. See also* Burlington Northern, Inc. v. EEOC, 582 F.2d 1097 (7th Cir. 1978). However, the court in *Burlington Northern* interpreted "public" as narrowly as possible: they held that a Title VII litigant who had filed suit could only obtain information relevant to his case. Thus, information can be made "public" only to the one who is involved in the case. *See* note 14 *supra* for a discussion of *Burlington Northern*.

[45] 42 U.S.C. § 2000e-8(a) (1976); Sape & Hart, *supra* note 26, at 871-72.

[46] 42 U.S.C. § 2000e-9 (1976); B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 778-79 (1969).

[47] Sape & Hart, *supra* note 26, at 872 & n.315.

[48] *Burlington Northern*, 582 F.2d at 1100. *See also Sears*, 581 F.2d at 947.

adversariness, they predicted, might interfere with the EEOC's ability to obtain a voluntary settlement. But the Commission has seldom been forced to use its coercive powers[49] since it first permitted disclosure to a charging party in 1965.[50] For example, the Los Angeles District Office, in investigating 16,750 charges, has only used its coercive powers three times.[51] In light of its infrequent use of its coercive powers it is fair to conclude that the EEOC's disclosure practices have not adversely affected its relationship with employers.

B. *Impact of Nondisclosure on the Private Litigant*

Although all three courts agreed that nondisclosure discourages private litigation,[52] only the *Kessler* court explored the issue.[53] The court pointed to the difficulty that parties had in obtaining competent attorneys to handle their Title VII actions. It asserted that without the information that is likely to be in the investigatory file, a charging party had little hope of persuading an already reluctant attorney to take his case.[54] However, as the *Sears* court noted, section 706(f)(1) empowers the court, in circumstances it deems just, to appoint an attorney for a private litigant and to "'authorize the commencement of the action without the payment of fees, costs, or security'".[55] The court may also award the prevailing party a reasonable attorney's fee.[56] Thus, although a charging party might still be hampered in persuading an attorney to take his case if he does not have the file, his position is not as bleak as suggested by the *Kessler* court.

Even though a charging party does not always need his investigatory file to obtain an attorney, the information in the file would enable a charging party and his attorney more accu-

[49] B. SCHLEI & P. GROSSMAN, *supra* note 46, at 779.

[50] The EEOC regulation allowing disclosure first appeared at 42 C.F.R. § 1601.20 (1966).

[51] B. SCHLEI & P. GROSSMAN, *supra* note 46, at 779 n.70.

[52] This finding is the negative implication of the *Sears* and *Burlington Northern* courts' assertion that disclosure would encourage private litigation. *Burlington Northern*, 582 F.2d at 1100; *Sears*, 581 F.2d at 946. *See also* Kessler & Co. v. EEOC, 472 F.2d 1147, 1151-56 (5th Cir. 1973).

[53] 472 F.2d at 1151-52.

[54] *Id.*

[55] 581 F.2d at 948 (quoting 42 U.S.C. § 2000e-5(f)(1) (1976)).

[56] 581 F.2d at 948 (quoting 42 U.S.C. § 2000e-5(k) (1976)).

rately to assess their course of action. Because an employer seldom openly discriminates,[57] a charging party often has only a suspicion of discrimination.[58] He must determine whether practices and policies which are neutral on their face are in fact discriminatory.[59] The information necessary to make this determination[60] would not normally be available to the charging party. The charging party and his attorney in many instances are then forced to bring an action with only the slightest information. With access to the EEOC's investigatory files, a charging party and his attorney could make a more informed and presumably more accurate decision on whether to bring an action.[61] Viewed in this manner, disclosure of investigatory files to the charging party would not simply "fuel private litigation," but would serve to reduce the number of unfounded private actions.

C. *Nondisclosure and Delay in Bringing the Private Action*

The predicted effect of nondisclosure is to delay the commencement of private actions until the conciliation process has ended.[62] The median span of the conciliation process is seventeen and one-half months.[63] Even then, less than one-half of the cases in which a reasonable cause determination is made are resolved through conciliation.[64] Thus, while it is not clear that Congress intended that a charging party wait until the end of the conciliation process to bring a private action, a majority of charging parties will wait eighteen months or longer only to

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[57] *See* Brown v. Gaston County Dyeing Mach. Co., 457 F.2d 1377, 1382 (4th Cir. 1972), *cert. denied*, 409 U.S. 982 (1972).

[58] H. Kessler & Co. v. EEOC, 472 F.2d 1147, 1151-52 (5th Cir. 1973).

[59] Belton, *supra* note 33, at 249.

[60] *See id.* at 249-53 for a discussion of the evidence necessary to establish a prima facie case of employment discrimination. Some of the information a charging party and his attorney would need in order to make an informed decision on whether to bring an action includes the make-up of the employer's work force, his hiring records, and his criteria for employment and promotion.

[61] This discussion is not to suggest that a charging party must be able to prove his case before bringing an action. That is the purpose of discovery. Instead, the purpose of the discussion is to point out that a charging party and his attorney need to have some idea whether he has been illegally discriminated against before bringing an action.

[62] *See* Burlington Northern Inc. v. EEOC, 582 F.2d 1097 (7th Cir. 1978).

[63] 93 LAB. REL. REP. (BNA) 104, 106.

[64] *Id.*

find themselves back where they started. Such a delay imposes an unfair burden on the Title VII litigant[65] and contravenes the intentions of Congress which emphasized the charging party's right to timely action.[66]

CONCLUSION

Thus, it appears that the two underlying premises of both the *Sears* and *Burlington Northern* opinions are open to question. First, although the legislative record is not free from ambiguity, there is little in the history of the Civil Rights Act of 1964 or the Equal Employment Opportunity Act of 1972 to indicate that Congress intended to promote the EEOC's efforts to such a predominant position that actions by private litigants should be throttled or discouraged. Indeed, once a charging party has fulfilled the filing requirement and the time restrictions have elapsed, the legislative scheme places no limitations on the right to bring a private action. Second, it is unclear that the threat of private actions will have any appreciable impact on the effectiveness of the conciliation process. While these points do not resolve the disclosure question, they militate against a court forbidding disclosure in order to discourage private litigation. Keeping in mind the humanitarian and remedial underpinnings of Title VII, the useful function performed by disclosure in reducing the number of unfounded actions, and the burden imposed on the charging party by long delays, section 709(e) should be interpreted to allow disclosure to the charging party or his attorney before a Title VII proceeding is brought.

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[65] H. Kessler & Co. v. EEOC, 472 F.2d 1147, 1149 (5th Cir. 1973). *See* Cooksey, *The Role of Law in Equal Employment Opportunity*, 7 B.C. INDUS. & COM. L. REV. 417, 427 (1966).

[66] H.R. REP. No. 238, *supra* note 28, at 12, 59-62.