

## CIVIL RIGHTS: PRIVATE CAUSE OF ACTION EXISTS UNDER TITLE VII NOTWITHSTANDING EEOC DETERMINATION OF NO REASONABLE CAUSE

In *Fekete v. U.S. Steel Corp.*<sup>1</sup> the Court of Appeals for the Third Circuit held that a finding of “no reasonable cause” by the Equal Employment Opportunity Commission (EEOC) did not bar district court jurisdiction of the complainant’s suit against his employer under Title VII of the Civil Rights Act of 1964.<sup>2</sup> Fekete was employed by U.S. Steel from 1964 until 1967, and upon his dismissal he filed a complaint with the EEOC pursuant to Title VII, alleging that his discharge had been based upon his Hungarian origin. Initially, the complaint was referred to the appropriate state fair employment practices agency as required by Title VII.<sup>3</sup> After the state agency rejected the charge of discrimination, the EEOC conducted its own investigation and concluded that no reasonable cause existed to believe that the employer had violated the Act. Soon thereafter, Fekete commenced an action in the appropriate federal district court, reasserting his charge of discrimination based upon national origin. The court dismissed the action, holding under certain provisions of the Act<sup>4</sup> that the EEOC’s finding of no reasonable cause precluded the court from taking jurisdiction of the matter. The court of appeals unanimously reversed, holding that an aggrieved party may initiate such an action under Title VII notwithstanding an EEOC finding of no reasonable cause.

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1. 424 F.2d 331 (3d Cir. 1970).

2. 42 U.S.C. §§ 2000e to 2000e-15 (1964).

3. *Id.* § 2000e-5(b).

4. The following language is that relied upon by the court:

Whenever it is charged in writing under oath by a person claiming to be aggrieved . . . that an employer . . . has engaged in an unlawful employment practice, the Commission . . . shall make an investigation of such charge. . . . If the Commission shall determine, after such investigation, that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.

. . . .  
If . . . the Commission has been unable to obtain voluntary compliance with this subchapter, the Commission shall so notify the person aggrieved and a civil action may, within thirty days thereafter, be brought against the respondent named in the charge (1) by the person claiming to be aggrieved. . . . *Id.* § 2000e-5 (a) & (e).

Title VII of the Civil Rights Act of 1964 makes unlawful employment discrimination on the basis of race, color, religion, sex, or national origin.<sup>5</sup> The administrative agency created to handle complaints of discrimination under the title is the Equal Employment Opportunity Commission.<sup>6</sup> Although the Commission is empowered to investigate charges of employment discrimination, its function in the actual resolution of grievances is limited to "informal methods of conference, conciliation, and persuasion."<sup>7</sup> Enforcement power is left entirely to the federal courts, which may enjoin future violations of the Act and "order such affirmative action as may be appropriate. . . ."<sup>8</sup> When a charge is properly before the Commission,<sup>9</sup> the Commission is required to conduct an investigation and upon determining "that there is reasonable cause to believe that the charge is true, . . . eliminate any such unlawful employment practice. . . ."<sup>10</sup> If within the prescribed time "the Commission has been unable to obtain voluntary compliance with . . . [the Act], the Commission shall so notify the person aggrieved. . . ."<sup>11</sup> and the complainant may then commence a civil action against the charged party.

In the course of the Civil Rights Act's troubled journey through Congress, perhaps the most substantial single political compromise made to ensure its passage was the Senate amendment of Title VII which stripped the Commission of its proposed enforcement power.<sup>12</sup> As an amendment to Title VII of the Kennedy Administration's proposed Civil Rights Act of 1963<sup>13</sup> Congressman Roosevelt offered

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5. *Id.* § 2000e-2.

6. *Id.* § 2000e-4(a).

7. *Id.* § 2000e-5(a).

8. *Id.* § 2000e-5(g).

9. In addition to the aggrieved party, a Commission member may also initiate action by filing a charge "where he has reasonable cause to believe a violation of this subchapter has occurred. . . ." *Id.* § 2000e-5(a). If the alleged discrimination occurred in a state which has fair employment practice legislation covering the act in question, the aggrieved party must utilize whatever state administrative remedies are available before filing a charge with the Commission. *Id.* § 2000e-5(b).

10. *Id.* § 2000e-5(a).

11. *Id.* § 2000e-5(e).

12. The Senate compromise, popularly known as the Dirksen, or Mansfield-Dirksen Amendment, removed from the EEOC the power to file suits on its own. See notes 28-31 *infra* and accompanying text. See generally Vaas, *Title VII: Legislative History*, 7 B.C. IND. & COM. L. REV. 431, 445-57 (1966); Comment, *Enforcement of Fair Employment Under the Civil Rights Act of 1964*, 32 U. CHI. L. REV. 432-34 (1965).

13. H.R. 7152, 88th Cong., 1st Sess. (1963).

H.R. 405,<sup>14</sup> the “nominal ancestor”<sup>15</sup> of the present Title VII. Section 10 of that bill provided that, should informal methods of conciliation fail to resolve a complaint, the Equal Employment Opportunity Board would be empowered to conduct an adversary hearing. If the Board determined that the respondent had engaged in an unlawful employment practice, it could issue a cease and desist order<sup>16</sup> and, if necessary to obtain compliance, petition a court of appeals for enforcement of its order.<sup>17</sup> A person aggrieved by a final order of the Board could obtain judicial review thereof,<sup>18</sup> but the individual could not bring an action on his own behalf. When reported out by the House Education and Labor Committee, H.R. 405 went to the Rules Committee where it lay dormant while the House Judiciary Committee considered the Administration’s omnibus civil rights bill, H.R. 7152,<sup>19</sup> which did not itself declare any employment practices to be unlawful.<sup>20</sup> In the Judiciary Committee, Congressman Roosevelt offered H.R. 405 as an amendment to Title VII, asserting that the inclusion of the bill in the proposed omnibus act had the support of the Administration.<sup>21</sup> Principally because a “substantial number of committee members . . . preferred that the ultimate determination of discrimination rest with the Federal judiciary,”<sup>22</sup> the version of Title VII finally reported by the Judiciary Committee provided that if informal conciliation failed, the EEOC should have the power to bring a de novo civil action against an alleged discriminator rather than the power to issue cease and desist orders. If the Commission failed or declined to bring such an action, the aggrieved party could,

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14. H.R. 405, 88th Cong., 1st Sess. (1963). See *Hearings on Civil Rights Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 88th Cong., 1st Sess. 2282-99 (1963) [hereinafter cited as *Hearings on Civil Rights*].

15. Vaas, *supra* note 12, at 433.

16. H.R. 405, 88th Cong., 1st Sess. § 10 (1963); H.R. REP. NO. 570, 88th Cong., 1st Sess. 10-11 (1963).

17. H.R. 405, 88th Cong., 1st Sess. § 11 (1963); H.R. REP. NO. 570, 88th Cong., 1st Sess. 11 (1963).

18. H.R. 405, 88th Cong., 1st Sess. § 11(h) (1963).

19. H.R. 7152, 88th Cong., 1st Sess. (1963).

20. Although Title VII of H.R. 7152 created a Presidential Commission on Equal Employment Opportunity, the provision served merely to provide a statutory basis for prior executive action. Exec. Order No. 10,925, 3 C.F.R. 448 (1959-1963 Comp.), as amended by Exec. Order No. 11, 114, 3 C.F.R. 774 (1959-1963 Comp.), created a Presidential Commission on Equal Employment Opportunity which was intended to prevent employment discrimination by government contractors and subcontractors in federally assisted programs.

21. *Hearings on Civil Rights* 2284.

22. H.R. REP. NO. 914, 88th Cong., 1st Sess., pt. 2, at 29 (1963).

with the written approval of at least one member of the Commission, bring the action in his own behalf.<sup>23</sup> As amended by the Judiciary Committee, and despite many unsuccessful attempts at floor amendment, H.R. 405 became Title VII of the bill passed by the House on February 10, 1964.<sup>24</sup>

The House bill was read for the first time in the Senate on February 17, and the hopes of the bill's supporters that the Senate would give the House measure early consideration and adopt it verbatim were soon lost in extended debate.<sup>25</sup> It was not until March 26 that the Senate agreed both to consider the bill<sup>26</sup> and to table a motion to refer it to the Judiciary Committee.<sup>27</sup> Debate continued well into June when Senator Dirksen introduced an amendment in the nature of a substitute for the entire bill.<sup>28</sup> The proposed new Title VII represented one of the crucial political compromises necessary to obtain Senate approval of the entire bill. It stripped the EEOC of its power to bring suit and placed in the hands of the aggrieved party the power to bring an independent action against his employer without the prior approval of any members of the Commission.<sup>29</sup> The Senate voted cloture on the same day that the Dirksen Amendment was introduced,<sup>30</sup> the amendment was approved a week later,<sup>31</sup> and on June

23. Sections 707(b) & (c), H.R. 7152, reproduced in H.R. REP. No. 914, 88th Cong., 1st Sess., pt. 1, at 12 (1963).

24. 110 CONG. REC. 2804-05 (1964). The House vote was 290 to 130. A last minute motion by Congressman Cramer to recommit the bill to the Judiciary Committee failed. *Id.* at 2804. For a summary of the amendments approved by the House, see Vaas, *supra* note 12, at 438-40.

25. In his initial remarks on the bill, Minority Leader Dirksen, perhaps giving an indication of things to come, observed that he had examined "every word, every phrase, every line" of both the original and amended House bills, and that "[a]lready, some amendments have occurred to me. . . . If I think they have merit, I shall offer them." *Id.* at 2885.

26. *Id.* at 6417.

27. *Id.* at 6455. The motion to refer the bill to the Judiciary Committee was made by one of the strongest supporters of the bill, Senator Morse. His reason for so moving was stated in an elaborate and eloquent fashion—to provide meaningful legislative history:

If I ever saw a bill that needed to be clarified for the courts by way of a committee report, the argument which has taken place on the floor of the Senate in the past 14 days has shown that bill to be the one before the Senate.

. . . .  
Those Senators [who have been debating the bill] cannot agree on any part of the bill. They cannot agree on definitions. They cannot agree on meanings. What can we expect the courts to do when they come to consider legislation about which Senators are in such disagreement? *Id.* at 6419.

28. Amendment No. 1052, 110 CONG. REC. 13310 (1964). This amendment was offered as a substitute for Amendment 656. See note 34 *infra*.

29. *Id.* §§ 706(a) & (c).

30. 110 CONG. REC. 13327 (1964).

31. *Id.* at 14239.

19 the Senate passed the entire bill.<sup>32</sup> The amended bill went back to the House, and, after brief hearings, a resolution calling for approval of the Senate amendments was passed.<sup>33</sup>

Unlike the Civil Rights Act as a whole, it seems clear that the legislative history of the current enforcement provisions of Title VII dates only from May 26, 1964, the date on which Senator Dirksen first introduced the present language in a substitute amendment.<sup>34</sup> The only discussion on the Senate floor during the record 83 day debate which is directly relevant to the question of whether an affirmative finding of reasonable cause by the EEOC is a condition precedent to the individual's right to sue occurred during debate on an amendment submitted by Senator Ervin<sup>35</sup> where the following exchange took place:

MR. CANNON. Does the distinguished Senator agree that it is a prerequisite that the Commission find that such condition [reasonable cause] existed before the individual can sue?

MR. HUMPHREY. I do not agree to that. The point is that the Commission may offer to advise the Attorney General. The individual may proceed in his own right at any time. He may take his complaint to the Commission, he may bypass the Commission, or he may go directly to court.<sup>36</sup>

Although Senator Humphrey almost certainly overstated his case,<sup>37</sup> his immediate answer to Senator Cannon's question finds support in the somewhat more precise language of Senator Javits later in the same debate:

The Commission may find the claim invalid; yet the complainant still can sue, and so may the Attorney General, if he finds reasonable cause for doing so. In short, the Commission does not hold the key to the courtroom door. The only

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32. *Id.* at 14511.

33. *Id.* at 15897. President Johnson signed the amended H.R. 7152 into law immediately following the vote.

34. See note 28 *supra*. Commenting on Amendment No. 656, Senator Dirksen said:

As I look back now upon how [*sic*] upon the time that has been devoted to the bill, I doubt very much whether in my whole legislative lifetime any measure received such meticulous attention. We have tried to be mindful of every word, of every comma, and of the shading of every phrase. 110 CONG. REC. 11935 (1964).

35. Amendment No. 590 would have deleted from section 706(a) of Title VII the power of an EEOC member to file a charge on behalf of an aggrieved party. See 110 CONG. REC. 14192 (1964).

36. *Id.* 14188.

37. See note 42 *infra*. See also *Hall v. Werthan Bag Corp.*, 251 F. Supp. 184, 187 n.9 (M.D. Tenn. 1966).

thing this title gives the Commission is time in which to find that there has been a violation and time in which to seek conciliation.

[A finding of reasonable cause] . . . is not a condition precedent to the action of taking a defendant to court.<sup>38</sup>

Senator Ervin took the opposite view, asserting that "the aggrieved party cannot sue in the Federal courts unless the Commission first finds that there is reasonable cause to believe the charge is true. . . ."<sup>39</sup> The inference from the foregoing discussion is that at least the supporters and drafters of the compromise Title VII language felt that a Commission finding of reasonable cause was not a prerequisite to the individual's right to file suit,<sup>40</sup> while at least some of the opponents of the bill held the contrary view. The history of the civil rights bill in both houses is, from its inception, replete with statements regarding the emphasis placed upon voluntary proceedings and informal conciliation.<sup>41</sup> This history seems to buttress the position that one may not bypass the Commission *entirely* under a Title VII cause of action<sup>42</sup> but is not relevant to an assessment of the reasonable cause requirement. It is apparent that in spite of the staggering number of words spoken in Congress in discussion of the civil rights bill, only fleeting consideration was given to the question of whether a finding of reasonable cause by the Commission is a procedural prerequisite to the individual's right to bring suit.<sup>43</sup>

38. 110 Cong. Rec. 14191 (1964).

39. *Id.* at 14188.

40. *Cf. id.* at 14191 (remarks of Senator Saltonstall).

41. *See, e.g., id.* at 14190 (remarks of Senator Morse); *id.* at 14443 (remarks of Senator Humphrey); *id.* at 12690 (remarks of Senator Saltonstall); *id.* at 2565 (remarks of Congressman Lindsay).

42. *See Dent v. St. Louis-S.F. Ry.*, 406 F.2d 399, 403 (5th Cir. 1969) (dictum); *Stebbins v. Nationwide Mut. Ins. Co.*, 382 F.2d 267 (4th Cir. 1967), *cert. denied*, 390 U.S. 910 (1968); *Grimm v. Westinghouse Elec. Corp.*, 300 F. Supp. 984, 986 (N.D. Cal. 1969) (dictum); Berg, *Equal Employment Opportunity Under the Civil Rights Act of 1964*, 31 BROOKLYN L. REV. 62, 83 n.39 (1964); Walker, *Title VII: Complaint and Enforcement Procedures and Relief and Remedies*, 7 B.C. IND. & COM. L. REV. 495, 497 (1966); *cf. Hearings on H.R. Res. 789 Before the House Comm. on Rules*, 88th Cong., 2d Sess. 7 (1964) [hereinafter cited as *Hearings on H.R. Res. 789*], where it is stated that a charge "must be filed" with the EEOC.

43. In the House deliberations on the Senate amendments, Congressman McCulloch had the following remarks about the individual's right to sue under the bill:

[I]f within 30 days after the Commission has completed its investigation it fails to obtain voluntary compliance, it shall notify the person aggrieved. Thereafter, the person aggrieved shall have 30 days to file a suit in a Federal court. *Hearings on H.R. Res. 789* at 19.

The history of the Title VII compromise language in the senate does not appear to justify Congressman Celler's statement prior to final House passage that "[n]o phrase of the bill has been left unexplored, undefined, unexplained." 110 CONG. REC. 15894 (1964).

In the first court case dealing with the enforcement provisions of Title VII, a federal district court held that a complaint seeking injunctive relief for employment discrimination could be prosecuted as a class action.<sup>44</sup> After a Commission finding of reasonable cause, conciliation failed and the complainant brought suit. When others of the same class as the plaintiff sought to intervene, the court held that, with regard to the injunctive relief which would benefit the entire class, the intervenors need not have personally exhausted their administrative remedies with the Commission.<sup>45</sup> The requirement of resort to the Commission "was not designed to serve as a screen to prevent frivolous complaints from reaching the courts."<sup>46</sup> In *Edwards v. North American Rockwell Corp.*<sup>47</sup> a plaintiff filed a complaint with the Commission, but a finding of reasonable cause was never made. More than 60 days after the original complaint was filed, suit was initiated. The defendant's motion for dismissal was granted on several grounds, but the court made a specific finding that it was not deprived of jurisdiction by the Commission's failure to make a reasonable cause determination or by its failure affirmatively to seek conciliation.<sup>48</sup>

Several cases have held that actual efforts by the Commission to conciliate a grievance do not constitute a jurisdictional prerequisite to the individual's right to sue so long as the EEOC is given the *opportunity* to conciliate before an individual sues.<sup>49</sup> In all of these cases there had been an affirmative finding of reasonable cause by the Commission. In *Miller v. International Paper Co.*<sup>50</sup> a suit was allowed where the Commission had been unable to determine whether or not

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In Congressman Celler's summation of the Senate amendments to the bill immediately prior to the final House vote, he stated only:

The Equal Employment Opportunity Commission is given a maximum of 60 days in which to obtain voluntary compliance with the provisions of the law. If they [*sic*] are not able to do so, the aggrieved party in any case may file an action in the Federal district court in which the practice occurred. 110 CONG. REC. 15896 (1964).

44. *Hall v. Werthan Bag Corp.*, 251 F. Supp. 184 (M.D. Tenn. 1966).

45. *Id.* at 188. The plaintiff's compliance with Commission procedure was seen as satisfying the requirement for the entire class.

46. *Id.* Reliance was placed on Senator Javits' remarks on the floor of the Senate discussed in the text accompanying note 38 *supra*.

47. 291 F. Supp. 199 (C.D. Cal. 1968).

48. *Id.* at 211.

49. *Dent v. St. Louis-S.F. Ry.*, 406 F.2d 399 (5th Cir. 1969); *Johnson v. Seaboard Air Line Ry.*, 405 F.2d 645 (4th Cir. 1968); *Holliday v. Railway Express Co.*, 306 F. Supp. 898 (N.D. Ga. 1969).

50. 408 F.2d 283 (5th Cir. 1969).

reasonable cause existed. Prior to *Fekete*, the only case holding that suit could be maintained in spite of an affirmative finding of *no* reasonable cause was *Grimm v. Westinghouse Electric Corp.*<sup>51</sup> The *Grimm* opinion represents an excellent survey of judicial application of the enforcement language of Title VII, concluding that "the jurisdictional hurdles in Title VII pertain only to the filing of charges with the Commission and the receipt of notice from the Commission concerning compliance."<sup>52</sup> The thrust of the *Grimm* opinion is that the courts have properly given liberal treatment to the statutory language dealing with remedies available to an aggrieved party.<sup>53</sup> The court observed:

The question in each instance is whether a Commission determination adverse to those whose rights are established by Title VII can be judicially preclusive, and the answer in each case must be "no."

A contrary resolution of this question would vest the Commission with a final, legally effective authority not contemplated by the statute. . . .<sup>54</sup>

In *Fekete* the court of appeals based its decision on two factors: the legislative history of Title VII presents no firm guidelines with respect to the issues involved in the case, and "good reason and fealty to the spirit and purpose of the Act"<sup>55</sup> demand that the enforcement power given to the individual grievant not be cut off by a preliminary determination by an agency not possessing such power itself. As for legislative intent, the court stated that the political compromise which led to the passage of the Act created a situation in which Congress never considered the issue presented.<sup>56</sup> This, of course, is not strictly accurate,<sup>57</sup> but it is true that the only apparent consideration given by Congress to the procedural question in *Fekete* occurred during a brief floor debate, and no committee ever considered the question.<sup>58</sup> The history of Title VII clearly reflects a congressional unwillingness to give the EEOC any substantial, conclusive power but, instead, to

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51. 300 F. Supp. 984 (N.D. Cal. 1969).

52. *Id.* at 986.

53. *Id.* at 987-88.

54. *Id.* at 990.

55. 424 F.2d at 336.

56. *Id.* at 334.

57. See text accompanying notes 36-40 *supra*.

58. The Supreme Court has stated the rule many times that "debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute. . . ." *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 318 (1897). The courts will, however, give weight to "the [text of the] bill as introduced, [and] changes made in the frame of the bill in the course of its passage. . . ." *United States v. St. Paul, Minneapolis & Manitoba Ry.*, 247 U.S. 310, 318 (1918).

place principal responsibility for enforcement upon the individual complainant and the courts. Even before H.R. 7152 reached the Senate, the House had replaced the Commission's power to issue cease and desist orders with a power to bring de novo court actions because many members of the House Judiciary Committee "preferred that the ultimate determination of discrimination rest with the Federal judiciary"<sup>59</sup> rather than with the Commission. The removal of Commission enforcement power was completed in the Senate by the Dirksen Amendment<sup>60</sup> when the power to sue was also taken from the Commission. The view that a Commission determination of no reasonable cause should preclude any further judicial proceedings<sup>61</sup> does indeed appear inconsistent with the statutory absence of any Commission power to make a final and binding determination of any matter.<sup>62</sup> Since an affirmative finding of reasonable cause is without binding legal significance, it is difficult to see why a contrary finding should be treated any differently.<sup>63</sup> A second factor which should be accorded considerable weight is the wording of the statute itself. Section 706(a) makes a finding of reasonable cause a condition precedent *only* to Commission conciliation efforts.<sup>64</sup> In contrast to this language, section 706(e) provides that the individual may commence judicial proceedings "[i]f . . . the Commission has been unable to obtain voluntary compliance with this subchapter. . . ."<sup>65</sup> Had Congress intended a finding of

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59. H.R. REP. NO. 914, 88th Cong., 1st Sess., pt. 2, at 29.

60. See notes 28-31 *supra* and accompanying text.

61. See, e.g., 110 CONG. REC. 14188 (1964) (remarks of Senator Ervin). See text accompanying note 39 *supra*.

62. See Anderson, *Civil Rights and Fair Employment*, 22 BUS. LAW. 513 (1967). "[T]he EEOC itself has no power to make an interpretation of the law which is binding on anyone. It has no power to make an effective determination that anyone has or has not violated the law." *Id.* at 522.

Two additional matters should be noted. First, in addition to the Commission's lack of legally binding power, "[n]othing said or done during . . . [Commission investigations] may be . . . used as evidence in a subsequent proceeding." 42 U.S.C. § 2000e-5(a) (1964).

Second, the *Fekete* court also emphasized the well-established principle reiterated recently in *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, (1970), that "[t]here is no presumption against judicial review and in favor of administrative absolutism. . . ." *Id.* at 157. See 424 F.2d at 334.

63. See Berg, *Equal Employment Opportunity: Procedure Under Title VII of the Civil Rights Act of 1964*, 55 ILL. B.J. 654, 655 (1967).

64. "If the Commission shall determine, after such investigation, that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice. . . ." 42 U.S.C. § 2000e-5(a) (1964).

65. *Id.* § 2000e-5(e).

reasonable cause to be a prerequisite to court action by the complainant, it would have been a simple matter to have so provided in either of the foregoing sections. The fact that Congress did not so provide, taken in light of the legislative history of Title VII and the remarks made on the floor by those privy to the Dirksen Amendment negotiations,<sup>66</sup> leads to the conclusion that the *Fekete* court's resolution was well justified.

The *Fekete* decision certainly presents the possibility of increased resort to the courts by those complainants who are initially met with a "no reasonable cause" determination by the Commission. Although a substantial majority of those complaints not settled administratively result in a finding of reasonable cause,<sup>67</sup> the number resulting in a determination adverse to the complainant is in the hundreds each year, creating a corresponding number of potential plaintiffs.<sup>68</sup> Several factors, however, indicate that no great upsurge in litigation under Title VII will occur. In the first place, it would be unreasonable to assume that *every* complaint resulting in a no reasonable cause finding will end up in the courts. Secondly, there was, from the Act's inception, considerable support for the view adopted in *Fekete*.<sup>69</sup> Arguably, not many complainants have been deterred from filing suit, notwithstanding a few scattered adverse decisions by the lower federal courts. A third and less apparent reason for believing that *Fekete* will not produce a wave of lawsuits is that many individuals doubtless rely heavily on Commission investigation reports in the preparation of a case.<sup>70</sup> If that research led the Commission to a conclusion of no reasonable cause, the chances are quite good that the record does not establish a very imposing case for the would-be plaintiff.

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66. See notes 36-38 *supra* and accompanying text.

67. Excluding complaints which have been administratively settled or voluntarily withdrawn, the rate of findings of "reasonable cause" is approximately 75 percent. This compares with a similar rate of 50 percent in state fair employment practice commissions. Comment, *Title VII, Civil Rights Act of 1964: Present Operation and Proposals for Improvement*, 5 COLUM. J. OF L. & SOC. PROB. 1, 22 (1969); cf. J. WITHERSPOON, ADMINISTRATIVE IMPLEMENTATION OF CIVIL RIGHTS 14-17 (1968).

68. 5 COLUM. J. OF L. & SOC. PROB., *supra* note 67, at 22.

69. See, e.g., Berg, *supra* note 42, at 83 n.39; Gardner, *The Procedural Steps of Title VII of the Civil Rights Act of 1964*, 29 ALA. LAW. 80, 86 (1968); cf. Anderson, *supra* note 62, at 522.

It should be noted that the EEOC itself appeared in *Fekete* as amicus curiae on behalf of appellant's position. See 424 F.2d at 333 n.2.

70. 5 COLUM. J. OF L. & SOC. PROB., *supra* note 67, at 43. The EEOC has made available for the private suit substantially all relevant investigation and certain conciliation records and has generally attempted to cooperate with the private litigant in whatever way possible.

Since it is highly unlikely that *Fekete* will be expanded to the point of sanctioning a total avoidance of EEOC machinery,<sup>71</sup> the Commission will continue to play a major role in the settlement of discrimination disputes. As long as Title VII requires resort to the EEOC in the first instance, it is to the advantage of both the employee and employer to try to settle the dispute voluntarily even though the agency has no enforcement power. Under *Fekete*, the employer knows that even if the Commission finds "no reasonable cause," he still might be sued in the district court. While the *Fekete* decision does not undermine the congressional scheme requiring prior resort to the administrative agency, it does call into question the wisdom of Title VII's allocation of functions between court and agency. It would appear that the EEOC, like other federal agencies, would necessarily acquire skill and expertise in its specialized field, and that its findings of fact should be accorded *some* weight in subsequent court proceedings. The *Fekete* decision necessarily means that in instances where the aggrieved party goes ahead and files suit in the face of a "no reasonable cause" finding, the Commission's work has been to little avail. Short of adopting the scheme originally proposed of giving the Commission the power to issue cease and desist orders and allowing aggrieved persons to seek judicial review thereof,<sup>72</sup> there seems to be another way to prevent resort to the Commission from becoming a mere perfunctory exercise. If the findings of fact of the Commission were made conclusive in subsequent court proceedings "if supported by substantial evidence," there would be less duplication of effort by agency and court. The type of problem with which the EEOC deals is similar to the discrimination charges which the NLRB routinely decides.<sup>73</sup> In such cases the findings of the Board are conclusive if supported by substantial evidence,<sup>74</sup> and the reviewing court does not waste judicial energy finding facts supposedly already found by a more expert body. Where the jurisdiction of the court is dependent upon prior resort to an administrative agency, it would seem more efficacious to give the agency's findings of fact some weight in the

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71. See note 43 *supra* and accompanying text.

72. See notes 16 & 18 *supra* and accompanying text.

73. See National Labor Relations Act §§ 8(a)(3) & (4), 29 U.S.C. § 158(a)(3) & (4) (1964), making it an unfair labor practice to discriminate against an employee in order to discourage membership in a labor organization or because an employee has filed charges or given testimony against the employer.

74. National Labor Relations Act § 10(e), *id.* § 160(e).

subsequent court proceedings. But, under the statutory scheme as it presently exists, the *Fekete* decision does ensure that an agency decision will not have the absolute effect of precluding any judicial determination of the disputed matter.<sup>75</sup>

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75. *Cf.* *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967).