UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Christine Mills et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	04 CV 2205 (HHK/AK)
	)	
James Billington,	)	
Librarian of Congress	)	
	)	
Defendant.	)	
	)	

Plaintiffs' Supplemental Brief on Standing

Defendant takes the position that plaintiffs have not suffered an injury-in-fact sufficient to confer Article III standing by reason of defendant's failure to carry out its duties under §717(b) of Title VII as amended, 42 U.S.C. §2000e-16(b). Yet it offers no coherent interpretation of the statute that would put plaintiffs outside the zone of interest protected by the statute and injured by denial of the right to information, participation in the process and freedom from discriminatory practices that might be curtailed by compliance with the statutory mandate. Plaintiffs include African Americans who are present employees of the Library of Congress. They have a specific interest in ensuring that the Librarian of Congress carries out his duties to: a) review and maintain an affirmative action plan for the benefit of employees like plaintiffs; b) publish, on at least a semi-

annual basis, progress reports to provide information to interested parties like plaintiffs; and c) consult with and solicit the recommendations of interested parties - like plaintiffs. Plaintiffs have suffered a cognizable injury by denial of their statutory right to information and participation in the affirmative action plan process.

Defendant does not challenge plaintiffs' assertion that compliance with the EEO requirements of §717(b) was adequately raised at the administrative level and that raising it pre-suit was not possible as defendant only stopped publishing the reports when this suit was filed. Yet, defendant suggests that the remedy provided by §717(c) somehow excludes enforcement of the requirements of §717(b). The specific question does not appear to have been addressed in a reported opinion. The few opinions addressing employee remedies for violation of anti-discrimination statutes by federal agencies are universal in finding a remedy.

Argument

This Court has recently ennumerated the basic requirements for individual standing to bring suit under §717(c) of Title VII of the Civil Rights Act of 1964:

> For the individual employees to have standing, they must establish: (1) that they have suffered an "injury in fact"; (2) that the injury is "fairly ... trace[able] to the challenged action of the defendant"; and (3) that the injury will "likely" be "redressed by a favorable decision." *Lujan,* 504 U.S. at 561, 112 S.Ct. 2130; *see also Animal Legal Defense Fund, Inc. v. Glickman,* 154

F.3d 426, 431 (D.C.Cir.1998).

Cook v. Billington, 541 F.Supp.2d 358, 362 (D.D.C. 2008).

The question of standing involves both the "irreducible minimum" under Article III of the Constitution that the plaintiff have suffered an "injury-in-fact" caused by the challenged conduct that can be redressed by the Court and additional prudential limits. Among the prudential limits to a claim of injury by failure to comply with a statutory mandate is the requirement that the plaintiff's grievance be within the "zone of interest" that the statute was meant to protect. *Bennett v. Spear* 520 U.S. 154, 162, 117 S.Ct. 1154, 1161 (1997). While Title VII extends standing to its Article III limits, both requirements are easily met in this case.

Injury In Fact

Injury-in-fact does not have to be measured in dollars. Violation of a statutory right or failure to provide an informational benefit created by a statute clearly gives rise to a cognizable injury that can be asserted by the intended beneficiaries of the statute. *Havens Realty Corp. v. Coleman,* 455 U.S. 363, 373, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982) (sustaining the right of Fair Housing Act market testers to receive "truthful information concerning the availability of housing" from sellers, even in the absence of any further harm); *Shays v. Federal*

Election Com'n, 528 F.3d 914, 923, 381 U.S.App.D.C. 296, 305 (D.C. Cir. 2008)(voter has standing to assert claim of statutory right to information about political candidates); *Cook v. Billington*, 541 F.Supp.2d 358, 362 (D.D.C.2008)(employees have standing under §717 of Title VII to challenge Librarian's refusal to recognize employee group where recognition allows for paid meeting time).

A claim for information may become moot - and therefore not capable of redress - when the defendant provides the requested information before suit is filed and there is no claim of a risk of future denial of information. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 105, 118 S.Ct. 1003, 1018 (1998). That situation is not presented on the present record. Since 2004 (shortly after plaintiffs filed the present action) Defendant has ceased: to collect the information; to draft affirmative action plans; to include comments from parties interested in the plans; and to publish the mandatory progress reports. Defendant has also failed to carry out his duty to monitor his own performance of those duties. Defendant admits that it has shirked its statutory duties for the past six years and that it has no plan to come into compliance. The controversey is very much alive as the injury continues. Plaintiffs seek injunctive relief as well as loss of income.

The zone of interest analysis requires only a showing that the plaintiff's particularized complaint "arguably" falls within the class of interests the statute was written to protect:

> a plaintiff's grievance must arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit. See *Allen, supra,* at 751, 104 S.Ct., at 3324; *Valley Forge, supra,* at 474-475, 102 S.Ct., at 759-760.

Bennett v. Spear, 520 U.S. 154, 162, 117 S.Ct. 1154, 1161 (1997); *Cohen v. U.S.,* 578 F.3d 1, 11 -12 (D.C. Cir. 2009). It is at least arguable that black employees of the Library of Congress are among the class of people for whose benefit Congress mandated the periodic review, solicitation of comments and publication of reports about EEO progress as required by §717(b).

Section 717 of Title VII of the Civil Rights Act of 1964 was added to the statute in 1972. Its purpose is stated in the text of the statute itself:

> All personnel actions affecting employees [of] . . . the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

42 U.S.C. §2000e-16(a).

Employees of the Library of Congress are clearly within the class of people who might be affected by the failure of the Librarian of Congress to carry out mandatory duties Congress determined to be necessary to effectuate the goal of

§717. Among those duties are the requirements of §717(b).

Defendant appears to concede that the relief plaintiffs seek is within the scope of the administrative process that gave rise to this action. Defendant suggests that plaintiffs would not have standing to enforce a private employer's duty to submit reports to the EEOC, Def. Supp. p. 4. The suggestion is not relevant as defendant is not a private employer and the reporting requirement as well as the civil suit provision involved in this action comes from a part of Title VII that applies only to federal employers. Defendant does not even argue that employees of the Library of Congress are outside of the class of "employees" of, *inter alia*, the "Library of Congress" who can bring suit if they are "aggrieved" by the failure of the Librarian of Congress to take "final action" on a complaint of discrimination. 42 U.S.C. 2000e-16(c).

The only specific argument defendant makes against plaintiffs standing is easily refuted. At page 14 of plaintiffs' moving brief, undersigned counsel made the statement that

> Plaintiffs may not suffer a direct injury from the Defendant's repeated failures to comply with his statutory duties to file such plans and progress reports but they have standing in Court to enforce the broad remedial mandate of Title VII.

Plaintiffs did not and do not concede that there is no "injury-in-fact"

sufficient to confer standing. To the contrary, both the moving brief and the reply describe specific "injury-in-fact" from defendant's denial of plaintiffs' statutory right to information, involvement in the process of drafting the affirmative action plans, and benefits of any amelioration of discriminatory pay and promotion practices. As noted above, plaintiffs need not suffer an economic injury to suffer an injury-in-fact. The quoted language from the moving brief was simply a recognition that defendant's compliance with the requirements of 42 U.S.C. 2000e-16(b) will not provide the kinds of relief that plaintiffs seek in the underlying pay and promotion litigation. Plaintiffs do not seek specific promotions, changes to hiring practices, back pay or other relief on this motion. Plaintiffs do have standing to require defendant to meet the minimum requirements of the statute even while the claims for other relief are pending.

Injury Attributable to Defendant and Redressible by the Court

None of the opinions cited by defendant addresses the scope of standing under §717 of Title VII. Each turns on questions of causation and redressibility not raised in this case. All are easily distinguished.

In *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 118 S.Ct. 1003 (1998), the Court expressly declined to rule on the question whether denial of the plaintiffs' statutory right to an inventory of defendant's toxic chemical use

would give rise to injury-in-fact. 523 U.S. at 105. In that case, the defendant had filed the report required under the toxic inventory statute during the pendency of the 60 day notice period mandated by the citizens' suit provision that created the cause of action. Because there was no allegation of an ongoing failure to file reports or a reasonable probability of future violations, the Court held that the plaintiffs failed to allege an injury that could be redressed in an action filed after the defendant had complied with the law. The present action presents the flip side of *Steel Co.* because the Defendant Librarian started violating the law shortly *after* plaintiffs filed this action. The injury from denial of statutory rights is clearly redressable.

Defendant also mis-cites *Freedom Republicans, Inc. v. Federal Election Com'n*, 13 F.3d 412, 416 (D.C. Cir.1994) ("Because we hold that Freedom Republicans is unable to satisfy the redressability and causation requirements of standing, we need not decide whether it makes out a judicially cognizable injury."). Like *Steel Co.*, the *Freedom Republicans* opinion expressly declines to examine the question of injury-in-fact. There, the plaintiffs sued the FEC to stop funding of the Republican convention due to allegedly discriminatory party rules on delegate selection. The Court held that the causal nexus between FEC funding and the challenged rule was too tenuous to establish the possibility that a

successful challenge would address the underlying discrimination. There was no evidence that changing the FEC funding procedures would have any impact on the delegate selection rules of the Republican Party.

Here, there is a direct causal nexus between the Librarian's failure to ensure that he complies with the EEO requirements of Title VII and plaintiffs' request for relief - an order compelling the Librarian to come into compliance with those requirements. The violation of the statute can easily be cured by court order. It is redressable.

Sovereign Immunity Is Waived for the Requested Relief

Defendant concedes, as it must, that Congress waived sovereign immunity when it created a civil action for the express purpose of allowing suit against Defendant by any employee who may be 'aggreived' "by the failure to take final action on his complaint." 42 U.S.C. 2000e-16(c). The language of the waiver is clear and unequivocal. *Gomez-Perez v. Potter*, 128 S.Ct. 1931, 1940-1941 (2008). An employee may sue the head of his agency:

> . . . an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

42 U.S.C. 2000e-16(c). *Gomez-Perez v. Potter, supra,* at 1940-1941.

Defendant further concedes that plaintiffs' requests for affirmative action information and participation in the process during the administrative stage of this

action - including the January 2005 letter cited in the moving brief - were sufficient to constitute an administrative "complaint" for defendant's failure to carry out its affirmative action data collection, reporting and consultation duties from January 2005 to the present duty. Yet defendant argues that the relief plaintiffs request here is, somehow, outside the scope of the civil action created by 42 U.S.C. 2000e-16(c).

While Defendant makes a generalized argument against implied waivers of sovereign immunity by the federal government, it ignores the clear evidence of Congressional intent to create the broadest possible remedy for federal employees challenging discrimination in the federal workplace. Specifically, Congress mandated affirmative action plans, reporting and participation of interested parties for federal agencies. 42 U.S.C. 2000e-16(b). There is no such mandate in Title VII for private employers. Thus, while such requirements can be ordered only as a means to redress underlying discrimination in private employment, the EEO analysis and reports are mandatory for the Librarian of Congress independent of any other statutory violation. Defendant's efforts to distinguish cases finding reporting to be a valid remedy for private employers who have violated Title VII are without merit. Federal employers have an express statutory duty to engage in the EEO activities listed in 42 U.S.C. 2000e-16(b), independent of any finding of

underlying discrimination.

Defendant offers no authority to suggest that the scope of relief under §717(c) is somehow narrower than it is for private employers under §702. Nor could it as Congress expressly defined the scope of relief available against federal employers by reference to the provisions that apply to private employers. 42 U.S.C. 2000e-16(d) thus incorporates the provisions of 42 U.S.C. 2000e-5(f) through (k) relating to remedies.

Finally, it is well established that the mandate to root out discrimination from federal personnel practices is broader than for private employers both in requiring EEO activities under subsection (b) and in the scope of activity prohibited in subsection (a). §717(a), unlike §702 of Title VII, mandates that "all personnel actions" be free from discrimination, not just the specific practices ennumerated in section 702. *Compare*, 42 U.S.C. 2000e-16(a) with 42 U.S.C. 2000e-2(a). *Palmer v. Schultz, supra*, 815 F.2d 84, 97 (D.C. Cir. 1987)(Title VII); *Cf*., *Forman v. Small,* 271 F.3d 285, 298 (D.C. Cir. 2001)(ADEA); *see also Gomez-Perez v. Potter*, 128 S.Ct. 1931, 1940-41 (2008).

Even before Congress created a specific cause of action for enforcement of federal employees' right to be free from handicap discrimination, this court found that a handicapped employee could bring suit to compel a federal agency to carry

out its mandatory duty to create and execute an affirmative action plan. *McNutt v. Hills*, 426 F.Supp. 990, 997 (D.D.C. 1977); *Womack v. Lynn*, 504 F.2d 267, 269, 164 U.S.App.D.C. 198, 200 (D.C. Cir. 1974). In the present case, jurisdiction is already established over the underlying discrimination action filed pursuant to §717(c). There is no need to examine the Administrative Procedures Act, the mandamus statute, or Executive Orders to find a basis for the kind of jurisdiction found in *McNutt*. Those bases for jurisdiction are, in any event, saved by §717(e) which provides that the addition to Title VII is not intended to pre-empt or override any pre-existing right of federal employees to assert anti-discrimination rights established before 1972.

Title VII is not a statute of general application that plaintiffs are trying to extend to cover the federal government. Rather, §717 represented a deliberate decision by Congress in 1972 to waive sovereign immunity by federal employers to the extent that it had not be waived before. The D.C. Circuit has interpreted the statute as creating a broad action to vindicate rights guaranteed by the statute even where there is no tangible economic harm. *Palmer*, 815 F.2d at 97-98.

The only opinion cited by defendant that even involves the scope of a discrimination statute is *Lehman v Nakshian*, 453 U.S. 156, 160-70 (1981). There, the Supreme Court recognized that there is no doubt that Congress waived

sovereign immunity for the full scope of relief available under the ADEA when it enacted 29 U.S.C. 633a in 1978. The only issue raised in that case was the right to jury trial. The Court has noted that Congress expanded the scope of the waiver of sovereign immunity in 1991 when it made a right to jury trial for compensatory damages available to federal employees. *West v. Gibson,* 527 U.S. 212, 222, 119 S.Ct. 1906, 1912 (U.S.,1999). Nothing in the Act or the caselaw suggests that the waiver of sovereign immunity under section 717 somehow excludes the right to enforce 717(b).

Respectfully submitted,

/s/ David L. Rose
David L. Rose
daver@roselawyers.com
Joshua N. Rose
josh@roselawyers.com
Earlene W. Rosenberg
erosenberg@roselawyers.com
Rose & Rose, P. C,
1320 19th St., N. W., Suite 601
Washington, D. C. 20036
Attorneys for the Plaintiffs
Tel. 202 331-8555
Fax 202 331-0996

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