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Note

PROCEDURAL DEVELOPMENTS UNDER TITLE VII: PROTECTION FOR BOTH PARTIES?

The procedural structure of Title VII of the Civil Rights Act was designed to safeguard the rights of both plaintiffs and defendants in employment discrimination suits. Frequently ignoring the plain language of the Act, the courts and the EEOC have interpreted the remedial nature of the statute to create a bias in favor of the Title VII plaintiff. Through an examination of judicial interpretation of Title VII procedures in private and EEOC suits, the author concludes that the confusion created by such inaccurate interpretation is detrimental to the rights of both parties and fails to implement the policies of the Civil Rights Act.

I. INTRODUCTION

Title VII of the Civil Rights Act of 1964,[1] as amended in 1972,[2] leaves "much to be desired in clarity and precision," [3] particularly in portions of the Act that deal with procedure. The Equal Employment Opportunity Commission is the agency charged with interpretation of the Act, but its regulations are not always consistent with the statutory language, and the Commission has been known to ignore its rules when expediency so requires. The resulting confusion has worked to the detriment of both plaintiffs and defendants in Title VII suits.

The typical Title VII plaintiff files a claim with the Equal Employment Opportunity Commission expecting a speedy and fair resolution of his problem. Although the Commission and the courts purport to be on the side of the layman/plaintiff, he may find himself waiting months or even years for his case to be resolved. And if he finally does file suit, his case may be dismissed for lack of

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1. 42 U.S.C. §§ 2000e to 2000e-15 (1970) [hereinafter cited as Act].
2. The Act was amended by the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified at 42 U.S.C. §§ 2000e, 2000e-1, -2(a)(2), (c)(2), -3, -4(a)-(g), -5(a)-(g), (i)-(j), -6(c)-(e), -8(b)-(d), -9, -13, -14, -16 (Supp. IV, 1974)). The remainder of the Equal Employment Opportunity Act can be found codified in scattered sections of 5 U.S.C.
3. Cunningham v. Litton Indus., 413 F.2d 887, 889 (9th Cir. 1969).

jurisdiction, even if he follows the procedural directions provided him by the EEOC.

A similar dilemma may await the defendant in a Title VII action. The defendant, typically a company or union, can be subject to virtually unlimited investigation by the Commission on the basis of one charge. If a judicial complaint is filed, it may contain allegations of which the defendant was previously unaware. And, if the Commission is not prompt in its decision to file suit, the defendant may be subject to back-pay liability for a period far in excess of the two years provided in the Act. The result is that the courts find themselves burdened with stale claims and endless procedural litigation.

It is the thesis of this Note that the procedures provided in the Act were formulated to protect both parties and that any interpretation which ignores or circumvents the plain language of the Act must be rejected. In the words of Senator Brock:

> The public is entitled to have its business handled by the Government in an efficient manner. . . .
>
> [But equally] important is that the procedures be equitable. Fundamental to our system of justice is fairness. In our desire to achieve equal employment opportunity we must be fair to both the respondent and the complainant. We cannot forsake the principle that anyone charged with violating the law is presumed innocent until proven guilty. He is entitled to be tried by an impartial tribunal.[4]

Contrasted to this is the present judicial attitude, reflected in the words of an Alabama district court: "Our polestar in this analysis should be the fundamental principle of Title VII that procedural niceties should not be used to impede a claimant in his quest for a hearing on the merits of his case." [5]

The procedural bias in favor of Title VII plaintiffs which has developed in the courts is a result of interpreting the Act as a "remedial" statute.[6] This classification implies that legislation is to be read broadly to supply or restore rights to a class of persons

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4. 118 CONG. REC. 732 (remarks of Senator Brock) (1972).

5. Shaffield v. Northrop Worldwide Aircraft Servs., Inc., 373 F. Supp. 937, 940 (M.D. Ala. 1974).

6. *See* Antonopulos v. Aerojet-General Corp., 295 F. Supp. 1390 (E.D. Cal. 1968). "We are not dealing with businessmen-plaintiffs or plaintiffs accustomed to consulting lawyers about their rights. This law is a remedial one. . . ." *Id.* at 1395.

who were formerly denied those rights. A similar bias is evident in the Commission's efforts to bypass its own regulations when they tend to hinder enforcement. The problem with this approach is that it has tended to deemphasize procedural rights granted to both parties by distorting the statutory time scheme. One might question why, after the major revision of the statute in 1972, a detailed procedural format was preserved. Presumably the system was meant to even-handedly preserve the rights of both parties. However, much of its symmetry has been destroyed through piecemeal judicial interpretation.

But the EEOC regulations and the judicial gloss liberalizing the statute cannot be ignored. Parties, lay and lawyer alike, are forced to deal with them in every Title VII action. Only by recognizing the inconsistencies and dealing with them can the difficulties be resolved. This Note will highlight some of the procedural problems as they affect the private suit and the EEOC suit.

II. The Structure of the Act

In the original Civil Rights Act of 1964, a right of action was created in an individual who was being discriminated against because of race, color, religion, sex, or national origin.[7] Under the statutory scheme the individual was given the dual role of private litigant and public attorney general charged with the primary duty of enforcing a congressional act.[8] The EEOC was only empowered to investigate charges and attempt conciliation between the parties;[9] except for certain exceptional situations, it could not bring an action for court enforcement or injunction.[10]

The 1972 amendments gave the Commission a more prominent role in policing employment practices. The originally proposed amendments would have granted the Commission cease and desist powers similar to those of the National Labor Relations Board. However, a last minute legislative compromise resulted in the

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7. 42 U.S.C. § 2000e-2 (1970).

8. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).

9. Tuft v. McDonnell Douglas Corp., 517 F.2d 1301, 1305 (8th Cir. 1975), *cert. denied*, 96 S. Ct. 782 (1976).

10. For a more thorough discussion, see Berg, *Equal Employment Opportunity Under the Civil Rights Act of 1964*, 31 Brooklyn L. Rev. 62 (1964); Sape & Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 Geo. Wash. L. Rev. 824 (1972); *Developments in the Law: Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109 (1971).

limited enforcement power to initiate an action in federal court against the offending party. As a result of this measure, much of the floor debate on the bill is useless as legislative history, and many internal ambiguities were created in the Act itself.

The original version of the Act set up a compact and carefully timed system for filing and processing a charge. The complainant was given 90 days from the time of the allegedly unlawful employment practice to file a charge with the EEOC.[11] If the state had a fair employment practices commission, the charge was first to be filed locally and the complainant then had 210 days from the date of the allegedly illegal practice to file with the EEOC.[12] The EEOC was given 30 days (usually expanded to 60) from the date of the allegedly illegal practice to investigate the charge and to attempt a conciliation. Upon the expiration of the 30 (or 60) day period, the Commission was to notify the complainant of his right to file suit if conciliation efforts had failed. The individual was then allowed to bring a private suit within 30 days of receipt of this notice.[13]

Unfortunately, this timetable proved too restrictive for the Commission. Certain changes were made under the 1972 amendments to help ease its burden. The time for filing a charge with the Commission has been expanded from 90 to 180 days, or from 210 to 300 days if the state has a fair employment practices commission.[14] The EEOC must now serve notice on the charged party within 10 days of the filing of the complaint.[15] The Commission has also been empowered to bring an action after a 30-day reconciliation period has passed,[16] but if it has not instituted suit or achieved a conciliation 180 days after a charge was filed, it must notify the complainant, who then has an additional 90 days during which he may bring his own suit.[17] As a further exhortation to speed, the district court is admonished to "cause the case to be

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11. 42 U.S.C. § 2000e-5(d) (1970), *as amended,* 42 U.S.C. § 2000e-5(e) (Supp. IV, 1974).

12. *Id.* §§ 2000e-5(b), (c), *as amended,* 42 U.S.C. § 2000e-5(c), (d) (Supp. IV, 1974). If the complaint had initially been filed with the state agency, the time for filing with the EEOC would have been increased to 210 days.

13. *Id.* § 2000e-5(e), *as amended,* 42 U.S.C. § 2000e-5(f)(1) (Supp. IV, 1974).

14. 42 U.S.C. § 2000e-5(e) (Supp. IV, 1974).

15. *Id.* § 2000e-5(b).

16. *Id.* § 2000e-5(f)(1).

17. *Id.*

in every way expedited." If a trial has not been scheduled within 120 days of the time when the issue is joined, the assigned judge may appoint a master to assist him.[18]

Although on its face the statutory scheme appears to establish a detailed and specific procedural timetable, certain glaring omissions remain. There is no outside time limit on the state agency that elects to keep a case longer than 60 days,[19] nor is there a time limit during which the EEOC must bring suit.[20] And, there is still no limit to the time a case can drag on once it reaches the district court.

These technical requirements have provided a fertile ground for recent litigation. However, the resolutions reached by the courts are in some instances far removed from the literal statutory requirements. Much of the morass surrounding Title VII litigation is a result of a lack of judicial uniformity in approaching the statute—a confusion between jurisdiction and procedure.

III. The Private Suit

A. *Jurisdictional Requirements*

As the previous discussion illustrates, the Act describes a detailed procedure which must be followed in filing a Title VII charge. However, the federal courts have isolated two procedural steps[21] as "jurisdictional" prerequisites to the private suit. The individual complainant must (1) file a timely charge of employment discrimination with the EEOC, and (2) receive and act upon the Commission's statutory notice of the right to sue.[22]

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18. *Id.* § 2000e-5(f)(5). *See also* Harris v. Sherwood Medical Indus., Inc., 386 F. Supp. 1149 (E.D. Mo. 1974). Although this provision is reflective of a general legislative intent to speed up the process, it is otherwise useless. Presumably under the Federal Rules a federal judge can appoint a master at any time, Fed. R. Civ. P. 53, and the Act fails to give any outside time limit on how long a case may actually take in the district court.

19. *See* 42 U.S.C. § 2000e-5(d) (Supp. IV, 1974).

20. *See id.* Some courts have read in a limit of 180 days. *See* notes 128-33 *infra* and accompanying text.

21. These requirements were first set forth in Choate v. Caterpillar Tractor Co., 402 F.2d 357 (7th Cir. 1968) without explanation or case support.

22. Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 798 (1973); Beverly v. Lone Star Lead Constr. Corp., 437 F.2d 1136, 1140 (5th Cir. 1971); Cox v. United States Gypsum Co., 284 F. Supp. 74 (N.D. Ind. 1968), *aff'd,* 409 F.2d 289 (7th Cir. 1969).

In this context, "jurisdictional" presumably refers to subject matter jurisdiction. Although the courts and the commentators have spoken as if that were the case,[23] their approach raises some disturbing questions. For example, of all the procedural requirements listed in the Act, why did the courts choose these two as delimiting the complainant's right of action? Traditionally, subject matter jurisdiction has referred to the power of the federal courts to entertain an action.[24] If this is so, can liberal statutory interpretation that expands or contracts the federal courts' "power" to hear cases be constitutionally justified? Do the actions of the parties and the "equities" of the situation enable a court to hear cases over which it otherwise would have no subject matter jurisdiction? Or, has the term "jurisdictional" been used inaccurately and inarticulately to describe a waivable restriction which is really only procedural?

Constitutionally, the lower federal courts are courts of limited jurisdiction; their existence and their power depend upon specific acts of Congress.[25]

> [J]urisdiction over the subject matter exists when the constitution or the legislature or the unwritten law has told *this court* to do *something* about *this kind of dispute.*
>
> Once the defendant and the dispute are thus properly *in this court,* then, . . . [w]hat the court does about the dispute merely involves the exercise of its power to adjudicate it somehow.[26]

Title VII gives the federal courts power—"jurisdiction"—to hear employment discrimination disputes. However, when the courts refer to procedural rules as "jurisdictional prerequisites," they are merely confusing discretion, whether they ought to hear a case, with jurisdiction, their power to hear the case. "When the word [jurisdiction] is employed in this unfortunate and confusing sense, it is wholly disconnected with the existence of power."[27] Further-

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23. *See, e.g.,* Comment, *A Primer to Procedure and Remedy Under Title VII of the Civil Rights Act of 1964,* 31 U. PITT. L. REV. 407, 409 (1970).

24. Brougham v. Oceanic Steam Navigation Co., 205 F. 857, 859-60 (2d Cir. 1913); Morse, *Judicial Self Denial and Judicial Activism—the Personality of the Original Jurisdiction of the Federal District Courts,* 3 CLEV.-MAR. L. REV. 101, 107 (1954).

25. Morse, *supra* note 24, at 113-14.

26. Z. CHAFEE, SOME PROBLEMS OF EQUITY 306 (1950) (emphasis original).

27. *Id.* at 303.

more, the courts have not generally distinguished true jurisdictional questions from what Professor Chafee terms "principles of right decision." [28] Such a distinction would help clarify otherwise puzzling dispositions of so-called jurisdictional questions in plaintiffs' Title VII suits.

The problem of defining the nature of the two prerequisites is most evident when the courts try to apply "equitable" considerations to solve Title VII "jurisdictional" questions. Much confusion could be avoided by replacing "jurisdictional" with a less restrictive term such as "procedural." This distinction is significant; there is a vast difference between treatment accorded jurisdictional prerequisites and that accorded such procedural requirements as statutes of limitations. Failure of a condition that is jurisdictional extinguishes the right of action and the liability; it is not merely a bar to the remedy.[29] On the other hand, a procedural condition, such as a statute of limitations, may bar a remedy, but it does not extinguish the right of action or the liability. Traditional equitable doctrines such as waiver, tolling, and estoppel can revive the claim or extend the limitation.[30]

With these distinctions in mind, treatment afforded the two "jurisdictional prerequisites" by the courts will be examined.

1. *Filing the Charge*

Filing a "timely charge" is the first requirement of a private Title VII suit. According to the Act, a charge is timely if it is filed no more than 180 days after the allegedly unlawful employment practice.[31] The charge must be filed by or on behalf of the individual claimant, or by the Commission.[32] The Act also requires that the charge be "in writing under oath." [33] The requirement of a "writing under oath" is treated as procedural; the original "complaint" is often simply an unsworn letter setting out the complainant's grievance, but the EEOC regulations allow any defect in the

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28. *Id.* at 314.

29. *See* cases discussed in Guy v. Robbins & Myers, Inc., 525 F.2d 124, 127-28 (6th Cir. 1975).

30. Reeb v. Economic Opportunity Atlanta, Inc., 516 F.2d 924, 927 (5th Cir. 1975).

31. *See* note 14 *supra* and accompanying text.

32. 42 U.S.C. § 2000e-5(e) (Supp. IV, 1974).

33. *Id.* § 2000e-5(a).

charge to be remedied by amendment relating back to the date of the original charge.[34]

The courts have generally followed the Commission in this interpretation. The general rule was expressed in *Choate v. Caterpillar Tractor Co.:*[35] the requirement that the complaint be filed under oath should be interpreted as "directory and technical rather than mandatory and substantive."[36] The plaintiff can verify or add to his statements at a later time and preserve the filing date of his original charge.

Other courts have gone further in liberalizing the writing requirement and have not required that the sworn charge refer specifically to the earlier unsworn statement. So long as the same events were mentioned in both and the charge could be reasonably interpreted as relating to the earlier complaint, the requirement of a writing under oath has been held satsified.[37] The facts in *Pittman v. Anaconda Wire & Cable Co.*,[38] are representative of this class of cases.

In *Pittman*, the plaintiff sent an unsworn letter of complaint to the EEOC on the date his employment was terminated for allegedly discriminatory motives by the defendant company. Four hundred fifty days later, the plaintiff filed a written, sworn, formal charge with the Commission. The defendant company moved to dismiss for lack of subject matter jurisdiction claiming that the plaintiff had failed to file a "timely charge." The court refused to grant the dismissal, holding that, since the defects in the first informal complaint were cured by the second formal one, the complaint was timely since the effective date of filing was that of the first.[39] The court's explanation that "these jurisdictional requirements must not be technically construed to defeat the purpose of the Act"[40] is an example of the confusion brought about by using the "jurisdictional" label. Certainly if the requirement is really a restriction on subject matter jurisdiction, the court must interpret it "technically." For example, no federal court has suggested that the

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34. 29 C.F.R. § 1601.11 (1975). *See also* Choate v. Caterpillar Tractor Co., 402 F.2d 357, 360 (7th Cir. 1968).

35. 402 F.2d 357 (7th Cir. 1968).

36. *Id.* at 359.

37. Stastny v. Southern Bell Tel. & Tel. Co., 293 F. Supp. 574 (W.D.N.C. 1968).

38. 11 BNA FAIR EMPL. PRACT. CAS. 9 (E.D.N.C. 1974).

39. *Id.* at 12-13.

40. *Id.* at 11.

jurisdictional requirement of case or controversy be interpreted other than technically. If, on the other hand, the court meant that the purpose of the Act was to afford private, untutored complainants a right of action in the federal courts by giving the courts subject matter jurisdiction, then it might well have argued that less than strict compliance with procedural rules should not defeat the plaintiff's right of action.

The time period for filing, like the requirement of a writing under oath, has been liberally interpreted by many courts to give the complainant every available chance to bring his suit. For instance, in *Davis v. Valley Distributing Co.*[41] the plaintiff filed his first complaint with the Arizona Civil Rights Commission 114 days after an allegedly discriminatory discharge. Since this was long past the 60 day state statute of limitations, the Arizona Commission dismissed the complaint. The plaintiff then filed with the EEOC 135 days after the discriminatory act. The EEOC referred the complaint to the Arizona commission, but the state commission returned it to the EEOC. One hundred fifty-two days after the allegedly discriminatory act the EEOC assumed jurisdiction. At this time the period for filing a Title VII action with the EEOC was 90 days, or 210 days if the complaint were first filed with a state FEP Commission.[42]

After the plaintiff filed with the EEOC, but before that Commission assumed jurisdiction, the 1972 amendments became effective. These amendments lengthened the time period for filing with the EEOC from 90 to 180 days, or from 210 to 300 days in a state like Arizona that had an FEP Commission.[43] Section 14 of the 1972 amendments provided that the new time framework would apply to [1] charges "pending with the Commission on the date of enactment . . . and [2] all charges filed thereafter."[44] The court found that the charge filed by the plaintiff with the EEOC was timely. If the charge were considered filed when the EEOC received it 135 days after the plaintiff's discharge, then it

41. 522 F.2d 827 (9th Cir. 1975).

42. *Id.* at 829, *citing* 42 U.S.C. § 2000e-5(d) (1970).

43. 42 U.S.C. § 2000e-5(e) (Supp. IV, 1974).

44. Act of March 24, 1972, Pub. L. No. 92-261, § 14, 86 Stat. 103 (the Equal Employment Opportunity Act is codified in scattered sections of 5, 42 U.S.C.). "The amendments made by this Act to section 706 of the Civil Rights Act of 1964 shall be applicable with respect to charges pending with the Commission on the date of enactment of this Act and all charges filed thereafter." *Id.*

was "pending" when the amendments took effect. If it were considered filed when the EEOC assumed jurisdiction 152 days after the discharge, then it was a charge filed "thereafter." The court applied the 180-day limitation of the amended Act,[45] although the events occurred while the shorter 90-day limitation of the original Act was effective.

If this court had treated a "timely filing" as a jurisdictional requirement, presumably it would not have been empowered to hear the merits of the case, because under that interpretation the plaintiff's right of action would have ceased to exist at the end of 90 days. Instead, the court treated the time period as a statute of limitations. Since "statutes of limitations go to matters of remedy, not to destruction of fundamental rights,"[46] the court had the power to hear the dispute, and the defendant's liability was not extinguished when the plaintiff failed to file within 90 days. The effect of the new statute of limitations was to restore the plaintiff's right to a remedy by removing a bar to the defendant's substantive liability. The subject matter jurisdiction of the court was not affected.

Upon a similar set of facts, however, an Indiana district court reached the opposite result. In *Bottoms v. St. Vincent's Hospital*,[47] the plaintiff first filed her charge with the EEOC 122 days after the alleged act of discrimination. At that time both the EEOC and the state commission had a 90-day limitation period for filing complaints. The EEOC referred the charge to the state FEP commission, which returned it to the EEOC without taking any action. The plaintiff argued that the longer 210-day limitation period should apply for filing with the EEOC because the charge had been referred to a state agency, although she had not filed with either the state agency or the EEOC within their time limits.[48] This argument might be plausible if the 90-day limit were treated as a statute of limitations, since the right of action would not have been extinguished by the plaintiff's failure to meet the 90-day limit in either forum. However, the court treated the 90-day limit as a strict prerequisite to its subject matter jurisdiction.[49]

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45. 522 F.2d at 832.

46. *Id.* at 830 n.7, *quoting* Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314 (1945).

47. 11 BNA FAIR EMPL. PRAC. CAS. 392 (S.D. Ind. 1975).

48. *Id.*

49. *Id.* at 394.

When the plaintiff failed to meet the limit, she lost her right of action and the court lost its power to hear the case. The question was not removal of a bar to the defendant's liability as it had been in *Davis.* The defendant simply ceased to be liable when the plaintiff failed to meet the 90-day limitation.

Even in *Bottoms,* however, there is the suggestion that the plaintiff could have preserved her claim if she had shown "the required diligence" in either the state or the federal forum.[50] Since subject matter jurisdiction cannot be waived or extended by either party, it seems odd to suggest that the plaintiff's diligent, albeit misguided, attempt to comply with the statute could create or extend that jurisdiction. The suggestion is more in keeping with the equitable considerations that surround the application of statutes of limitations.

Only one court to date has directly rejected the suggestion that the "timely filing" requirement is jurisdictional. In *Reeb v. Economic Opportunity Atlanta, Inc.,*[51] the plaintiff's employment was terminated on September 24, 1969. However, she did not file charges of sex discrimination with the EEOC until April 28, 1970, seven months later. Despite the excuse that she had not learned that the discharge was discriminatory until that time, the district court dismissed the suit for lack of subject matter jurisdiction. The defendant's motion to dismiss was granted because the plaintiff had failed to meet the "jurisdictional prerequisite" by filing suit within 90 days of the allegedly discriminatory act.[52] The Fifth Circuit reversed, holding that the 90-day requirement was not a jurisdictional prerequisite, but rather a statute of limitations.[53]

The court noted that the 90-day filing period should be considered an administrative requirement having reference only to charges filed with the EEOC. "In terms [of the Act], at least, it had nothing to do with the jurisdiction of the United States district courts over a suit later authorized by the EEOC."[54] In applying the requirement, the court pointed out that other courts have frequently resorted to common law equitable doctrines such as waiver, estoppel, and tolling "to prevent an injustice which might

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50. *Id.*

51. 11 BNA FAIR EMPL. PRAC. CAS. 234 (N.D. Ga. 1974), *rev'd,* 516 F.2d 924 (5th Cir. 1975).

52. 11 BNA FAIR EMPL. PRAC. CAS. 234 (N.D. Ga. 1974).

53. 516 F.2d 924, 928 (5th Cir. 1975).

54. *Id.* at 926.

otherwise be worked by a literal application of the statute."[55] For instance, courts have applied the tolling principle to cases of continuing discrimination,[56] and to cases in which the employee sought to pursue his claim under grievance procedures established by a labor contract before filing with the EEOC.[57] The *Reeb* court concluded as follows:

> The *ratio decidendi*, however, of the leading cases dealing with timing requirements in general under the Act compels the conclusion that the ninety day requirement is not "jurisdictional" in the sense that compliance with it *vel non* determines the jurisdiction of the district court, without respect to any of the other circumstances in a particular case. We accept the view that the requirement should be analogized to statutes of limitations. Equitable modifications, such as tolling and estoppel, that are applied to them should also be applied here.[58]

Applying these equitable doctrines to the facts, the court in *Reeb* held that the statute of limitations did not begin to run until it was apparent or should have been apparent to a reasonably prudent person that there had been an act of discrimination.[59] This construction was supported by the defendant's failure to claim any prejudice to its cause because of the later filing date, and by the court's finding that the claim was not stale.[60] The court alternatively indicated that the defendant may have been estopped from asserting the statute of limitations by its alleged concealment of the discrimination from the plaintiff.[61] These considerations are common concerns of a court of equity in deciding whether to toll a statute of limitations.

The Fifth Circuit in *Reeb* relied upon the Supreme Court's decision in *Love v. Pullman Co.*[62] Although *Love* did not concern the time period for filing with the EEOC, it did set guidelines for interpreting the statutory prerequisites of a private Title VII suit equitably, as procedural matters.

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55. *Id.* at 927.
56. *See* Cox v. United States Gypsum Co., 409 F.2d 289 (7th Cir. 1969).
57. *See* Culpepper v. Reynolds Metals Co., 421 F.2d 888 (5th Cir. 1970).
58. 516 F.2d 924, 928 (5th Cir. 1975).
59. *Id.* at 931.
60. *Id.* at 930.
61. *Id.*
62. 404 U.S. 522 (1972).

In *Love,* the plaintiff sent the EEOC a "letter of inquiry" charging racial discrimination instead of first filing a complaint with the state FEP commission as required by the Act. In accordance with its custom, the EEOC referred the matter to the Colorado Civil Rights Commission. The Colorado Commission returned the complaint to the EEOC without taking any action, and the EEOC automatically filed it at that time. The court of appeals dismissed the suit because the plaintiff had not "filed" the charge himself with the Colorado Commission, as prescribed by the Act.[63] The Supreme Court reversed, holding that the EEOC practice of keeping a complaint in "suspended animation," *i.e.,* holding it without formally filing, "fully complied with the intent of the Act."[64] The Court said that since the defendant had not demonstrated any prejudice to its interests, "[t]o require a second 'filing' by the aggrieved party after termination of state proceedings would serve no purpose other than the creation of an additional procedural technicality. Such technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process."[65]

Several cases after *Love* speak of this practice—holding a charge suspended when it is first filed with the EEOC and then referring it to a state agency—as "tolling" the time period.[66] However, tolling is an equitable doctrine that is used to apply statutes of limitations, not to expand jurisdiction. It is reasonable to infer from these cases that the timely filing requirement is not really jurisdictional. It is in fact a statute of limitations which is subject to all the equitable considerations normally applied to such statutes.

2. *Filing Suit*

The second "jurisdictional" requirement in a private Title VII suit is that the plaintiff receive and act upon the Commission's statutory notice. The private plaintiff has 90 days after receipt of the notice to file suit in federal court.[67]

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63. Love v. Pullman Co., 430 F.2d 49, 52-53 (10th Cir. 1970), *citing* 42 U.S.C. § 2000e-5(b), (d) (1970).

64. Love v. Pullman Co., 404 U.S. 522, 525 (1972).

65. *Id.* at 526-27.

66. Richard v. McDonnell Douglas Corp., 469 F.2d 1249 (8th Cir. 1972); Vigil v. American Tel. & Tel. Co., 455 F.2d 1222 (10th Cir. 1972); Anderson v. Methodist Evangelical Hosp., Inc., 464 F.2d 723 (6th Cir. 1972).

67. 42 U.S.C. § 2000e-5(f)(1) (Supp. IV, 1974).

An analysis of the courts' handling of the two-letter notification system that was employed by the EEOC until last year will demonstrate the difficulties created by describing the notice requirement as jurisdictional.[68] The pertinent provision of Title VII is as follows:

> If a charge filed with the Commission pursuant to subsection (b) [of this section] is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, 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. . . .[69]

The EEOC practice was to wait to issue notice, regardless of the length of time, until one of the following occurred: dismissal of the charge, failure of conciliation, or determination not to file suit. Upon the occurrence of one of these facts, the EEOC would issue a letter advising the charging party of the Commission's disposition of the case and further informing him that he could then request a "Notice of Right-to-Sue." On receipt of this second letter, the complainant was informed he had only 90 days in which to file suit. This procedure was developed to "allow a charging party the option of either requesting the right to sue immediately . . . or waiting indefinitely to see whether the Commission [would] sue the respondent itself."[70] The charging party could request his Notice of Right-to-Sue after 180 days, whether or not the Commission had disposed of his case,[71] but the EEOC did not publicize this option except through its regulations.

This procedure has caused controversy. In *DeMatteis v. Eastman Kodak Co.*,[72] the complainant's charge was dismissed by the EEOC because it found no reasonable cause to believe the charge,

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68. This practice has been abandoned by the Commission. New Developments, [1974-1975 Transfer Binder] CCH EMPL. PRACTICES GUIDE ¶ 5318 (1975).

69. 42 U.S.C. § 2000e-5(f)(1) (Supp. IV, 1974).

70. Harris v. Sherwood Medical Indus., Inc., 386 F. Supp. 1149, 1155 (E.D. Mo. 1974).

71. 29 C.F.R. § 1601.25b, c (1974).

72. 511 F.2d 306, *reaff'd and modified*, 520 F.2d 409 (2d Cir. 1975).

and the Commission so notified the complainant by letter on May 8, 1973. The notice of dismissal, however, also advised DeMatteis that his 90-day period for filing suit would not begin to run until he requested and received a second letter, a Notice of Right-to-Sue, from the EEOC. Consequently, the complainant's attorney delayed requesting the second letter until July 26, 1973. The suit was finally filed on October 3, 1973, far beyond 90 days from the first letter of May 8th, but within 90 days of the date the Right-to-Sue letter was requested.

The Second Circuit Court of Appeals adhered to the jurisdictional formula. In its initial opinion, the court held that the first letter gave sufficient notice to begin running the 90-day time limit, because the EEOC regulations did not require a formal Notice of Right-to-Sue for dismissal of charges. The purpose of the special notice was "definitely to fix a time when the administrative remedies had ended"[73] in cases that the EEOC had processed beyond the investigatory stage. Since it was evident that this dismissal had definitely ended the Commission's processes, there was no need for a more complete notification. The court expressed concern that, since there was no limit on the time when the second letter must be requested and sent, a contrary holding would enable the Commission and the charging party to extend the 90-day period indefinitely by postponing its beginning.[74]

However, it became evident on rehearing that the complainant had been misled by his reliance on the EEOC's instructions. Without abandoning its jurisdictional formulation, the court decided that in fairness to the plaintiff it must apply equitable principles to suspend the 90-day requirement.[75] The court allowed the case to proceed to trial on the merits, but limited the precedential effect of its decision to cases begun within 90 days of its original opinion.[76] The decision reflects an equitable consideration which might well be a factor in construing a statute of limitations, but it is not an appropriate jurisdictional standard. As the court said in its earlier opinion, "[t]he jurisdiction of the federal court is carefully guarded against expansion by judicial interpretation."[77]

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73. *Id.* at 310.

74. *Id.* at 311.

75. DeMatteis v. Eastman Kodak Co., 520 F.2d 409, *reaff'g and modifying* 511 F.2d 306 (2d Cir. 1975).

76. *Id.*

77. *Id.* at 311, *quoting* American Fire & Cas. Co. v. Finn, 341 U.S. 6, 17 (1951).

The flexibility afforded the charging party in *DeMatteis* has not been universally provided. A recent series of district court decisions, following the reasoning of *Harris v. Sherwood Medical Industries, Inc.*,[78] has interpreted the filing requirement much more strictly.[79]

In *Harris*, the first notice received by the complainant was of the Commission's failure to conciliate. Nevertheless, the court held that this was the only notice necessary under the Act, and that once such notice was given the 90-day period in which the individual must bring suit began to run. The court also said it was not necessary to inform the plaintiff that she had only 90 days to bring suit. "While the furnishing of such additional information may well be desirable, it is not a necessary element of notice under the statute." [80]

The *Harris* opinion demonstrates the effect of a strictly jurisdictional approach to the filing requirement. The court ignored the plaintiff's reliance upon the instructions of the EEOC. The court also ignored the information supplied by the EEOC regarding the number of pending cases in which plaintiffs had similarly relied and would be adversely affected by a dismissal.[81] Its only concern was that the notice given had satisfied the statutory purpose—not "to advise prospective litigants of their legal rights, but merely to announce [that] the administrative remedies set forth in the statute have been exhausted." [82]

However, one might question whether administrative remedies were, in fact, exhausted in *Harris*. The court did not deal with this question satisfactorily. The cases it cited[83] all concerned actions under the 1964 Act when the Commission did not have the power to bring suit. Prior to the amendments, if the EEOC failed to conciliate, its processes were at an end. However, after the 1972 amendments the EEOC could file suit itself if conciliation efforts failed.

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78. 386 F. Supp. 1149 (E.D. Mo. 1974).

79. Bradshaw v. Zoological Soc'y, 10 BNA FAIR EMPL. PRAC. CAS. 1268 (S.D. Cal. 1975); Mungen v. Choctaw, Inc., 10 BNA FAIR EMPL. PRAC. CAS. 1345 (W.D. Tenn. 1975); Wilson v. Sharon Steel Corp., 11 BNA FAIR EMPL. PRAC. CAS. 145 (W.D. Pa. 1975).

80. 386 F. Supp. at 1153.

81. *Id.* at 1151-52.

82. *Id.* at 1155. *See* notes 122-26 *infra* and accompanying text.

83. 386 F. Supp. at 1153-54.

The overriding concern of the *Harris* court was that the EEOC not be allowed to arbitrarily extend the 90-day limitation. Although this is a valid concern, the court's solution was directly contrary to previous case law. The opinions cited by the *Harris* court to support its strict jurisdictional approach had held that "recognized equitable grounds" could serve to toll the statutory time limit for filing suit.[84]

The Eighth Circuit Court of Appeals has effectively overruled *Harris* in *Tuft v. McDonnell Douglas Corp.*[85] The fact pattern in *Tuft* was similar to that of *Harris*. The plaintiff first received a letter from the EEOC advising her that conciliation efforts in her case had failed, and that she could request a Right-to-Sue letter at any time. The letter suggested that she first retain a lawyer since after receiving the second letter, the Right-to-Sue letter, she would have only 90 days in which to file suit. She filed her action a few days after receiving the second letter but more than 90 days after receiving the first letter. The defendant moved to dismiss for lack of subject matter jurisdiction. The court denied the motion for two reasons.

First, the Eighth Circuit agreed that the purpose of the notification requirement is to fix a definite point in time at which administrative remedies have been exhausted so that the 90-day limitation period for filing a private suit can begin to run.[86] Unlike the district court in *Harris*, the *Tuft* court did not believe that the administrative remedies were exhausted until the EEOC had determined whether or not to file suit. Therefore, no notice was required until such a determination was made, and if notice of failure of conciliation were given, it would not be sufficient to begin the 90-day period. The court's holding was based upon a review of the legislative history of Title VII from which it reasoned that Congress had intended the EEOC to have the primary duty of enforcing the Act. The court concluded that the agency should be given as long a time as necessary to reach a final disposition of the charge.

However, in Ms. Tuft's case, which was not atypical, the EEOC had the case for over two years before it announced that concilia-

84. Stebbins v. Nationwide Mut. Ins. Co.,' 469 F.2d 268, 269 (4th Cir. 1972), *cert. denied*, 410 U.S. 939 (1973). *See also* cases cited in Harris v. Sherwood Medical Indus., Inc., 386 F. Supp. 1149, 1153 (E.D. Mo. 1974).

85. 517 F.2d 1301 (8th Cir. 1975), *cert. denied*, 96 S. Ct. 782 (1976).

86. *Id.* at 1308, *quoting* Beverly v. Lone Star Lead Constr. Corp., 437 F.2d 1136, 1140 (5th Cir. 1971).

tion efforts had failed. Under the *Tuft* decision, the EEOC did not need to issue any notice upon failure of conciliation; it could have held up the case indefinitely until it made a determination not to file suit, or until Ms. Tuft requested a Notice of Right-to-Sue of her own initiative.

Second, the court evaluated the quality of notification given by the first letter. That letter explicitly informed the plaintiff that the 90-day limitation period, which the court characterized as a statute of limitations,[87] would not begin to run until she received the second letter. Therefore, the first letter could not constitute effective notice: "Since the first letter did not give Ms. Tuft any effective notification that she could sue within 90 days of the receipt of that letter, it cannot serve to initiate the running of the statute of limitations." [88] The court also considered factors such as the plaintiff's reliance on the EEOC procedures and the failure of the defendant to demonstrate prejudice as important in reaching an equitable solution to the controversy.[89]

The problem with the first argument, that notice need not issue until administrative remedies have been exhausted, is that it is based upon a faulty reading of the statute. The statutory language requires that the Commission "shall so notify" the claimant in either of two cases: (1) if a charge is dismissed; or (2) after 180 days if the Commission has not filed a civil action or entered into a conciliation agreement.[90] The plain implication of this section is that some notice shall issue after the Commission has had 180 days to consider the case, regardless of the progress of the proceedings. The *Tuft* court's interpretation, however, was that the EEOC need not notify the aggrieved party until it had either dismissed the case or made a determination not to file suit. This inconsistency will be dealt with at greater length in the following discussion.

The court's second argument, that notification must be actual to be effective, is consistent with prior case law. In *Franks v. Bow-*

87. *Id.* at 1309-10.

88. *Id.* at 1310.

89. "Moreover, it is undisputed that Ms. Tuft relied on the Commission's procedures, and in the absence of prejudice to the defendant, she should not be penalized for any errors or omissions of the EEOC." *Id.* (footnotes omitted). *See also* DeMatteis v. Eastman Kodak Co., 511 F.2d 306, *reaff'd as modified,* 520 F.2d 409 (2d Cir. 1975).

90. 42 U.S.C. § 2000e-5(f)(1) (Supp. IV, 1974).

man Transportation Co.,[91] for example, the Right-to-Sue letter was delivered to the complainant's house, but he proved that he had never personally received it. In accordance with the majority view that the statutory notice must be "actual and effective" to begin the running of the (then) 30-day period, the Fifth Circuit held that the 30-day period for filing suit did not begin until a second letter was actually received by the plaintiff a year later.[92] The *Franks* court refers to the time requirement as a "statutory limitation period" [93] rather than as a jurisdictional requirement.

> In terms of the policy behind limitations periods generally, the claimant can hardly be said to have slept on his rights if he allows the thirty-day period to expire in ignorance of his right to sue. . . . Congress did not intend to condition a claimant's right to sue under Title VII on fortuitous circumstances or events beyond his control which are not spelled out in the statute.[94]

While both *Tuft* and *Franks* styled the 90-day filing period as a statute of limitations, *DeMatteis* termed it a jurisdictional prerequisite. In application, however, all three courts looked to the same factor—effectiveness of notification—as the final criterion that triggered the time period on the basis that any other reading would be unfair, or "inequitable" to the plaintiff. The "equities" plainly should not be considerations in determining subject matter jurisdiction.

While these courts have all used different language to describe the two private suit requirements, filing a timely charge and promptly acting upon notification by the EEOC, they have uniformly treated the requirements as statutes of limitations, with all the consequences implied by that label. This treatment is probably the correct one, since it comports best with the statutory purpose and with the treatment the Supreme Court has afforded to similar provisions in other "remedial" statutes.

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91. 495 F.2d 398 (5th Cir. 1974), *rev'd on other grounds*, 96 S. Ct. 1251 (1976).

92. *Id.* at 404. *See also* Tuft v. McDonnell Douglas Corp., 517 F.2d 1301, 1310 (8th Cir. 1975), *cert. denied*, 96 S. Ct. 782 (1976); Taylor v. Pacific Intermountain Express Co., 394 F. Supp. 72 (N.D. Ill. 1975).

93. Franks v. Bowman Transp. Co., 495 F.2d 398, 403 (5th Cir. 1974), *rev'd on other grounds*, 96 S. Ct. 1251 (1976).

94. *Id.* at 404.

B. *Other Remedial Statutes*

In its interpretation of similar statutory time limits in other federal statutes, the Supreme Court has used principles of laches and tolling to ensure equitable application of the statutory limitation periods. In *Burnett v. N.Y. Central Railroad Co.*,[95] the Court said that the three-year limitation period of the Federal Employers' Liability Act was tolled when the plaintiff instituted suit in a state court, even though venue was later found to be improper and the state case was dismissed. The plaintiff's subsequent federal court suit was technically barred by the FELA three-year limit. The Court, however, took the position that "the basic inquiry is whether congressional purpose is effectuated by tolling the statute of limitations in given circumstances. In order to determine congressional intent, we must examine the purposes and policies underlying the limitation provision, the Act itself, and the remedial scheme developed for enforcement of the rights given by the Act." [96]

The general purposes of statutes of limitations are to put the defendant on notice and to relieve courts of the problem of hearing stale claims because the plaintiff has "slept on his rights." [97] These policies are "frequently outweighed, however, where the interests of justice require vindication of the plaintiff's rights." [98] Special consideration is due a plaintiff who has been misled or otherwise prevented from bringing his suit in time.[99]

The Court reached a similar decision under the Sherman Act in *American Pipe & Construction Co. v. Utah*.[100] The defendant in that case claimed that the statute of limitations was a "substantive" requirement of the claim and could not be extended by "procedural" rules.[101] The Court rejected the substantive/procedural distinction. Instead it said that the test should be "whether tolling the limitation in a given context is consonant with the legislative scheme," [102] and that traditional equitable principles should apply in deciding when to toll the statute.[103]

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95. 380 U.S. 424 (1965).
96. *Id.* at 427. *Cf.* Herb v. Pitcairn, 324 U.S. 117 (1945).
97. Burnett v. New York Cent. R.R., 380 U.S. 424, 428 (1965).
98. *Id.*
99. *Id.* at 428-29.
100. 414 U.S. 538 (1974).
101. *Id.* at 556-57.
102. *Id.* at 558.
103. *Id.* at 559.

While it is difficult to cull a specific intent from the legislative history of Title VII, the general intent is clear. "Congress neither intended, nor should the courts permit, an impoverished 'private attorney general' . . . to be saddled with procedures which might seriously impede the vindication of the civil rights laws. The procedures of Title VII were not intended as 'a stumbling block to the accomplishment of the statutory objective.'"[104] The "jurisdictional" approach espoused by the majority of courts sharply conflicts with this objective. A more reasonable approach would be the equitable one used by the Supreme Court to construe similar statutory limitations periods. Since it appears that in actual fact the majority of courts are already using this standard, if the language were brought in line with the treatment, much of the confusion in this area would be alleviated.

C. *Preserving the Statutory Time Scheme*

If, as it appears from the case law, the Title VII time limitations on private suits are in the nature of statutes of limitations and not jurisdictional limitations, are we not then left with the dilemma feared by the *Harris* court: Will the EEOC be able to expand the statutory time frame indefinitely by withholding its Notice of Right-to-Sue until it has completed its procedures? Surely Congress could not have intended to allow so detailed a procedural plan to be so easily distorted. The preservation of the time plan by the 1972 amendments was purposeful; in fact, two basic controls are built into its workings.

The first limitation is the doctrine of judicial discretion. Merely because a statute is "remedial" does not signal that its limitations periods may be ignored. Liberal construction should not be equated with judicial license to rewite the statute.[105] Only "recognized equitable grounds" can toll a statute of limitations, and, in spite of some language to the contrary, the courts have consistently recognized and applied this rule in Title VII cases.[106]

The second check appears in the statute itself. The discussion of *Tuft v. McDonnell Douglas Corp.*[107] noted the specific statutory requirement that the EEOC "shall . . . notify" the complainant

104. McQueen v. E.M.C. Plastic Co., 302 F. Supp. 881, 884 (E.D. Tex. 1969). *See also* Alexander v. Gardner-Denver Co., 415 U.S. 36, 45 (1974).

105. EEOC v. Westvaco Corp., 372 F. Supp. 985, 991 (D. Md. 1974).

106. Goodman v. City Prods. Corp., 425 F.2d 702 (6th Cir. 1970).

107. 517 F.2d 1301 (8th Cir. 1975), *cert. denied*, 96 S. Ct. 782 (1976).

of his right to file suit 180 days after the charge is filed.[108] Although this requirement has generally been ignored by the courts,[109] it is as essential to the time plan of Title VII as any of the other limitations periods.

In spite of the confusion surrounding the legislative history of Title VII, Congress was clearly concerned that the private litigant have quick and easy access to relief.[110] The Act mandates that the Commission, on its own initiative, notify the complainant 180 days after the charge was filed if it has failed to either reach a conciliation agreement or file suit.[111] Originally, the EEOC complied strictly with this directive.[112] However, the present regulations provide for notification in 180 days only if it is requested by the charging party.[113] Otherwise notice is not issued until a dispositive decision has been reached on the case: *i.e.*, there has been a finding of no reasonable cause, conciliation efforts have failed, or a decision has been made not to file suit.[114] Most courts have upheld the EEOC regulations on the rationale[115] that the charging party

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108. 42 U.S.C. § 2000e-5(f)(1)(Supp. IV, 1974). *See* note 90 *supra* and accompanying text.

109. In EEOC v. Meyer Bros. Drug Co., 521 F.2d 1364 (8th Cir. 1975), the Eighth Circuit Court of Appeals expressly held that the EEOC was not required to issue notice unless the complainant requested it. The court relied on the dictum in Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975), to support its holding. However, the *Johnson* decision only holds that the "claimant . . . may demand the right-to-sue letter." *Id.* at 458. The opinion does not specifically deal with the question of whether the EEOC should issue the letter without a request.

110. The retention of the private right of action, as amended, . . .

> is designed to make sure that the person aggrieved does not have to endure lengthy delays if the Commission or the Attorney General does not act with due diligence and speed. Accordingly, the provisions described above allow the person aggrieved to elect to pursue his or her own remedy under this title. . . . It is hoped that recourse to the private lawsuit will be the exception and not the rule. . . . However, . . . it is necessary that all avenues be left open for quick and effective relief.

118 CONG. REC. 593 (remarks of Senator Dominick); *id.* at 732 (remarks of Senator Brock).

111. 42 U.S.C. § 2000e-5(f)(1) (Supp. IV, 1974); 5 UNITED STATES COMMISSION ON CIVIL RIGHTS, THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT 519 (1975) [hereinafter cited as CIVIL RIGHTS REPORT].

112. Johnson v. Seaboard Air Line R.R. Co., 405 F.2d 645 (4th Cir. 1968), *cert. denied,* 394 U.S. 918 (1969).

113. 29 C.F.R. § 1601.25b (1974).

114. *Id.* §§ 1601.19, 1601.19b, 1601.25, 1601.25b(b), 1601.25c.

115. *See* Tuft v. McDonnell Douglas Corp., 517 F.2d 1301 (8th Cir. 1975); Gates v. Georgia-Pacific Corp., 492 F.2d 292 (9th Cir. 1974); Stebbins v. Continental Ins. Co., 442 F.2d 843 (D.C. Cir. 1971).

would otherwise be forced to choose between filing a private suit immediately, perhaps missing the chance to conciliate the case, and waiting for a possible EEOC-instituted suit at a later date.[116] However, this procedure clearly denies the charging party a procedural right that was established by the Act. It is unrealistic to assume that the right to request notice is a replacement, since many, if not most, complainants are ignorant of that right, and, judging from the reported cases, most do not retain a private attorney until instructed to do so by the Commission's Notice of Right-to-Sue. "By ignoring the provisions [of the Act], and not at least informing charging parties of their right to request notices, EEOC has effectively denied this alternative to the thousands of individuals whose charges are caught up in its backlog."[117]

Such unfettered expansion of the Title VII time frames by the EEOC also prejudices the defendant. For instance, although the Act establishes a two-year limitation on back-pay awards,[118] the time it takes the EEOC to investigate the charge and conciliate or file suit is added to this. Thus, the total liability period for one employee may be five to nine years.[119] The legislative history indicates that Congress was concerned with this problem: "The conferees spent considerable time dealing with the detailed provisions covering the procedure for filing and processing charges of discrimination brought by individuals who feel they have been unfairly treated because of their race or their sex. An effort was made to insure a speedy and equitable resolution of such charges which is in the interest of both the employee and the respondent employer or labor union."[120]

Expansion of limitation periods creates an additional problem for the parties and for the court—the evidence of discrimination is stale by the time a suit finally comes to trial. In cases where discrimination is a continuing problem, the EEOC could alleviate

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116. *Id.* at 846. It is not necessary that the Commission make a finding of reasonable cause before a private party can institute suit or that it actually attempt a conciliation. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Johnson v. Seaboard Air Line R.R., 405 F.2d 645 (4th Cir. 1968), *cert. denied,* 394 U.S. 918 (1969); Dent v. St. Louis-San Francisco Ry., 406 F.2d 339 (5th Cir. 1969), *cert. denied,* 403 U.S. 912 (1971).

117. CIVIL RIGHTS REPORT 521.

118. 42 U.S.C. § 2000e-5(g) (Supp. IV, 1974).

119. Schneider, *The Unprotected Minority: Employers and Civil Rights Compliance,* 49 L.A. BAR BULL. 458, 460 (1974).

120. 118 CONG. REC. 7563 (remarks of Senator Perkins) (1972).

some of the difficulty by filing new charges at a later date and thus base the judicial hearing on fresh incidents and evidence.[121]

In spite of these difficulties, some courts have specifically ruled that notice should not issue until the Commission has completed its processes.[122] Until that time, the complainant has not "exhausted his administrative remedies" since the EEOC may still bring suit.[123] Other courts, however, have held that the plaintiff exhausts his administrative remedies merely by filing his charge and awaiting the advice of the EEOC, since that is all he can personally do.[124]

These arguments confuse "exhaustion of remedies" with "primary enforcement." The Civil Rights Act only requires that the EEOC be given first chance to pursue a charge of employment discrimination. There is no requirement that administrative remedies be exhausted before the claimant can bring a private suit. In fact, the language of the Act suggests that there will be cases in which the administrative processes are incomplete at the end of the 180 days by unconditionally allowing the complainant to file suit at that time.[125] The EEOC regulations implicitly recognize this possibility by allowing the charging party to request notice after 180 days regardless of what stage the proceedings have reached.[126]

Clearly the procedure of delaying notification until the Commission has made a final disposition of the case does not comport with the Act. A change is called for so that after 180 days every claimant would receive notification of his right to file suit.[127] This procedure would eliminate much of the litigation that has arisen because of the uncertainty of both plaintiffs and attorneys over interpretation of statutory limitations. It would also speed up conciliation talks by encouraging defendants to settle rather than delay. Hope that a long delay would cause the plaintiff to lose interest would be undermined if a court suit were foreseeable in six months. If the complainant failed to file suit within the time period, the Commission could still sue at a later date.

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121. EEOC v. Union Oil Co., 369 F. Supp. 579, 584 (N.D. Ala. 1974).

122. Tuft v. McDonnell Douglas Corp., 517 F.2d 1301 (8th Cir. 1975). *See also* Taylor v. Pacific Intermountain Express Co., 394 F. Supp. 72, 74 (N.D. Ill. 1975).

123. Tuft v. McDonnell Douglas Corp., 517 F.2d 1301, 1309 (8th Cir. 1975).

124. Miller v. International Paper Co., 408 F.2d 283, 290 (5th Cir. 1969); Johnson v. Seaboard Air Line R.R., 405 F.2d 645 (4th Cir. 1968).

125. 42 U.S.C. § 2000e-5(f)(1) (Supp. IV, 1974).

126. 29 C.F.R. § 1601.25b (1974).

127. CIVIL RIGHTS REPORT 669.

Unlike the private suit, which can be filed only within the 90-day period following notification from the Commission, there is no express statutory limitation on the time in which the EEOC may bring suit.[128] The four circuit courts that have considered the question[129] have refused to infer a 180-day limitation from the notice requirement in section 5(f).[130] In reaching this conclusion, much weight was given to the Commission's conciliatory function. Although the legislative history of Title VII indicates that conciliation is the preferred method of enforcing fair employment practices,[131] a heavy backlog makes it virtually impossible for the Commission to reach an agreement within 180 days.[132] This would appear to bolster the arguments for inferring a 180-day limitation on an EEOC suit on the same grounds used to justify allowing the private suit after 180 days.[133] However, no statutory language supports a time limit on an EEOC suit. Congress knew how to write a statute of limitations since it so clearly limited the private action; to imply a limitation where none exists would be sheer judicial fabrication. The overwhelming majority of courts have rightly refused to do this.[134]

IV. The EEOC Suit

As with the private suit, the statutory procedure by which the EEOC may file suit is aimed at protecting the rights of the parties. The problem, however, is less difficult than in the private suit because there are no offsetting equities created by the presence of a layman/plaintiff. Here the plaintiff is the EEOC, an agency with expertise in employment law.

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128. EEOC v. Cleveland Mills Co., 502 F.2d 153, 156-57 (4th Cir. 1974), *cert. denied,* 420 U.S. 946 (1975).

129. Tuft v. McDonnell Douglas Corp., 517 F.2d 1301 (8th Cir. 1975); EEOC v. Kimberly-Clark Corp., 511 F.2d 1352 (6th Cir.), *cert. denied,* 423 U.S. 994 (1975); EEOC v. Louisville & Nashville R.R. Co., 505 F.2d 610 (5th Cir. 1974); EEOC v. Cleveland Mills Co., 502 F.2d 153 (4th Cir. 1974).

130. 42 U.S.C. § 2000e-5(f)(1) (Supp. IV, 1974). *See* note 129 *supra.*

131. "Only if conciliation proves to be impossible do we expect the Commission to bring an action in federal district court to seek enforcement." EEOC v. Kimberly-Clark Corp., 511 F.2d 1352, 1357 (6th Cir. 1975), *citing* 118 Cong. Rec. 7563 (remarks of Senator Perkins) (1972).

132. Civil Rights Report 529-32.

133. *See* EEOC v. Union Oil Co., 369 F. Supp. 579 (N.D. Ala. 1974).

134. For listing of decisions pro and con, see EEOC v. Kimberly-Clark Corp., 511 F.2d 1352, 1355-56 n.5 (6th Cir. 1975).

The cases have extracted five "conditions precedent" from the procedure outlined in the Act: (1) a charge must be filed; (2) a notice of the charge must be served on the employer, employment agency, or labor organization that is the object of the complaint within 10 days of the filing; (3) there must be an investigation of the charge; (4) there must be a determination of reasonable cause; (5) the EEOC must attempt a conciliation.[135] These five procedural steps are designed to protect the defendant's rights in two ways: first, by insuring that the charged party has notification of the investigation, and second, by insuring that the EEOC considers the charges and attempts conciliation before seeking judicial relief.[136] Of these five steps, the latter four are peculiarly within the control of the EEOC, while the first step, filing the charge, may be accomplished either by or on behalf of an aggrieved individual, or by the Commission. Nonetheless, the completion of each of these conditions must be alleged in the judicial complaint upon filing suit.[137]

Contrary to the judicial interpretation of procedural prerequisites in private suits,[138] most courts have held that the conditions precedent to the filing of a federal suit by the EEOC are procedural, and not jurisdictional. In an unusually lucid and well reasoned opinion, Judge Collinson [139] explained the difference between subject matter jurisdiction and procedural conditions precedent:

> Federal jurisdiction [for civil rights cases] is based on 28 U.S.C. Sec. 1343 (4) (1970) [*not on the Civil Rights Act*]:
>
> "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> . . . .

135. EEOC v. Louisville & Nashville R.R., 505 F.2d 610, 617 (5th Cir. 1974); EEOC v. Raymond Metal Prods. Co., 385 F. Supp. 907, 916 (D. Md. 1974), *rev'd in part and aff'd in part*, 530 F.2d 590 (4th Cir. 1976).

136. EEOC v. Raymond Metal Prods. Co., 385 F. Supp. 907, 916 (D. Md. 1974).

137. FED. R. CIV. P. 9(c). A general pleading that "all conditions precedent to the commencement of the action" have been fulfilled is sufficient to satisfy the jurisdictional requirement under Rule 9(c). *Id.* EEOC v. Wah Chang Albany Corp., 499 F.2d 187, 190 (9th Cir. 1974); EEOC v. Standard Forge & Axle Co., 496 F.2d 1392, 1393 (5th Cir.), *cert. denied*, 419 U.S. 1106 (1974); EEOC v. United Aircraft Corp., 383 F. Supp. 1313, 1315 (D. Conn. 1974).

138. *See* notes 21-30 *supra* and accompanying text.

139. EEOC v. Mobil Oil Corp., 362 F. Supp. 786 (W.D. Mo. 1973).

> (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."
> This of course, is known as "federal question" jurisdiction and is derived from Article III, section 2 of the Constitution.[140]

If a complaint alleges violation of the Civil Rights Act, the federal courts have subject matter jurisdiction. If, on the other hand, the complainant fails to meet the conditions precedent listed in the Act, the complaint may be dismissed for failure to state a claim upon which relief can be granted, but not for lack of subject matter jurisdiction. As long as the complaint is properly drawn to seek recovery based on a violation of Title VII, judicial inquiry into the plaintiff's satisfaction of the conditions precedent requires a judgment on the merits.[141] If, however, the conditions precedent are not met, the "equity" court has power to deny the EEOC relief and give judgment against it on the merits.[142]

This further explanation was offered by a Florida district court:[143] "[C]ivil litigation under Title VII is essentially equitable in nature to be tried 'through the exercise of the court's discretion, not by a jury'."[144] On this basis, the court reached the same result as Judge Collinson—failure of the conditions precedent did not affect the court's subject matter jurisdiction. However, the question of whether the conditions precedent have been met is a proper subject of judicial inquiry,[145] and may be the basis of a motion for summary judgment under Rule 56 or a motion for dismissal for

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140. *Id.* at 789.

141. *Id. See also* EEOC v. Standard Forge & Axle Co., 496 F.2d 1392, 1395 (5th Cir. 1974); EEOC v. Westvaco Corp., 372 F. Supp. 985, 991 (D. Md. 1974).

142. The view that Title VII claims are essentially "equitable" in nature and must be governed by equitable considerations has been espoused in other opinions. In EEOC v. Detroit Edison Co., 515 F.2d 301, 309 (6th Cir. 1975), *petition for cert. filed* 44 U.S.L.W. 3214 (U.S. Aug. 13, 1975) (No. 75-393), the court said that "[w]hile affirmative action may not be limited to the reinstatement or hiring of employees with or without back pay, we believe that it is limited to relief of the same general kind, that is, equitable relief in the form of restitution." *See also* Reeb v. Economic Opportunity Atlanta, 516 F.2d 924 (5th Cir. 1975); Franks v. Bowman Transp. Co., 495 F.2d 398 (5th Cir.), *cert. denied,* 419 U.S. 1050 (1974); McQueen v. E.M.C. Plastic Co., 302 F. Supp. 881 (E.D. Tex. 1969).

143. EEOC v. Air Guide Corp., 395 F. Supp. 600 (S.D. Fla. 1975).

144. *Id.* at 605.

145. EEOC v. Mobil Oil Corp., 362 F. Supp. 786 (W.D. Mo. 1973).

failure to state a claim on which relief can be granted under Rule 12(b). The conditions precedent out of which most procedural litigation has arisen are notice, investigation and conciliation.

A. *Notice*

The original 1964 Civil Rights Act contained no time limit during which the charged party had to be notified that a complaint had been filed. Although the Act did require that a copy of the charge at some time be furnished to the charged party,[146] it was not until the 1972 amendments that Congress added the requirement that the charged party be notified within 10 days after a complaint was filed with the EEOC.[147] The cases have held that the EEOC's failure to notify the defendant does not preclude the claimant's personal cause of action, since "the individual's right to bring a statutorily conferred right of action should not depend upon doing certain acts beyond his knowledge or control."[148] However, suits brought by the Commission are treated more strictly, and failure to notify may be grounds for summary judgment.

In *EEOC v. Air Guide Corp.*,[149] the court listed the notice requirement as a "condition precedent" to a suit by the EEOC[150] that is necessary in order to insure due process to the charged party.[151] The court argued that "[t]he natural effect of a failure to receive notice is plainly prejudicial to the respondent;"[152] therefore, such a failure should not be regarded as a mere technical error despite the absence of evidence of actual prejudice. Furthermore, the EEOC, which in this case broke its own procedural rules by failing to notify, was given the burden of showing that the defendant was not thereby prejudiced.[153]

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146. 42 U.S.C. § 2000e-5(a) (1970), *as amended,* 42 U.S.C. § 2000e-5(b) (Supp. IV, 1974). *See* IBEW v. EEOC, 398 F.2d 248, 252 (3d Cir. 1968), *cert. denied,* 393 U.S. 1021 (1969); U.S. Steel Corp. v. EEOC, 6 CCH EMPL. PRAC. DEC. ¶ 8980 (W.D. Pa.), *aff'd mem.,* 487 F.2d 1396 (3d Cir. 1973); Chromcraft Corp. v. EEOC, 465 F.2d 745 (5th Cir. 1972).

147. 42 U.S.C. § 2000e-5(b) (Supp. IV, 1974).

148. Healen v. Eastern Airlines, Inc., 9 CCH EMPL. PRAC. DEC. ¶ 10,023, 7237 (N.D. Ga. 1973); *see* Foye v. United A.G. Stores Cooperative, Inc., 336 F. Supp. 82 (D. Neb. 1972).

149. 395 F. Supp. 600 (S.D. Fla. 1975).

150. *Id.* at 603, *citing* EEOC v. Hickey-Mitchell Co., 507 F.2d 944 (8th Cir. 1974); EEOC v. DuPont de Nemours & Co., 373 F. Supp. 1321 (D. Del. 1974), *aff'd,* 516 F.2d 1297 (3d Cir. 1975).

151. EEOC v. Air Guide Corp., 395 F. Supp. 600, 603 (S.D. Fla. 1975).

152. *Id.* at 604.

153. *Id.*

While it is probably impossible for the EEOC to investigate a charge without the defendant's awareness, notions of basic fairness require that he be informed of the exact charges. Even without reference to such notions of fairness, the language of the Act leaves no room for deviation. The notice requirement is a basic procedural safeguard: the defendant cannot be summarily deprived of it without affecting his position in the proceedings.

B. *Investigation*

Title VII gives the EEOC broad investigatory powers once a charge has been filed. Thus, in the words of one commentator, "even an absurd, blatantly and maliciously false complaint can bring an EEOC investigation into every phase of an employer's employment practices."[154]

In *EEOC v. Western Publishing Co., Inc.*,[155] the charging party had originally complained only of receiving bad job references because of her race. The Eighth Circuit held that the EEOC was entitled to discover all evidence relevant to salaries, promotions, discharges, hiring, and references. The expanded scope of investigation was permitted because discrimination in all these areas was claimed two years after the original filing in a final, perfected charge.[156] But even in cases in which the original charge has not been subsequently expanded, the EEOC has been afforded broad investigatory powers. For example, where the aggrieved party filed a charge relating only to a discriminatory wage scale, the EEOC was allowed to investigate hiring practices, job classification, rates of pay, interdepartmental transfers, and promotions.[157]

There have been a few isolated attempts to limit the method and scope of EEOC investigations.[158] In *United States Steel Corp.*

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154. Schneider, *The Unprotected Minority: Employers and Civil Rights Compliance,* 49 L.A. BAR BULL. 458, 459-60 (1974).

155. 502 F.2d 599 (8th Cir. 1974).

156. *See* notes 34-37 *supra* and accompanying text.

157. EEOC v. Hickey-Mitchell Co., 372 F. Supp. 1117 (E.D. Mo. 1973), *aff'd,* 507 F.2d 944 (8th Cir. 1974).

158. EEOC v. Western Elec. Co., 382 F. Supp. 787, 793-95 (D. Md. 1974). The EEOC was not authorized to investigate by means of compulsory interrogatories, since the Act says only that testimony or documentary evidence may be compelled through the issuance of a subpoena, the same procedure which is followed by the NLRB. The EEOC regulations also support this position. *See* 29 C.F.R. § 1601.15 (1974).

v. EEOC,[159] the Pennsylvania district court held that a charge by one individual of a single incident of discriminatory failure to transfer the complainant to another department was insufficient to support a broad investigation of all hiring and transfer practices in every department of the defendant company.[160] The court took the position that such an investigation wrongfully included facts not "relevant and material to the charge under investigation."[161] This is an unusual case; the majority of courts have upheld broad investigations on the basis of a single complaint.[162] The Act appears to encourage this approach, and, in fact, it promotes the most efficient use of the EEOC's resources, as long as the defendant is not deprived of procedural safeguards.

A related issue is whether the complaint that is finally filed in district court is limited to the specific illegality complained of in the original charge. For instance, where the original charge filed with the EEOC was one of racial discrimination, some courts have dismissed a complaint growing out of the same charge alleging sex discrimination. The current judicial test was stated in *Sanchez v. Standard Brands, Inc.*:[163] a complaint under Title VII may

> encompass any kind of discrimination like or related to allegations contained in the charge and growing out of such allegation during the pendency of the case before the Commission. . . . In other words, the scope of the judicial complaint is limited to the "scope" of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination.[164]

In *Sanchez*, the plaintiff's original charge claiming sex discrimination was later amended to include discrimination because of national origin. The complaint filed with the court, however, alleged discrimination because of "race or color." The defendant argued that only the sex discrimination charge should be litigated. The court decided that it was unnecessary that "every particular fact

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159. 6 CCH EMPL. PRAC. DEC. ¶ 8980 (W.D. Pa.), *aff'd mem.*, 487 F.2d 1396 (3d Cir. 1973).

160. *Id.* at 6167-68.

161. *Id.* at 6168. 42 U.S.C. §§ 2000e-8(a), 2000e-9(a) (Supp. IV, 1974).

162. *See* Besser, *Recent Developments in Equal Employment Opportunity Litigation*, 22 CLEV.-MAR. L. REV. 72, 85 & n.85 (1973); Schneider, *supra* note 154, at 461 n.23.

163. 431 F.2d 455 (5th Cir. 1970).

164. *Id.* at 466, *quoting in part* King v. Georgia Power Co., 295 F. Supp. 943 (N.D. Ga. 1968) (Smith, J.).

alleged in the judicial complaint must have a direct counterpart in the charge of discrimination. . . . A charge of discrimination is *not* filed as a preliminary to a lawsuit. On the contrary, the purpose of a charge of discrimination is to trigger the investigatory and conciliatory procedures of the EEOC."[165]

While it is true that the court in *Sanchez* was dealing with a private, individual claim, the same problem could occur in an EEOC-initiated suit. The plaintiff knew she was the object of discrimination, but she did not know why. As a result, she did not properly describe the discrimination in her charge. If judicial complaints were limited by the conclusions of such inexperienced plaintiffs, many meritorious claims would be lost. Unfortunately, the implications of this limitation have not always been recognized by the courts.

"Regrettably, a trend seems to be developing in some federal courts . . . to overlook the emphasis which the *Sanchez* court placed on the EEOC investigation, rather than on the charge, as the primary determinant of the proper scope of a subsequent civil action."[166] A number of recent decisions have held that only a charge that was included in the original complaint can be a proper subject of the subsequent suit.[167] Any other form of discrimination uncovered by the EEOC investigation must have as its basis a separate charge filed by the Commission. Although it may be required by the EEOC regulations, this procedure is not necessitated by the statutory language.[168] It causes more delays in an already lengthy process. Furthermore, it does not afford the defendant procedural protection; he is protected by the requirement that the EEOC find reasonable cause to believe the charges and that it attempt to conciliate.[169]

The original complainant's standing to sue may also limit the broad investigatory power of the EEOC. In *EEOC v. New York Times Broadcasting Service, Inc.*,[170] a charge of sex discrimination

165. 431 F.2d at 465-66.

166. EEOC v. Raymond Metal Prods. Co., 385 F. Supp. 907, 915 (D. Md. 1974), *rev'd in part and aff'd in part,* 530 F.2d 590 (4th Cir. 1976).

167. EEOC v. J.C. Penney Co., 11 CCH EMPL. PRAC. DEC. ¶ 10,660 (S.D. Miss. 1975); EEOC v. General Elec. Co., 376 F. Supp. 757 (W.D. Va. 1974), *rev'd,* 532 F.2d 359 (4th Cir. 1976); EEOC v. Rexall Drug Co., 9 CCH EMPL. PRAC. DEC. ¶ 9936 (E.D. Mo. 1974); EEOC v. New York Times Broadcasting Serv., Inc., 364 F. Supp. 651 (W.D. Tenn. 1973).

168. *See* notes 188-93 and accompanying text.

169. *See* note 191 *infra* and accompanying text.

170. 364 F. Supp. 651 (W.D. Tenn. 1973).

filed by a white female was the basis of a judicial complaint charging sex as well as racial bias by the defendant. The court held that the EEOC could only maintain an action if its complaint could have been brought by the charging party. Since a white female would not have had standing to raise the issue of racial discrimination, the EEOC was barred from raising that issue.

Besides its determination on standing the *New York Times* court also held, under the *Sanchez* test, that race discrimination was not "like or related to" sex discrimination, even though the charges all arose out of the same investigation. Similarly, the original complainant's charge in *EEOC v. Rexall Drug Co.*[171] alleged unlawful discharge on the basis of race, but the complaint eventually filed in the district court by the EEOC also alleged sex discrimination. The court held that the judicial complaint was not "reasonably related" to the original charge filed with the Commission, and so had to be stricken.

Although in *New York Times* the court suggested that the "EEOC's investigation on its face [had] apparently failed to show"[172] the racial discrimination which it alleged, neither the *New York Times* nor the *Rexall Drug* decisions disputed the EEOC's power to make the investigations. Instead the dismissals were granted on the premise that the original charge, rather than the EEOC investigation, should be the basis for the judicial complaint. This was directly contrary to the conclusion in *Sanchez*.

A Missouri district court, however, went even further. In *EEOC v. Hickey-Mitchell*,[173] where a black female had filed a charge of race discrimination, Judge Nagle held that the EEOC could not bring an action charging sex discrimination against the same defendant. Even though the evidence had been gathered during the investigation of the original complaint, and the complainant would have had standing to raise both issues, the court refused to allow the sex discrimination theory. The court gave no explanation for this holding, other than a citation to a 1970 Colorado district court decision.[174] In the earlier case, the suit was dismissed because the complainant alleged religious discrimination for the

171. 9 CCH EMPL. PRAC. DEC. ¶ 9936 (E.D. Mo. 1974).

172. EEOC v. New York Times Broadcasting Serv., Inc., 364 F. Supp. 641, 654 (W.D. Tenn. 1973).

173. 372 F. Supp. 1117 (E.D. Mo. 1973), *aff'd*, 507 F.2d 944 (8th Cir. 1974).

174. Fix v. Swinerton & Walberg Co., 320 F. Supp. 58 (D. Colo. 1970).

first time in his court suit, and the EEOC had only investigated his charge of discrimination because of national origin. This, however, was a completely different situation from that in *Hickey-Mitchell,* where the EEOC had investigated both charges, thereby giving the defendant time to dispute the charges and effect a conciliation. Because of this discrepancy, the holding of *Hickey-Mitchell* is not persuasive.

Recently the Fourth Circuit Court of Appeals in *EEOC v. General Electric Co.,*[175] took a firm stand against limiting the scope of an EEOC court action to the type of discrimination originally charged. The action grew out of two separate charges, one alleging racially discriminatory promotions and job transfers, the second alleging racial discrimination in employment. The EEOC found "reasonable cause" as to the first charge only, but during the course of the investigation it also found reasonable cause to believe that the defendant had engaged in sex discrimination. Conciliation efforts failed and the EEOC filed suit charging the defendant with both race and sex discrimination.[176] The district court dismissed the charge of sex discrimination on two grounds: first, since the charging parties, both males, could not have had standing to raise the issue of sex-based discrimination, the EEOC also lacked standing to raise it in a suit based upon those charges; second, the EEOC failed to follow its own procedural regulations, and such failure denied the defendant the due process protections to which he was otherwise entitled.[177]

The court of appeals reversed. Unlike the lower court, it saw the charge as merely a "springboard" or a "starting point," from which the EEOC could begin its investigation. If in the course of that investigation the Commission obtained evidence of other forms of discrimination, that evidence could become the basis for a civil suit without filing a new charge.

> In other words, the original charge is sufficient to support action by the EEOC as well as a civil suit under the Act for *any discrimination stated in the charge itself or developed in the course of a reasonable investigation of that charge,* provided such discrimination was included in the

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175. 532 F.2d 359 (4th Cir. 1976).

176. The defendant chose not to discuss the charge of sex discrimination beyond the statement that it was no longer doing its own testing. *Id.* at 362, 371.

177. EEOC v. General Elec. Co., 376 F. Supp. 757 (W.D. Va. 1974).

> reasonable cause determination of the EEOC and was followed by conciliation procedures fixed in the Act.[178]

The court did not explain exactly what constitutes a "reasonable investigation." It did state, however, that the "EEOC has the right during the investigation to compel the production of any material or evidence that has relevancy to any claim made in the charge."[179] Coupled with the broad powers to amend the charge,[180] this would seem to give the Commission virtual carte blanche to investigate and file suit once a charge has been filed against a defendant. For example, the charge of sex discrimination in *General Electric* was based on tests given to prospective employees. Since the defendant made no objection that production of the evidence of the tests was irrelevant to the original charge, the court found that that evidence was a proper basis for the subsequent finding of reasonable cause as to sex discrimination.

On the issue of standing, the court of appeals held that the EEOC should not be restricted to only those claims which could have been raised by the complaining party; a suit instituted by the EEOC does not redress only private wrongs. By the time of the 1972 amendments, "Congress had come to recognize discrimination in employment as a 'societal' wrong, calling primarily for public enforcement. . . ."[181] Since the EEOC sues "to vindicate the public interest," its standing "cannot be controlled or determined by the standing of the charging party to sue, limited as he is in rights to the vindication of his own individual rights."[182]

In so holding, the court was following the lead of two other circuits: the Sixth Circuit in *EEOC v. Kimberly-Clark Corp.*,[183] and the Fifth Circuit in *EEOC v. Huttig Sash and Door Co.*[184] However, not every court has agreed with this reasoning. The Seventh Circuit, deciding the standing issue in a private class-action suit,[185] followed the very restrictive rule of *Hickey-Mitchell*.[186] It

178. 532 F.2d 359, 366 (4th Cir. 1976).

179. *Id.* at 364-65.

180. *See* notes 34-40 *supra* and accompanying text.

181. 532 F.2d at 372-73.

182. *Id.* at 373.

183. 511 F.2d 1352 (6th Cir.), *cert. denied*, 423 U.S. 994 (1975).

184. 511 F.2d 453 (5th Cir. 1975).

185. Jenkins v. Blue Cross Mut. Hosp. Ins., Inc., 522 F.2d 1235 (7th Cir. 1975).

186. EEOC v. Hickey-Mitchell Corp., 372 F. Supp. 1117 (E.D. Mo. 1973), *aff'd*, 507 F.2d 944 (8th Cir. 1974). *See* text accompanying note 173 *supra*.

held that a charge alleging race discrimination could not possibly be the basis for a judicial complaint alleging sex discrimination, even if the charging party would have had standing to raise the second issue.

The court in *General Electric* also ruled that the EEOC's noncompliance with its own procedural regulations, by determining reasonable cause before the defendant was given an opportunity to comment on the allegations of sex discrimination, would only bar a suit if the noncompliance actually prejudiced the defendant's interests.[187] As a practical matter, the defendant had some chance to be heard during the conciliation proceedings and would have another chance in the trial de novo in federal court.

The district court in *General Electric* had ruled that a separate charge must be filed for each allegation of a different type of discrimination in order to afford the defendant the benefit of the two-year back-pay liability limitation. Limiting back-pay liability to two years prior to the filing of the original charge is another procedural protection guaranteed by the Act, but it had been voided by lengthy time delays between the filing of charges and the final judgment.[188] Although rejecting the argument that a separate charge must be filed for each allegation in the judicial complaint, the court of appeals said that a federal court would have discretion to calculate back-pay liability from the date of the reasonable cause determination on the new charge instead of from the filing date of the original charge if there would otherwise be "substantial prejudice" to the defendant. In practice, such a ruling would be required if there were no "countervailing equities."[189] The court theorized that the purpose of the limitation was to give the employer notice of the claimed discrimination, but if notice of the charge were not given, a reasonable cause determination would suffice as long as liability was limited accordingly. This is a novel and sensible approach which could help to alleviate the problem of nearly unlimited defendant liability caused by lengthy delays in EEOC proceedings.

In his dissent, Chief Judge Widener strongly protested the EEOC's practice of ignoring its own regulations. According to the regulations, the defendant is to be notified of a charge and given a right to respond before there is a determination of reasonable

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187. EEOC v. General Elec. Co., 532 F.2d 359, 370-71 (4th Cir. 1976).
188. 42 U.S.C. § 2000e-5(g) (Supp. IV, 1974).
189. 532 F.2d at 371-72.

cause.[190] However, the notice procedure established by the regulations may be unnecessary to guarantee due process because the Commission itself has no enforcement power. The court trial is de novo; while it is necessary that the Commission make a reasonable cause determination before it can proceed to a court suit,[191] that determination is not binding on the court.[192] The dissent's argument is further weakened by the facts of this case because the defendant company was actually given an opportunity to respond, which it exercised to a limited extent.[193]

More serious than the failure to notify is the charge that the EEOC failed to follow its own regulations. The unfairness which arises when an agency fails to follow its own regulations has been the subject of considerable controversy.[194] However, most of the debate has centered around agency enforcement procedures in quasi-judicial settings. The EEOC has no power of enforcement, as the majority makes clear, but it does engage in investigations and produce judgments. Unless the EEOC changes its procedures the courts must continue to carefully scrutinize its actions to prevent prejudice to defendants.

C. *Conciliation*

If the EEOC investigation leads to a determination that there is reasonable cause to believe the charge of discrimination, the Commission must "endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion."[195] The EEOC regulations establish a detailed conciliation plan, but it is not always followed by the Commission. This failure accounts for most of the conciliation problems that have arisen.

Although there has been general agreement in the courts that some attempt to conciliate must be made by the EEOC before it can file suit,[196] once it is clear that conciliation efforts have been

190. 29 C.F.R. §§ 1601.13, 1601.14 (1974).

191. EEOC v. Westvaco Corp., 372 F. Supp. 985 (D. Md. 1974).

192. *Accord,* EEOC v. Kimberly-Clark Corp., 511 F.2d 1352 (6th Cir.), *cert. denied,* 423 U.S. 994 (1975).

193. 532 F.2d at 371.

194. *Id.* at 379 n.9.

195. 42 U.S.C. § 2000e-5(b) (Supp. IV, 1974).

196. EEOC v. Raymond Metal Prods. Co., 385 F. Supp. 907 (D. Md. 1974), *rev'd in part and aff'd in part,* 530 F.2d 590 (4th Cir. 1976); EEOC v. Westvaco Corp., 372 F. Supp. 985 (D. Md. 1974); EEOC v. United

made the courts do not ordinarily inquire into their quality. For instance, in *EEOC v. Rexall Drug Co.*,[197] the court held that one telephone conversation between the respondent and an EEOC conciliator was sufficient.[198] However, where there has not even been a minimal attempt at conciliation, the case will be dismissed.

In *EEOC v. United States Pipe & Foundry Co.*,[199] the complainant filed a charge against his employer and his union alleging employment discrimination. The EEOC determined from its investigation that there was reasonable cause to believe the charges, and further, that most of the allegedly discriminatory practices were a product of the collective bargaining agreement between the employer and the union. However, the Commission failed to include the union in any of its conciliation efforts. The court held that it was barred from hearing the case against the union because of the EEOC's failure to attempt conciliation.

The legislative history of Title VII indicates that court action was only to be used as a last resort.[200] To effectuate this policy, the court held that the litigable issues in an EEOC suit must be limited to those issues that had been the subject of conciliation efforts.[201] The court also noted that conciliation efforts with the employer alone were not sufficient, because even though the union had effective notice of the charges pending, the employer and union were separate parties with different interests. In any case, mere "notice" would not satisfy the statutory requirement that a respondent actually be given a chance to settle before a court suit.

The EEOC regulations have enforced the judicial inference that the statutory conciliation procedure is a mandatory prerequisite to suits by the EEOC. In *EEOC v. Westvaco Corp.*,[202] charges of sex discrimination were filed against the employer and the union.

States Pipe & Foundry Co., 375 F. Supp. 237 (N.D. Ala. 1974); Belcher v. Bassett Furniture Indus., Inc., 376 F. Supp. 593 (W.D. Va. 1974); EEOC v. Container Corp. of America, 352 F. Supp. 262 (M.D. Fla. 1972).

197. 9 CCH EMPL. PRAC. DEC. ¶ 9936 (E.D. Mo. 1974).

198. *Id.* at 6930.

199. 375 F. Supp. 237 (N.D. Ala. 1964).

200. The Conference Report, which accompanied the House's version of the 1972 Amendments [to Title VII], provided:

> "The conferees will contemplate that the Commission will continue to make every effort to conciliate as required by existing law. Only if conciliation proves to be impossible do we expect the Commission to bring action in federal district court to seek enforcement."

Id. at 242, *citing* 118 CONG. REC. 7563 (remarks of Senator Perkins) (1972).

201. *Id.* at 243-44.

202. 372 F. Supp. 985 (D. Md. 1974).

The Commission investigated the charges and conducted settlement discussions with both parties, but it did not make a determination of reasonable cause or attempt conciliation as the Act and EEOC regulations require.[203] Instead, the Commission proceeded to file suit, afterward informing the respondents that it had made a determination of reasonable cause. The court granted summary judgment against the EEOC, holding that either the failure to meet the statutory requirements that it make a reasonable cause determination and attempt conciliation or the failure to follow its own regulations would have provided sufficient reason to dismiss the charge.

As with investigation procedures, the courts have looked with disfavor on the EEOC's failure to follow its own regulations concerning conciliation efforts. For instance, the regulations require that "the respondent shall be notified promptly in writing" of his "last chance" to conciliate before suit is filed by the Commission.[204] While some courts have permitted a cursory notification procedure to suffice where there has been no showing of prejudice to the respondent,[205] a few district courts have consistently granted dismissal where the EEOC has failed to notify the respondent of its final chance to reopen conciliation discussions.[206] One example is *EEOC v. United States Pipe & Foundry Co.*,[207] in which the court held that "last chance" notice affords respondents an important procedural protection which may not be capriciously denied by the EEOC. The decision was not based on any actual or alleged prejudice to the defendant, but upon the court's own determination that such a denial by the EEOC must of necessity result in prejudice. This ruling is inconsistent with the "harmless error" rule followed in the Sixth Circuit,[208] which would allow the deviation as long as the defendant demonstrated no actual prejudice to its interests.

One court has allowed the EEOC to by-pass the conciliation regulations by means of the Commission's "pre-suit letter" proce-

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203. 29 C.F.R. §§ 1601.19a, 1601.19b, 1601.22, 1601.25 (1974).

204. *Id.* § 1601.23.

205. EEOC v. Louisville & Nashville R.R., 505 F.2d 610 (5th Cir. 1974), *cert. denied*, 96 S. Ct. 39 (1975).

206. EEOC v. Western Elec. Co., 382 F. Supp. 787 (D. Md. 1974); EEOC v. Raymond Metal Prods. Co., 385 F. Supp. 907 (D. Md. 1974).

207. 375 F. Supp. 237 (N.D. Ala. 1974). *See* text accompanying notes 199-201 *supra*.

208. *See* EEOC v. Kimberly-Clark Corp., 511 F.2d 1352, 1360 (6th Cir. 1975).

dure. In *Dickson v. Mortgage & Trust Inc.*,[209] the Commission investigated the complainant's charge of race discrimination, found reasonable cause, and then attempted a conciliation. When conciliatory efforts failed, the EEOC decided to file suit, but before doing so, it sent a copy of the proposed complaint with a pre-suit letter to the respondent, notifying him that he had ten days to discuss the charges further before suit would be filed. Although it had not been discussed during the conciliation period, the proposed complaint included a charge of sex discrimination based upon evidence the EEOC allegedly found during its investigation.

The court permitted this procedure. It held that the notice given the defendant had been sufficient to comport with due process requirements, and more importantly, that "it would be a great waste of judicial and administrative time to require the EEOC, when it has alleged that it has become aware of discrimination beyond the narrow specifics of the charging party's charge, to start at the very beginning of the statutory procedures."[210]

The *Dickson* court's notice argument is directly contrary to that of the Alabama district court in *United States Pipe & Foundry*[211] which specifically held that the purpose of the reasonable cause and conciliation requirements was to encourage out-of-court settlements rather than to put the defendant on notice. The second argument, that the procedure is more efficient, is also somewhat misleading, since the EEOC would not have to start over from the beginning if it chose to expand upon the original complaint. It could have complied with the statutory procedure simply by issuing a finding of reasonable cause and proceeding with conciliation efforts before filing suit.

While it is true that the pre-suit letter procedure does allow the defendant to make some response to the charges, it is directly contrary to published EEOC regulations[212] and to the procedure outlined in the Act. As with other deviations from mandated procedure, the acceptability of the pre-suit letter procedure should turn on the ability of the EEOC to prove that it is necessary rather than

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209. 9 CCH EMPL. PRAC. DEC. ¶ 10,215 (S.D. Tex. 1975).

210. *Id.* at 7955.

211. EEOC v. United States Pipe & Foundry Co., 375 F. Supp. 237 (N.D. Ala. 1974).

212. The procedure was "explained in an EEOC Memorandum dated June 29, 1973, from the General Counsel," but it is not contained in the Federal Register. Dickson v. Mortgage & Trust Inc., 9 CCH EMPL. PRAC. DEC. ¶ 10,215 at 7955 (S.D. Tex. 1975).

on the defendant's ability to prove prejudice.[213] It is reasonable to expect the Commission to explain its disregard for its own regulations, but it might be difficult for a defendant to prove that he was prejudiced by subtle factors such as insufficient time to prepare a defense.

There is some question whether the EEOC's failure to follow its own regulations could be invalidated on due process grounds, since the regulations do not purport to create any constitutional rights.[214] However, there is judicial precedent indicating that "the persons whose interests a regulation is meant to promote have a 'right' or are 'entitled' to have the regulation enforced."[215] The "right" becomes even stronger where, as in conciliation cases, it is granted by an Act of Congress as well as by Commission regulations.

V. CONCLUSION

The Civil Rights Act is still a relatively young statute, and many of the procedural difficulties that have arisen in its application may be attributed to growing pains. The United States Civil Rights Commission has suggested that only another amendment will really solve the problems.[216] However, some basic considerations emerge from the case law which could lead to quicker and easier solutions.

First, if, as has been suggested, Title VII is indeed a "remedial" statute to be "equitably" construed, the equities must be balanced on both sides. Protections are built into the statute for defendants as well as for plaintiffs, including time limitations, notice requirements, and conciliation procedures. The courts have the expertise to apply the balancing process which is necessary to a fair adjudication. It is up to them to see that both parties are protected. The current inconsistencies in judicial approach are counterproductive for the litigants and for society. Because neither party can accurately predict the outcome of a procedural battle, time is lost and resources are wasted.

Secondly, the EEOC could solve a number of difficulties by conforming its regulations to the language of the Act and by

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213. Note, *Violations by Agencies of Their Own Regulations*, 87 HARV. L. REV. 629, 650-51 (1974).

214. *Id.* at 654-55.

215. *Id.* at 632.

216. CIVIL RIGHTS REPORT 649 *et seq.*

stricter adherence to its own official procedures. Its interpretations are to be accorded the "great deference" normally accorded an agency charged with interpreting a statute,[217] but too often it has been the cause, rather than the cure, of misapplications of the law. The plaintiff has the right to rely on the EEOC's procedural directions and the defendant has the right to expect fair notice and hearing. Until these rights can be guaranteed, the Commission has failed to implement the policies underlying the Civil Rights Act.

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217. Robinson v. Lorillard Corp., 444 F.2d 791, 801 (4th Cir. 1971), *cert. dismissed,* 404 U.S. 1006, 1007 (1971).