

## COMMENTS

### AN ANALYSIS OF THE EEOC'S ISSUANCE OF EARLY RIGHT-TO-SUE LETTERS: DOES IT PROMOTE JUDICIAL EFFICIENCY OR ENCOURAGE ADMINISTRATIVE INCOMPETENCE?

MICHAEL A. SZKODZINSKI<sup>†</sup>

#### INTRODUCTION

The Equal Employment Opportunity Commission (EEOC or "Commission") receives nearly 60,000 charges of employment discrimination each year under Title VII of the Civil Rights Act of 1964.<sup>1</sup> Title VII prohibits discrimination on the basis of race, sex, religion, or national origin.<sup>2</sup> The grievance process for employees who believe they have been victims of discrimination is complicated by the dual nature of these complaints: claims first must be made to the EEOC before a plaintiff may have his day in court by filing a complaint in the appropriate United States district court.<sup>3</sup>

---

<sup>†</sup> B.A. 1999, Williams College; J.D. Candidate 2002, University of Pennsylvania. I wish to thank Jason M. Abbott for his helpful suggestions in selecting this topic and for discussions on the merits of some of the arguments for each of the holdings on this complex issue. I would also like to thank Professors Ralph M. Bradburd, David Zimmerman, and David Corbett for introducing me to the study of law and economics at Williams. In addition, I would like to thank the editors of the *University of Pennsylvania Law Review* for their helpful comments and editing, especially Mike Kaplan, whose diligence and attention to detail has been exceptional. All remaining errors are mine.

<sup>1</sup> U.S. Equal Employment Opportunity Commission, *Title VII of the Civil Rights Act of 1964 Charges: FY 1992-FY 2000*, at <http://www.eeoc.gov/stats/vii.html> (last modified Jan. 18, 2001) [hereinafter EEOC, *Title VII Charges*].

<sup>2</sup> See 42 U.S.C. § 2000e-2(a) (1994) ("It shall be an unlawful employment practice for an employer . . . 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 . . .").

<sup>3</sup> The process actually is complicated further by another duality of this system. In most jurisdictions (save primarily those in the Southeast), the charge first must be filed with the relevant state agency and available state remedies must be exhausted before the EEOC takes charge. MACK A. PLAYER, *EMPLOYMENT DISCRIMINATION LAW* 470-72

Assuming state remedies (if applicable) have been exhausted, the plaintiff must file a charge with the EEOC within 180 days of the alleged unlawful practice.<sup>4</sup> If the EEOC is unable to achieve conciliation with a private employer within thirty days, the Commission may bring a civil action in United States district court.<sup>5</sup> A very small percentage of cases are resolved in this manner.<sup>6</sup> If the Commission does not bring suit, it must notify the claimant:

If a charge filed with the Commission . . . is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge . . . the Commission has not filed a civil action under this section . . . or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge . . . by the person claiming to be aggrieved . . . .<sup>7</sup>

This Comment addresses the question of when the EEOC can give such notice—commonly called a “right-to-sue letter” because it gives an employee the right to file a lawsuit in United States district court—to a claimant. Specifically, must the EEOC wait until the 180-day period has elapsed, or may it authorize an “early” suit prior to the expiration of the statutory period?

In several jurisdictions, the EEOC has been unable to act on the charges within the 180-day period and has issued right-to-sue letters prior to the expiration of that time period. One interpretation of the statutory provision is that the EEOC has exclusive jurisdiction within

---

(student ed. 1988). Because the federal/state distinction is beyond the scope of this Comment, all analysis assumes that the state remedy is exhausted and assumes that the plaintiff's only obstacle to getting into United States district court is getting through the EEOC.

<sup>4</sup> 42 U.S.C. § 2000e-5(e)(1) (1994).

<sup>5</sup> 42 U.S.C. § 2000e-5(f)(1) (1994). When the employer is a government, governmental agency, or political subdivision, the Commission shall refer the case to the attorney general. *Id.*

<sup>6</sup> In fiscal year (“FY”) 1999, the EEOC brought direct suits in only 324 cases out of 57,582 charges filed under Title VII; in FY 2000, the number of direct suits fell to 222 while the number of charges increased to 59,588. U.S. Equal Employment Opportunity Commission, *EEOC Litigation Statistics, FY 1992 Through FY 2000*, at <http://www.eeoc.gov/stats/litigation.html> (last modified Mar. 1, 2000); see also *infra* note 105 (reporting the total number of charges filed with the EEOC in FY 1999 and FY 2000). Direct suits filed by the EEOC account for only about one-half of one percent of all Title VII charges filed with the Commission. In FY 2000, dividing 222 direct suits by 59,588 charges yields 0.373% of the total caseload; in FY 1999, dividing 324 by 57,682 yields 0.563%.

<sup>7</sup> 42 U.S.C. § 2000e-5(f)(1) (1994).

this 180-day period and the plaintiff may not file suit until this period has elapsed.<sup>8</sup> The contrary interpretation is that the Commission has the ability to cede its jurisdiction and allow a plaintiff to sue prior to the expiration of the 180-day period.<sup>9</sup>

In Part I of this Comment, I discuss the cases holding that the EEOC has exclusive jurisdiction during the statutory period and requiring remand to the agency before a complaint may be filed in United States district court. In Part II, I analyze the cases holding that a plaintiff may sue upon receipt of a right-to-sue letter prior to the end of the 180-day period. In Part III, I examine the legislative history of the applicable statutory provisions. In Part IV, I discuss which of the two interpretations of the EEOC's jurisdiction is more economically efficient and conclude that there is no clear answer. In Part V, I suggest two alternatives to those interpretations that could make resolution of employment discrimination cases even more efficient—one giving the EEOC a much larger role in these cases and the other eliminating the role of the Commission altogether.

#### I. MARTINI AND OTHER CASES SUPPORTING REMAND TO THE AGENCY FOR EARLY ISSUANCE OF A RIGHT-TO-SUE LETTER

In 1999, the Court of Appeals for the District of Columbia Circuit was the first appellate court to hold that the EEOC may not issue an early right-to-sue letter. In *Martini v. Federal National Mortgage Ass'n*, the D.C. Circuit vacated and remanded a judgment in favor of plaintiff Elizabeth Martini for \$903,500 on sexual harassment and retaliation claims following a jury trial because the EEOC had granted a right-to-sue letter only twenty-one days after she had filed her charge with the Commission.<sup>10</sup> The court "conclude[d] that the EEOC's power to authorize private suits within 180 days undermines its express statutory duty to investigate every charge filed, as well as Congress's unambiguous policy of encouraging informal resolution of charges up to the 180th day."<sup>11</sup> Although some district courts had held that early right-to-sue letters were not permissible, this was the first circuit court to make this decision and thus invalidate the regulation issued by the EEOC. This decision in *Martini* created a circuit split that provides an important issue for resolution by the United

---

<sup>8</sup> See *infra* notes 10-34 and accompanying text for a discussion of cases so holding.

<sup>9</sup> See *infra* notes 35-62 and accompanying text for a discussion of cases so holding.

<sup>10</sup> 178 F.3d 1336 (D.C. Cir. 1999), *cert. dismissed*, 528 U.S. 1147 (2000).

<sup>11</sup> *Id.* at 1347.

## States Supreme Court.

The EEOC had issued the following regulation based upon its interpretation of the provisions of 42 U.S.C. § 2000e-5(f)(1):

When a person claiming to be aggrieved requests, in writing, that a notice of right to sue be issued . . . the Commission may issue such notice . . . at any time prior to the expiration of 180 days from the date of filing the charge with the Commission; provided, that the District Director [or other delegated officials] has determined that it is probable that the Commission will be unable to complete its administrative processing of the charge within 180 days from the filing of the charge and has attached a written certificate to that effect.<sup>12</sup>

A court interpreting an administrative agency's construction of a statute uses the two-step inquiry mandated by *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*<sup>13</sup> The court must first ask "whether Congress has directly spoken to the precise question at issue."<sup>14</sup> If so, then the unambiguous intent of Congress must be carried out by the reviewing court.<sup>15</sup> But "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."<sup>16</sup> The *Martini* court found that "Congress clearly intended to prohibit private suits within 180 days after charges are filed,"<sup>17</sup> and it therefore held that the agency's interpretation that allowed for early right-to-sue letters violated the clear, unambiguous intent of Congress and had to be overruled under *Chevron*.

In deciphering the intent of Congress not to allow early private suits, the *Martini* court relied on the provision prescribing the EEOC's duties that requires a prompt determination—within 120 days if practicable.<sup>18</sup> The court found that "the Commission's duty to investigate is both mandatory and unqualified."<sup>19</sup> Further, it stated that Congress "hoped that recourse to the private lawsuit will be the exception and

<sup>12</sup> Notice of Right to Sue: Procedure and Authority, 29 C.F.R. § 1601.28(a)(2) (1997).

<sup>13</sup> 467 U.S. 837, 842 (1984).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 842-43.

<sup>16</sup> *Id.* at 842.

<sup>17</sup> *Martini*, 178 F.3d at 1346.

<sup>18</sup> See 42 U.S.C. § 2000e-5(b) (1994) ("The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge . . .").

<sup>19</sup> *Martini*, 178 F.3d at 1347.

not the rule."<sup>20</sup> Not allowing early private suits should put pressure on the EEOC to improve its investigatory procedures or perhaps to ask Congress for additional funding so that it would be able to complete its statutory duties.<sup>21</sup>

The United States Supreme Court, in dictum, prior to the EEOC's promulgation of 29 C.F.R. § 1601.28, reached the same conclusion as the *Martini* court when seven Justices agreed that a plain reading of the statute compels the finding that early suits prior to the expiration of 180 days should not be permitted. In *Occidental Life Insurance Co. of California v. EEOC*, the Court stated, "[A] natural reading of [the statute] can lead only to the conclusion that it simply provides that a complainant whose charge is not dismissed or promptly settled or litigated by the EEOC may himself bring a lawsuit, but that he must wait 180 days before doing so."<sup>22</sup> The Court considered a claim by a defendant that the 180-day period was a statute of limitations and the EEOC could not file a charge beyond the expiration of this time.<sup>23</sup> The Court rejected this assertion and, without knowledge or consideration that this issue would later become relevant, found that the EEOC must wait 180 days before giving permission to a plaintiff to file a charge in United States district court.<sup>24</sup>

After the EEOC promulgated 29 C.F.R. § 1601.28(a)(2), a district court used similar reasoning to that of the Supreme Court in *Occidental Life*. In *Montoya v. Valencia County*, the court held that, even exercising the deference to the Commission required by *Chevron*, the EEOC's interpretation was "patently inconsistent with section 2000e-5(f)(1)."<sup>25</sup> The court therefore rejected the allowance of an early suit and subsequently granted the defendants' motion to dismiss the case.<sup>26</sup> The court expressed sympathy for the EEOC's difficulties in carrying out its duties but suggested that the proper way to resolve the lack of funding and inability to investigate all charges within the statutory time limit was to ask Congress to amend the statute or increase funding, and that unilateral action by the agency in issuing a regulation contrary to its underlying statute was not the solution.<sup>27</sup>

---

<sup>20</sup> *Id.* at 1346-47 (quoting 118 CONG. REC. 7168 (1972)).

<sup>21</sup> *Id.* at 1347.

<sup>22</sup> 432 U.S. 355, 361 (1977).

<sup>23</sup> *Id.* at 358-66.

<sup>24</sup> *Id.* at 366.

<sup>25</sup> 872 F. Supp. 904, 906 (D.N.M. 1994).

<sup>26</sup> *Id.*

<sup>27</sup> *See id.* ("The Commission must look to Congress to amend the statute or other-

In *New York v. Holiday Inns, Inc.*, the district court noted the attractiveness of allowing plaintiffs to sue prior to the expiration of the time period when the EEOC is backlogged, but quoted the dictum from *Occidental Life* stating that it was Congress's intent that 180 days must elapse before charges could be filed in district court.<sup>28</sup> The court noted that despite the apparent "futility of forcing victims of discrimination to 'mark time' when it appears that the EEOC will be unable to investigate their charges or reach conciliation proceedings within the 180-day period," arguments for allowing early suits should be addressed to Congress rather than to the judiciary.<sup>29</sup>

Other courts have noted that the purpose of the 180-day period is to induce conflict resolution through conciliation within the EEOC rather than litigation.<sup>30</sup> In 1980, Judge Sofaer of the Southern District of New York looked at the problem from a separation of powers perspective in *Spencer v. Banco Real S.A.*: The jurisdiction of the federal courts should not be expanded by judicial decision or by agency regulations, but rather through an act of Congress.<sup>31</sup> The court also examined policy considerations in making its decision. Not allowing suits would put pressure on the EEOC to improve its efficiency rather than simply hand off the work to the courts.<sup>32</sup> Since the Commission still has to determine which cases to pursue and in which to issue early right-to-sue letters, it would have too much discretion to decide which cases to keep and which to give to the courts. This argument about the incentive effects seems to be the most persuasive objection to allowing early suits.

A further consideration is that employers who are unwilling or unable to afford litigation costs for even unmeritorious suits may settle because of the small chance of recovering costs from unsuccessful plaintiffs.<sup>33</sup> Title VII plaintiffs might be able to take advantage of this tendency by trying to sidestep the Commission and sue prior to the period for investigation and conciliation by the EEOC. The district

---

wise ease its regulatory burden.").

<sup>28</sup> 656 F. Supp. 675, 679 (W.D.N.Y. 1984).

<sup>29</sup> *Id.* at 679-80.

<sup>30</sup> See *Mills v. Jefferson Bank E.*, 559 F. Supp. 34, 35 (D. Colo. 1983) (citing numerous cases to that effect).

<sup>31</sup> See 87 F.R.D. 739, 746-47 (S.D.N.Y. 1980) (Sofaer, J.) ("Regulation 1601.28(a)(2) in effect permits the agency to expand federal jurisdiction whenever an aggrieved claimant is impatient with the normal waiting period and the agency feels unable to complete its tasks within the statutory period.").

<sup>32</sup> *Id.* at 746.

<sup>33</sup> *Id.* at 747.

court in *Spencer* ordered a suspension of an early suit for two reasons—both because it was against Congress's intent and because it was unsupported by policy arguments.<sup>34</sup>

The review of this problem in the District of Columbia Circuit's opinion in *Martini* seems to reach the proper result, even if it at first glance seems unfair to the plaintiff who lost a nearly one million dollar judgment. The good of preventing the EEOC from ceding its jurisdiction and choosing which cases it wants to pursue is important. The plain meaning of the statute and the policy arguments also support this view. I turn next to the arguments in favor of allowing early right-to-sue letters, which is the position taken by three circuit courts and several district courts.

## II. SIMS AND OTHER CASES ALLOWING THE EEOC TO ISSUE RIGHT-TO-SUE LETTERS PRIOR TO THE EXPIRATION OF THE 180-DAY PERIOD

Other courts have held that the EEOC's early right-to-sue regulation in 29 C.F.R. § 1601.28(a)(2) is valid and have allowed suits in district court prior to the expiration of the 180-day period specified in 42 U.S.C. § 2000e-5(f)(1). The Court of Appeals for the Eleventh Circuit, in *Sims v. Trus Joist MacMillan*, found that "the procedural requirements of Title VII are to be viewed as conditions precedent" rather than the jurisdictional requirements.<sup>35</sup> The court was convinced by three distinct considerations: (1) the regulation itself, (2) the purpose of the 180-day period, and (3) the pointlessness of "marking time" when the agency will be unable to investigate.<sup>36</sup>

First, alluding to *Chevron* deference, the court found that the regulation was reasonable and consistent with congressional intent.<sup>37</sup> The

---

<sup>34</sup> *Id.* at 746-47. The act of suspending a case to allow the EEOC to have the case until the 180-day period elapsed is effectively the same as dismissing the case without prejudice, as most other courts have done when coming to the conclusion that early right-to-sue letters are invalid.

<sup>35</sup> 22 F.3d 1059, 1061 (11th Cir. 1994).

<sup>36</sup> *Id.*

<sup>37</sup> *See id.* at 1062 (noting that a regulation must be upheld if it is reasonably related to the purposes of the underlying legislation). The court also made a point of noting that the regulation was procedural, perhaps suggesting that courts should be more deferential on matters of procedure than on matters of substance. *See id.* ("In enacting Title VII, Congress charged the Commission with the responsibility to enforce the statute and vested it with the authority 'to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this subchapter.'" (quoting 42 U.S.C. § 2000e-12(a) (1994))). "A regulation promulgated pursuant to section 713(a) must be upheld 'so long as it is "reasonably related to the purposes of the enabling legislation.'"

*Sims* court believed that the statutory grant of an automatic right to sue *after* 180 days did not preclude a suit prior to 180 days under certain conditions.<sup>38</sup> It reasoned that nothing in the Act prohibited the EEOC from relinquishing its jurisdiction.<sup>39</sup> This is in some ways a curious assertion—no one would suggest that the Secretary of Defense has the ability to decide that the Army should take the summer off or that the Securities and Exchange Commission could decide not to enforce insider-trading regulations on Wednesdays. When the Commission gives up its jurisdiction by issuing early right-to-sue letters for certain actions or types of actions, it is doing so selectively and could expose its action to a potential challenge under the Administrative Procedure Act as an arbitrary and capricious agency decision.<sup>40</sup>

The court persuasively argued, however, that since the aims of Title VII are to provide a remedy for victims of employment discrimination, “[W]e do not think that Congress intended to force victims of discrimination to undergo further delay when the district director has determined such delay to be unnecessary.”<sup>41</sup> Looking to the legislative history, the *Sims* court believed that since Congress was aware of the EEOC’s backlog at the time of the relevant amendments in 1972, it imposed the provision as a ceiling, or maximum time, to protect the rights of individuals who had been victims of discrimination: “The primary concern must be protection of the aggrieved person’s option to seek a prompt remedy in the best manner available.”<sup>42</sup> Concluding that such a course would not circumvent Congress’s intentions and that if the Commission has determined that it would be unable to act on the charge—“a remand to the Commission would be an exercise in futility”<sup>43</sup>—the *Sims* court reversed the district court’s dismissal and allowed the claim to proceed without remand to the EEOC.<sup>44</sup>

In a series of decisions, the Court of Appeals for the Ninth Circuit

*Id.* (quoting *Mourning v. Family Publ’ns Serv., Inc.*, 411 U.S. 356, 369 (1973) (internal citation omitted)).

<sup>38</sup> *Id.* at 1061.

<sup>39</sup> *Id.* at 1063.

<sup>40</sup> See 5 U.S.C. § 706(2)(A) (1994) (“The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . .”).

<sup>41</sup> *Sims*, 22 F.3d at 1063 (quoting *Rolark v. Univ. of Chicago Hosps.*, 688 F. Supp. 401, 404 (N.D. Ill. 1988)).

<sup>42</sup> *Id.* (quoting H. COMM. ON EDUC. AND LABOR, REPORT ON H.R. 1746, EQUAL EMPLOYMENT OPPORTUNITIES ENFORCEMENT ACT OF 1971, H.R. REP. NO. 92-238, at 13 (1971), reprinted in 1972 U.S.C.C.A.N. 2137, 2148).

<sup>43</sup> *Id.* (quoting *Weise v. Syracuse Univ.*, 522 F.2d 397, 413 n.27 (2d Cir. 1975)).

<sup>44</sup> *Id.*



has allowed suits to be brought after early right-to-sue letters were issued by the EEOC. In one case, the court looked to the practical difficulties that the EEOC faced in completing its statutory workload but—unlike the District of Columbia Circuit and other courts mentioned above—assumed without much discussion that the Commission had the power to abdicate its duty, rather than requiring Congress to amend the statute.<sup>45</sup> In a later case, the Ninth Circuit reversed a district court decision that dismissed a claim and remanded to the Commission.<sup>46</sup> The circuit court found that it was irrelevant whether the Commission had actually attempted to investigate or conciliate the case.<sup>47</sup>

The most recent court of appeals decision on this issue, in February 2001 by the Tenth Circuit, also upheld the validity of the regulation. In *Walker v. United Parcel Service, Inc.*, the court found that under the *Chevron* standard of deference, the regulation in question was a reasonable interpretation of the underlying statute.<sup>48</sup> The court cited legislative history in support of this decision, as have other courts reaching this outcome.<sup>49</sup> The Tenth Circuit also raised a rationale not considered in other decisions—that the EEOC official reviewing the charge retains the power to deny a request for an early right-to-sue letter if he believes that it is in the parties' interests to have the EEOC continue attempts to resolve the dispute.<sup>50</sup> This is an interesting point, and one that would be important if we could assume the existence of an omniscient bureaucrat whose sole decisional rule was to maximize resolution of employment discrimination claims. As we shall see below, however, the incentive effects and related problems in giving the EEOC significant discretion in deciding which cases to process and which to abandon through the issuance of an early right-to-sue letter make such an assumption unreasonable in the real world.<sup>51</sup>

Several district courts have also held that early right-to-sue letters are permissible and that a plaintiff may sue prior to the expiration of

---

<sup>45</sup> See *Bryant v. Cal. Brewers Ass'n*, 585 F.2d 421, 425 (9th Cir. 1978) (“[I]n 1973-1974, the undermanned EEOC staff faced a huge backlog of Title VII cases . . . . Given this state of affairs, it would be a travesty to require the EEOC and Bryant to mark time until 180 days were counted off.”), *vacated on other grounds and remanded*, 444 U.S. 598 (1980).

<sup>46</sup> *Saulsbury v. Wismer & Becker, Inc.*, 644 F.2d 1251, 1257 (9th Cir. 1980).

<sup>47</sup> *Id.*

<sup>48</sup> 240 F.3d 1268, 1274-75 (10th Cir. 2001).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 1275.

<sup>51</sup> *Infra* notes 60-62 and accompanying text.

180 days. The district judge in *Parker v. Noble Roman's, Inc.*, in denying a motion to dismiss, expressed disappointment that the EEOC acted very quickly without any effort to settle but nevertheless allowed an early suit to proceed.<sup>52</sup> In *Parker*, EEOC personnel suggested that plaintiff's counsel ask for a right-to-sue letter only one day after the charges were filed; the EEOC issued the letter seven days after the charges were filed and before the defendant employer even had the opportunity to respond to an invitation to attend a nonadversarial settlement discussion.<sup>53</sup>

In another case, despite the defendant's assertion that the plaintiff asked for a right-to-sue letter to deliberately circumvent the EEOC investigatory process, the court refused to find 29 C.F.R. § 1601.28(a)(2) invalid and allowed the suit to go forward.<sup>54</sup> The court emphasized the clear statement by the Commission that it would not be able to investigate and conciliate the charge within 180 days, and the court discounted the circumstances that led to the issuance of the letter.<sup>55</sup>

Another district court allowed suit after an early right-to-sue letter despite its finding that "Congress showed clear preference for conciliatory efforts at the administrative level prior to suit in federal court."<sup>56</sup> The court reasoned that when employer-defendants try to use the language of the statute that suggests that the EEOC has jurisdiction for the first 180 days to prevent suits, they disregard the purpose of Title VII and turn the statute on its head.<sup>57</sup> Citing *Chevron*, the court found that the EEOC had authority to fill in gaps in the statute and, because the Commission did not contravene congressional intent, upheld the regulation.<sup>58</sup>

Another court took a practical approach, determining that "requiring the plaintiff in such a case to sit twiddling her thumbs and

<sup>52</sup> See No. IP-96-65-C-D/F, 1996 U.S. Dist. LEXIS 10653, at \*5 (S.D. Ind. June 26, 1996) ("We hope the EEOC's actions here are merely isolated accidents by an over-worked and underappreciated federal agency."), *defendant's mot. for summ. j. granted in part and denied in part*, 1997 U.S. Dist. LEXIS 22885 (S.D. Ind. Dec. 10, 1997).

<sup>53</sup> *Id.* at \*1-2.

<sup>54</sup> *DeFranks v. Court of Common Pleas*, No. 95-327, 1995 U.S. Dist. LEXIS 15715, at \*16-17 (W.D. Pa. Aug. 17, 1995).

<sup>55</sup> *Id.* at \*19.

<sup>56</sup> *Rolark v. Univ. of Chi. Hosps.*, 688 F. Supp. 401, 404 (N.D. Ill. 1988).

<sup>57</sup> See *id.* (stating that the purpose of the 180-day period is to afford victims of employment discrimination private causes of action where the EEOC fails to act or does not act in a timely fashion).

<sup>58</sup> See *id.* ("It is up to the EEOC to decide how to efficiently administer the Act . . .").

'flattening her time' by watching the days drift by until there finally appeared the time when a remedy was available would just not make sense."<sup>59</sup> The court denied the defendant's motion to dismiss.<sup>60</sup> It interpreted the 180-day period as a ceiling rather than a floor for EEOC investigation. While the court agreed that the Commission likely would be more efficient in resolving complaints, it noted that "[p]ersons aggrieved by discriminatory employment practices must be afforded a forum in which to assert their rights, and when the EEOC is unable to act, the district court stands ready."<sup>61</sup> This reasoning may be flawed because it takes an ex post rather than an ex ante approach. Changing the rule for what appears to be just or equitable in a particular instance for an individual party is likely to alter incentives in the future.<sup>62</sup> A previous commentator on this topic exhibits a similar logical shortcoming: "[T]he *Martini* decision has made it increasingly difficult for aggrieved persons to obtain relief for acts of employment discrimination. Consequently, the result of the court's holding in *Martini* is flawed."<sup>63</sup>

Even assuming that making it easier for allegedly aggrieved persons to obtain relief should be encouraged,<sup>64</sup> a regime that overall

---

<sup>59</sup> *Cattell v. Bob Frenley Ford, Inc.*, 505 F. Supp. 617, 622 (M.D. Tenn. 1980).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> A hypothetical inspired by Judge Posner's concurrence in *Chicago Board of Realtors, Inc. v. City of Chicago*, 819 F.2d 732, 741 (7th Cir. 1987), illustrates this point. Take, for example, a rule prohibiting eviction of widows and orphans from rental housing until they are delinquent in payments for an extremely long time, say one full year. A court considering this rule from an ex post perspective might reason that it benefits those widows and orphans who cannot pay their rent and therefore uphold the rule. But over time, this rule would likely cause landlords to charge higher monthly rent to make up for the probability that they would not receive rent for an extended period of time prior to eviction or reduce the amount landlords spend on improvements or maintenance, thus charging the same price for a lesser quality product. The net result would be a decrease in welfare for the widows and orphans who then might be unable to afford decent housing. If most widows and orphans pay their rent on time but bear the increased rental costs, the intended beneficence of the decision could be offset by the large unintended consequences of the decision. From an ex ante perspective, assuming the goal is to maximize aggregate utility, the benefit to the delinquent tenants is likely to be trumped by the increased rent for all, which would make such a rule inefficient and one that should not be imposed.

<sup>63</sup> Nathan C. Sprague, Comment, *Is the Honeymoon Over? The Fate of the EEOC and the Early Right-To-Sue Letter*, 39 WASHBURN L.J. 572, 583 (2000).

<sup>64</sup> This assumption may be faulty because each complaint filed against an employer imposes a significant cost on that firm. Even complaints that are completely frivolous will not likely result in recovery of costs by the firm—the individual plaintiff is likely to be judgment proof—though perhaps the plaintiff's lawyer could be charged with costs. See generally FED. R. CIV. P. 11 (providing standards for and enumerating

makes relief easier for meritorious Title VII plaintiffs while forcing some to wait some period less than 180 days to go to court should be favored if the net result is improved adjudication and resolution of the discrimination charges. Plaintiffs who would end up going to district court and prevailing on the merits under either regime are benefited by a legal regime allowing them to sue earlier. Allowing early suits, however, means the EEOC will be less likely to investigate and resolve claims. Some cases that could have been resolved by the EEOC will then instead have to go to district court. In the aggregate, Title VII plaintiffs may be disadvantaged by what seems to be a beneficial regime from an *ex post* perspective.

The arguments for allowing early right-to-sue letters and suits in district court are most persuasive when examining the plight of an individual plaintiff who would be burdened by having to wait extra time until his complaint is heard in district court if the case were remanded to the EEOC to run out the clock on the 180-day period. One major problem is the negative incentive effect that such a rule likely places on the Commission—it removes motivation to act more efficiently or change its operating procedure to carry out its statutory duty. A second criticism is a separation-of-powers argument that the Commission has unreasonably interpreted its organic statute and that if the procedures (perhaps justifiably) should be changed, then Congress is the proper forum for that change rather than the Commission.

With the judicial branch determining whether the Commission has the power to issue early right-to-sue letters, the results have been split fairly evenly. I next turn to the legislative history in an attempt to determine what Congress intended in enacting the statute.

### III. LEGISLATIVE HISTORY OF § 2000E-5(B)

A crucial question in determining the intent of the framers of the EEOC's enabling statute is what they expected would happen if there were a backlog of cases and the Commission could not act on a sufficient number of them within the 180 days set by the statute. There is credible evidence supporting two possible interpretations, but it is not clear that the framers actually considered this precise question.

First, members of Congress were aware of the backlog that the EEOC faced in 1971 when this provision was included in a bill modifying the enforcement procedures and jurisdiction of the EEOC. At

---

potential sanctions against parties who file frivolous pleadings).

least one Senator recognized the relative workloads of the EEOC and the district courts and understood that they were both possible fora for the resolution of employment discrimination claims.<sup>65</sup> The Chairman of the EEOC testified in 1971 that the Commission's backlog was 32,000 cases and that the median time for resolution by the EEOC was eighteen to twenty-four months.<sup>66</sup> In contrast, the median time for a case in district court to move from issuance to trial in a non-jury trial in 1971 was ten months, and the twenty-nine district courts that were expected to hear the largest share of the cases had median times to trial of twelve months or less.<sup>67</sup> Members of the House were also aware of the backlog of the EEOC in resolving cases.<sup>68</sup>

The majority report of the House Committee on Education and Labor asserted a competence argument in favor of an administrative resolution of employment discrimination by the Commission:

Administrative tribunals are better suited to rapid resolution of such complex issues than are Courts. Efficiency and predictability will be enhanced if the necessarily detailed case by case findings of fact and fashioning of remedy is performed by experts in the subject matter. Moreover, administrative tribunals are less subject to technical rules . . . and are less constrained by formal rules of evidence—which give rise to a lengthier (and more costly) process of proof.<sup>69</sup>

This argument is in favor of the Commission having the opportunity to resolve the dispute before allowing plaintiffs to proceed in United States district court. It does not speak directly to the question of the ability of an overworked Commission to allow a plaintiff to go to court prior to the end of the 180-day period.

One statement of the Senate Committee on Labor and Public Welfare provides support for allowance of early right-to-sue letters: “[W]here the Commission is not able to pursue a complaint with satisfactory speed . . . the bill provides that the [plaintiff] shall have an

---

<sup>65</sup> See S. COMM. ON LABOR AND PUBLIC WELFARE, REPORT ON S. 2515, EQUAL EMPLOYMENT OPPORTUNITIES ENFORCEMENT ACT OF 1971, S. REP. NO. 92-415, at 87 (1971) (views of Sen. Dominick) (“To a large extent, speedy resolution of an unfair employment practice will be determined by the respective caseloads of the EEOC and the district courts.”).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> See H.R. REP. NO. 92-238, at 58 (1971) (minority views) (“[W]e fear that, in view of the estimated 18-month to two-year backlog that currently exists at the EEOC, the intent of H.R. 1746 to expand the EEOC’s jurisdiction will serve only to retard and frustrate the purposes and objectives of the Equal Employment Opportunity Act.”), reprinted in 1972 U.S.C.C.A.N. 2137, 2167.

<sup>69</sup> *Id.* at 11, reprinted in 1972 U.S.C.C.A.N. 2137, 2146.

opportunity to seek his own remedy . . . ."<sup>70</sup> This suggests that the 180-day period is there to protect plaintiffs from agency inaction. It follows that if the Commission states that it will be unable to act, then suit in the district court should be allowed immediately. The Committee went on to note that this would be an exceptional course of action after the EEOC's procedures were implemented and suggested that this would be only a temporarily available option.<sup>71</sup> Since the EEOC today faces a backlog that the framers of the legislation most likely did not expect would occur thirty years after its enactment, it is unclear if a contemporary observer should give much weight to this statement.<sup>72</sup>

Other statements from the same report provide evidence that the Committee on Labor and Public Welfare was concerned with providing a prompt remedy for the employee and therefore would support early right-to-sue letters. The Committee wrote that "[t]he primary concern should be to protect the aggrieved person's option to seek a prompt remedy."<sup>73</sup> It noted that six months would normally be a sufficient time for "the normal case to be processed from complaint to order" and stated that the Commission should have to explain to a court if it requested additional time.<sup>74</sup> The Committee instructed the Commission to "develop its capacity to proceed rapidly with the hearing and decision on charges once the complaint has issued."<sup>75</sup> Another question therefore is raised—what should happen if the Commission is unable to do so? Does it matter if the failure is due to lack of funding from Congress, on the one hand, or administrative incompetence or inability to solve the problem, on the other hand?

A reasonable examination of the legislative history of this provi-

<sup>70</sup> S. REP. NO. 92-415, at 23 (1971).

<sup>71</sup> The Committee stated:

It is expected that recourse to this remedy will be the exception and not the rule, particularly once the Commission's enforcement procedures are fully operational. In the meantime, however, the committee believes that the aggrieved person should be given an opportunity to escape the administrative process when he feels his claim has not been given adequate attention.

*Id.*

<sup>72</sup> One possible way to examine this situation is to assume that Congress has some knowledge of the EEOC backlog and the use of early right-to-sue letters. An oversight committee has regular hearings on the operation of the Commission and approves its budget. Inasmuch as Congress could amend the statute to clarify that the provision is intended to give the EEOC exclusive jurisdiction for the first 180 days, one could conclude that its silence can be interpreted as authorizing the Commission to grant early right-to-sue letters.

<sup>73</sup> S. REP. NO. 92-415, at 24.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

sion can tell only a few things about the intent of Congress in drafting it. We cannot go back in time to ask this specific question of the purpose of the 180-day period. We can only look to see if it has been answered with some clarity. First, members of Congress were aware of the backlog the EEOC was facing—three to four times the statutory 180-day period—and still included the provision of 180 days in the legislation. This suggests that the 180 days might have been seen as a minimum time for the EEOC to try to resolve the claim. Second, the framers were also aware of data that suggested the resolution of discrimination claims might be quicker in the district courts.<sup>76</sup> The choice of the forum likely to result in slower resolution of claims suggests that there was an interest in administrative resolution—either based on perceived expertise of the Commission, cost savings, a desire not to burden the workload of the courts, or some other reason. Perhaps Congress believed that giving the EEOC “first crack” at these cases was worth something, which would weigh against allowing early right-to-sue letters.

There is no evidence that this precise question was discussed by either the House or Senate committees or on the floor of either body before the legislation was passed.<sup>77</sup> Finding that the results of the survey of the legislative history are inconclusive, I turn next to an economic analysis of the question of whether the Commission should be

---

<sup>76</sup> The statistic quoted by the committees does not tell the whole story. The House committee minority listed the intervals of time in 1971 in each of the twenty-nine districts that were within the top ten states in volume of employment discrimination cases. H.R. REP. NO. 92-238, at 60-61 (1971) (minority views), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2170. Some of the representatives recognized that it takes time for a court to issue a decision but nevertheless maintained that “such forum would clearly be quicker [than an administrative proceeding].” *Id.* at 60 (minority views), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2170.

<sup>77</sup> The legislative reenactment doctrine—the absence of action by Congress to overturn regulations that its members are presumed to be aware of—is often relied upon in tax cases to provide support for the position that Congress approves of the regulation. *See* Jay Katz, *The Deductibility of Educational Costs*, 17 VA. TAX REV. 1, 93 (1997) (“Even if the Current Regulations were challenged as unreasonable, the doctrine of legislative reenactment could be invoked to invalidate them. Under this doctrine, Congress is deemed to approve of existing regulations when it reenacts the underlying code section(s) without substantial change.”); *see also* Connor v. WTI, 67 F. Supp. 2d 690, 696 n.9 (S.D. Tex. 1999) (“[T]he Court notes that the EEOC promulgated its early right-to-sue regulation in 1977 . . . and for the past twenty-two years Congress has elected not to override the provision, despite the fact that every pre-printed dismissal order issued by the EEOC includes ‘right-to-sue requested’ as a reason for dismissal.”). For a discussion of some criticisms of the legislative reenactment doctrine, *see* William D. Popkin, *Law-Making Responsibility and Statutory Interpretation*, 68 IND. L.J. 865, 884-89 (1993).

able to issue early right-to-sue letters allowing persons alleging employment discrimination to sue in United States district court prior to the end of the 180-day period stated in 42 U.S.C. § 2000e-5(f)(1).

#### IV. ECONOMIC ANALYSIS OF THE EARLY RIGHT-TO-SUE PROVISION

The regulation granting the EEOC the power to issue early right-to-sue letters has merit in eliminating the need for plaintiffs to “mark time” or “run out the clock” when the Commission is not likely to resolve the case within the statutory 180-day period. The primary concern is the incentive effects of giving the EEOC a means to avoid its duties when it is overworked, underfunded, or otherwise unable to complete the mission with which it is charged. But there are several other factors affecting the costs and benefits of the system that are discussed below.

##### A. *Costs of Not Allowing Early Suits*

Assuming that the EEOC cannot and does not resolve the charge but the plaintiff is required to wait 180 days until it is filed, one direct cost is the increase in potential damages that a plaintiff will receive due to delayed resolution of the claim. Damages available for an employee that has been wrongfully terminated include back pay from the time of discharge to the date of the court’s decision, limited to two years prior to the date of filing a charge with the Commission.<sup>78</sup> Assuming a reasonable time for preliminary processing by the EEOC of 30 days, with the current regulation 29 C.F.R. § 1601.28 in place, the claim could be filed in district court on day 31 (the hypothetical date of receipt of a right-to-sue letter) rather than day 181 (the expiration of the statutory period). The result, *ceteris paribus*, would be resolution of the claim 150 days earlier. If the plaintiff was successful at trial, and the defendant liable for back pay, this cost could be quite substantial.<sup>79</sup>

---

<sup>78</sup> See 42 U.S.C. § 2000e-5(g)(1) (1994) (listing remedies for violations of Title VII).

<sup>79</sup> The amount of increased damages in this case could be more than one-third of annual pay. If the remedy is to give back pay and return the employee to work, then the firm is forced to pay back wages and not receive any benefit in its output. The employee may in some sense be thought of as receiving a windfall bonus of salary paid without working. But it is a loss to society of that employee’s output of goods or services for that time and a deadweight loss of salary paid without benefits received. It would be Kaldor-Hicks preferred for the worker to have actually produced something during this time—he could have returned to work 150 days earlier and improved the economy’s output. The statute does provide that “[i]nterim earnings or amounts



A court may also award attorney's fees to a successful Title VII plaintiff.<sup>80</sup> In fact, the United States Supreme Court has stated that under "Title VII a prevailing *plaintiff* ordinarily is to be awarded attorney's fees in all but special circumstances."<sup>81</sup> It is reasonable to assume that attorney's fees could be increased because of the extra time involved and that would increase the potential liability for a defendant who is deciding whether to settle or go to trial. Even if the defendant prevails, legal expenses will likely be greater during the extra time required to resolve the suit. A rational method for the employer to consider a lawsuit, as any contingent liability, is as the probability of loss times the damages if the plaintiff prevails. If the possible damages are increased due to increased time to resolution, the defendant may be more likely to settle a suit (even if it is without merit).<sup>82</sup> The plaintiff is perhaps also affected by the delay and further uncertainty, as he might not know if he will receive any awards of pay or be returned to his previous job (by court order should he prevail) for an extra 150 days.<sup>83</sup> So his incentives to settle a suit might also be affected—the plaintiff may need money sooner rather than later.<sup>84</sup> The relative importance of these two opposing factors—the influence of the financial

---

earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable." *Id.* If the employee is unable to find other employment, however, the damages would be the full amount of salary. In times of recession, or for workers whose skills are in relatively low demand in a given locale, the inability to find a job would be greater, and therefore the potential employee liability would be greater.

<sup>80</sup> 42 U.S.C. § 2000e-5(k) (1994).

<sup>81</sup> *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 417 (1978).

<sup>82</sup> Assume that the potential damages with the allowance of early suits are \$50,000. Adding back pay of \$10,000 during the extra 120 days on which the EEOC retains jurisdiction of the case absent early right-to-sue and \$5000 additional attorneys' fees for each side, this could alter the decision of a rational, risk-neutral defendant deciding whether to settle. Assume that probability of plaintiff's success (P) is 40%. Therefore the expected value of the defendant's loss would be \$20,000 allowing an early suit and \$28,000 if early suits were not allowed. A defendant faced with a higher expected loss might be induced to settle a claim by the change in the legal regime.

<sup>83</sup> A court has wide discretion to order equitable remedies, including reinstatement, under 42 U.S.C. § 2000e-g(1).

<sup>84</sup> If we could assume efficient capital markets, then this concern would go away. That is, with perfect information, the plaintiff could borrow against his future potential judgment and would not be induced to act differently due to lack of capital. As Judge Posner has explained, "[S]ociety undertakes a variety of measures to compensate for . . . failure of the capital markets . . ." RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 144 n.2 (4th ed. 1992). With inefficient capital markets, it might be the choice of Congress to ease burdens on plaintiffs with such measures as shifting the burden of proof or providing for punitive damages or the award of attorney's fees in Title VII cases.

uncertainty on the employee and employer—will affect which way the effect of delay cuts. If the plaintiff is a minimum-wage employee suing a very large corporation such as Wal-Mart, then this effect of delay may adversely affect the Title VII plaintiff more than the defendant, inasmuch as a risk of thousands of dollars is a larger portion of the plaintiff's resources than it is to a large corporation. But the employment discrimination provisions of Title VII also apply to small businesses,<sup>85</sup> and an employer with seventeen employees that is teetering on the edge of insolvency and discharges for cause two high-level employees who are members of protected classes (for example, an African American who charges racial discrimination and a woman who charges gender discrimination), the delay and uncertainty may hurt the defendant more.

### B. *Benefits of Not Allowing Early Suits*

Even if disallowing early suits increases legal fees, expenses, and potential damages, there is a large potential benefit, namely, the possibility of resolution of the case during the extended time.<sup>86</sup> The shadow of the EEOC may induce an employer to settle a case with a plaintiff, even if the Commission does not do anything directly. Moreover, the EEOC may be able to arrange a meeting or settlement conference in which the parties could sit down and attempt to resolve the dispute. Another possibility is that this 180-day period could be thought of as a "cooling-off" period that has been used in other areas of the federal law such as labor disputes.<sup>87</sup> "The purpose of the statutorily imposed cooling-off period is to give the parties enough time to conduct calm negotiations and resolve their differences . . . ."<sup>88</sup> Rather than forcing the parties into the adversarial proceeding of a district court, a few months of reflection might lead one side to realize

---

<sup>85</sup> "The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . . ." 42 U.S.C. § 2000e(b) (1994).

<sup>86</sup> As will be seen below, the portion of cases that the EEOC is able to resolve in a manner favorable to plaintiffs is roughly ten percent. See *infra* notes 112-16 and accompanying text (discussing the number of cases resolved through settlements or withdrawals with benefits).

<sup>87</sup> One such example is the Railway Labor Act, 45 U.S.C. §§ 151-188, which imposes a thirty-day cooling-off period for transportation employees before they go on strike.

<sup>88</sup> Local 553, Transp. Workers Union v. E. Air Lines, Inc., 695 F.2d 668, 674 (2d Cir. 1982).

that it is wrong or at least that there is room to compromise and settle the case before going to district court.

### C. *Costs of Early Suits*

If the issuance of early right-to-sue letters becomes the rule rather than the exception that the Senate committee had envisioned, or at least a more regular event, a plaintiff might include a request for early right-to-sue with his complaint or shortly after the complaint is filed.<sup>89</sup> Some simple cases that the EEOC could more easily resolve could be channeled directly into district court, which would impose costs on the parties, the legal system, and other litigants on the docket in the district court. The EEOC might be able to resolve a case with some investigation, a settlement conference, and the advice or urging of an administrator that a case has a clear outcome or likely victory for one side or another. For a hypothetical "cheap" case with twenty-five hours of work, the EEOC might resolve a complaint for \$500. If instead it went to court, the parties would incur additional legal expenses. Once a complaint is filed, depositions will likely have to be taken and extensive discovery may be required. Because of the fact-intensive nature of employment discrimination cases, these cases may be more difficult to resolve through summary judgments than other types of cases.<sup>90</sup> Some of these "easy" cases could go to trial because they turn on credibility of witnesses and even if it is reasonably clear which side will prevail, there may be a genuine issue of material fact that precludes summary disposition.<sup>91</sup> Adding these "easy" cases to a district court's docket could impose substantial costs to all the parties on that docket.<sup>92</sup>

---

<sup>89</sup> See *supra* note 53 and accompanying text (describing a case in which the plaintiff's counsel asked for a right-to-sue letter the day after charges were filed).

<sup>90</sup> The United States Supreme Court has stated that "trial courts or reviewing courts should [not] treat discrimination differently from other ultimate questions of fact." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 524 (1993) (quoting *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983)). But discrimination cases often turn on testimony of what happened at certain emotional times, and each side's witnesses may interpret the same events very differently. The conflicting affidavits of these witnesses may prevent the resolution of cases at the summary judgment stage.

<sup>91</sup> See generally FED. R. CIV. P. 56 (providing standards for summary judgment).

<sup>92</sup> A small delay affecting parties can amount to a large cost. Think of a toll booth. One additional car might stop for ten seconds, but, if it delays each of 100 vehicles behind it, the marginal cost of that vehicle being on the road during rush hour is not the trivial ten seconds but 1000 seconds or almost fifteen minutes of valuable time lost. Similarly, if each case that could have been resolved by the EEOC goes to court and

#### D. *Benefits of Early Suits*

Disputes that begin in the EEOC and are investigated for 180 days yet not resolved are in some sense failures for the Commission. The time spent in the Commission is likely without benefit, except perhaps if the issues are narrowed or the dispute that will proceed to the district court is clarified.<sup>99</sup> The cost of the EEOC staff that investigates and processes the complaint is borne by the taxpayers, as is the cost of district court staff. For those cases in which nothing is gained through the EEOC processing of the charges, taxpayers pay costs of both Commission and district court proceedings for a considerable amount of activity that is duplicative. This is likely the most substantial cost of not allowing early suits. Allowing early suits avoids this expenditure. Disregarding the negative incentive effects, following the EEOC regulation would probably provide a large net benefit.

#### E. *Net Costs and Benefits Are Unclear*

Inasmuch as there are several factors working in either direction, it is not clear whether allowing early suits has a net cost or benefit. Some of the factors depend upon empirical data that are not immediately available. The costs and benefits are likely within the same ballpark or order of magnitude, so without empirical analysis it is not possible to conclude that allowing early suits is better than not allowing such suits. Perhaps the optimal answer is a bolder solution that changes the current relationship between the EEOC and the courts rather than simply working at the margins. Next I discuss two alternatives to the current system of jurisdictional overlap between the EEOC and the district courts.

### V. PROPOSED ALTERNATIVES TO THE CURRENT SYSTEM

A larger question underlying this narrow issue of early right-to-sue letters is the role, if any, the EEOC should take in employment discrimination claims under Title VII of the Civil Rights Act of 1964. This dual system of enforcement has both costs and benefits, but rather than modifying the process of early right-to-sue letters, at least two more decisive alternatives exist. Both are significant changes and

---

delays each of ten cases by three days, the marginal cost of that suit going to trial is quite substantial.

<sup>99</sup> A pro se plaintiff, without the help of a detailed knowledge of the legal terms of art, might benefit from someone at the EEOC clarifying the issues or allegations.

would require an overhaul of the statutory structure through new legislation. Each recognizes that a middle-of-the-road solution may be ineffective and that the Commission should not continue in an underfunded and ineffective manner. Instead, the EEOC should be given the power it needs to act in the nation's interest to resolve employment discrimination claims efficiently. Alternatively, the Commission should be eliminated in recognition that times have changed and that, some thirty-five years after its creation, it is no longer necessary to serve its initial purposes.<sup>94</sup>

One option is eliminating the EEOC altogether. Just as in most other civil violations of federal law, the plaintiff would file suit in district court within a specified time after the alleged incident, and the court would have exclusive jurisdiction. The biggest concern is the expense—in terms of time and money—of expanding the jurisdiction of the already overworked federal district courts.

The opposite alternative is to give the agency exclusive jurisdiction over simple employment discrimination cases, namely those involving one plaintiff, one defendant, and a discrete set of facts.<sup>95</sup> Administrative hearings could be held with appeal to an Article III court (either the local district court or regional circuit court of appeal). The National Labor Relations Board and the Social Security Administration use this procedure.<sup>96</sup> Appeals from final orders of the former agency are heard by a circuit court;<sup>97</sup> appeals from the latter, by a district court.<sup>98</sup> I will discuss in turn the merits of these alternative systems of administration of Title VII. Before commencing a discussion of the strengths and weaknesses of each proposed alternative system, a few words about how much money the EEOC spends and how many cases it is able to resolve are in order.

The EEOC had an annual budget of \$242 million for fiscal year

---

<sup>94</sup> This reasoning is analogous to arguments made by opponents of so-called affirmative action programs that the harmful effects of past, demonstrable discrimination have been cured and that, therefore, affirmative action has become obsolete, since its purpose of curing such harms has been satisfied.

<sup>95</sup> So called "pattern or practice" suits involving more complicated violations have more complicated issues that might not be resolved effectively within this framework.

<sup>96</sup> See generally 29 U.S.C. § 160 (1994) (describing the procedures of the National Labor Relations Board for preventing unfair employment practices); 42 U.S.C. § 405 (1994) (describing the procedure for establishment of Social Security benefits and the process by which termination of benefits may be appealed).

<sup>97</sup> 29 U.S.C. § 160(f) (1994).

<sup>98</sup> 42 U.S.C. § 405(g) (1994).

("FY") 1998,<sup>99</sup> \$279 million for FY 1999,<sup>100</sup> and \$281 million for FY 2000.<sup>101</sup> Projections for future years are for a small increase and then constant funding for the Commission.<sup>102</sup> It employed a full-time staff of 2,852 employees at the end of FY 2000,<sup>103</sup> down nearly one quarter from its staff of 3,752 in 1979.<sup>104</sup> Inasmuch as the EEOC administers charges other than Title VII, assuming the amount of work is spread equally among all types of cases, this amounts to about \$3,520 for each charge filed in FY 2000.<sup>105</sup> For FY 2000, the last year for which data are available, out of the 57,136 Title VII cases the EEOC resolved only 11,875, or 20.8%, were so-called "merit resolutions"—cases resolved with outcomes favorable to the charging parties (employees) or found to have meritorious allegations.<sup>106</sup> This relative success was anomalous, as the previous year saw only 15.6% of claims reach merit resolutions, and, in the eight fiscal years preceding 2000, the highest per-

---

<sup>99</sup> OFFICE OF MANAGEMENT AND BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT OF THE UNITED STATES, *THE BUDGET OF THE UNITED STATES GOVERNMENT: FISCAL YEAR 2000*, at 589 (United States Government Printing Office CD-ROM, Feb. 1999) [hereinafter *FY 2000 BUDGET*].

<sup>100</sup> OFFICE OF MANAGEMENT AND BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT OF THE UNITED STATES, *THE BUDGET OF THE UNITED STATES GOVERNMENT: FISCAL YEAR 2001*, at 131 (United States Government Printing Office CD-ROM, Feb. 2000).

<sup>101</sup> U.S. Equal Employment Opportunity Commission, *Fiscal Year 2002 Budget Request and Annual Performance Plan* (2001), available at <http://www.eeoc.gov/plan/2002budget/salaries.html>.

<sup>102</sup> See *FY 2000 BUDGET*, *supra* note 99, at 589 (listing estimated future budgets of the EEOC as remaining constant at \$312 million).

<sup>103</sup> U.S. Equal Employment Opportunity Commission, *Budget and Staffing*, at <http://www.eeoc.gov/budget.html> (last modified July 25, 2001).

<sup>104</sup> U.S. Equal Employment Opportunity Commission, *End of the 1980s Leaves EEOC to Face New Challenges*, in *35 YEARS OF ENSURING THE PROMISE OF OPPORTUNITY*, available at <http://www.eeoc.gov/35th/1980s/end.html> (last visited Jan. 7, 2001).

<sup>105</sup> The total number of charges filed with the EEOC in FY 2000 was 79,896 and in FY 1999 was 77,444. U.S. Equal Employment Opportunity Commission, *Charge Statistics: FY 1992 Through FY 2000*, at <http://www.eeoc.gov/stats/charges.html> (last modified Jan. 18, 2001). In FY 2000, the 59,588 charges filed under Title VII amount to 74.5% of the total caseload. EEOC, *Title VII Charges*, *supra* note 1. Dividing the budget of \$281 million by 79,896 yields an average cost of \$3,517 per case for 2000. In FY 1999, the 57,582 charges filed under Title VII amount to 74% of the total caseload. *Id.* Dividing the budget of \$279 million by 77,444 cases yields an average cost of \$3,603 per case for 1999.

<sup>106</sup> EEOC, *Title VII Charges*, *supra* note 1. Merit resolutions are defined as "[c]harges with outcomes favorable to charging parties and/or charges with meritorious allegations. These include negotiated settlements, withdrawals with benefits, successful conciliations, and unsuccessful conciliations." U.S. Equal Employment Opportunity Commission, *Definitions of Terms*, at <http://www.eeoc.gov/stats/define.html> (last modified Aug. 11, 1998) [hereinafter *EEOC, Definitions of Terms*].

centage of cases categorized as merit resolutions was 15.7%.<sup>107</sup> In fiscal years 2000 and 1999, some 3,705 and 2,515 cases, respectively, were categorized as reaching merit resolutions, even though they ended in unsuccessful conciliations after the Commission investigated and determined that reasonable cause existed to believe that discrimination occurred.<sup>108</sup> The majority of cases resolved by the EEOC in FY 2000—33,822 or 59.2%—were categorized as “no reasonable cause.”<sup>109</sup> In FY 1999, the numbers were similar—35,614 or 60.3% were classified as “no reasonable cause.”<sup>110</sup> The charging party has the right to sue in district court after such finding is made. The cases in which an early right-to-sue letter is issued are included in this category of resolution. In each of the past nine fiscal years, the “no reasonable cause” category has been listed for a majority of the Commission’s resolutions.<sup>111</sup> In one-fifth of the EEOC’s resolutions in FY 2000 (and in nearly one quarter in FY 1999), the charge was closed for administrative reasons.<sup>112</sup> These include failure to locate the charging party, failure of the charging party to respond to EEOC communications, failure to accept full relief, and lack of statutory jurisdiction.<sup>113</sup> Putting administrative closure and findings of no reasonable cause together, in eight of the past nine fiscal years, over four-fifths of resolutions can by any reasonable definition be considered unsuccessful, and FY 2000 narrowly missed that mark with 79.2%.<sup>114</sup>

<sup>107</sup> EEOC, *Title VII Charges*, *supra* note 1.

<sup>108</sup> *Id.* An unsuccessful conciliation is defined as a “[c]harge with reasonable cause determination closed after efforts to conciliate the charge are unsuccessful. Pursuant to Commission policy, the field office will close the charge and review it for litigation consideration.” EEOC, *Definitions of Terms*, *supra* note 106.

<sup>109</sup> EEOC, *Title VII Charges*, *supra* note 1. No reasonable cause is defined: “EEOC’s determination of no reasonable cause to believe that discrimination occurred based upon evidence obtained in investigation.” EEOC, *Definitions of Terms*, *supra* note 106.

<sup>110</sup> EEOC, *Title VII Charges*, *supra* note 1.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> EEOC, *Definitions of Terms*, *supra* note 106.

<sup>114</sup>

	FY 1992	FY 1993	FY 1994	FY 1995	FY 1996	FY 1997	FY 1998	FY 1999	FY 2000
Administrative Closures (%)	22.6	27.0	34.2	35.0	28.7	27.8	26.5	24.1	20.0
No Reasonable Cause (%)	61.6	57.5	50.8	53.9	62.9	61.9	62.1	60.3	59.2
	====	====	====	====	====	====	====	====	====
	84.2	84.5	85.0	88.9	91.6	89.7	88.6	84.4	79.2

EEOC, *Title VII Charges*, *supra* note 1 (calculations by author).

The EEOC has had some success in achieving settlements between the charging party and the respondent and withdrawals of charges after the charging party received the desired benefits. FY 2000 brought more success than other recent years, with 4,828 settlements (8.3%) and 2,251 withdrawals with benefits (3.9%).<sup>115</sup> In FY 1999, there were 3,748 settlements (6.3%) and 2,084 withdrawals with benefits (3.5%).<sup>116</sup> These resolutions are those in which an administrative process is very likely superior to a private action in district court. The expenses of the parties are almost certainly lower through this administrative resolution than had the parties gone to court. But is a success rate of around ten percent good enough to require all parties in all cases to go through the EEOC? Again, using rough back-of-the-envelope calculations, dividing the pro-rata share of the EEOC's budget in FY 1999 assumed to go toward Title VII cases—roughly \$206 million—by the number of settlements and withdrawals with benefits yields a high price tag of \$29,573 per successful resolution in FY 2000, down substantially from a cost of over \$35,000 per successful resolution in FY 1999.<sup>117</sup> Put in this perspective, the cost of EEOC resolution may be much higher than allowing immediate direct suits in United States district courts for all Title VII plaintiffs. Although ten percent of cases resolved by the EEOC have favorable outcomes, the remaining ninety percent of claims necessarily require some duplication of spending.

Eliminating the EEOC would allow a plaintiff to proceed directly to district court and to get his proverbial “day in court” sooner. While substantial savings of over one-quarter of a billion dollars (the EEOC budget) is a huge advantage, the increased workload of the federal

---

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* The data are similar for most of the seven fiscal years preceding 1999, although FY 2000 had a higher proportion of settlements than previous years. Settlements ranged from a low of 3.0% in FY 1996 to a high of 6.9% in FY 1992. *Id.* Withdrawals with benefits ranged from a low of 3.1% in FY 1997 to a high of 7.0% in FY 1993. *Id.* The percentage of cases successfully resolved ranged from a low of 6.5% in FY 1997 to a high of 13.2% in FY 1993 and is generally around 10% of the cases resolved in a given year. *Id.*

<sup>117</sup> The EEOC total budget for FY 2000 was \$281 million and 74.5% of the cases filed were under Title VII. Thus, assuming even distribution of costs across cases, \$209,345,000 was spent on Title VII cases. Dividing this amount by the sum of the settlements and withdrawals with benefits (7,079) yields an average expense of \$29,573 per successful resolution in FY 2000. The EEOC total budget for FY 1999 was \$279 million and 74% of the cases filed were under Title VII. Thus, \$206,460,000 was spent on Title VII cases. Dividing this amount by the sum of the settlements and withdrawals with benefits (5,832) yields an average expense of \$35,401 per successful resolution for FY 1999.



district courts is the corresponding disadvantage. Perhaps some cases would not be filed in district court for various reasons if the EEOC were eliminated,<sup>118</sup> but if they were filed in district court, the result would be an increase in the caseload of each district judge of nearly ninety cases per year.<sup>119</sup> This is quite substantial considering the number of civil filings per authorized district court judgeship was around 400 in 1998, 1999, and 2000.<sup>120</sup> But several things could be done to mitigate the effect of this caseload increase. The most straightforward solution would be to increase the number of district judges. Another would be to make more effective use of the magistrate judges—the parties could consent to try the case before a magistrate judge as they can today,<sup>121</sup> or the statute could provide for trial before a magistrate judge when the claim is below a jurisdictional amount such as \$10,000.<sup>122</sup> The district courts could establish programs of alternative dispute resolution (“ADR”) for employment discrimination claims.<sup>123</sup>

---

<sup>118</sup> For example, the filing fee in federal court might keep some would-be plaintiffs from filing. But if the market for contingency fee plaintiffs lawyers is efficient, that should not be a concern for plaintiffs whose cases have merit. Based on a pure market approach to obtaining a plaintiff's contingency fee lawyer, if a claim is valid, then putting the “probable merit of his case to the test of the market” will mean that good cases will attract lawyers who wish to prosecute them. *Merritt v. Faulkner*, 697 F.2d 761, 769 (7th Cir. 1983) (Posner, J., concurring in part and dissenting in part). If a plaintiff “cannot retain a lawyer on a contingent fee basis the natural inference to draw is that he does not have a good case.” *Id.* at 770.

<sup>119</sup> In January 2000, there were 651 district judgeships authorized under 28 U.S.C. § 133(a) (1994 & Supp. V 1999). Dividing the FY 2000 EEOC charges filed under Title VII (57,582) by the 651 authorized district court judges yields 88.5 cases per authorized judge.

<sup>120</sup> LEONIDAS RALPH MECHAM, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2000 ANNUAL REPORT OF THE DIRECTOR 22 tbl.4, available at <http://www.uscourts.gov/judbus2000/front/2000artext.pdf> (last visited Sept. 8, 2001).

<sup>121</sup> See 28 U.S.C. § 636(c)(1) (1994) (granting magistrate judges authority to conduct all proceedings of a civil matter upon consent of the parties). Adding more magistrate judges would not have the potential harmful effects some predict if the number of district judges increases. Cf. Akhil Reed Amar, *A Neo-Federalist View of Article III*, 65 B.U. L. REV. 205, 269 n.215 (1985) (“Many of those generally sympathetic to the federal judiciary have expressed concern that overexpansion of the federal bench could weaken the prestige currently enjoyed by Article III judges—prestige that serves . . . to legitimate judicial decisions . . .”).

<sup>122</sup> A district court may grant jurisdiction to a magistrate judge to sentence individuals charged with misdemeanors pursuant to 18 U.S.C. § 3401(a) (1994). By similar reasoning, a less significant civil controversy involving lower alleged monetary damages might be transferred automatically to the magistrate judge.

<sup>123</sup> ADR is an umbrella term that includes arbitration, early neutral evaluation, stipulated fact-finding, mediation, mini-trials, negotiation, summary jury trials, and other methods to resolve disputes using non-traditional methods. See Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 CAL. L.

Perhaps the EEOC could be reconstituted as an optional ADR program that could try to resolve the case upon the election of one or both parties.

Since these cases are often fact-intensive and therefore not conducive to summary disposition, the elimination of the EEOC could pose significant challenges for the judiciary. An alternative, then, is to give the EEOC significantly more control over employment discrimination and then to hear appeals in an Article III court. The merits of such a plan are discussed next.

An increased role for the EEOC would require additional funding for the Commission but reduce the workload of the federal courts in employment discrimination cases to a supervisory or appellate function. The parties could present evidence to a non-Article III administrative law judge ("ALJ") employed by the Commission. The ALJ would be an attorney with specialized expertise in the area of employment discrimination who could hear these claims. A House committee discussing the enforcement provisions of Title VII noted that an agency tribunal staffed by experts and not subject to the technical rules of procedure of district courts would be better than courts at resolving complex Title VII cases.<sup>124</sup> Appeals from an ALJ's ruling could be heard by an appeals panel as of right within the EEOC and then perhaps to the full Commission on a discretionary basis. In many cases, this would be the end of the process for the parties, but either party could then appeal to the district court or circuit court of appeal.<sup>125</sup> This right of appeal would provide the legitimacy of an Article III court to the process but likely result in substantial monetary savings. One criticism of this plan might be a perceived lack of impartiality of the decision makers.<sup>126</sup> The EEOC's mission is to remedy

REV. 577, 580 n.3 (1997) (describing in detail different methods of ADR).

<sup>124</sup> See *supra* text accompanying note 69 (quoting H.R. REP. NO. 92-238, at 11 (1971), reprinted in U.S.C.C.A.N. 2137, 2146).

<sup>125</sup> Congress would decide which court should hear the appeal depending upon factors such as the perceived complexity of the cases and whether Congress felt a trial judge, whose specialty is fact finding, would be more competent than an appellate panel, whose expertise is in deciding questions of law. District courts now hear appeals from bankruptcy courts. 28 U.S.C. § 158(a) (1994).

<sup>126</sup> This criticism was raised by the minority committee report in the House of Representatives enacting the 1972 amendments to Title VII. See H.R. REP. NO. 92-238, at 59 (minority views) ("We contend that the EEOC has attained an image as an advocate of civil rights, and properly so. For this very reason, we submit that it cannot be an impartial arbiter of the law."), reprinted in 1972 U.S.C.C.A.N. 2137, 2169. Others have expressed concern over the quality of administrative decision making. See A. Leo Levin & Michael E. Kunz, *Thinking About Judgeships*, 44 AM. U. L. REV. 1627, 1650 (1995)

employment discrimination. Therefore, it could be perceived as biased against employers and likely to find instances of discrimination in cases in which discrimination did not occur. But safeguards can be established to minimize this concern, and appeals to independent Article III courts also protect employers from abuses by the Commission.

#### CONCLUSION

The EEOC has issued a regulation allowing itself to cede its jurisdiction when a midlevel bureaucrat decides that the Commission probably will not be able to complete its statutory duty of attempting to resolve an employment discrimination claim. This action by the EEOC suggests that there is a problem with the procedures for enforcement of Title VII of the Civil Rights Act of 1964. Disagreement among federal circuit courts of appeals as to the validity of the regulation suggests that both the Supreme Court and Congress should act on this issue. The Supreme Court should grant certiorari to resolve the issue of the validity of 29 C.F.R. § 1601.28(a).<sup>127</sup> Congress should examine whether the system for resolving Title VII claims is working as it was created, or as the present Congress believes it should operate. I have suggested a framework for examining the costs and benefits of the allowance of early suits in district court, but since the offsetting factors are not clearly in favor of one side or the other, some questions remain that cannot be answered without detailed empirical data.

Without providing a numerical proof, I suggest that the EEOC should not be able to issue early right-to-sue letters that allow plaintiffs to go directly into district court. A plain reading of the text of the underlying statute supports this conclusion. Further, the incentive effects on the EEOC and its staff of knowing that they have a way to avoid its workload are difficult to measure but likely substantial. If Congress wants to create a system by which the EEOC can choose the cases it wants to try to resolve and leave other plaintiffs on their own to go to court, it surely may do so. But it is not clear that either the Congress that drafted the legislation or the current Congress approves

---

(“[L]itigating in a non-Article III tribunal hardly assures high quality adjudication.”). Leo Levin and Michael Kunz also describe circumstances that put the impartiality of ALJs in question, such as if they are constrained by allowance-rate goals that in effect set reversal rates in advance of hearings on the merits. *Id.*

<sup>127</sup> See SUP. CT. R. 10(a) (“The following . . . indicate the character of the reasons the Court considers [in determining whether to grant certiorari]: (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter . . .”).

of this system. The vitality of 29 C.F.R. § 1601.28 allows the status quo to persist and gives the EEOC no incentive to become more efficient in its case processing or investigation. Without this regulation, the EEOC would be more accountable to aggrieved employees who would demand action rather than being forced to wait 180 days for the EEOC to “mark time” before issuing a right-to-sue letter.<sup>128</sup> Today, a plaintiff’s attorney who is aware of the backlog at a local EEOC office might ask for an early right-to-sue letter as a matter of course, and the EEOC will probably grant the request and alleviate potential political pressure from unhappy plaintiffs. In fact, in *Parker* and *DeFranks* that appears to be what happened.<sup>129</sup> Absent this procedure, the EEOC might be held more accountable as citizens complain to their representatives in an effort to force the Commission to better perform its statutory duties (or request increased funding from Congress to do so).

The EEOC need not continue under the present regime of working on some cases, handing others off to the district court, and achieving a successful outcome in only about a tenth of those received. I have suggested two significant alternatives to the current system of enforcement. Giving the EEOC exclusive original jurisdiction to hear all Title VII cases on the merits, followed by appeals to Article III courts, utilizes the efficiencies of specialized administrative staff that can become experts in hearing these cases and eliminates costly duplication of resources that occur in the cases that start in the EEOC and later move to United States district court. An alternative that also eliminates the costly duplication, but may substantially increase the caseload of the federal courts, is to eliminate the EEOC’s jurisdiction over Title VII cases and allow plaintiffs to commence an action in district court without taking a detour through the EEOC. In the end, it may be that the current system should prevail, and, with additional resources or re-allocation of resources, giving the EEOC the first crack at resolving discrimination claims may be the most efficient system. In the aftermath of the attacks of September 11 and the return of a budget deficit, cutting government expenditures is once again a priority;<sup>130</sup> the potential savings through reform of the administration of

---

<sup>128</sup> Perhaps, more properly, the plaintiff’s employment discrimination bar should monitor the Commission through its repeated interactions with the EEOC.

<sup>129</sup> See *infra* notes 52-55 and accompanying text (discussing *Parker* and *DeFranks*).

<sup>130</sup> I do not mean to suggest that the federal government deserves or has earned taxpayers’ money when there is a budget surplus in a given year and that the issues of fiscal responsibility and cutting costs should be less important in times of surplus.

Title VII of the Civil Rights Act of 1964, either through small steps or more drastic changes, is an area that deserves careful consideration.

\* \* \* \* \*