ORIGINAL

In the

Supreme Court of the United States

GENERAL TELEPHONE COMPANY OF THE NORTHWEST, INC., et al.,

Petitioners,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, et al.,

Respondents.

No. 79-488

Washington, D.C.
March 25, 1980

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v.	No. 79-488
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL., Respondents.	

Washington, D. C.,

Tuesday, March 25, 1980.

The above-entitled matter came on for oral argument at 2:33 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

JAMES R. DICKENS, ESQ., Karr, Tuttle, Koch, Campbell, Mawer & Morrow, 2600 Seattle-First National Bank Building, Seattle, Washington 98154; on behalf of the Petitioners

LAWRENCE G. WALLACE, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C. 20530; on behalf of the Respondents

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument next in 79-488, General Telephone Company v. Equal Employment Opportunity Commission.

Mr. Dickens, you may proceed whenever you are ready.

ORAL ARGUMENT OF JAMES R. DICKENS, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. DICKENS: Mr. Chief Justice, and may it please the Court: I am James Dickens, of Karr, Tuttle, Koch, Campbell, Mawer & Morrow, in Seattle, and I represent General Telephone, the petitioner herein.

We have a very narrow procedural question before the Court. It is very simple. When the Equal Employment Opportunity Commission brings a class action under section 706(f)(1) of the Civil Rights Act, does it have to comply with Rule 23, and we believe it requires a very short answer and that is yes.

QUESTION: Let me ask you this, if I may, Mr. Dickens. Why would EEOC bring a class action? It is entitled to sue as a litigant. I would have thought it could have gotten virtually all the benefits of its litigant status as a litigant on behalf of the government without denominating its action as a class action.

MR. DICKENS: Your Honor, the government has

not in the prayer or in the complaint said that it is a class action, but by the scope of the complaint and the relief requested, we believe that it is clear that it is a class action. They moved at the trial court level to bifurcate the issue of class liability from the issue of individual damages. We then moved to dismiss the class action aspects of the case and they acknowledge that they were seeking relief for a class and that is what they are. We believe this is the way the statutory procedure is set up, they are seeking relief on behalf of an individual plus on behalf of the class.

QUESTION: But by definition there is no individual in any conceivable class that the EEOC could represent other than itself, is there?

MR. DICKENS: No, Your Honor, that is where we believe that what Congress has done in accordance with its power to supersede the federal rules in whole or in part, it has declared that the commission is a properly suing party and therefore to that extent they have superseded the requirement of Rule 23(a) that it be a member of the class. As a consequence by statute we believe and we contend that Congress has made the commission a properly suing party under Rule 23. Having taken that step, they are a properly suing party, it is the same as the Court has held, for example, in Hunt v. Washington

State Apple Commission, associations, state agencies and so forth do have standing to bring suit on behalf of a class, even if technically they are not a member of the class.

QUESTION: Who are all the members of the class?

MR. DICKENS: The other members of the class, that would depend on two things. First of all, we look to the charging parties. We have four charging parties here. They are four women employees at one facility out of 116 in one state out of five. Now --

QUESTION: Are they of the same class as the EEOC?

MR. DICKENS: I didn't say that. There have been cases in the lower court --

QUESTION: Doesn't a class action theory require that they all have the same claim?

MR. DICKENS: No, Your Honor, substantially --

QUESTION: Doesn't the class action require that all members of the class stand on the same footing?

MR. DICKENS: Yes, as a typicality requirement.

QUESTION: Isn't that true?

MR. DICKENS: Yes, Your Honor, it is.

QUESTION: Now, who is on the same level as the EEOC?

MR. DICKENS: Your Honor, first of all, the EEOC

is --

QUESTION: Who is on the same level as the EEOC?

MR. DICKENS: Your Honor, the EEOC is on a level by itself. It is on the level with the charging parties. That is our posisition, that the typicality requirement, you look to the charging parties. The EEOC --

QUESTION: Is that what Congress said when it authorized the EEOC to bring a suit on its own behalf, that it was to have the same status as the charging parties?

MR. DICKENS: Your Honor, we believe that is correct in the sense that it stands in their shoes.

QUESTION: But is that what Congress said in the statute?

MR. DICKENS: Your Honor, the statute itself, as the Court is aware, doesn't refer to this way or the other in the sense of is the standing the same or otherwise. We only have, as we had -- and I know the Court has talked about this earlier today -- the congressional history kept referring to cease and desist approach versus court enforcement approach and should we follow the normal rules of procedures.

QUESTION: Well, what about the traditional action that was in existence long before '72 enabling the Wage and Hour Administrator to sue to enforce practices

of employers contrary to the Wage and Hour Fair Labor Standards Act. Now, could he have brought a class action?

MR. DICKENS: Your Honor, I don't believe so because I think you have to look at the unique phrasing of the statute and in that situation you normally have authority on behalf of the administrator to bring and file suit on behalf of the government itself and you usually have questions of what is the relief. We are not talking about the relief. We are talking about the procedure, a procedure which is solely triggered in each case by the individual charging party.

QUESTION: Well, what about the United States suing under the antitrust laws in a civil action to enjoin violations of the antitrust laws, could it bring that as a class action?

MR. DICKENS: Your Honor, the United States can bring an action in its own name for its own injury, but when it brings suit in a normal civil or criminal case it doesn't usually bring suit on behalf of other private individuals who have been injured and seek to bind the defendant to those individuals if it wins but not have them bound if it loses. That is a critical distinction and that is what we have here. The government says if you lose, employer, you are bound to the class, but if you win they are not bound to you, and we

are saying that in this case we have the same procedure either for a private litigant or for the government under section 706(f) is you trigger with the private individual, you investigate, determination, the commission says either we will let you sue or we will sue, if the individual sues the government admits, rule --

QUESTION: I am surprised frankly that you concede that the civil actions authorized by Congress to be brought by the EEOC is analogous in any way to Hunt v. Washington State Apple Growers who are all private litigants.

MR. DICKENS. Your Honor, in Hunt that was a question of standing with regard to a state agency, the Washington State Apple Commission, and the question was standing by it as a state agency to bring suit on behalf of various growers in the state and this --

QUESTION: They were all members of the agency, were they not?

MR. DICKENS: No, Your Honor. They had some effect to the extent that they helped select the people who were on the agency, but it was not a private organization.

QUESTION: It was a quasi-public trade agency, it was a trade agency with legislative status, was it not?

MR. DICKENS: I don't deny that, it was and

that was part of the approach but the Court did say, as Your Honor is aware, having written the opinion, that it was a state agency and there was standing to bring suit on behalf of the group.

We are not questioning the standing of the commission to bring suit. We are saying that the commission can bring suit and we are not questioning at this time, it is not a question as to the scope of what they can do. All we are saying is that when the commission brings suit and says, well, we will bring it instead of you, charging party, and we know you would have to comply with it, we want the same relief, we say they should comply with Rule 23 also.

QUESTION: Isn't it up to Congress to decide that?

MR. DICKENS: Yes, Your Honor, it is.

QUESTION: Congress gave them the right, didn't they?

MR. DICKENS: I am not denying they have a right to sue.

QUESTION: And did they have to go further?

MR. DICKENS: Yes, Your Honor, they did.

QUESTION: Did they have to go further?

MR. DICKENS: Yes, Your Honor, they did, if they were going to --

QUESTION: I said have to. I didn't say did or didn't.

MR. DICKENS: No, Your Honor, I said they did. They would have had to go further to exempt the commission from Rule 23.

QUESTION: Why?

MR. DICKENS: Because the general rule is that the rules apply to all civil actions unless otherwise exempted or unless clearly superseded by Congress. Rule 1 says it applies.

QUESTION: Clearly superseded by Congress.

MR. DICKENS: That's correct, Your Honor.

QUESTION: Congress gave EEOC the right to bring this action on behalf of these people.

MR. DICKENS: That's correct.

QUESTION: And it didn't say class action. You said it should have said pursuant to Rule 23?

MR. DICKENS: No, Your Honor.

QUESTION: Well, what do you think Congress should have said? Or do you say that Congress should have said anything, that Congress intended Rule 23 to apply?

MR. DICKENS: Your Honor, I am saying that if Congress did not intend Rule 23 to apply, they should have said so.

QUESTION: Why?

MR. DICKENS: Because that is the general rule. This Court and Congress have promulgated the federal rules. They have said in Rule 1 that --

QUESTION: The Congress did it.

MR. DICKENS: Yes, Your Honor, and this Court has authority also under its power in the statute to assist, too.

QUESTION: The jurisdiction of this Court as well as the other federal courts is determined by guess who?

MR. DICKENS: Well, it is determined by the Constitution, Your Honor.

QUESTION: Day by day by whom?

MR. DICKENS: By this Court, Your Honor, and by Congress.

QUESTION: I thought Congress had that power.

MR. DICKENS: Yes, they do also.

QUESTION: I thought they had the power to decide what jurisdiction this Court had.

MR. DICKENS: Yes, they do.

QUESTION: And they say that the federal courts shall have jurisdiction over actions by the EEOC on behalf of people, period, and that is what the federal government did. Now you say you have to add on to that Rule 23.

MR. DICKENS: Your Honor, I am saying that Rule

23 applies. They also did not mention --

QUESTION: Can the average citizen file a case who is a member of the class without making it a class action?

MR. DICKENS: If he only seeks --

QUESTION: Can he?

MR. DICKENS: Yes.

QUESTION: Well, that is what they are doing.

MR. DICKENS: No, Your Honor, they are not, they are seeking class relief, that is where we have the problem. If they only sought relief for the four charging parties, we have no problem, but they are seeking class right relief without the following of the general rule that --

QUESTION: Which they have a right to do under the act.

MR. DICKENS: Your Honor, I respectfully disagree. The act doesn't say that. It says that you have a right to file the action. If they file the action, the private party files the action and want to make it a class action, Rule 23 applies.

Let me just briefly give the Court a little flavor for the facts. We mentioned some of them. We had four women employees in the Beaverton, Oregon facility file charges. That is one facility out of 116

and that is in one state out of five that General Telephone operates in.

The commission investigated and when it concluded it wanted to file a broad-based action and the action is as broad as possible. It mentions no specifics, no dates, no individuals, and requests injunction, affirmative action, it requests that people be made whole who are adversely affected, and requests back pay.

We are not in this case questioning the scope of relief that can be granted. All we are trying to do quite frankly is avoid litigating this case now, in the future, and in the future. I wuld think -- there is no question that the court out our way doesn't want to try the case two or three times. But if the class is not bound by any decision that is reached, they can relitigate.

Furthermore, this Court has continued to say, in talking about Title VII cases, two principles which we contend are very applicable here. First of all, under Title VII it is the courts that are the final authority on Title VII and how it is implemented, and we agree. Secondly, this Court said in Rodriguez that the adherence to Rule 23 is indispensable -- the requirements of Rule 23. We agree, and that is what we are trying to do.

Now, here is what we have in this case, for example. I will give the Court I think a very concrete example of where in this situation the commission is making decisions that Congress intended the courts to make.

First of all, there is no question that because you allege something to be a class action, that does not make it a class action. We have good class action allegations and we have poor class actions. In this case, however, the commission has usurped the authority of the court in the class certification area by, number one, it said this is a class action. That is normally a determination the court makes. And number two, it said the scope of the class is this broad.

Now, we contend that those are requirements that Congress intended the courts have in making that determination.

QUESTION: Do you contend that in addition to certification there should be notice to all the class members?

MR. DICKENS: Your Honor, I think that depends upon the type of class action that is certified, whether it is --

QUESTION: Well, it is one in which they ask the defendants to make all those persons adversely

affected by unlawful employment practices.

MR. DICKENS: Your Honor, I think that notice of some type will have to be given. Now, whether it is an opt-in, opt-out, that depends on how the court decides to approach it. It probably would be an opt-out type notice that a class action is pending and you may opt out if you do not desire to be bound. That is the normal situation I believe in this case. But I want to go back to --

QUESTION: How about settlement?

MR. DICKENS: Settlement, Your Honor, that is really a big problem quite frankly. They say let's settle and I say, well, I can't settle with you, some good plaintiff's lawyer is going to tell me, hey, that's a great settlement, let's file a new action on behalf of these people that settled and --

QUESTION: Under the government's approach, what about settlement?

MR. DICKENS: They are not bound, Your Honor. The class members aren't bound. We have a settlement, it doesn't bind the class members. It binds the employer. Once again, it is the same thing with a judgment. We are bound if we lose, we are bound if we settle. The class members, they can either take it or they can go their own merry way and either bring a separate action or whatever.

QUESTION: Well, what if the EEOC brings an action against your client simply seeking to enjoin practices in violation of the Civil Rights Act of 1964, do you think they have to bring that as a class action?

MR. DICKENS: No, I think there is a distinction not so much under 706 but there can be a distinction, a dichotomy between injunctive relief prospectively and the situation where you are seeking individual may call relief under 706. It is in the latter situation where you are seeking to give back pay, you are seeking a seniority spot or slot, that is where I believe we should bind the class.

QUESTION: But what if they don't ask for -- what if they simply ask for an injunction?

MR. DICKENS: If they come in and ask for an injunction, probably they are not binding the class, although if it is under 706 I think it should. Now, 707 appears to be more of a situation where traditionally broad ranging prospective injunctive relief under a pattern or practice cases come in, but --

QUESTION: Then it is intentional.

MR. DICKENS: Pardon?

QUESTION: Then it is required to be intentional, too, isn't it?

MR. DICKENS: Yes. As the Court is probably

aware, it has already heard one Title VII case today, there was a long debate in Congress in 1971 and '72 over how much authority to give the commission. Congress decided that the provisions under 706 permitting individuals to file suit was not working as well as it wanted, so we had the two approaches. We had the cease and desist, which would have given them an awful lot of authority similar to the National Labor Relations Board. Now, in that case the commission would have received the charge, they would have investigated the charge, they would have adjudicated the charge and would have prosecuted the charge like the board did. But Congress didn't go for that. They said no, you've got all the regular procedures. We are going to be fair to everybody. We are going to be fair to the defendants and the employer is going to be fair to the parties.

Now, we believe that what we are requesting is fully in accord with what Congress intended in granting court enforcement powers to the commission. They didn't give it unlimited authority. They gave it the same authority under 706 as the private individuals.

QUESTION: Mr. Dickens, on just one point.

MR. DICKENS: Yes, sir.

QUESTION: Could it be that at a later stage in this proceeding you could raise this same point, this

class action point?

MR. DICKENS: The question of not being able to--

QUESTION: I mean when it begins to hurt you.

MR. DICKENS: Well, Your Honor, I can raise it. Let's assume there is a subsequent lawsuit by a lot of employees --

QUESTION: All right, or some person already in this one.

MR. DICKENS: But, Your Honor, what happens in that case is that I am going to have as many different decisions as I have district courts in our five states that litigated. One court may say, well, you're bound by the prior decision if you accept relief; one court may say, well, you're not bound. They may go a variety of different ways. We don't think that is what the court intended or what this Court wants to do.

WE've gone through the various parts of the history. There is no question that the courts are split on the matter. As I mentioned earlier, we believe that had Congress intended to exempt the commission from Rule 23, it would have done so. It is clear that in the legislative history Congress made two specific references and changes in two federal rules. It made a change in Rule 53 on special masters to insure that they would be able to handle these cases. They made a change in Rule

65. What you get out of that, you are well aware that Congress knew about the federal rules and knew how to make exceptions. It didn't make a similar exceptions for the commission under 706 for a class action.

Now, it did talk about in several cases in the post history and throughout the committee reports that the commission is a properly suing party. Under Rule 23 you can bring a class action. We have all of that.

Now, when you look at what the commission can do under 706, it is the same as a private party. We are not seeking greater relief or anything else. The charge is triggered by a private individual in both cases. Investigation is the same in both cases. The conciliation is the same in both cases. The action is the same as a private party with the possible exception that the standing is broadened to include other unlawful practices discovered. We are not questioning the standing as such. The relief is the same as under 706(g) in both of the situations.

Now, when the private party instead brings the suit instead of the commission, all absent members of the class are bound. There is no dispute on that.

QUESTION: Mr. Dickens, let me just as you a little bit about how you handle the language of Rule 23(a) that says that one or more members of a class may sue or

be sued as representatives of the class. Is it your theory that -- the EEOC, of course, is not a member of the class but is suing on behalf of the charging parties who are like the representative plaintiffs. Is that your theory?

MR. DICKENS: That's correct, Your Honor.

QUESTION: If that is true and your charging parties, say, are charging sex discrimination, say they are four female employees who claim there was discrimination on account of gender. Say the commission in its investigation decided they wanted to broaden the case to include some race discrimination charges, could they do so?

MR. DICKENS: They could if they discovered race discrimination charges during their investigation in addition to sex as part of that investigation under the lower court decisions. This Court has never ruled upon that.

QUESTION: Then would the charging parties, if you look at it as the members of the class within the meaning of the rule as the charging parties, could they represent the victims of race discrimination when their charge was based on gender discrimination?

MR. DICKENS: Your Honor, what we are saying is this, is that as far as the typicality requirement,

the typicality requirement is coextensive with the standing which the commission is to bring the suit. If they have standing to bring it on behalf of sex, fine. If they also have standing to bring it on behalf of race, fine. The question here isn't the standing. We recognize there are cases saying the commission may have broader standing than the individual charging parties. We aren't denying that. That is not an issue here.

Whatever they have standing to bring, that determines the typicality.

QUESTION: But in answer to Mr. Justice Marshall you in effect said, well, the rules apply unless Congress says they don't.

MR. DICKENS: That's correct.

QUESTION: But if you just read the rules, they wouldn't cover this double capacity kind of suit.

MR. DICKENS: No, Your Honor --

QUESTION: The rule would really cover maybe a sex discrimination suit or any kind that would be an appropriate class for your charging party.

MR. DICKENS: Your Honor, your typicality, your reference is back to number one, the charging parties, and, number two, the people who were not charging parties but who may have had claims that were discovered. It can be both groups. You may have to handle a case somewhat

differently but there is no problem. We have many class actions where you have different types of claims or you may separate those. We are not contesting that. That is not a question.

I wanted to reserve ten minutes for rebuttal and at this time would like to do that.

MR. CHIEF JUSTICE BURGER: You have less than ten left.

MR. DICKENS: Fine.

MR. CHIEF JUSTICE BURGER: So you may reserve it.

MR. DICKENS: Fine. Thank you very much.

MR. CHIEF JUSTICE BURGER: Mr. Wallace, you have time to open at least.

ORAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. WALLACE: Thank you, Mr. Chief Justice, and may it please the Court:

Outside of the context of Title VII, no court has ever held that a suit by the United States or one of its agencies to enforce federal law must proceed as a class action on behalf of the affected members of the public even though there are many contexts in which such suits arise, and the contrary practice has been common place.

We reviewed in some detail in our brief this Court's decision in Porter v. Warner Holding Company which involved the rent control legislation of the World War II era. Back pay cases are common under the National Labor Relations Act; actions to recover on behalf of an affected group of employees are common under the Fair Labor Standards Act.

QUESTION: But in those they have express authority to do it, don't they?

MR. WALLACE: Well, they are --

QUESTION: I mean on behalf of named parties or unnamed parties?

MR. WALLACE: There is statutory authority, that is correct, but --

QUESTION: Suppose there weren't and suppose the United States --

MR. WALLACE: Actually there was not in Porter v. Warner Holding Company.

QUESTION: Suppose there was only authority to bring suits on behalf of named parties.

QUESTION: Mr. Wallace, there was in Porter v. Warner Holding Company, that was what the argument was about. Our other order was construed by the majority to be such statutory authority.

MR. WALLACE: It wasn't express statutory

authority.

QUESTION: Yes, but it was construed to be.

MR. WALLACE: It was interpreted that way.

QUESTION: Suppose the only authority --

MR. WALLACE: There was a lot of emphasis on the equitable power of the court to award the relief.

QUESTION: Suppose the authority is only to bring suit on behalf of named parties of which there are certainly plenty of examples, do you think the United States under Rule 23 could nevertheless bring a class action?

MR. WALLACE: Well, we haven't really faced that question.

QUESTION: You should say no. You should say that you are really just exercising a strictly special statutory authority to bring --

MR. WALLACE: There are situations where the United States represents individuals and is a lawyer for individuals under the veterans reemployment law or in cases where there is state taxation of servicemen, and I am not sure that the United States could not move under Rule 23 in those circumstances, if it saw fit to.

QUESTION: So you think it might then be a real representative under Rule 23?

MR. WALLACE: I don't know.

QUESTION: I thought your argument was that it wasn't.

MR. WALLACE: It really is functioning as counsel for named persons. It is not suing in its own name under those statutes. When the cases reach this Court the name of the United States is not a party. The United States is serving as counsel for individuals that it is authorized by statute to represent in court in those situations.

QUESTION: You're saying that the named parties are bringing a class action.

MR. WALLACE: In situations, for example, where we decide not to petition for certiorari, we typically notify them that they have the right to hire their own counsel and do so if they want to proceed with the case, even though we have determined that we won't go ahead with it. The case is really their case under those statutes. It is quite different from the kind of situation here where Congress has authorized the commission or the Attorney General to sue in their own capacity to enforce the law.

QUESTION: Mr. Wallace, as I understand your position, even if they grant you the right to bring the suit in the name of the EEOC and even if you have the right to bring the suit in the name of the EEOC on behalf

of the four named complainants, you don't have the right to also ask for relief for the whole class?

MR. WALLACE: Unless we can comply with amicus standards of Rule 23. I believe that is their position.

QUESTION: Well, what is wrong with it?

MR. WALLACE: Most of that will have to await tomorrow, but that --

QUESTION: I just want to be sure you get to it.

MR. WALLACE: Yes.

MR. CHIEF JUSTICE:BURGER: We will resume there in the morning.

(Whereupon, at 3:00 o'clock p.m., the Court was in recess, to reconvene on Wednesday, March 26, 1980, at 10:00 o'clock a.m.)

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