Merikay and the Pacific Press: An Update

by Tom Dybdahl

On May 12, the U.S. Court of Appeals for the Ninth Circuit issued its decision in the case of *Equal Employment Opportunity Commission and Merikay Silver and Lorna Tobler vs. Pacific Press Publishing Association and the General Conference of Seventh-day Adventists.* The Circuit Court reversed an earlier decision by the District Court that had restrained the Press from firing Mrs. Silver and Mrs. Tobler.

This ruling in favor of the Press ends the suit brought by the EEOC on behalf of the women, unless the Commission decides to appeal, which now appears unlikely.

The EEOC suit (see the author's article in SPECTRUM, Vol. 7, No. 2) had grown out of an earlier suit brought by Mrs. Silver against PPPA. It centered on the issue of retaliation against the two women in violation of Title VII of the Civil Rights Act. Mrs. Silver told the EEOC that after she filed the private civil action, she was harassed by the Press. After investigation, the EEOC filed suit on behalf of Mrs. Silver and Mrs. Tobler.

In ruling on the case, the lower court judge agreed that the Press was a religious publishing house, with the right to hire only "members in good standing of the Seventh-day Adventist Church." But he found that the Press "sought to terminate the employment of Tobler and Silver because they had opposed practices they believed unlawful . . . and because they made charges, testified, assisted and participated in investigations and proceedings. . . ."

He ruled that since the Press was not exempt from complying with the Title VII provisions of the Civil Rights Act on the basis of the First Amendment, this action constituted "an unlawful employment practice." His order was to remain in force until either the *Silver vs. PPPA* suit was settled, or until either woman was no longer a member "in good standing of the Seventh-day Adventist Church." The Press appealed the decision.

The three-judge panel of the Court of Appeals upheld the Press' appeal, and reversed the decision. The judges said it was "unfortunate" that both parties had concentrated on the constitutional questions, instead of focusing on a discussion and analysis of the statute under which the original injunction had been issued. In their opinion, "the outcome of the appeal turns on the statute. In their haste to confront constitutional issues of the first order," the court said, "the parties have overlooked the basics which we are bound to observe."

The section of the Civil Rights Act under which the EEOC had sued—42 U.S.C. Sec.

Tom Dybdahl's earlier report on the Merikay suit appeared in SPECTRUM, Vol. 7, No. 2.

2000e-5(f)(2)—was not unlimited. Specifically, it stated that action could be brought only for relief "pending final disposition of such charge." And the clear legislative meaning of "final disposition," the court said, "was the EEOC's administrative disposition." This meant that the lower court's authority to grant relief ended with the conclusion of the administrative phase. And the administrative phase ended, the judges said, when Mrs. Silver initiated her private suit against the Press. This act "signalled the failure of efforts at conciliation and terminated EEOC's opportunity to bring suit." The decision, simply put, was that the EEOC had no authority to sue the Press under the Civil Rights Act at the time it sued.

In regard to the charges of discrimination and retaliation filed with the Commission by the women, the Appeals Court said that these allegations might still be theoretically "subject to the administrative process." But since they were similar to the charges in the Silver suit, the court said that a favorable resolution of the private suit "will provide plaintiffs/intervenors with the same relief sought here."

One of the three judges issued a dissenting opinion in which he suggested that the issue was more "complicated" than the majority had made it appear, although he found their decision "appealing." He argued that the administrative phase "may have been merely 'suspended,' not concluded." If this were true, the EEOC would still have had the right to sue. He said he would have reversed the decision but remanded it for further proceedings to determine whether the administrative part was "suspended" or "concluded."

The decision leaves the original *Merikay Silver vs. PPPA* suit, regarding sex discrimination and alleged retaliation, yet to be settled. But it is an unsatisfying decision. The judges did not deal with the charges of retaliation, leaving them to the lower court to decide. And they did not address themselves to the most intriguing question of all: does a church's freedom of religion make it exempt from other laws, specifically the employment provisions of the Civil Rights Act?