Davis

IN THE SUPREME COURT OF PENNSYLVANIA

WESTERN DISTRICT

No. 133 March Term, 1976

COMMONWEALTH OF PENNSYLVANIA,
PENNSYLVANIA HUMAN RELATIONS COMMISSION,

Appellant

vs.

ST. JOE MINERALS CORPORATION
ZINC SMELTING DIVISION,

Appellee

SUPPLEMENTAL BRIEF FOR APPELLANTS

Appeal from the Decision and Order of the Commonwealth Court of Pennsylvania, at No. 1084 C.D. 1975, dismissing the petition of the Pennsylvania Human Relations Commission to enforce its Order at Docket No. E-5089A

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TABLE OF CITATIONS

STATEMENT OF QUESTION INVOLVED

Did the Administrative Complaint for the Investigation of Which the Instant Interrogatories were Issued Comply with the Requirements of the Pennsylvania Human Relations Act?

(Answered in the Affirmative by the Court Below)

ARGUMENT

THE ADMINISTRATIVE COMPLAINT FOR THE INVESTIGATION OF WHICH THE INSTANT INTERROGATORIES WERE ISSUED CLEARLY COMPLIES WITH THE REQUIREMENTS OF THE PENNSYLVANIA HUMAN RELATIONS ACT.

The Appellee ("St. Joe") contends that the complaint lacks "particularity" required by §9 of the Pennsylvania Human Relations Act ("Act"), relying on Pennsylvania Human Relations Commission vs. United States Steel Corporation, 458 Pa. 559, 325 A.2d 910 (1974).

In that case, the Pennsylvania Human Relations Commission ("Commission") initiated administrative complaints against many large corporate employers alleging a pattern and practice of employment discrimination prohibited by §5(a) of the Act. The respondent employers were selected on the basis of statistics showing a substantial statistical under-representation of non-Whites and females at all levels of the workforce. St. Joe was one of the corporate employers selected. The substantive allegations against the corporate employers were identical in every complaint. Thus, when the court held the complaint invalid in U.S. Steel, the effect was to invalidate all the identical complaints.

In order to proceed on the complaints, the Commission had to amend them to comply with §9. It did so in the instant case by setting forth in the body of the Second Amended Complaint (Paragraphs 5 through 14) the statistical analysis which provided the basis for its asserted belief that St. Joe, in violation of the Act, "discriminates in its hiring of Blacks and females and fails or refuses to utilize recruitment

sources which will, or may reasonably be expected to, provide it with Black and female applicants." (Supp. Record 40b) This statistical analysis was not included in the original complaint nor were the imbalance-showing statistics included in the complaint in U. S. Steel which was struck down. This court has recognized that such statistics can make a prima facie case or even establish unlawful employment discrimination. PHRC vs. Chester Housing Authority, 327 Pa. 335 (1974).

This strong substantial statistical disparity between the representation of non-Whites and females in St. Joe's workforce and their representation in the labor area in which St. Joe was located was all that the Commission knew about St. Joe when it filed a complaint. Certainly this was sufficient to file a complaint so that the Commission could investigate to determine whether there were non-discriminatory reasons which accounted for the imbalance or whether in fact it was caused by St. Joe's discriminatory policies and practices. [1]

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[1] Mr. Justice Roberts in dissent in U.S. Steel wrote: "...Where the focus is on some broader pattern or practice, the complaint need only set out the reasons for the complaint's belief that the person complained of is engaged in unlawful discrimination. These reasons may include such facts as substantial statistical imbalances suggesting the presence of discrimination or a continuing flow of more specific complaints about the person or complaint." 325 A.2d 915-916. The majority in U. S. Steel did not suggest what additional information had to be included in the complaint to comply with Section 9.

The Commission in the instant case has set forth everything it knew which led it to believe that St. Joe was violating the Act. Is it conceivable that such information sufficient to make a prima facie or even a conclusive case of unlawful discrimination is insufficient to support a complaint in the investigative stage?

Thus it is submitted that, under any reasonable standard of "particularity", the Second Amended Complaint is sufficient. Beyond this, however, it is important that this court draw a clear distinction between what must be set forth in the complaint in this preliminary investigative stage and what must be set forth if the investigation leads to a determination of probable cause and if conciliation fails and a public hearing on the merits is ordered.

In his dissent in U.S. Steel, Mr. Justice Roberts emphasized this distinction, which is supported by the clear language and thrust of the Act and solidly rooted in fundamental principles of administrative agency law.

> The complaint before us is only the foundation for an investigation to determine whether there is probable cause to believe that appellee is engaged in unlawful discriminatory practices.
>
> Surely a complaint which is only the basis for further investigation ought not to be judged by the same standard as one which requires the respondent to defend at a formal hearing before the Commission. While the requirement that the complaint "set foth ... particulars" is applicable at both stages of the proceeding, the substance of that requirement must plainly vary in light of the differing realities of those stages.
>
> The very purpose of the complaint is to acquaint the Commission with the challenged practice. Before the Commission investigates, it could not possibly have sufficient information to frame a precise and detailed complaint. Therefore, relatively little factual particularity can be expected at this point.

> Furthermore, the person under investigation need not, at this stage, prepare a defense. Only if the Commission finds, as a result of its investigation, probable cause to believe that there has been a violation of the Act will there be a hearing. Prior to that hearing, the complaint may be amended so that the respondent will have his "opportunity to prepare." 325 A.2d at 915.

Although the first paragraph of §9 of the Act requires the complainant, whether it be an individual or the Commission, to "set forth the particulars" of the alleged unlawful discriminatory practice complained of, it is clear that there is contemplated two stages in the recitation of the particulars.

In the first stage, the complainant can only set forth what facts or information it knew which gave rise to the belief that the Act had been violated. Such particulars were clearly set forth in the instant case.

Thereupon, "after the filing of any complaint, ... the Commission shall make a prompt investigation in connection therewith." This, of course, is the purpose of the interrogatories here in question. This was deemed by the Commission to be the most effective method under the circumstances to launch the investigation by securing that information which would enable it to inform itself on the employer's structure and system and learn of the existence and location of pertinent records and other materials so that the Commission could with maximum efficiency zero in, by way of subpoenas, interview and on-site inspections, on the facts necessary to a determination of whether probable cause existed.

If a determination of no probable cause is made, the complaint is dismissed. If probable cause is found, the Commission endeavors to conciliate.[2]

If conciliation fails, the Commission shall "... cause to be issued and served a written notice, together with a copy of such complaint as the same may have been amended, requiring the ... respondent ... to answer the charges of such complaint at a hearing before the Commission ..." (Emphasis added)

Thus, where the investigation triggered by the preliminary complaint enables the Commission to make a probable cause determination, the Commission has much more knowledge and information in its possession about the allegations of the complaint and, if a public hearing is scheduled, is able to and does amend the complaint to "set forth the additional particulars thereof."

The analysis of the court in Hannah vs. Larche is instructive as to the distinction between the preliminary investigative stage in the administrative agency process and the adjudicatory stage. 80 S. Ct. 1502 (1960). The case involved a challenge to the procedures of the United States Civil Rights Commission, a purely investigatory and fact-finding body, which provided that the idenity of persons sumbitting complaints to the

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[2] Of the complaints filed with the Commission in the last fiscal year, some thirty percent were administratively closed (complainant failed to proceed, Commission lacked jurisdiction, etc.). In a substantial percentage of the remainder of the complaints, the Commission's investigation led to a determination that probable cause did not exist. In approximately four of every five complaints in which probable cause was found, a formal or informal conciliation agreement was entered into with the respondent.

commission need not be disclosed and that persons under investigation had no right to cross-examine adverse witnesses. The Court upheld these procedures against a due process challenge, emphasizing that rights available at an adjudicatory hearing need not be conferred upon persons appearing before purely investigatory agencies.

The Court cited the Federal Trade Commission as a typical agency whose rules "draw a clear distinction between adjudicative proceedings and investigative proceedings." The court noted that although the FTC's investigations are frequently initiated by complaints from undisclosed informants and although the FTC may use the information obtained during investigation to initiate adjudicative proceedings, "nevertheless, persons summoned to appear before investigative proceedings are entitled only to a general notice of the purpose and scope of the investigation.

"The reason for these rules is obvious," said the court. "The FTC could not conduct an efficient investigation if persons being investigated were permitted to convert the investigation into a trial. We have found no authorities suggesting that the rules governing FTC investigators violate the Constitution and this is understandable since any person investigated by the FTC will be accorded all the traditional safeguards at a subsequent adjudicative proceeding ..." at 1517.

The NLRB also has this two-stage system. As the court noted in Hannah vs. Larche:

> Although a copy of the initial charge may be served upon an alleged violator, there is no specific rule requiring the Board to give notice of the preliminary investigation. At 1524.

It appears that the court's majority opinion in U. S. Steel overlooked this two-stage nature of proceedings before the Commission. In rejecting Federal cases cited by the Commission holding complaints sufficient under Title VII of the Civil Rights Act of 1964, the Court observed that the Federal pleading system is a notice pleading system while this Commonwealth has a system of fact pleading. Clearly, however, neither the complaint in U. S. Steel nor the complaint in the instant case could be considered a "pleading" so that its content would be influenced by the Commonwealth system of fact pleading. By definition, "pleading" contemplates litigating parties. As has been shown, there are no litigating parties before the Commission at the preliminary stage. Neither the Act nor the regulations or practices of the Commission require an answer to be filed at any stage of the proceedings. The only suggestion that an answer may be filed comes in that portion of Section 9 dealing with the adjudicatory stage.

It should further be pointed out that St. Joe recognizes this two-stage concept.

> Even in a case where a complaint is filed, the Act provides for the charged party to receive notice of, and a copy of, the complaint only after the Commission has completed its investigation, attempted conciliation and scheduled a hearing on the complaint. (St. Joe's Brief, Page 18)

By necessary implication St. Joe would appear to concede or argue that the initial complaint need not rise to any standard of particularity since it doesn't even have to be made available to a respondent.

While stressing that unless and until the case reaches the adjudicatory stage the respondent need not prepare a defense, at which stage it will have all discovery tools available to the Commission, the Commission's

position is that it is desirable, from a fairness standpoint and from a practical standpoint for the respondent to be served with a copy of the initial complaint and this is done in every case.

* * *

Although the Commission was afforded the opportunity to submit a supplemental brief on the issue of the sufficiency of the administrative complaint, it hopes it will not abuse the Court's courtesy by making several additional comments on the fundamental issue of the Commission's authority to order respondents to answer written interrogatories, which wad decided adversely to the Commission by the Court below.

The Commission in urging the critical need for written interrogatories as an investigatory tool, does not assert that it will be unable to investigate without it. Its position is that in order to be an effective law enforcement agency, it needs the flexibility to employ the most effective investigative tool appropriate to a particular complaint and that frequently, particularly in a complaint alleging a pattern and practice of employment discrimination, written interrogatories are by far the most appropriate means of launching an investigation.

The Court below, in denying the Commission interrogatory power, suggested the Commission's subpoena power as the recourse for the Commission to investigate when a respondent proves uncooperative.

Mr. Justice Roberts in dissent in U. S. Steel, supra, takes cognizance of the subpoena power for purposes of investigation.

> Once it is understood that the Commission's subpoena is fully available for the purpose of investigation, the contention that it may not use interrogatories falls of its own weight. The Commission may compel the attendance of a witness, together with his books and papers, and require him to testify. What, then, could be the reason to forbid the Commission to furnish the questions in writing and allow the witness to respond in writing? By so doing, the Commission accommodates the convenience of the witness. This procedure also saves both parties needless time and expense, which would be required for the taking of oral testimony. Surely the Legislature cannot have intended to limit the Commission to only the most burdensome form of evidence-gathering.

The Commission has attempted to use oral despositions as an alternative to written interrogatories in cases such as the instant one. Thus far it has not proceeded to the actual deposition because respondents have either questioned the authority to take depositions or have raised other objections.

The Commission now once again respectfully advises this court of its belief that a decision of the court upholding the Commission's interrogatory power would prove of enormous help in unlocking the logjam created by respondents refusing to cooperate with Commission investigations.

St. Joe asserted at oral argument that the Federal Equal Employment Opportunity Commission did not use interrogatories. That assertion was incorrect. Not only does EEOC employ written interrogatories to inves-

tigate charges filed with it [3], but it may itself proceed to Federal Court if conciliation fails or a complainant may do so if a "right to sue" letter is issued, whereupon all discovery tools including interrogatories are available to investigate the complaint. It is submitted that the knowledge that EEOC may take a charge into Federal Court or allow a complainant to do so has the strong effect of inducing respondents to cooperate with EEOC investigations. The Commission hopes the same result will follow once its investigatory powers are fully established.

During oral argument, a Justice expressed concern that interrogatories would increase the burden and the expense of employers. It is the Commission's response that if it may proceed in appropriate cases with written interrogatories, it will minimize the burden and expense not only to respondents but also to the taxpayers while enabling it to be a more effective agency. If a particular set of interrogatories is unduly broad or burdensome, the respondent, of course, would have the same protection under Commission procedures that it has in litigation in

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[3] Section 21.1(e) of the EEOC Compliance Manual, Commerce Clearing Clearing House ¶781, states:

> Prepare Interrogatories - The Commission has approved use of mail service for interrogatories, questionnaires, and requests for documents prior to on-site investigation as another method of streamlining investigations. The methods result in substantial reduction of investigator's in-field time because they reduce delays in scheduling appointments with respondents; provide the respondents with an opportunity to engage counsel; enhance the availability of their necessary records and may increase the possibility of early settlement. In some instances, responses to well-developed interrogatories are sufficient to develop determinations.

Federal or State court to object on that basis.

We conclude by asserting that the power to compel answers to written interrogatories is necessarily drawn from the express power and duty to "promptly investigate." The Legislature's strong statement of concern about the evils of discrimination expressed in Section 2, its direction that the provisions of the Act be construed liberally to effectuate the purposes, and the provisions in Section 7(d) and (e) that the Commission may adopt rules and regulations and formulate policies to effectuate the purposes of the Act have combined to persuade this Court that the Legislature intended to create an effective agency and support the Commission's power here in question.

Respectfully submitted,

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