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Title VII and the Continuing Violation Theory: A Return to Congressional Intent

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TITLE VII AND THE CONTINUING VIOLATION THEORY: A RETURN TO CONGRESSIONAL INTENT

INTRODUCTION

In order to bring a claim of employment discrimination under Title VII of the Civil Rights Act of 1964[1] (Act), a private plaintiff[2] must first meet the jurisdictional prerequisite[3] of filing a charge with the Equal Employment Opportunity Commission[4] (EEOC) within 180 days of the alleged discrimina-

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1. 42 U.S.C. §§ 2000e to 2000e-17 (1976). *Id.* § 2000e-2(a) provides: "It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

Employment agencies, labor unions, and joint labor-management committees are similarly barred from discriminating on the basis of race, color, religion, sex, or national origin. *Id.* § 2000e-2(b) to (d). Other unlawful employment practices barred by the Act include discriminating against an employee or applicant for attempting to enforce his rights under the Act, *id.* § 2000e-3(a), and printing or publicizing notices indicating any discriminatory preference, limitation, or specification in relation to employment. *Id.* § 2000e-3(b).

2. The Act specifically allows individuals to bring a private cause of action for discrimination in employment. *Id.* § 2000e-5(f). The Act also provides for a dual enforcement scheme and empowers the Equal Employment Opportunity Commission (EEOC) to bring an action when it has been unable to secure an acceptable conciliation agreement. *Id.* For a general discussion of some of the practical problems caused by the dual enforcement scheme, see Sullivan, *The Enforcement of Title VII: Meshing Public and Private Efforts*, 71 Nw. U. L. Rev. 480 (1976). The focus of this Note will be on private suits.

3. There is some debate as to whether the 180 day time limit is a jurisdictional prerequisite to filing suit or a statute of limitations subject to equitable tolling. The clear weight of authority is that it is a jurisdictional prerequisite. *See* United Air Lines, Inc. v. Evans, 431 U.S. 553, 555 n.4 (1977); Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974); Olson v. Rembrandt Printing Co., 511 F.2d 1228, 1231 (8th Cir. 1975); Moore v. Sunbeam Corp., 459 F.2d 811, 821 n.26 (7th Cir. 1972); B. Schlei & P. Grossman, Employment Discrimination Law 871 (1976). *But see* Boudreaux v. Baton Rouge Marine Contracting Co., 437 F.2d 1011, 1014 n.6 (5th Cir. 1971); Jackson & Matheson, *The Continuing Violation Theory and the Concept of Jurisdiction in Title VII Suits*, 67 Geo. L.J. 811, 841-50 (1979); Note, *Continuing Violations in Private Suits Under Title VII of the Civil Rights Act of 1964*, 32 Ark. L. Rev. 381, 384-85 (1978).

4. 42 U.S.C. § 2000e-5(b) (1976). Whenever a charge is filed, the EEOC must serve a notice of the charge upon the employer within 10 days, and then make an investigation of the complaint. If the EEOC determines that there is reasonable cause to believe that the charge is true, it attempts to eliminate the unlawful practice through informal conciliation. *Id.* If the EEOC is unable to secure an acceptable conciliation agreement within 30 days after the charge is filed, it may bring a civil action against the employer, unless the employer is a government agency, in which case the charge is referred to the Attorney General. The complaining employee may intervene in the EEOC's action. *Id.* § 2000e-5(f). If the EEOC determines that there is no reasonable cause to believe that the charge is true, it dismisses the charge and notifies both parties. *Id.* § 2000e-5(b). If the employee's charge is dismissed by the EEOC, or if the EEOC or the Attorney General has not filed a suit within 180 days of the filing of the charge and there has

tion.[5] Because of the severe impact that this brief filing period can have on the possible claims of unsophisticated employees, courts have avoided strict application of the requirement through a liberal interpretation of when the violation occurred. When the employer's discrimination against the plaintiff consists of a series of acts rather than a single isolated incident, the EEOC filing will be timely if it is made within 180 days of the last discriminatory act.[6] In such a case, the discrimination will be treated as one continuous violation rather than a series of isolated acts, and recovery will be permitted for the entire period of discrimination rather than solely for the incidents that occurred within 180 days of the filing.[7]

This theory of a continuing violation due to repeated discrimination against the plaintiff was endorsed by Congress[8] in the 1972 amendments to the Act.[9] Some courts, however, have expanded the theory and applied it to cases in which there is no actual continuing discrimination against the complaining employee. These courts have held that the filing period is measured not from the last occurrence of discrimination against the plaintiff, but from either the last occurrence of any similar discrimination by the employer against other

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been no conciliation agreement to which the plaintiff is a party, the EEOC must notify the employee, and the employee may then bring a civil action within 90 days after the notice. *Id.* § 2000e-5(f).

The original charge may also be filed by the EEOC. *Id.* § 2000e-5(b). In such a case, any person whom the charge alleges was discriminated against may also bring an action within 90 days of receiving notice from the EEOC. *Id.* § 2000e-5(f). For a detailed discussion of this procedure, see Sape & Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 Geo. Wash. L. Rev. 824, 862-84 (1972).

5. 42 U.S.C. § 2000e-5(e) (1976). If the employee has initially instituted proceedings with a proper state or local agency, as is required if such an agency exists, *id.* § 2000e-5(c), the charge must be filed within 300 days of the alleged violation, or within 30 days after receiving notice that the state or local agency has terminated the proceedings under state or local law, whichever is earlier. *Id.* § 2000e-5(e). If state or local law prohibits the discrimination that the plaintiff alleges, he may not file with the EEOC until 60 days after he has commenced proceedings under the state or local law. *Id.* § 2000e-5(c). Regardless of the length of the state filing period for invoking state remedies, the state filing must be within 180 days of the alleged violation in order for the plaintiff to have the benefit of the 300 day period for his EEOC filing. Olson v. Rembrandt Printing Co., 511 F.2d 1228, 1232-33 (8th Cir. 1975).

6. *See* pt. II(A) *infra*.

7. *See* Acha v. Beame, 570 F.2d 57, 65 (2d Cir. 1978); Egelston v. State Univ College, 535 F.2d 752, 755 (2d Cir. 1976); Macklin v. Spector Freight Sys., Inc., 478 F.2d 979, 987 (D.C. Cir. 1973). The remedies provision of Title VII authorizes the court to order an injunction or other affirmative relief, including, but not limited to, reinstatement or hiring with or without back pay. 42 U.S.C. § 2000e-5(g) (1976). The provision is modeled after § 10(c) of the National Labor Relations Act, 29 U.S.C. § 160(c) (1976), and is intended to give the courts wide discretion in fashioning the most complete relief possible in order to make the victims of unlawful discrimination whole. 118 Cong. Rec. 4292 (1972) (report of Sen. Williams); *see* Franks v. Bowman Transp. Co., 424 U.S. 747, 764 (1976); Albemarle Paper Co. v. Moody, 422 U.S. 405, 419 (1975). There is, however, a two year limitation on back pay liability. 42 U.S.C. § 2000e-5(g) (1976).

8. 118 Cong. Rec. 4941 (1972) (report of Sen. Williams), *discussed at* note 33 *infra* and accompanying text.

9. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 105 (1972) (codified at 42 U.S.C. § 2000e to 2000e-17 (1976)), *discussed at* notes 31-33 *infra* and accompanying text.

employees,[10] or from the last date that the plaintiff experiences any effect from a prior discrimination against him.[11] In applying the continuing violation theory in this manner, these courts have generated inconsistent case law and frustrated the very purpose of having a filing period.

This Note will analyze the various applications of the continuing violation theory and argue that its proper use should be limited to cases involving actual discrimination against the plaintiff within 180 days of his EEOC filing. Part I will trace the origins of the continuing violation theory and the congressional response to it in the 1972 amendments. In an effort to develop a framework for the proper limitation of the theory, Part II will categorize the cases into three distinct theories of a continuing violation—present discrimination, systemic, and present effects[12]—and will illustrate the application of these theories in various factual situations. Finally, it will be proposed that an extension of the filing period will better alleviate the problems caused by its brevity than do the expansions of the continuing violation theory.

I. ORIGIN OF THE CONTINUING VIOLATION THEORY

When Congress enacted the Civil Rights Act of 1964,[13] it established a ninety day period within which to file Title VII claims with the EEOC.[14] If a plaintiff failed to file within that period, he was barred from later bringing suit for any claim he might have. Although the legislative history of the Act is unclear as to why such a short filing period was chosen,[15] courts have generally interpreted the purpose to be similar to that of a statute of limitations—to compel plaintiffs to bring suits promptly.[16]

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10. *See* pt. II(B) *infra*.

11. *See* pt. II(C) *infra*.

12. Courts are by no means uniform in categorizing the various types of continuing violations. The concept that the continuing violation theory itself may be broken down into three basic theories is taken in part from B. Schlei & P. Grossman, *supra* note 3, at 894-908.

13. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified at 42 U.S.C. §§ 2000a to 2000h-6 (1976)).

14. *Id.* § 706(d) (current version at 42 U.S.C. § 2000e-5(e) (1976)).

15. The legislative history of the Act has been charitably described as "chaotic." Hall v. Werthan Bag Corp., 251 F. Supp. 184, 186 (M.D. Tenn. 1966). *See generally* Vaas, *Title VII: Legislative History*, 7 B.C. Indus. & Com. L. Rev. 431 (1966). Although the purpose of the time limit is not clearly ascertainable from the congressional debates concerning the Act, some commentators have indicated that it was the result of a political compromise. The Act was "born in the House [and] transfigured on the floor of the Senate by those who wished to save [it] from an otherwise certain death. [It] is the result of a political compromise, a product more of the desire for passage than the desire for a rational scheme for uprooting discrimination. . . . [C]ourts must [therefore] wrestle with the language and construe the provisions in light of what appear to be the broad purposes of [the] Act." Note, *Discrimination In Employment and in Housing: Private Enforcement Provisions of the Civil Rights Acts of 1964 and 1968*, 82 Harv. L. Rev. 834, 835 (1969) (footnote omitted); *see* Hill, *The Equal Employment Opportunity Acts of 1964 and 1972: A Critical Analysis of the Legislative History and Administration of the Law*, 2 Indus. Rel. L.J. 1, 7 (1977) (describing the Act as the result of tortuous congressional compromises).

16. "Congress, in placing the various time limitations in Title VII, was attempting to eliminate the problem of . . . stale complaints. . . . [T]he time limitation is meant to penalize only those who sleep on their rights . . . ." Culpepper v. Reynolds Metals Co., 421 F.2d 888, 892 (5th

In 1968, however, the court in *King v. Georgia Power Co.*[17] refused to apply the filing period strictly and held that a plaintiff's suit to recover for discriminatory practices that had occurred more than ninety days prior to the EEOC filing was not automatically time-barred when the violations continued into the filing period.[18] Citing no precedent and offering no explanation of the theory, the court held that the time of the EEOC filing was of no importance because "the violations of Title VII alleged in the complaint may be construed as 'continuing' acts."[19] Later cases adopted this theory of continuing present discrimination and allowed plaintiffs to sue as long as they had filed their EEOC charges within ninety days of the cessation of the discrimination.[20]

Soon after the *King* decision, the concept of a continuing violation was expanded to cases of an employer's systematic discrimination against a group of employees. Under this "systemic" theory, the courts held that the filing period for the plaintiff's claim did not begin to run if the employer continued to discriminate in a similar way against other employees, and the plaintiff was still affected in some way as a result of the prior discrimination against him.[21] In *Robinson v. Lorillard Corp.*,[22] the court held that an ongoing discriminatory seniority system affecting black employees automatically constituted a continuing violation against all those employees even though there was no allegation of a specific violation within ninety days of the EEOC filing.[23] The *Robinson* decision was indicative of a judicial trend towards facilitating suits under Title VII whenever possible, and a feeling that a liberal interpretation of the time limit would expedite the eradication of discriminatory systems. As the court in *Culpepper v. Reynolds Metals Co.*[24] wrote: "Title VII of the 1964 Civil Rights Act provides us with a clear mandate from Congress that no

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Cir. 1970); *accord,* Hecht v. Cooperative for Am. Relief Everywhere, Inc., 351 F. Supp. 305, 310 (S.D.N.Y. 1972) (in keeping with the statutory scheme, the EEOC should be required to investigate only discriminatory acts that are "fresh"); McCarty v. Boeing Co., 321 F. Supp. 260, 261 (W.D. Wash. 1970) (time limitation is designed to protect persons from being surprised through revival of old claims).

17. 295 F. Supp. 943 (N.D. Ga. 1968).

18. *Id.* at 946. The plaintiffs claimed that Georgia Power Company had for more than 90 days prior to the EEOC filing maintained racially segregated facilities for the employees, used biased tests in determining promotions, and refused to allow blacks to fill certain upper level positions. *Id.* at 945.

19. *Id.* at 946.

20. *See* Moore v. Sunbeam Corp., 459 F.2d 811, 828 (7th Cir. 1972); Cox v. United States Gypsum Co., 409 F.2d 289, 290 (7th Cir. 1969); Sciaraffa v. Oxford Paper Co., 310 F. Supp. 891, 896 (D. Me. 1970); Moreman v. Georgia Power Co., 310 F. Supp. 327, 328 (N.D. Ga. 1969); Logan v. General Fireproofing Co., 309 F. Supp. 1096, 1096 (W.D.N.C. 1969).

21. *See* Bartmess v. Drewrys U.S.A., Inc., 444 F.2d 1186, 1188 (7th Cir.), *cert. denied,* 404 U.S. 939 (1971); Banks v. Lockheed-Georgia Co., 46 F.R.D. 442, 444 (N.D. Ga. 1968).

22. 319 F. Supp. 835 (M.D.N.C. 1970), *modified,* 444 F.2d 791 (4th Cir.), *cert. dismissed,* 404 U.S. 1006 (1971).

23. *Id.* at 842. In *Robinson,* the defendant's employment system segregated and classified the plaintiffs on the basis of race so as to deprive them of employment opportunities. Blacks were denied full seniority rights upon transfer, refused promotion, and suffered wage losses if they chose to work in a formerly all-white department. *Id.*

24. 421 F.2d 888 (5th Cir. 1970).

longer will the United States tolerate this form of discrimination. It is, therefore, the duty of the courts to make sure that the Act works . . . ."[25]

The concept of a continuing violation was further expanded to include a plaintiff experiencing a present effect from a prior discriminatory system that had been discontinued. In *Tippett v. Liggett & Myers Tobacco Co.*,[26] the plaintiffs had been laid off pursuant to an established policy that discriminated against women.[27] After the policy was discontinued, the women were rehired without being credited with their prior accumulated seniority, and filed an EEOC charge seeking reinstatement of their seniority rights. The court held that although both the layoff and rehiring had occurred more than ninety days prior to the EEOC filing, the employer's consistent refusal to credit the plaintiffs with their old seniority perpetuated the past discrimination, and thus constituted the basis for a claim of a present violation.[28] The court justified this expanded concept of a continuing violation by explaining that the prior discrimination would otherwise not be effectively remedied.[29]

Judicial use of the continuing violation theory was by no means uniform. While some courts utilized the theory in the various ways described above, other courts rejected the concept of a continuing violation. These courts held that any claim not filed within ninety days of the alleged discrimination was time-barred, reasoning that "[t]here is no known authority to the effect that a failure to rectify an alleged unlawful act converts it into a continuing transaction or suspends the 90 day period."[30]

In 1972, Congress amended the Act in an effort to facilitate prosecution of Title VII claims. In recognition of the difficulties created by the brevity of the 90 day EEOC filing period, it extended the period to 180 days.[31] This

25. *Id.* at 891. In *Culpepper*, the court held that the time limit was tolled while a black employee invoked contractual grievance remedies in an effort to settle his complaint of alleged racial discrimination in promotion. *Id. Culpepper*'s holding that the time limit was tolled was an example of a court treating the time limit as a statute of limitations, rather than as a jurisdictional prerequisite. *See* note 3 *supra*. *Culpepper* was implicitly overruled in International Union of Elec. Radio & Mach. Workers Local 790 v. Robbins & Myers, Inc., 429 U.S. 229 (1976), in which the Supreme Court held that Title VII's remedies were independent of any grievance procedure provided in a collective bargaining agreement, and thus the filing period was not tolled when the plaintiff sought to invoke his contractual remedies first. *Id.* at 236-40.

26. 316 F. Supp. 292 (M.D.N.C. 1970).

27. The employer consistently laid off women while retaining men who performed the same jobs and had less seniority. *Id.* at 294.

28. *Id.* at 296-97.

29. *Id.* at 296; *accord,* Marquez v. Omaha Dist. Sales Office, Ford Motor Co., 440 F.2d 1157, 1159-60 (8th Cir. 1971); United States v. Dillon Supply Co., 429 F.2d 800, 804 (4th Cir. 1970); Griggs v. Duke Power Co., 420 F.2d 1225, 1236 (4th Cir. 1970), *rev'd on other grounds,* 401 U.S. 424 (1971); Local 189, United Papermakers v. United States, 416 F.2d 980, 990-91 (5th Cir. 1969), *cert. denied,* 397 U.S. 919 (1970).

30. Hutchings v. United States Indus., Inc., 309 F. Supp. 691, 693 (E.D. Tex. 1969), *rev'd on other grounds,* 428 F.2d 303 (5th Cir. 1970); *accord,* Payne v. Ford Motor Co., 334 F. Supp. 172, 175 (E.D. Mo. 1971), *rev'd on other grounds,* 461 F.2d 1107 (8th Cir. 1972); Younger v. Glamorgan Pipe & Foundry Co., 310 F. Supp. 195, 197 (W.D. Va. 1969); Fore v. Southern Bell Tel. & Tel. Co., 293 F. Supp. 587, 587 (W.D.N.C. 1968).

31. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 4(e), 86 Stat. 105 (1972) (codified at 42 U.S.C. § 2000e-5(e) (1976)). In extending the filing period, Congress stated that its purpose was to provide potential plaintiffs with a greater opportunity to file Title VII

extension was not intended in any way to eliminate the continuing violation theory. Indeed, Congress implicitly endorsed the theory by imposing a two year limitation on back pay liability.[32] Such a limitation would be superfluous if each act of discrimination were to be treated as separate and distinct, because an employer then would be liable solely for those violations that had occurred within 180 days of the EEOC filing. In addition, Congress expressly endorsed the theory in its explanation of the scope of the amendments:

> In establishing the new time period for the filing of charges, it is not intended that existing law, which has shown an inclination to interpret this type of time limitation to give the aggrieved person the maximum benefit of the law, should be in any way circumscribed. Existing case law which has determined that certain types of violations are continuing in nature, thereby measuring the running of the required time period from the last occurrence of the discrimination and not from the first occurrence is continued, and other interpretations of the courts maximizing the coverage of the law are not affected.[33]

This statement clearly endorses the application of the continuing violation theory when the discrimination involved is ongoing against the plaintiff within 180 days of the EEOC filing. At the same time, the language undermines the reasoning of the *Tippett* decision because it endorses the measurement of the filing period from the last date of discrimination, not from the last date of an effect from that discrimination. Because the language is not express as to whether the discrimination alleged must be continuous as to the particular plaintiff or whether it can be continuous as to other employees, its effect on the systemic theory is unclear. The use of the vague phrase "other interpretations of the courts maximizing the coverage of the law are not affected" is also perplexing. It is uncertain whether this language is referring to a form of the continuing violation theory or some other liberalization of the filing requirement.

While the 1972 amendments evidence congressional approval of the continuing violation theory, the extent of this approval was left ambiguously open. This ambiguity is reflected in the morass of subsequent court decisions. A review of this case law reveals that judicial use of the continuing violation theory in all its forms has greatly increased, but not without considerable confusion and inconsistency.

II. CURRENT USES OF THE CONTINUING VIOLATION THEORY

A. *Present Discrimination*

A continuing violation under the present discrimination theory requires a series of discriminatory acts against the plaintiff that is still ongoing within

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claims. "It is intended by expanding the time period for filing charges . . . that aggrieved individuals, who frequently are untrained laymen who are not always aware of the discrimination which is practiced against them, should be given a greater opportunity to prepare their charges and file their complaints, and that existent but undiscovered acts of discrimination should not escape the effect of the law through a procedural oversight." 118 Cong. Rec. 4941 (1972) (report of Sen. Williams).

32. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 4(g), 86 Stat. 105 (1972) (codified at 42 U.S.C. § 2000e-5(g) (1976)).

33. 118 Cong. Rec. 4941 (1972) (report of Sen. Williams); *see* 118 Cong. Rec. 7563, 7565 (1972) (reprint of House Conference Report).

180 days of the EEOC filing. In order for this continuing discrimination to exist, some type of continuing relationship between the plaintiff and the employer is necessary. In such a case, the filing period will be measured from the last date of discrimination,[34] and the plaintiff will be entitled to recover for discrimination that took place prior to the filing period, subject to the two year limitation on back pay liability,[35] because the violation will be treated as a continuous one rather than a series of isolated acts.[36] The theory applies not only in cases of discrimination directed against a particular employee, but also when the discrimination against the plaintiff is part of a broader systematic discrimination against a group of employees, as long as there is actual discrimination against the plaintiff within 180 days of the filing. The existence of the discriminatory system, however, does not strengthen the plaintiff's ability to bring suit; what is significant is the existence of a continuing violation against the particular plaintiff.[37]

Because of the necessity of a continuing relationship between the employer and the plaintiff, the present discrimination theory generally does not apply when the plaintiff has either been refused a job or discharged from employment because of an employer's discrimination. In both situations, there is no ongoing relationship and thus no opportunity for an employer to continue to discriminate against the plaintiff. If the plaintiff fails to file an EEOC charge within 180 days of either the refusal to hire or the discharge, he is generally barred from bringing suit.[38] An exception may exist, however, when there has been some type of continuing relationship between the employer and the plaintiff after the discriminatory discharge or refusal to hire. In *Weise v. Syracuse University*,[39] two faculty members claimed that they had been fired by the university solely because they were women. Although neither plaintiff's EEOC charge was filed within 180 days of her firing,[40] each had requested reconsideration of her termination within 180 days of her EEOC filing. The court held that the filings were timely because it found that the refusal to

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34. B. Schlei & P. Grossman, *supra* note 3, at 900.

35. *See* note 32 *supra* and accompanying text.

36. Acha v. Beame, 570 F.2d 57, 65 (2d Cir. 1978); Egelston v. State Univ. College, 535 F.2d 752, 755 (2d Cir. 1976); Macklin v. Spector Freight Sys., Inc., 478 F.2d 979, 987 (D.C. Cir. 1973).

37. *See* Cox v. United States Gypsum Co., 409 F.2d 289, 290 (7th Cir. 1969); Rosario v. New York Times Co., 10 Empl. Prac. Dec. ¶ 10,450, at 5948 (S.D.N.Y. 1975), *discussed at* notes 62-64 *infra* and accompanying text.

38. *See* Cates v. Trans World Airlines, Inc., 561 F.2d 1064, 1068 (2d Cir. 1977) (refusal to hire); Greene v. Carter Carburetor Co., 532 F.2d 125, 126 (8th Cir. 1976) (discriminatory discharge); Terry v. Bridgeport Brass Co., 519 F.2d 806, 807 (7th Cir. 1975) (same); Olson v. Rembrandt Printing Co., 511 F.2d 1228, 1234 (8th Cir. 1975) (same); Molybdenum Corp. v. EEOC, 457 F.2d 935, 936 (10th Cir. 1972) (refusal to hire); Higginbottom v. Home Centers, Inc., 10 Empl. Prac. Dec. ¶ 10,337, at 5373 (N.D. Ohio 1975) (discriminatory discharge); Phillips v. Columbia Gas, Inc., 347 F. Supp. 533, 537-38 (S.D. W. Va. 1972) (same), *aff'd mem.*, 474 F.2d 1342 (4th Cir. 1973); Burney v. North Am. Rockwell Corp., 302 F. Supp. 86, 92-93 (C.D. Cal. 1969) (same).

39. 522 F.2d 397 (2d Cir. 1975).

40. One plaintiff filed her EEOC charge 17 months after her termination, while the other waited almost three years before filing. *Id.* at 402-03.

reconsider the discharges was a continuing discrimination.[41] Thus, present discrimination after the employment relationship has been terminated is possible, but only when special circumstances serve to perpetuate the relationship.

The primary application of the present discrimination theory is in the situation of ongoing discrimination against present employees. For example, in *Corbin v. Pan American World Airways, Inc.*,[42] a black service supply clerk brought suit claiming that he had been demoted from lead clerk because of his race, that his employer had failed to reappoint him to his former position when it became available, and that he was being paid less than the nonblack employees who were performing the same work.[43] Although the plaintiff failed to file his EEOC charge until more than five years after his demotion, the court held that his filing was timely because it alleged continuing acts of discrimination by the employer that caused him to remain at his lower position until the time of the filing.[44] The court stated that the claim of repeated failure to promote and denial of equal pay involved ongoing aspects of the employer-employee relationship, and, therefore, was a sufficient allegation of a continuing discrimination.[45]

Not all acts of discrimination become continuous merely because the plaintiff is still employed. A single discriminatory act will start the running of the filing period, and there will be no continuing violation unless there is subsequent additional discrimination against the plaintiff. For example, in the case of a discriminatory refusal to promote an employee, if there are neither subsequent refusals to promote him nor promotions of others in preference to him, his continued employment in the lower position is not by itself sufficient to constitute a continuing violation.[46]

41. *Id.* at 412-13; *accord,* Egelston v. State Univ. College, 535 F.2d 752, 755 (2d Cir. 1976); Logan v. General Fireproofing Co., 309 F. Supp. 1096, 1098 (W.D.N.C. 1969). *But see* Wallace v. International Paper Co., 426 F. Supp. 352, 354 (W.D. La. 1977).

42. 432 F. Supp. 939 (N.D. Cal. 1977).

43. *Id.* at 943.

44. Although the plaintiff had been promoted by the time his actual lawsuit was brought, this promotion was not until a year and a half after the filing of his EEOC charge. *Id.* at 942.

45. *Id.* at 944. Although the EEOC filing was held timely for jurisdictional purposes, the court did hold against the plaintiff on the merits of the case. *Id.* at 946. The court's reasoning as to the timeliness of the filing has been applied not only to promotion cases, but also to the use of biased tests in job placement and discriminatory transfers and demotions. *See* Cedeck v. Hamiltonian Fed. Sav. & Loan Ass'n, 13 Empl. Prac. Dec. ¶ 11,593, at 7147 (8th Cir. 1977) (repeated failure to promote the plaintiff); Noble v. University of Rochester, 535 F.2d 756, 758 (2d Cir. 1976) (same); Pacific Maritime Ass'n v. Quinn, 491 F.2d 1294, 1297 (9th Cir. 1974) (same); Moore v. Sunbeam Corp., 459 F.2d 811, 827 (7th Cir. 1972) (same); Lattimore v. Loews Theatres, Inc., 410 F. Supp. 1397, 1399 (M.D.N.C. 1975) (refusal to transfer); Henderson v. First Nat'l Bank, 344 F. Supp. 1373, 1375 (M.D. Ala. 1972) (discriminatory tests); Tooles v. Kellogg Co., 336 F. Supp. 14, 17 (D. Neb. 1972) (refusal to transfer); Moreman v. Georgia Power Co., 310 F. Supp. 327, 328 (N.D. Ga. 1969) (discriminatory tests).

46. *See* Guerra v. Manchester Terminal Corp., 350 F. Supp. 529, 531 (S.D. Tex. 1972), *modified,* 498 F.2d 641 (5th Cir. 1974); Givler v. Chesapeake & Potomac Tel. Co., 5 Empl. Prac. Dec. ¶ 7,969, at 6585 (E.D. Va. 1972); Younger v. Glamorgan Pipe & Foundry Co., 310 F. Supp. 195, 197 (W.D. Va. 1969); Fore v. Southern Bell Tel. & Tel. Co., 293 F. Supp. 587, 587 (W.D.N.C. 1968). Suit may be permitted in these types of situations under the systemic or present effects theories. *See* pt. II(B), (C) *infra.*

Similarly, a discriminatory layoff by itself is a completed act at the time it occurs and cannot be the basis for a claim of a continuing violation.[47] An employee can claim a present violation after a layoff, however, if the employer has refused to reconsider rehiring him within 180 days of the EEOC filing, or has hired others in preference to him within that time period. In *Cox v. United States Gypsum Co.*,[48] five plaintiffs charged their employer with a discriminatory layoff that had occurred more than ninety days[49] prior to their EEOC charges. In addition, two of the plaintiffs explicitly claimed that the employer had recently rehired men with less seniority and had hired new men to fill jobs that they were qualified to perform.[50] The Seventh Circuit held that the filing was timely, stating that the "charges should be deemed a sufficient foundation for an action based on discriminatory failure to recall these plaintiffs."[51] The court treated the failure to rehire as one part of a single ongoing violation that extended into the statutory time period.[52]

The present discrimination theory is not applicable when a plaintiff alleges discrimination in retirement benefits. Although a plaintiff may claim that he is receiving a lower pension than other former employees, the retirement plan itself is generally neutral;[53] the reduced payments are the result of a discriminatory salary that had been paid while the plaintiff was employed. In these cases, the employment relationship, and thus the actual discrimination, terminates when the employee retires. If he fails to file within 180 days of that date, he is time-barred.[54]

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47. *See* Griffin v. Pacific Maritime Ass'n, 478 F.2d 1118, 1120 (9th Cir.), *cert. denied*, 414 U.S. 859 (1973); Cisson v. Lockheed-Georgia Co., 392 F Supp. 1176, 1182 (N.D. Ga. 1975); Loo v. Gerarge, 374 F. Supp. 1338, 1340 (D. Hawaii 1974). Sciaraffa v. Oxford Paper Co., 310 F. Supp. 891, 896 (D. Me. 1970); Burney v. North Am. Rockwell Corp., 302 F. Supp. 86, 92 (C.D. Cal. 1969).

48. 409 F.2d 289 (7th Cir. 1969).

49. *Cox* was decided prior to the 1972 amendments to the Act that increased the filing period from 90 to 180 days. *See* note 31 *supra* and accompanying text. *Cox* is the seminal continuing violation case involving layoffs; in fact, it is one of the most frequently cited cases in the entire continuing violations area. *See, e.g.*, Williams v. Norfolk & Western Ry., 530 F.2d 539, 542 (4th Cir. 1975); Weise v. Syracuse Univ., 522 F.2d 397, 410 n.20 (2d Cir. 1975); B. Schlei & P. Grossman, *supra* note 3, at 898; *Developments in the Law, Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1211 n.101 (1971).

50. 409 F.2d at 290. The other three plaintiffs merely referred to the discrimination as "continuing." *Id.*

51. *Id.* The court was interpreting the allegation by the other three plaintiffs that the discrimination was continuing to mean that there was recurrent failure to rehire these plaintiffs as well as the other two.

52. *Id.* at 290-91; *accord*, Macklin v. Spector Freight Sys., Inc., 478 F.2d 979, 987 (D.C. Cir. 1973); Richard v. McDonnell Douglas Corp., 469 F.2d 1249, 1253 (8th Cir. 1972); Sciaraffa v. Oxford Paper Co., 310 F. Supp. 891, 896 (D. Me. 1970).

53. Indeed, it would be difficult to envision an employer establishing a pension plan that offers different benefits to retired employees based solely on their race or sex. Such blatant discrimination would invite a Title VII action.

54. *See* Freude v. Bell Tel. Co., 438 F. Supp. 1059, 1061 (E.D. Pa. 1977); McCarty v. Boeing Co., 321 F. Supp. 260, 261 (W.D. Wash. 1970). Some courts have found a continuing violation after retirement, however, under the systemic theory. *See* notes 70-73 *infra* and accompanying text.

The present discrimination theory is an appropriate interpretation of the statutory requirement of a timely EEOC filing. While providing employees with a greater opportunity to challenge discriminatory actions, its restrictive parameters ensure that its use does not prejudice the rights of employers.[55] Any suggestion that this approach contravenes the statutory time limit ignores Congress' explicit endorsement of the theory in the 1972 amendments.[56] The theory complies with the statutory purpose of the 180 day time limit, and establishes a relatively clear standard for courts to follow in various factual situations.

B. *The Systemic Theory*

The systemic theory is utilized when the plaintiff alleges not only a violation against him individually, but also a broader discriminatory system that affects an entire group of employees. Under the theory, the suit may continue even when there is no actual violation against the plaintiff within 180 days of the EEOC filing, provided that, within that period, the employer has continued to discriminate against other employees and the plaintiff is still affected in some way, no matter how minute, by the prior discrimination against him. The plaintiff's ability to bring an otherwise time-barred suit is therefore directly dependent upon the employer's conduct with respect to other employees. It is submitted, however, that in endorsing the continuing violation theory, Congress could not have intended application of the theory when there is no ongoing violation against the plaintiff. Furthermore, application of the systemic theory creates inequitable distinctions between plaintiffs based on the employer's conduct and not on the timeliness of their claims.

Unlike the present discrimination theory, the systemic theory has been applied in cases of a discriminatory refusal to hire. In *Kohn v. Royall, Koegel & Wells*,[57] a second year law student was refused a summer job with a large New York City law firm and filed an EEOC charge alleging sex discrimination one year later. The court permitted the plaintiff to bring a class action,[58]

55. It would be difficult for an employer to complain that a claim of discrimination is stale when the discrimination is actually continuing within 180 days of the EEOC filing.

56. *See* note 33 *supra* and accompanying text.

57. 59 F.R.D. 515 (S.D.N.Y. 1973), *appeal dismissed*, 496 F.2d 1094 (2d Cir. 1974).

58. Suits brought against discriminatory systems are frequently class actions, which are considered to be an appropriate enforcement mechanism for Title VII claims. *See generally* Comment, *The Class Action and Title VII—An Overview*, 10 U. Rich. L. Rev. 325 (1976). The courts are quite liberal in applying the requirements of Rule 23 of the Federal Rules of Civil Procedure to Title VII cases. *See, e.g.*, Barnett v. W. T. Grant Co., 518 F.2d 543, 547-48 (4th Cir. 1975); Rodriguez v. East Tex. Motor Freight, 505 F.2d 40, 50 (5th Cir. 1974), *vacated*, 431 U.S. 395 (1977); Capaci v. Katz & Besthoff, Inc., 72 F.R.D. 71, 78 (E.D. La. 1976); McBroom v. Western Elec. Co., 7 Empl. Prac. Dec. ¶ 9347, at 7454 (M.D.N.C. 1974). The scope of the suitable class naturally varies from case to case, and it is well established that all members of the class need not have filed a claim with the EEOC as long as they were eligible to file at the time that the plaintiff representing the class filed. Franks v. Bowman Transp. Co., 424 U.S. 747, 755 (1976); Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 246 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975); Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 719-20 (7th Cir. 1969); Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 499 (5th Cir. 1968); Wilhite v. South Cent. Bell Tel. & Tel. Co., 426 F Supp. 61, 64 (E.D. La. 1976); CWA v. New York Tel. Co., 8 Fair Empl. Prac. 509, 513 (S.D.N.Y 1974); Gilbert v. General Elec. Co., 59 F.R.D. 267, 272 (E.D. Va. 1973). In determining who is eligible

even though her EEOC filing was untimely, because she had alleged that the employer engaged in an ongoing pattern of sex discrimination. The court explained that the result was "a way of defining the jurisdiction-conferring concept of continuing violation so as to carry out the underlying purposes of the Act."[59] It reasoned that the allowance of the plaintiff's suit was justifiable, despite the statutory time limit, because the employer's violation had continued and was therefore "fresh."[60] Although there was neither a continuing relationship with the plaintiff nor a discrimination against her within 180 days of her EEOC filing, the plaintiff was permitted to sue because of the fortuitous circumstance that the employer had since discriminated against others.[61] In allowing the plaintiff to sue, the court essentially disregarded the legislative mandate of a timely filing.

An additional problem in the refusal to hire cases is that the systemic theory is not uniformly applied. The Southern District of New York, for example, which decided *Kohn,* subsequently in *Rosario v. New York Times Co.*[62] refused to join as members of a class any applicants who could not show a refusal to hire within 180 days of the EEOC filing.[63] In *Rosario,* the plaintiffs had alleged an ongoing discriminatory hiring system as well as individual discrimination directed against them. The court held that any claim under the Act based upon discrimination in hiring is time-barred if not filed within 180 days of the refusal to hire.[64] The *Rosario* decision is a more logical interpretation of the continuing violation theory, and it does not create a situation in which the plaintiff's ability to sue is totally dependent on the defendant's actions with respect to others. A refusal to hire is an isolated incident, and the employer's continuing discrimination against other applicants should hold no legal significance for the plaintiff who is suing.

In contrast to the refusal to hire cases, the courts have consistently held that the systemic theory has no application in cases involving a discriminatory discharge. Once the plaintiff has been discharged, there is no longer any employment relationship, and the courts are in agreement that the mere status

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to file, however, courts unfortunately have used the class action mechanism to allow suits by time-barred plaintiffs or to include in the class employees who themselves would be unable to bring suit. *See* notes 79-87 *infra* and accompanying text.

59. 59 F.R.D. at 518.

60. *Id.; accord,* Acha v. Beame, 570 F.2d 57 (2d Cir. 1978); Briggs v. Brown & Williamson Tobacco Corp., 414 F. Supp. 371 (E.D. Va. 1976); Henderson v. First Nat'l Bank, 344 F. Supp. 1373 (M.D. Ala. 1972).

61. "This method of enforcement makes an individual grievance the spearhead of an attack of larger proportions, since the individual claimant takes on the mantle of the state in seeking to rectify wrongs against himself and others." 59 F.R.D. at 519 (footnote omitted).

62. 10 Empl. Prac. Dec. ¶ 10,450 (S.D.N.Y. 1975).

63. *Id.* at 5948. The law in the Southern District of New York in this area is extremely unclear. In Blank v. Sullivan & Cromwell, 418 F. Supp. 1 (S.D.N.Y. 1975), the court held that the plaintiff was allowed to bring suit even though she filed her EEOC complaint more than 180 days after a refusal to hire because she alleged an ongoing discriminatory system. *Id.* at 4. In 1978, the court decided Ingram v. Madison Square Garden Center, Inc., No. 76-5870 (S.D.N.Y. June 8, 1978), which cited and followed *Kohn,* while ignoring *Rosario. Id.,* slip op. at 11.

64. 10 Empl. Prac. Dec. at 5948; *accord,* Smith v. Office of Economic Opportunity, 538 F.2d 226, 229 (8th Cir. 1976).

of unemployment after the discriminatory discharge is not sufficient to constitute an ongoing violation.[65] As the Eighth Circuit noted:

> While the continuing discrimination theory may be available to present employees, . . . we do not think this theory has validity when asserted by a former employee. . . . [T]he date of discharge . . . is the controlling date under the statute, and a charge of employment discrimination must be timely filed in relation to that date.[66]

The reasoning of the courts in a discharge situation undermines the rationale of *Kohn* and other similar cases.[67] Severance of the employment relationship ends the discrimination. Whether it is severance through a refusal to hire or a discharge, there is no continuing violation against the plaintiff, even if a continuing discriminatory system exists.

Similarly, in a layoff situation, courts have refused to extend the continuing violation concept beyond the present discrimination theory. Regardless of the existence of a discriminatory system, the EEOC filing period begins to run on the date of the layoff unless there has been a refusal to rehire or some other "fresh" violation.[68] The layoff situation exemplifies what should be the consistent rule with regard to all continuing violations. The plaintiff himself should be discriminated against within 180 days of the filing of the EEOC charge in order to be allowed to sue.

The application of the systemic theory to cases of alleged discrimination in retirement benefits illustrates the inequitable distinctions that can be created by the theory. The difference between a case of a discriminatory discharge and a discrimination in retirement benefits is that, while the employment relationship has been terminated in both cases, a retired employee is still receiving pension payments from the employer.[69] Some courts have found this

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65. *See* Collins v. United Air Lines, Inc., 514 F.2d 594, 596 (9th Cir. 1975); Terry v. Bridgeport Brass Co., 519 F.2d 806, 808 (7th Cir. 1975); Tarvesian v. Carr Div. of TRW, Inc., 407 F. Supp. 336, 339 (D. Mass. 1976); Rouse v. Gulf Oil Corp., 350 F. Supp. 178, 179 (E.D. Pa. 1972).

66. Olson v. Rembrandt Printing Co., 511 F.2d 1228, 1234 (8th Cir. 1975) (citation omitted).

67. *See* notes 57-61, 63 *supra* and accompanying text. The only possible distinction between a refusal to hire and a discharge that may have influenced the *Kohn* court to find a sufficient present effect was the assumption that the plaintiff may have still been waiting to be hired by the employer-defendant, *see* 59 F.R.D. at 524 n.2, while a discharged employee normally would not be waiting to be rehired. The distinction is a very fine one and does not explain the difference between the *Kohn* and *Rosario* decisions, as the court in *Kohn* had no more evidence to justify such an assumption than did the court in *Rosario*.

68. In such a case, there would be actual present discrimination against the plaintiff within the EEOC filing period. *See* notes 47-52 *supra* and accompanying text. The courts generally agree with the holding in Turner v. Seaboard Coast Line R.R. Co., 78 F.R.D. 654 (E.D.N.C. 1978), that complaints not filed within 180 days of a layoff, absent some additional violation within the filing period, should be dismissed, even when the plaintiff alleges a discriminatory system. "[A]n individual plaintiff may [not] rely on allegations of continuing discrimination in order to satisfy the jurisdictional requirement that his claim be filed with the EEOC within the time limit prescribed by law where it clearly appears that he has not been discriminated against personally within the statutory period." *Id.* at 657; *see* cases cited note 52 *supra*.

69. The discharged employee may be receiving unemployment benefits, which come indirectly from the employer, but no court has faced the question of whether this is sufficient to create an ongoing effect.

distinction to be significant and have determined that this continuous receipt of reduced payments is an ongoing effect that, when coupled with the existence of a discriminatory system, is sufficient to invoke the systemic theory.[70] In *Mixson v. Southern Bell Telephone & Telegraph Co.*,[71] the widow of an employee who had died at the age of fifty-nine alleged that she had been denied an annuity benefit because of the employer's discriminatory practice of fixing the retirement age at sixty for men and fifty-five for women.[72] The plaintiff's husband had died in 1966, and she filed her EEOC charge in 1968. The court held that her claim was timely because the discriminatory retirement plan was still in effect at the time she filed her EEOC complaint. The court stated that it was allowing Mrs. Mixson to sue because the defendant continued to maintain the unlawful practice affecting other employees.[73]

The *Mixson* case creates a distinction between plaintiffs that is solely based upon the employer's conduct. A plaintiff in the same position as Mrs. Mixson would be left with no remedy at all if his employer had since ceased the discriminatory policy, or had never discriminated against others. The court in *McCarty v. Boeing Co.*[74] applied the statute much more logically than did the *Mixson* court, holding that the plaintiff was barred from suing when the EEOC complaint was filed more than ninety days after the retirement.[75] The *McCarty* court reasoned that because retirement severs the employment relationship, there can be no continuing violation once the plaintiffs retire.[76]

The systemic theory is almost uniformly utilized in situations involving discrimination against present employees. Although most of the present employee cases involve a discriminatory refusal to promote, the same analysis would apply to a discriminatory demotion or a transfer. The systemic theory as applied to a discriminatory refusal to promote situation essentially eliminates the need for an allegation of any subsequent refusal within the statutory time period.[77] Under the theory, the employee simply alleges that there is an ongoing discriminatory promotion system and, as long as he has not yet been promoted, it will automatically be presumed that he is affected by the system.[78]

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70. *See* Bartmess v. Drewrys U.S.A., Inc., 444 F.2d 1186, 1188 (7th Cir.), *cert. denied*, 404 U.S. 939 (1971); Dennison v. City of Los Angeles Dep't of Water & Power, 10 Empl. Prac. Dec. ¶ 10,356, at 5479 (C.D. Cal. 1975); American Fin. Sys., Inc. v. Harlow, 65 F.R.D. 94, 103 (D. Md. 1974).

71. 334 F. Supp. 525 (N.D. Ga. 1971).

72. *Id.* at 526.

73. *Id.* at 527.

74. 321 F. Supp. 260 (W.D. Wash. 1970).

75. *Id.* at 261.

76. *Id.* Although the court acknowledged the existence of a continuing violation in some limited cases, it stated that in the retirement situation "[the] acts were not continuing in nature and plaintiffs' charge with the EEOC was not timely filed. To hold otherwise would disregard the purpose of the statutory limitation, namely, to protect persons from being surprised through revival of claims that have been allowed to slumber. . . . If such acts as here involved are continuing, then aggrieved persons could well assert their claim fifteen, twenty, or thirty years hence." *Id.* (footnote omitted).

77. This allegation is necessary under the present discrimination theory. *See* notes 42-46 *supra* and accompanying text.

78. *See* Black Grievance Comm. v. Philadelphia Elec. Co., 79 F.R.D. 98, 112 (E.D. Pa.

Rich v. Martin Marietta Corp.[79] is a classic illustration of the systemic theory in the present employee situation. In *Rich*, the plaintiff alleged a discriminatory refusal to promote him and, at the same time, challenged the entire promotion system, maintaining that it continually operated so as to keep him and other employees in a lower echelon. The court stated that the continuing discriminatory system made the timeliness of the EEOC filing "inconsequential."[80] Because the plaintiff was suing on behalf of a class, the court allowed him to sue even though his EEOC filing was not timely.[81] Although permitting the suit could bring an admirable result, an end to a discriminatory system, in doing so the court allowed the plaintiff to circumvent the jurisdictional prerequisite.

A liberal application of the systemic theory could permit suit by employees against whom the employer has not discriminated. In *Wetzel v. Liberty Mutual Insurance Co.*,[82] a plaintiff requested promotion to a higher paying, more prestigious position and was informed that the position was not open to women. She made a timely filing with the EEOC and commenced a class action alleging a discriminatory promotion system.[83] The court properly permitted the plaintiff to sue, but, in determining the members of the class,[84] the court held that the discriminatory promotion policies were "continuing violations of Title VII and would allow a filing of a charge at any time by a present employee,"[85] in effect allowing all female employees to sue regardless of any proof of actual discrimination against them. The court justified its decision by arguing that all present employees were necessarily affected by the ongoing system.[86] The court ignored the fact, however, that several female employees had been promoted in other departments and were therefore not actually affected.[87]

Judicial use of the systemic theory is perhaps attributable to an overambitious attempt to eliminate discriminatory systems. If the courts apply the time

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1978); Stallings v. Container Corp., 75 F.R.D. 511, 515 (D. Del. 1977); Briggs v. Brown & Williamson Tobacco Corp., 414 F. Supp. 371, 377-78 (E.D. Va. 1976); Robinson v. Lorillard Corp., 319 F. Supp. 835, 842 (M.D.N.C. 1970), *modified*, 444 F.2d 791 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971).

79. 522 F.2d 333 (10th Cir. 1975).

80. *Id.* at 348.

81. *Id.* at 340.

82. 508 F.2d 239 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975).

83. *Id.* at 244.

84. Employees were eligible to be members of the class even if they had not filed claims with the EEOC, as long as they were presently eligible to file. *Id.* at 246; *see* note 58 *supra*.

85. 508 F.2d at 246.

86. *Id.*

87. *Id.* at 258. The court explicitly stated that the only employees barred from the class were those who had left the employ of the defendant more than 210 days before the EEOC filing. The 210 day period was used because the plaintiffs had first instituted proceedings under state law. *Id.* at 244; *see* note 5 *supra*. The court noted that certain employees had actually been promoted, but did not consider this when it determined who was eligible to be a member of the class. It was, therefore, permitting all present employees to sue when not all had been denied a promotion, or were even eligible for a promotion within the filing period. Although one may argue that the suit would have been brought with or without the additional members of the class, this is not necessarily true. In fact, in *Wetzel*, there was an issue of whether the plaintiffs' class met the numerosity requirement of a class action. *Id.* at 246.

limit to bar a plaintiff from bringing suit, however, they are not immunizing a system from attack; it simply means that a particular plaintiff has not met the statutory prerequisite of a timely filing. The system can still be challenged in a variety of ways. Any employee who is being discriminated against pursuant to the system can bring suit, either individually or in a class action. As long as the suit is brought within 180 days of the discrimination against him, the suit will properly be permitted to continue. In addition, the EEOC itself can file a charge[88] and attempt to reach a conciliation agreement with the employer. If it is unsuccessful in securing an agreement, it can bring a civil action just as a private plaintiff can.[89] Thus, by discontinuing the use of the systemic theory, the courts could promote a more consistent application of the statute without insulating discriminatory systems from attack.

C. *Present Effects Theory*

Prior to 1977, several courts had found that a continuing violation existed when the plaintiff was still experiencing a present effect from a prior discriminatory system that had since been discontinued.[90] The analysis used by the courts was that present consequences rendered past discrimination continuing in nature and therefore subject to timely challenge.[91] Unlike the present discrimination and systemic theories, the present effects theory did not require an act of discrimination against the plaintiff or anyone else within 180 days of the EEOC filing, but required solely an effect within that period. The Supreme Court's ruling in *United Air Lines, Inc. v. Evans,*[92] however, seems to have marked an end to the use of the present effects theory, indicating that the concept of a continuing violation should be limited to situations of a present discrimination within the EEOC filing period.

The present effects theory was primarily utilized in cases holding that a nondiscriminatory employment system may nevertheless be subject to timely challenge if it perpetuated discrimination that had occurred in the past. These courts essentially held that an effect constituted a violation, a proposition for

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88. 42 U.S.C. § 2000e-5(b) (1976), *discussed at* note 4 *supra.*

89. *Id.* § 2000e-5(f). This provision was added by the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 4(f), 86 Stat. 105 (1972). The Attorney General may also bring a civil action whenever he has reasonable cause to believe that there exists a pattern or practice of discrimination. 42 U.S.C. § 2000e-6(a) (1976).

90. One court also applied the theory in a case of isolated discrimination against a particular plaintiff. In Marquez v. Omaha Dist. Sales Office, Ford Motor Co., 440 F.2d 1157 (8th Cir. 1971), the plaintiff had been refused a promotion in 1956, and 15 years later filed a charge protesting a current failure to promote. The court held that although there was no discrimination in the recent refusal to promote because he was not qualified to perform the job, the reason he was not qualified was the past discrimination and that, therefore, the present discriminatory effect gave rise to an actionable present violation. *Id.* at 1163

91. Williams v. Norfolk & W. Ry., 530 F.2d 539, 542 (4th Cir. 1975) (plaintiffs who had been denied seniority following a company merger could file a timely charge many years later); Local 189, United Papermakers v. United States, 416 F.2d 980, 991 (5th Cir. 1969), *cert. denied,* 397 U.S. 919 (1970); Kennan v. Pan Am. World Airways, Inc , 424 F. Supp. 721, 728 (N.D. Cal. 1976); Tippett v. Liggett & Myers Tobacco Co., 316 F. Supp. 292, 295 (M.D.N.C. 1970), *discussed at* notes 26-29 *supra* and accompanying text.

92. 431 U.S. 553 (1977), *discussed at* notes 99-104 *infra* and accompanying text.

which there was no statutory authority. For example, in *Sagers v. Yellow Freight System, Inc.*,[93] the defendant trucking company had previously discriminated against blacks by excluding them from the position of road driver, while allowing them to be employed at lower positions. At the time of the plaintiffs' EEOC complaint, the employer had ceased his discriminatory policy and was hiring blacks to be road drivers on an equal basis with all other applicants. Several black employees who had then been hired to be drivers brought suit claiming that they would have had higher seniority if they had been hired when they first had applied for the job.[94] The other plaintiffs, who had previously been hired at lower positions, were suing because of the employer's current neutral policy of prohibiting employees in other job classifications from transferring into the road driver position.[95] Despite the discontinuation of the discrimination long before the filing of the EEOC charge, the court allowed the plaintiffs to bring suit, stating that the company's current seniority lists and transfer policy served to perpetuate the past discrimination.[96] The court reasoned that the employees were entitled to a full remedy for the past discrimination.[97]

The *Sager* decision typifies the problems created by the present effects theory. Because the discrimination itself was not timely challenged, it is questionable whether the plaintiffs should have later been allowed to complain about the adequacy of the remedy. Permitting a suit in such a case ignores the existence of a statutory filing period. Moreover, effects from prior discrimination are often unavoidable.[98] Allowing an employer to be sued after it is no longer discriminating serves to penalize the employer despite its efforts to eliminate a discriminatory system.

The recent Supreme Court decision in *Evans* casts considerable doubt on the future application of the present effects theory. In *Evans*, a flight attendant for United Air Lines was forced to resign after her marriage in 1968, pursuant to the company's "no marriage" policy. The policy was subsequently ruled discriminatory in a case not involving the plaintiff,[99] and she then sought reinstatement. She was finally rehired in 1972 without any of her old seniority. One year later, she filed an EEOC complaint alleging that United's seniority system in 1972 perpetuated the consequences of the prior discrimination and thus constituted an ongoing violation.[100] The Supreme Court held

93. 388 F. Supp. 507 (N.D. Ga. 1973).

94. *Id.* at 511.

95. *Id.*

96. *Id.* at 528.

97. *Id.* at 514-15.

98. For example, if an employer has consistently refused to hire qualified blacks for ten years, there will necessarily be an effect on those unsuccessful applicants, many of whom may still be unemployed. Once the employer ceases his discriminatory policy, however, he cannot then be expected to hire all those whom he refused to employ in the past.

99. Sprogis v. United Air Lines, 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971).

100. 431 U.S. at 554. The plaintiff also alleged that she was treated less favorably than males who had been hired prior to her re-employment. The court disposed of this allegation by stating that women hired before she was rehired in 1972 had the same preference over her as did males; therefore the disparity was not a consequence of her sex but rather of the date of her rehiring. *Id.* at 557-58.

that her claim was time-barred because she had not filed within the statutory time period after the cessation of the discrimination, emphasizing that an effect within the filing period without any actual discrimination was insufficient to constitute a continuing violation:

> [T]he seniority system gives present effect to a past act of discrimination. But United was entitled to treat that past act as lawful after respondent failed to file a charge of discrimination within the 90 days then allowed by [the Act]. A discriminatory act which is not made the basis for a timely charge . . . is merely an unfortunate event in history which has no present legal consequences. . . . United's seniority system does indeed have a continuing impact on her pay and fringe benefits. But the emphasis should not be placed on mere continuity; the critical question is whether any present *violation* exists.[101]

Thus, *Evans* held that an employment system that is otherwise neutral does not constitute a violation of Title VII even though it precludes elimination of an effect from prior discrimination. *Evans* relied on section 703(h) of Title VII,[102] which provides that different standards of compensation or different terms and conditions of employment pursuant to a bona fide seniority system are not a violation if there is no intent to discriminate.[103] Therefore, the seniority system in *Evans,* which provided that all employees who were rehired would not be credited with prior service, was not a violation of Title VII. Although the system did serve to perpetuate an effect of the discrimination that had caused the plaintiff's prior layoff, the Court held that in order for a plaintiff to remedy that effect, the violation itself must be asserted within the filing period.[104]

Cases subsequent to the *Evans* decision have followed its reasoning and held that a presently neutral system does not give rise to a cause of action even though it perpetuates the effects of prior discrimination. In *Freude v. Bell Telephone Co.,*[105] a retired employee claimed that her pension payments constituted a violation of Title VII, even though the employer's pension plan was neutral, because the amount was based on her previous discriminatory salary.[106] The court rejected her argument, stating that "it is plain that the

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101. *Id.* at 558.

102. 42 U.S.C. § 2000e-2(h) (1976).

103. 431 U.S. at 559-60.

104. In International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977), the Supreme Court further defined its holding that a present effect does not constitute a present violation. In *Teamsters,* the employer engaged in a systemwide pattern of discrimination in hiring that was held to be a violation of Title VII. *Id.* at 342-43. The employer also maintained a seniority system that the plaintiff alleged perpetuated the discrimination in hiring in that employees who wanted to transfer to a position for which they were not originally hired because of discrimination had to forfeit all seniority. The Court held that because the seniority system did not have its genesis in racial discrimination, it was bona fide and therefore not a violation under § 703(h). *Id.* at 356. Under *Teamsters,* as well as *Evans,* therefore, a system is not discriminatory merely because it perpetuates a discriminatory effect from a past violation.

105. 438 F. Supp. 1059 (E.D. Pa. 1977).

106. The plaintiff admittedly filed her EEOC complaint 13 months after her retirement, but she alleged that the small pension payments constituted continuing discrimination. *Id.* at 1060.

basic holding of *Evans* is that a current nondiscriminatory policy will not revive a time-barred act of discrimination even though such policy gives present effect to the past act of discrimination."[107] The *Freude* decision hopefully indicates that the courts will continue to follow *Evans* and limit the extension of the EEOC filing period to cases involving continuing violations, not continuing effects.

CONCLUSION

The enactment of the Civil Rights Act of 1964 paved the way towards the complete eradication of discrimination in employment. The Act, as well as public policy, favors allowing employees who have been the victims of discrimination to sue. When limited to cases of present discrimination, the continuing violation theory is an appropriate judicial mechanism for liberalizing the interpretation of Title VII's statutory time limit. Although it facilitates private suit by employees, it also continues to uphold the statutory mandate of a timely filing with the EEOC. The systemic expansion on the continuing violation theory, however, while attempting to achieve the worthy goal of eradicating discriminatory systems, too frequently circumvents the statutory mandate by allowing plaintiffs to sue even though they have not been discriminated against within the filing period. The present effects theory is an even greater expansion in that it allows plaintiffs to sue when there was no violation at all within the filing period. By creating elements sufficient for a timely charge other than that the plaintiff himself is discriminated against within 180 days of the EEOC filing, the systemic and present effects theories are simply judicial legislation.

Although the broad uses of the continuing violation theory should be discontinued, they indicate a general feeling among the courts that 180 days is often too brief a filing period, particularly for unsophisticated employees who are frequently uninformed of their rights.[108] One hundred and eighty days may be an inadequate time for an employee to realize that he has a right to complain and to find the proper channel for doing so. If he has been fired or not hired, the discriminatee is probably concentrating his energies on seeking other employment. If he is still employed, he may be hesitant to file an EEOC claim immediately for fear of antagonizing his employer and may attempt first to settle the matter privately with the employer, thereby allowing the EEOC filing period to expire. In order to alleviate this problem, Congress should extend the filing period to one year. A one year filing period would provide employees with a greater opportunity to bring suit, thereby serving the compensatory objectives of the Act,[109] and promote the eradication of employment discrimination. At the same time, employers still would be protected

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107. *Id.* at 1061. Other courts seem to have similarly adopted the *Evans* holding. *See* Smith v. American Presidents Lines, Ltd., 571 F.2d 102, 105-06 (2d Cir. 1978); Cates v. Trans World Airlines, Inc., 561 F.2d 1064, 1069-70 (2d Cir. 1977).

108. This concern was also expressed by Congress when it extended the filing period from 90 to 180 days. *See* note 31 *supra*.

109. *See* note 7 *supra*.

from stale complaints.[110] Moreover, by facilitating employees' suits, a one year time limit would alleviate the need for unwarranted expansions of the continuing violation theory and be a first step towards eliminating the confusing and contradictory case law in this area.

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110. Indeed, it would still be shorter than most statutes of limitations in tort and contract law. *See, e.g.,* N.Y. Civ. Prac. Law §§ 213(2), 214(5) (McKinney 1972 & Supp. 1978).