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# Different Strokes for Different Folks: Balancing the Treatment of Employers and Employees in Employment Discrimination Cases in Courts within the Tenth Circuit Court of Appeals

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# Different Strokes for Different Folks: Balancing the Treatment of Employers and Employees in Employment Discrimination Cases in Courts within the Tenth Circuit Court of Appeals.

## I. INTRODUCTION

The Equal Pay Act of 1963 ("EPA"),[1] Title VII of the Civil Rights Act of 1964 ("Title VII"),[2] the Age Discrimination in Employment Act ("ADEA"),[3] and the Americans with Disabilities Act ("ADA")[4] are legislative attempts to eradicate employment discrimination in the United States. Following the passage of these acts, both state and federal courts have developed substantial case law regarding the time requirements for filing employment discrimination cases and the minimum number of employees an employer must have to be covered under the above listed acts.

With regard to time limitations, each act has specific times by which complainants must file a charge or lose their claim. The U.S. Supreme Court has held that where an act requires filing with an appropriate administrative agency before commencing civil suit, timely filing with the agency is not a jurisdictional prerequisite, but the time limitations are subject to tolling under equitable principles of law.[5] With regard to equitable tolling of time limitations, state and federal courts have varied as to which circumstances will persuade them to toll the time limitations. Some courts have interpreted the requirements for equitable tolling broadly, allowing more pro-employee holdings.[6] Other courts have been

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1. 29 U.S.C. § 206(d) (1963).
2. 42 U.S.C. § 2000e (1991).
3. 29 U.S.C. § 621 (1967).
4. 42 U.S.C. § 12101 (1990).
5. *See* Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982).
6. *See* Cantrell v. Knoxville Cmty. Dev. Corp., 60 F.3d 1177 (6th Cir. 1995); Oshiver v. Levin, 38 F.3d 1380 (3rd Cir. 1994); Armbruster v. Quinn, 711 F.2d 1332 (6th Cir. 1983); Hornick v. Borough of Duryea, 507 F. Supp. 1091 (M.D. Pa. 1980); Bethel v. Jefferson, 589 F.2d 631 (D.C. Cir. 1978); Burton v. United States Postal Serv., 612 F. Supp. 1057 (N.D. Ohio 1985).

more strict when dealing with equitable considerations regarding time limitations, or more employer friendly.[7]

Courts have varied in how broadly they define the term "employee" in deciding whether an employer has the minimum number of employees to be covered by the act under which the discrimination claim is brought. Some have strictly interpreted the term "employee." Other courts have construed the term "employee" more broadly, often including all persons over which the employer has control.

A survey of case law emanating from courts within the Tenth Circuit reveals that several courts, at both the state and federal level, are predictably employer friendly in employment discrimination suits. This Note argues for a more evenhanded approach by courts within the Tenth Circuit toward employees.

Part II briefly describes the EPA, Title VII, the ADEA, and the ADA, and explains the charge filing process. Part III gives the facts, procedural background, and holdings of three cases within the Tenth Circuit. Two are federal cases dealing with equitable tolling of time limitations in cases where claimants have been assisted by an attorney and where employer actions have been blamed for a claimants' failure to make a timely filing. The third, a Utah Supreme Court case, deals with the small employer exemption in state anti-discrimination acts. Analysis of this case will focus primarily on the dissent's opinion. Part IV argues for broader interpretations of the applicable act in each case. Specifically, it argues that the broader interpretation of filing requirements used within other circuits is the more evenhanded approach, especially given the realities faced by claimants in employment discrimination suits and the remedial nature of anti-discrimination laws.

## II. A DESCRIPTION OF FEDERAL ANTI-DISCRIMINATION ACTS

This Note deals with four federal anti-discrimination acts: the EPA, Title VII, the ADEA, and the ADA. A basic understanding of those acts is necessary to understand the analysis of the courts and this Note. This part gives a brief description of each statute listing the categories each protects. It also describes the method for processing charges of discrimination.

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7. *See* Dartt v. Shell Oil Co., 539 F.2d 1256 (10th Cir. 1976); Davis v. Wesley Ret. Cmty. Inc., 913 F. Supp. 1437 (D. Kan. 1995); Biester v. Midwest Health Servs. Inc., 1994 U.S. Dist. LEXIS 14350 (D. Kan. Sept. 26, 1994); Peterson v. Wichita, 706 F. Supp. 766 (D. Kan. 1989); Jones v. Hodell, 711 F. Supp. 1048 (D. Utah 1989); Burton v. Exam Ctr. Indus. & Gen. Med. Clinic, Inc., 994 P.2d 1261 (Utah 2000).

## A. *The Acts*

### 1. *The Equal Pay Act of 1963*

The EPA, passed in 1963, established the minimum wage and prohibited gender-based wage discrimination. It states in part: "No employer having employees subject to any provisions of this section shall discriminate . . . between employees on the basis of sex by paying wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for equal work . . . under similar working conditions . . . ."[8]

### 2. *Title VII of the Civil Rights Act of 1964*

Title VII was a legislative enactment that came partly in response to the civil rights movement of the 1960s. Title VII created the primary federal agency responsible for enforcement of the anti-discrimination acts, the Equal Employment Opportunity Commission ("EEOC"). Title VII made it an "unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate . . . with respect to [employment], because of such individual's race, color, religion, sex or national origin."[9] Title VII defines an "employer" as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year."[10] An "employee" is defined as "an individual employed by an employer."[11]

### 3. *The Age Discrimination in Employment Act*

In 1967, Congress passed the ADEA to protect workers forty years of age and older.[12] The ADEA sought to protect older workers from discrimination based on age in both the hiring and retention process.[13] The ADEA applies to employers with at least twenty employees.[14] Currently, there are no federal statutes protecting workers less than forty years of age from age discrimination.

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8. 29 U.S.C. § 206(d)(1) (1963).
9. 42 U.S.C. § 2000e-2(a)(1) (1990).
10. 42 U.S.C. § 2000e(b) (1990).
11. 42 U.S.C. § 2000e(f) (1990).
12. 29 U.S.C. § 621 (1967).
13. 29 U.S.C. § 621 (1967).
14. 29 U.S.C. § 630(b) (1967).

#### 4. *The Americans with Disabilities Act*

The ADA, passed in 1990, sought to eliminate "discrimination against individuals with disabilities."[15] It specifically prohibits discrimination against a qualified individual with a disability.[16] A qualified individual is defined as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[17] The ADA defines a disability as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."[18] The ADA applies to employers who have fifteen or more employees.[19]

### B. *Filing a Charge of Discrimination*

There are time limitations for filing discrimination claims under the EPA, Title VII, the ADA, and the ADEA. Parties filing under the EPA need not file a claim with the EEOC before commencing a private action in court.[20] If a person feels they have been the target of employer discrimination and decides to file a charge under Title VII, the ADA, or the ADEA, she must first file a charge with the EEOC in order to preserve her right to a civil suit.[21] The time limitation for filing a claim with the EEOC is 180 days from the time "the alleged unlawful discriminatory practice occurred."[22] However, in deferral states, or in states where the "EEOC defers to the enforcement efforts of a state agency empowered to undertake employment discrimination investigations," the filing date is three hundred days.[23]

The purpose of the time limitation is threefold: (1) to give notice to the employer that such a charge has been made[24], (2) to allow the receiving agency an opportunity to reconcile the parties through mediation,[25] and (3) to prevent the filing of stale claims, where material witnesses,

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15. 42 U.S.C. § 12101(b)(1) (1990).

16. 42 U.S.C. § 12112(a) (1990)

17. 42 U.S.C. § 12112(8) (1990).

18. 42 U.S.C. § 12102(2) (1990).

19. 42 U.S.C. § 12111(5)(A) (1990).

20. *See* Equal Employment Opportunity Commission, *Filing a Charge*, *at* http://www.eeoc.gov /facts/howtofil.html (June 10, 1997).

21. *See id.*

22. Bullington v. United Air Lines, Inc., 186 F.3d 1301, 1310 n.2 (10th Cir. 1999) (citing 42 U.S.C. § 2000e-5 (1990)).

23. *Id.* at n.2.

24. *See Cantrell*, 60 F.3d at 1182.

25. *See Dartt*, 539 F.2d at 1261.

and documents are no longer available.[26] In most deferral states, the anti-discrimination acts are based substantially on federal statutes. In employment discrimination cases brought before the Tenth Circuit under Title VII, the ADEA, and the ADA, filing a charge with the appropriate state or federal agency, or both, is a prerequisite to commencing a civil suit under either state or federal statutes.[27]

Upon receipt of the charge, the reviewing agency has time to assess and decide whether to pursue the claim on behalf of the charging party or find that there is no basis for the charge and terminate the investigation.[28] A state agency may forward the claim to the respective EEOC regional office.[29] If the EEOC believes the claim is valid, the EEOC may pursue relief on behalf of the charging party, pursuing mediation between the employer and the employee.[30] If within the time allotted, the EEOC finds that conciliation with the employer is not possible, then the EEOC must notify the charging party that conciliation efforts have failed and that the charging party has the right to file a civil claim within 90 days of receipt of the notice.[31] The notice advising the charging party of her right to sue is called the "right-to-sue" or "notice-to-sue" letter.[32] In *McDonnell Douglas Corp. v. Green*,[33] the Supreme Court held that a claimant must receive the right-to-sue letter before filing a claim in court. However, several courts have held that where the charging party subsequently receives the right-to-sue letter after having filed a claim, but before trial, the subsequent receipt cures the defect.[34] Also, the Supreme Court has held that "filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statue of limitations, is subject to waiver, estoppel and equitable tolling."[35]

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26. *See id.*

27. *See id.* at 1310.

28. *See* 42 U.S.C. § 2000e-5(e) (1990).

29. *See* Equal Employment Opportunity Commission, *Filing a Charge*, (June 10, 1997) *at* http://www.eeoc.gov /facts/howtofil.html .

30. *See* Equal Employment Opportunity Commission, *Facts about Mediation*, (Feb. 11, 1999) *at* http://www.eeoc.gov/mediate/facts.html .

31. 42 U.S.C. § 2000e-5(f)(1) (1990).

32. *Id; see also McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 798 (1973).

33. 411 U.S. 792 (1973).

34. *See* Wrighten v. Metropolitan Hosps., Inc., 726 F.2d 1346 (9th Cir. 1989); Pinkard v. Pullman-Standard, 678 F.2d 1211 (5th Cir. 1982); Henderson v. Eastern Freight Ways, Inc., 460 F.2d 258 (4th Cir. 1972).

35. Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982).

## III. THREE CASES: BIESTER, DAVIS, AND EXAM CENTER

This part gives the factual and procedural background of three cases within the Tenth Circuit. Two federal cases, *Biester v. Midwest Health Services*[36] and *Davis v. Wesley Retirement Community*,[37] deal with equitable tolling of time limitations in cases where a claimant has been assisted by an attorney and where employer actions have been blamed for a claimant's failure to timely file, respectively. *Burton v. Exam Center Industrial & Medical Clinic*,[38] a Utah Supreme Court case, deals with the minimum number of employees an employer must have to be covered under the Utah Anti-Discrimination Act.[39] This Note deals primarily with the dissent's opinion in *Exam Center*.

### A. *Biester v. Midwest Health Services, Inc.*

#### 1. *Factual background*

Steven W. Biester was an employee of Midwest Health Services, Inc. ("Midwest") from December 1992 through May of 1993.[40] While employed, he claims that he was sexually harassed by his supervising nurse from January through March.[41] Residing in a deferral state, Biester filed first with the Kansas Commission on Human Rights ("KCHR"), which then forwarded his claim to the regional EEOC office.[42] Subsequently, Biester requested that the EEOC issue him a right-to-sue letter.[43] Around the same time, Biester's attorney requested that the EEOC send him the right-to-sue letter on behalf of Biester.[44] Because of a clerical error on the part of the EEOC, a letter was sent only to Biester.[45] The letter informed Biester that he was required to file a claim within ninety days of receipt of the right-to-sue.[46]

Though Biester was notified of the letter by the postal service, he could not remember when he picked up the letter.[47] Biester informed his attorney that he picked up the letter on October 30, 1993, but postal ser-

36. 1994 U.S. Dist. LEXIS 14350 (D. Kan. Sept. 26, 1994).
37. 913 F. Supp. 1437 (D. Kan. 1995).
38. 994 P.2d 1261 (Utah 2000).
39. UTAH CODE ANN. § 34A-5-101 (1994).
40. *Biester*, U.S. Dist. LEXIS 14350, at *4.
41. *Id.* at *4.
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.* at *5.
47. *Id.*

vice records showed the letter was picked up on October 22, 1993. Biester was later hospitalized three times for major depression between April and May of the next year and continued outpatient treatment until December of that year.[48]

### 2. *Procedural history*

Biester filed a Title VII claim of sexual harassment against Midwest on January 26, 1994 in the United States District Court for the District of Kansas.[49] Midwest sought dismissal of the claim for failure to timely file a charge of discrimination.[50] Midwest argued that the right-to-sue letter was picked up October 22, 1993 and that Biester's filing was untimely, having been filed ninety-five days after his receipt of the right-to-sue letter.[51] Biester argued that the letter was received on October 30, 1993, and thus the filing was timely.[52] The court treated Midwest's motion as a motion for summary judgment.[53]

### 3. *The holding*

The District Court held that Midwest offered undisputed evidence that Biester received his notice on October 22.[54] After reviewing the parties' motions and the standards for summary judgment, the court analyzed whether equitable principles allowed Biester's claims to go forward.[55] Biester argued that the ninety-day time limitation should be tolled because of his mental incapacity at the time he received the right-to-sue letter and because of the EEOC's failure to send the letter to his attorney.[56]

The court recognized that courts in general have narrowly defined exceptions to time limitations for filing employment discrimination claims.[57] It restated the Tenth Circuit's position on the tolling of time limitations, saying that they would be tolled in limited circumstances where the plaintiff had been "lulled into inaction," "actively misled," or "in some extraordinary way been prevented from asserting his or her

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48. *Id.*
49. *Id.* at *1-2.
50. *Id.* at *1.
51. *Id.* at *2.
52. *Id.* at *5.
53. *Id.* at *7.
54. *Id.*
55. *Id.* at *8.
56. *Id.*
57. *Id.* at *9.

rights."[58] The court then addressed Biester's claims of mental incapacity, reviewing the holdings of other courts that had tolled the time limitation due to the claimant's mental incapacity.[59] The court recognized that time limitations could be tolled in some circumstances due to mental incapacity, but held that Biester's circumstances did not warrant tolling of the time limitation.[60]

In reviewing Biester's circumstances, the courts focused on Biester's representation by counsel rather than his mental incapacity during the ninety-day filing period.[61] The court stated that the attorney had time to file, knew of Biester's receipt of the right-to-sue letter, and relied only on Biester's testimony of when the letter was received.[62] The court stated that other courts had also refused to toll the time limitations "based on mental incapacity when a plaintiff is represented by counsel during the limitations period."[63] Accordingly, the court dismissed Biester's complaint for sexual harassment, granting summary judgment to Midwest.[64]

### B. *Davis v. Wesley Retirement Communities, Inc.*

#### 1. *The facts*

Joyce Davis was an employee of Wesley Retirement Communities ("Wesley").[65] On June 3, 1992, Wesley accused her of abusing a retirement facility resident.[66] The charge was reported to the Kansas Department of Health and Environment ("KDHE"), which subsequently instituted an investigation.[67] Davis's supervisor and Wesley's administrator, Mary Stuart, subsequently suspended Davis pending the investigation.[68] Soon after the investigation, Davis was fired on June 18, 1992 for the alleged abuse of a resident.[69] Davis appealed to the KDHE and another hearing was held on February 18, 1993.[70] During that hearing Stuart tes-

58. *Id.* at *11 (quoting Martinez v. Orr, 738 F.2d 1107, 1110 (10th Cir. 1984)).

59. *Id.* at *10-13.

60. *Id.* at *13.

61. *Id.*

62. *Id.* at *13-14.

63. *Id.* at *14 (citing Lopez v. Citibank, N.A., 808 F.2d 905, 907 (1st Cir. 1987) ; Moody v. Bayliner Marine Corp., 664 F. Supp. 232, 236 (E.D. N.C. 1987)).

64. *Id.* at *19.

65. *Davis* 913 F. Supp. at 1441.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

tified before a KDHE attorney.[71] Stuart was questioned about Davis's relation to a group of black facility workers.[72] Stuart affirmed that they "hung out together" and "would stick up for each other"[73] because they "[were] all black."[74] Stuart further stated that "these gals come from lower middle class" and "[e]ven some of our very best aides who were black stuck up for each other no matter what, even when they knew that that person was wrong."[75] She also believed the black facility workers "would lie to protect their friends."[76]

Soon after the appeal of February 18, KDHE's presiding officer filed a report in which he noted inconsistent and contradictory evidence relating to abuse and also recognized that the accuser had a record of fabricating claims of abuse.[77] Additionally, he identified a history of animus between Davis and Stuart as well as a history of racial bias by the facility administration.[78]

### 2. *Procedural history and holding*

Asserting that she did not know that she might have been terminated for racial reasons, Davis filed her first complaint of racial discrimination with the Kansas Human Rights Commission ("KHRC") and the EEOC in April 1993.[79] They both denied her complaint as being untimely.[80] The KHRC, however, reversed its decision and accepted a complaint from Davis.[81] Davis requested a right-to-sue letter and after its receipt, filed a civil suit on September 2, 1993 in the United States District Court for the District of Kansas.[82]

Wesley moved for summary judgment on Davis's Title VII claim alleging that Davis's suit was untimely filed.[83] Davis did not dispute that she filed after the three hundred day time limitation. However, she argued that the "300 day limitation for filing her complaint with the KHRC

71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.* at 1442.
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.* at 1440.

or the EEOC was tolled until [Davis] knew, or should have known, that the reasons for her termination were racially motivated."[84]

The court held that the time limitation was not tolled from the time she knew or should have known that the reason for her termination might have been racially motivated, but from the time the adverse action occurred.[85] In issuing its ruling, the Court cited another Tenth Circuit Court case, *Hulsey v. Kmart,*[86] for its proposition that the three hundred day time limitation would have little meaning if the employer were equitably estopped whenever it "did not disclose a violation of [Title VII]."[87] The court held that the employee had a duty to ascertain whether there was an unlawful reason for the employment action "[r]egardless of the reasons advanced by the employer for the employment decision. The mere fact that the employer gave a non-discriminatory reason for her termination does not constitute 'active deception.'"[88] The court consequently granted Wesley's Motion for Summary Judgment on Davis's Title VII claims.[89]

### C. *Burton v. Exam Center Industrial*

#### *1. The facts*

Hubert Burton, M.D. was a sixty-nine year old, part-time physician with Exam Center Industrial & General Medical Clinic, Inc. ("Exam Center").[90] In July of 1994, Exam Center president, Howard Boulter, terminated Burton.[91] Boulter told Burton that the Exam Center had hired a younger, full-time physician out of necessity and Boulter did not "know how much longer [Burton as an] older guy[] wanted to work."[92] Burton later filed a charge against the Exam Center with the Utah Anti-Discrimination Division ("UADD") alleging age discrimination.[93] The UADD stated that since the Exam Center had less than fifteen employees,[94] it was not covered under the jurisdiction of the UADD nor the Utah Anti-Discrimination Act ("UADA").[95]

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84. *Id.* at 1442.
85. *Id.* at 1443.
86. 43 F.3d 555, 557 (10th Cir. 1994).
87. *Davis*, 913 F. Supp. at 1442-43.
88. *Id.* at 1443.
89. *Id.* at 1445.
90. *Exam Center*, 994 P.2d at 1262.
91. *Id.*
92. *Id.* at 1262.
93. *Id.* at 1262-63.
94. Under the ADEA, an employer must have twenty employees. *See* 29 U.S.C. § 630(b) (1967).
95. *Exam Center*, 994 P.2d at 1262-63.

### 2. *Procedural history*

Burton then filed a claim in trial court alleging that both state and federal acts support a public policy prohibiting age discrimination and that such public policy gave rise to the tort of wrongful termination.[96] The trial court initially denied the Exam Center's Motion for Summary Judgment, but later granted it upon the Exam Center's Motion to Reconsider[97] that cited law from the Utah case, *Retherford v. AT&T Communications*.[98] Burton appealed the trial court's decision.[99]

### 3. *The holding*

On appeal, the Supreme Court of Utah held that the UADA did not assert "a public policy which [was] 'clear and substantial' with respect to small employers"[100] because the legislature exempted small employers from coverage under the UADA and any decision to expose small employers to liability for age discrimination was a legislative and not a judicial matter.[101] The court stated that there were three central reasons for not allowing a common law claim for wrongful discharge. First, the court stated that federal and state laws prohibiting age discrimination had as their common goal "not so much to redress each discrete instance of individual discrimination," but the eradication of the "egregious and continued discriminatory practices of economically powerful organizations. Thus, they could afford to exempt the small employer."[102] Second, the laws struck a balance between the desire to protect individual workers from discrimination and a desire to protect small businesses that would likely hire people of similar ethnicities, socioeconomic status, etc.[103] Third, the court stated that to expose small employers to a tort claim for wrongful discharge would invoke the longer time limits of tort claims, involve costly legal fees, and expose small employers to excessive damages.[104] The court, accordingly, affirmed the trial court's grant of Exam Center's Motion for Summary Judgment.[105]

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96. *Id.*

97. *Id.*

98. 844 P.2d 949 (Utah 1992) (holding that the UADA provided the only remedy for the tortious claim of discharge in violation of public policy).

99. *Exam Center*, 994 P.2d at 1263.

100. *Id.* at 1265.

101. *Id.* at 1266.

102. *Id.* at 1266-67 (quoting Jennings v. Maralle, 876 P.2d 1074, 1082 (Cal. 1994)).

103. Exam Center, 994 P.2d at 1266-67.

104. *Id.* at 1267.

105. *Id.*

#### 4. *Justice Durham's dissent*

Justice Durham, with Justice Stewart concurring, argued that the majority's decision would open a loophole to the UADA, allowing small employers to discriminate not only based on age, but also on race, gender, religion, and disability.[106] She provided three reasons in favor of the common law claim of wrongful discharge. First, Justice Durham argued that the Supreme Court of Utah had allowed public policy exceptions when they were "so substantial and fundamental that there can be virtually no question as to their importance for promotion of the public good."[107] Justice Durham argued that the core policy of the UADA was that discrimination based on age, race, gender, and disability was not in the public good.[108] The fact that the legislature did not extend coverage to small employers did not reduce the importance of that core policy; the legislature clearly intended the UADA to have broad implications.[109]

Second, Justice Durham argued that because small businesses constituted almost seventy percent of Utah's employers, the UADA only applied to a small portion of Utah employers, recognizing a common law claim of wrongful discharge would address the other seventy percent of employers.[110] Finally, Justice Durham reasoned that the state had a legitimate policy interest in regulating the workplace and prohibiting workplace discrimination.[111] Prohibiting small employers from discriminating would protect the public interest and protect future economic opportunities and growth for citizens.[112]

## IV. ANALYSIS

This section focuses on three areas where courts within the Tenth Circuit should interpret the various anti-discrimination statutes to provide a more balanced treatment of employees. First, it focuses on circumstances where claimants have been represented by counsel in employment discrimination cases. Second, it concentrates on circumstances where employer actions have been blamed for a plaintiff's failure to timely file. Finally, this analysis deals with the small business exemption in anti-discrimination acts.

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106. *Id.* at 1268.

107. *Id.* (quoting Berube v. Fashion Ctr., Ltd., 771 P.2d 1033, 1042 (Utah 1989)).

108. *Id.* at 1268.

109. *See id.*

110. *Id.* at 1269.

111. *Id.*

112. *See id.*

### A. *Assistance of an Attorney*

The *Biester* court reflects a similar approach taken by other courts within the Tenth Circuit when considering whether to toll the time limitations for plaintiffs who have been assisted by counsel.[113] In *Peterson v. Wichita*, Peterson, an African-American claimant, brought a charge of racial discrimination against the City of Wichita, Kansas.[114] Peterson had assistance of counsel at some points in the charge filing process.[115] Although Peterson filed his claim after the time limitation ran,[116] he argued that he was entitled to equitable tolling because of misinformation and mishandling on the part of city employees, as well as his general ignorance regarding the filing process.[117] The court refused to toll the time limitation, charging Peterson with constructive notice of Title VII charge filing requirements.[118] In denying Peterson the tolling of time limitations, the court stated that where a party claims ignorance of the law and has been assisted by counsel, there is no basis for equitable tolling.[119]

In *Dartt v. Shell Oil Company*,[120] Anne M. Dartt sued the company partly for age discrimination.[121] The *Dartt* court found that Dartt's circumstances merited equitable tolling of the time limitations, even though she consulted an attorney on two occasions.[122] The court noted that Dartt promptly followed the advice of the attorneys she consulted and was thus not sleeping on her rights.[123] The court also observed that the purpose of the notice requirement inherent in the time limitations was to allow the administrative agencies responsible for the charge to attempt conciliation and to provide the employer with notice of the charge.[124] However, in dictum, the court suggested that it might be inappropriate to grant tolling

113. *Compare* Peterson v. Wichita, 706 F. Supp. 766, *rev'd on other grounds,* 888 F.2d 1307 (D. Kan. 1989) (holding that the court had charged a plaintiff with constructive notice of procedural requirements for filing his complaint with the EEOC and refused to toll time limitations where plaintiff was assisted by counsel) *with* Dartt v. Shell Oil Co., 539 F.2d 1256, *aff'd* 434 U.S. 99, *reh'g denied*, 434 U.S. 1042 (10th Cir. 1976) (stating, in dictum, that tolling would not be permitted where the attorney slept on clients rights or believed client had none).

114. *Peterson*, 706 F. Supp. at 769.

115. *Id.* at 769-70.

116. *Id.* at 770.

117. *Id.* at 773.

118. *Id.*

119. *Id.* ("Plaintiff is unable to claim ignorance of the law because of his consultation with legal counsel."). The *Peterson* court, however, did state that where the actions of the employer are blamed for delayed filing, the fact that a plaintiff retained legal counsel is not considered when deciding whether to equitably toll time limitations. *See id.* at 773.

120. 539 F.2d 1256 (10th Cir. 1976).

121. *Id.* at 1258.

122. *Id.* at 1261-62.

123. *Id.*

124. *Id.*

of the time limitations, even when plaintiff's counsel "slept on his client's rights or did not believe he had any under the statute."[125]

The *Biester, Peterson*, and *Dartt* courts seem to reflect a bright-line rule that (1) refuses to toll the time limitations where attorney ineptitude is involved—even where the counsel sleeps on a client's rights, and (2) looks more closely at whether a plaintiff retained counsel in determining knowledge of filing requirements than at the actual knowledge and facts surrounding the plaintiff's charge filing process.

Such a rigid rule within the Tenth Circuit does not properly allow for the considerations that should be viewed in light of the purpose of state and federal anti-discrimination laws. First, such a bright-line rule is not appropriate in "a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process."[126] Though there are some claimants that might be able to navigate the "web of procedural traps,"[127] many will not know the requirements of filing a charge of discrimination. Those claimants that live in deferral states will not likely be aware that they must first file with the state agency before filing with the EEOC. Also, the state might have different requirements for investigation of charges, conciliation between the employer and employee, and varying remedies from the federal statutes. Procedural requirements and terms, like right-to-sue and conciliation, will likely be foreign to many claimants. Many claimants may find the process too complicated to truly pursue a charge to its full extent.

The Court of Appeals for the District of Columbia in *Bethel v. Jefferson*[128] recognized that the statutory path outlined by many remedial acts, such as Title VII, "leave[] much to be desired in clarity and precision"[129] and are "greatly confusing even for lawyers and judges."[130] In *Bethel,* two black police officers brought charges of racial and religious discrimination against the District of Columbia Metropolitan Police Department.[131] In tolling the time limitation, the *Bethel* court reasoned that an act dependent on laymen for initiation should not use strict procedural

125. *Id.* at 1261 n.4 (quoting Edwards v. Kaiser Alum. & Chem. Sales, Inc., 515 F.2d 1195, 2000 (5th Cir. 1975)).

126. Love v. Pullman, 404 U.S. 522, 527 (1972); *see also*, Oscar Mayer & Co. v. Evans, 441 U.S. 750 (1979).

127. Bethel v. Jefferson, 589 F.2d 631, 640 (D.C. Cir. 1978).

128. *Id.*

129. *Id.* at 637 (quoting Olson v. Rembrandt Printing Co., 511 F.2d 1228, 1232 (8th Cir. 1975) (en banc)).

130. *Id.* at 641 (citing Egelston v. State Univ. Coll., 535 F.2d 752,754 (2d Cir. 1976) ("Title VII is rife with procedural requirements which are sufficiently labyrinthine to baffle the most experienced lawyer, yet its enforcement mechanisms are usually triggered by laymen.")).

131. *Id.* at 635.

and technical requirements to foreclose possible relief.[132] Rather, it reasoned that a court, while observing closely the purpose of requirements under such remedial acts, should also look closely at the "broad humanitarian and remedial purposes" of federal employment discrimination legislation.[133] The *Bethel* court stated that the fact that a party might have had assistance of counsel at *any* stage of the filing process "is of no relevance, for the Act must be given a construction rendering its mechanisms workable in the hands of laymen generally."[134]

The fact that laymen are primarily responsible for initiation of the statutory process for enforcing discrimination laws is only one reason against a bright-line rule. Another reason is that a rigid rule does not allow for consideration of the circumstances of each case. A rule that would tend to deny relief to a party, holding them responsible for the actions of counsel, ignores the fact that not all attorneys are adequate. Some attorneys may be sleeping on a client's rights, others may not have the client's best interests at heart, and others are no more able to deal with the filing process than are their lay clients.

Finally, a bright-line rule tends to miss the mark by focusing on the acts of the attorney when it should focus on the acts of the claimant and the intent of the statute. The *Biester* court, though initially stating that it would focus on Biester's mental capacity, failed to thoroughly explain why his mental capacity was not enough to warrant tolling.[135] Its primary focus was on the presence of counsel throughout the process.[136]

Two Sixth Circuit cases, *Burton v. United States Postal Service*[137] and *Cantrell v. Knoxville Community Development Corporation*[138] deal with circumstances where the plaintiff was assisted by counsel and missed time limitations for claim filing. In *Burton*, a postal worker filed a claim of racial discrimination after being terminated.[139] EEOC requirements stated that the workers must file a written complaint after a discriminatory employment act.[140] Burton filed his complaint fourteen days late and at trial was ordered to explain why he had not filed in timely

132. *Id.* at 642.

133. *Id.*

134. *Id.* at 642 n.67.

135. *See* Beister v. Midwest Health Servs. Inc., 1994 U.S. Dist. LEXIS 14350, at *13-14.

136. *See id.*

137. 612 F. Supp. 1057 (N.D. Ohio 1985).

138. 60 F.3d 1177 (6th Cir. 1995).

139. Burton v. Exam Ctr. Indus. & Gen. Med. Clinic, Inc., 612 F. Supp. at 1058.

140. *Id.* at 1059.

fashion.[141] Burton stated that he was without counsel throughout the charge filing process "through no fault of his own."[142]

On appeal, the court, in determining whether equitable tolling was appropriate, compared the Title VII time limitations to other statutory time limitations and declared that "the basic inquiry is whether congressional purposes [were] effectuated by tolling the statute of limitations."[143] Instead of finding that Burton was estopped from arguing that his failure to timely file was due to lack of knowledge of the time requirements because of assistance by counsel, the court looked at the circumstances of Burton's case.[144] The court found that the plaintiff had pursued his claims as diligently as possible given his knowledge.[145] The court also looked at the actions of his attorney. Specifically, the court found that the attorney failed his client by neglecting to contact his client after consulting with the EEOC, by neglecting to mail complaints in a timely manner, and by leaving town without notifying Burton.[146] The court held that punishing an innocent client for the "irresponsibility of his counsel" would defeat the remedial purposes of legislation like Title VII and would not defeat legislative purposes embodied in time limitations.[147]

In *Cantrell v. Knoxville Community Development Corporation*, the court dealt with a plaintiff who filed a racial discrimination claim under Title VII.[148] The lower court held that the time limitations for Cantrell's timely filing were equitably tolled given the fact that his attorney was mentally incapacitated.[149] On appeal, the employer argued that equitable tolling of time limitations was never warranted where attorney negligence was involved.[150] The court stated that *Cantrell* was not a normal case of attorney negligence.[151] The court declared that before resolving whether equitable tolling was appropriate, the case must be remanded to determine the attorney's mental state during the 180 day filing period as well as Cantrell's diligence in filing his claim without attorney assistance.[152] The dissent went further, arguing that equitable tolling was clearly appropriate.[153] The dissent stated that Cantrell had attempted to

141. *Id.* at 1058-59.

142. *Id.* at 1059.

143. *Id.* (quoting Jones v. Transohio Sav. Assoc., 747 F.2d 1037, 1040 (6th Cir. 1984)).

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* at 1059.

148. 60 F.3d 1177, 1179 (6th Cir. 1995).

149. *Id.* at 1179.

150. *Id.*

151. *Id.* at 1179-80.

152. *Id.* at 1180.

153. *Id.* at 1181.

contact the attorney on several occasions asking about the claim.[154] In fact, the attorney had failed to file the claim and later was removed from active practice owing to his mental incapacity.[155] The dissent reasoned that because the employer had made no showing of prejudice by Cantrell's late filing, and Cantrell had acted in good faith and with due diligence in filing his claim, equitable tolling was clearly appropriate.[156]

The previous cases present a broader interpretation of the remedial purposes of anti-discrimination legislation and a realistic view of the charge filing process. Instead of holding to a hard and fast rule, as many courts within the Tenth Circuit do, courts should look to the circumstances surrounding a claimant's untimely filing instead of the presence of counsel at some point in the process. While recognizing the legislative intent embodied in time limitations, the courts should also look at the remedial purposes of anti-discrimination acts. Courts should focus on a plaintiff's diligence in pursuing his claim, any bad faith evidenced by the charging party, the complexity of the claim, and the process by which the plaintiff must pursue his remedies. Lastly, courts should look at counsel's actions. If Tenth Circuit courts adopt this approach, employees will find these courts more willing to consider the remedial purposes underlying anti-discrimination laws and less willing to foreclose remedies to lay employees.

### B. *The Acts and Omissions of Employers*

In most employment discrimination cases, the adverse employment action and knowledge of discrimination occur simultaneously. However, in some instances, such as was the case in *Davis*, knowledge of the discrimination will not be evident until some later time. The rule pronounced in *Davis* allows employers in such circumstances to conceal discriminatory pretext for adverse employment decisions and makes it more difficult for plaintiffs to find relief for employment discrimination within courts of the Tenth Circuit.[157] *Davis* held that regardless of the reason the employer advances for the employment action, "the employee still has a duty to determine whether there was a discriminatory motivation for the employment decision."[158] The *Davis* court stated that even if

154. *Id.*

155. *Id.* at 1180 n.1.

156. *Id.* at 1182.

157. *See Davis*, 913 F. Supp. At 1442-43; *but see* Jones v. Hodel, 711 F.Supp. 1048 (D. Utah 1989) (holding time period begins to run when facts that would support a claim of discrimination would have been apparent to similarly situated person with a reasonably prudent regard for his rights. The court in *Jones* stated that to toll the time limitation, the employer must have actively engaged in some deception to prevent the employee from filing.)

158. Davis v. Wesley Ret. Cmty. Inc., 913 F. Supp. 1437, 1443 (D. Kan. 1995).

the employer did terminate for discriminatory reasons, that reason need not be declared to the employee.[159] The core question as to when the time limitation starts to run was not "notice or knowledge of the discriminatory motivation" but "knowledge of the adverse employment decision."[160]

This rule places an impractical burden on the plaintiff. The plaintiff is charged with constructive notice of any discriminatory reason once an action is taken, even if the employee has no knowledge or supposition of discriminatory pretext at the time of the action. For many employees this will mean divining whether an employer has discriminated. Employees will learn of discriminatory acts from either other employees, which may or not be amiable towards the plaintiff, or from an employer who has already taken adverse employment action against the employee. This burden would of course be placed on a claimant without the aid of the discovery process.

The *Davis* rule places more focus on employer protection and less emphasis on the purpose of remedial legislation like Title VII, the ADA, the ADEA, and the EPA,which is to end a history of egregious employment discrimination in this country. The impractical burden on the plaintiff effectively serves to promulgate employer discrimination and concealment. The employer can then mislead the employee as to the true cause of the action and thus lull the employee into inaction. Despite this misrepresentation, the employee would have the duty of discovering the concealment placed on the employee.

The Court of Appeals for the Third Circuit dealt with this issue in *Oshiver v. Levin, Fishbein, Sedran & Berman*,[161] where a female attorney filed a charge of gender discrimination against her former law firm. Initially, Sherry J. Oshiver applied for a position as an associate attorney with the firm.[162] The firm hired her on an hourly basis, stating that it did not have a salaried position available, but that if one opened up the firm would consider hiring her.[163] The firm soon terminated Oshiver, stating that the firm did not have sufficient work to employ her on an hourly basis.[164] Oshiver applied for unemployment benefits months later.[165] At a benefits hearing, Oshiver discovered that the firm had hired a male attorney to replace her shortly after her termination.[166] The lower court dis-

159. *Id.*

160. *Id.* at 1443 (quoting Hulsey v. Kmart Inc., 43 F.3d 555, 558-59 (10th Cir. 1994)).

161. 38 F.3d 1380 (3d Cir. 1994).

162. *Oshiver*, 38 F.3d at 1383.

163. *Id.* at 1384.

164. *Id.*

165. *Id.*

166. *Id.*

missed Oshiver's complaints for discriminatory refusal to hire and discriminatory discharge as untimely and granted the firm's Motion for Summary Judgment.[167] On appeal, the court reversed the Motion for Summary Judgment on the discriminatory discharge claim.[168] In *Oshiver*, the court stated a rule contrary to that espoused in *Davis*. The court held that the trigger date for the time limitation was not the date of the adverse employment action, but the date that "the plaintiff discovers that he or she has been injured."[169] The court further explained that the date a claim accrues is the time from which the plaintiff knows or should have reasonably known of the discriminatory action.[170]

The *Oshiver* court reasoned that it would be unjust to allow an employer/defendant to benefit from its own misleading acts or omissions.[171] The time period should be tolled where the employer lulled the employee into inaction or misled the employee as to the reasons for the termination, thereby causing the plaintiff's untimely filing.[172]

Applying the *Oshiver* rule in courts within the Tenth Circuit would recognize the realities faced by an employee when attempting to obtain a remedy for discriminatory employment actions. It recognizes the core policy behind anti-discrimination legislation—the elimination of workplace discrimination. The *Oshiver* rule provides greater incentive for an employer to not conceal discriminatory reasons for employment decisions. By exposing a deceptive employer to possible claims in the future by employees who subsequently discover discriminatory pretext. *Oshiver* also places the burden of ensuring non-discrimination on the employer rather than the employee. If the Tenth Circuit applied a rule like that propounded in *Oshiver*, employees would be afforded greater protection from employers' discriminatory acts.

### C. *Counting Employees*

There are four approaches courts may consider when computing the number of employees to determine coverage under a particular anti-discrimination act. Three of those approaches are based on established case law and the fourth is based on core policy principles underlying federal anti-discrimination acts. Any of those approaches could be employed in the Tenth Circuit to allow for broader interpretations to fairly balance

167. *Id.* at 1383.

168. *Id.*

169. *Id.* at 1385.

170. *Id.* at 1386 (citing Ohemeng v. Delaware State Coll., 643 F. Supp. 1575, 1580 (D. Del. 1986)).

171. *Id.* at 1387.

172. *See id.* at 1389.

the treatment of employers and employees in employment discrimination cases.

*1. The public policy exception*

The majority's analysis in *Exam Center* focused primarily on Burton's state law claim as a UADA claim.[173] As a state law claim, the UADA provided the exclusive remedy for wrongful discharge. The majority then used the requirements and background of the UADA to guide its analysis.[174] The majority ultimately held that no public policy exception to the UADA allowing for a tort of wrongful discharge against an employer with fewer than fifteen employees should be adopted, especially where the legislature had expressly exempted small employers from coverage.[175]

The dissent suggested that instead of focusing primarily on the UADA as the exclusive remedy for age discrimination, the primary focus should be on the public policy exception framework presented by the Utah Supreme Court in *Berube v. Fashion Center Limited*.[176] The dissent suggested that clear public policy reasons existed for treating Burton's age discrimination claim, not as a strict UADA claim, but as a tort for wrongful discharge.[177]

In *Berube*, the Supreme Court of Utah reasoned that public policy exceptions should be implemented where there are interests "so substantial and fundamental that there can be virtually no question as to their importance for promotion of the public good."[178] The Durham dissent argued that an exception in this case would recognize that protection against employment discrimination was a substantial and fundamental right that promoted the public good of all workers in Utah.[179] The Durham dissent also cited other state court decisions,[180] arguing that the heart of the public policy exception was the rationale behind both state and federal anti-discrimination acts, noting the eradication of the "detrimental effects of employment discrimination on the public interest."[181] A

173. *Exam Center*, 994 P.2d at 1263-64.

174. *Id.*

175. *Id.* at 1267.

176. 771 P.2d 1033, 1042 (Utah 1989).

177. *See Exam Center*, 994 P.2d at 1268-69.

178. *Id.* (quoting *Berube*, 771 P.2d at 1042).

179. *Id.* at 1269.

180. *Id.* (citing Molesworth v. Brandon, 672 A.2d 608 (Md. 1996)). The dissent also cited other courts for the proposition that though there were small business exemptions, the small businesses were not exempt from the overall intent behind the state anti-discrimination acts. *See id.* at 1270.

181. *Id.* at 1270.

public policy exception allowing for a tort of wrongful discharge in state courts within the Tenth Circuit would place greater focus on the remedial purposes of the anti-discrimination acts. This would allow all employees, including those of small employers, opportunity to seek redress for employment discrimination.

However, a major concern with the dissent's proposition is the increased liability a small employer would face with a tort of wrongful discharge. Under the UADA, employers receive the benefits of notice requirements, shorter time limitations, and an administrative process that attempts conciliation between the employer and employee.[182] In addition, a state administrative process, if successful, can be less costly than a protracted legal battle. A tort of wrongful discharge would doubly burden small employers by giving them none of the benefits of the UADA and exposing them to expensive legal fees when faced with a charge of discrimination.

A better approach would be to strictly limit the public policy exception and not allow a common law cause of action for all discrimination cases. The exception would apply only to the employee minimum, allowing employers with less than the minimum number of employees required to be covered by the UADA. Allowing a claim of discrimination to proceed under the UADA would better balance the purpose of state acts like the UADA, while still providing the protection small employers need from the burden of employment discrimination litigation.

### 2. *The economic realities test*

Many courts have expanded the coverage of federal anti-discrimination statutes by employing the "economic realities" test in determining whether an employer meets the threshold requirement for the minimum number of employees.[183] Rather than looking at technical terms, such as "manufacturing representative," "volunteer," and even "independent contractor," these courts look to the economic realities of the relationship between the principal and the agent.[184]

In *McClure v. Salvation Army*,[185] the Fifth Circuit dealt with a gender discrimination claim brought by a female agent of The Salvation

182. *Id.* at 1267.

183. NLRB v. Hearst Publ'ns. Inc., 322 U.S. 111 (1944); Christopher v. Stouder Mem'l. Hosp., 936 F.2d 870 (6th Cir. 1991); Armbruster v. Quinn, 711 F.2d 1332 (6th Cir. 1983); Neff v. Civil Air Patrol, 916 F. Supp. 710 (S.D. Ohio 1996).

184. *See* McClure v. Salvation Army, 460 F.2d 553, 557 (5th Cir. 1972); *Armbruster*, 711 F.2d at 1335.

185. 460 F.2d at 554.

Army.[186] The court eventually held that McClure's claim could not be maintained because The Salvation Army was a religious organization and any regulation by the government would be an unconstitutional violation of the separation of church and state; however, the court, in probing the terms of the employment contract, determined that McClure was an "employee," despite that fact that her "employer" considered her a volunteer.[187] The court stated that semantics in terms of employment or in employment contracts should not "be used to waive protections granted to employees by an Act of Congress."[188] Rather, the court held the main focus should be on the particular facts of each case and factors such as whether the agent was "selected, employed, controlled, trained, and paid" by the principal.[189]

A similar approach was taken by the Sixth Circuit in *Armbruster v. Quinn*.[190] The court dealt with sexual discrimination charges brought by two females against their employer.[191] The district court had dismissed their claims, holding that the employer did not meet the employee minimum since their "manufacturing representatives" did not qualify as employees.[192] On appeal, the court noted that particular labels an employer might ascribe to its agents were not determinative of whether they were covered under Title VII, but rather the "economic realities underlying the relationship between the individual and the so-called principal."[193] The court observed that the purpose of congressional acts like Title VII was to remedy harms to workers in general, and the term "employee" should be construed broadly in light of the individuals they were to protect.[194] The court also observed that after Supreme Court decisions holding that independent contractors were covered under the National Labor Relations Act ("NLRA"), Congress specifically amended the NLRA to exclude independent contractors.[195] This occurred before the passage of the Title VII.[196] The court further reasoned that Congress had failed to exclude particular types of employees, like manufacturing representatives

186. *McClure*, 460 F.2d at 455.
187. *Id.* at 557.
188. *Id.*
189. *Id.*
190. 711 F.2d 1332, 1333-34 (6th Cir. 1983).
191. *See id.* at 1334.
192. *Id.*
193. *Id.* at 1340.
194. *Id.*
195. *Id.* at 1341.
196. *See id.*

and independent contractors from coverage, further evincing an intention for a broad reading of the term "employee." [197]

In *Hornick v. Borough of Duryea,*[198] a federal district court in Pennsylvania dealt with a sex discrimination charge filed by a temporary female employee of the borough police force.[199] The employers contended that the police force did not have the requisite number of employees to be considered an employer.[200] Specifically, the issue was over two part-time workers and ten Comprehensive Employment and Training Act workers.[201] The borough argued that it did not fit under the Title VII definition of "employer," because it did not have the requisite number of employees.[202] The *Hornick* court cited the opinions of other courts that had similarly dealt with the issues of part-time workers as employees and held that part-time workers did qualify as employees under Title VII.[203] The court also held that the Act was intended to cover not only part-time workers, but also seasonal workers.[204] The broadened interpretations of the term "employee" in *McClure* and *Hornick* allow for protection of more workers exposed to unlawful employment practices. The focus should not be on the labels assigned agents or on technical readings of remedial acts, but on the true relationship between the principal and agent. This focus allows for an interpretation that would provide protection for all workers intended to be covered by the congressional acts. Such a focus in courts within the Tenth Circuit would also provide greater remedies for employees that suffer employment discrimination.

### 3. *The payroll method of counting*

Another definitional aspect of the term "employee" was addressed in *Walters v. Metropolitan Educational Enterprises, Inc.*[205] Several circuit courts were at odds as to the method for counting employees for the purpose of determining whether a company qualifies for the small business exemption to Title VII and the ADEA. Some circuits used the counting method, in which salaried workers were counted "as employees for every day of the week they [were] on the payroll" and "hourly paid workers

197. *Id.*

198. 507 F. Supp. 1091 (M.D. Pa. 1980).

199. *Id.* at 1093.

200. *Id.*

201. *See Hornick*, 507 F. Supp. at 1098.

202. Title VII defines an "employer" as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." 42 U.S.C. § 2000e(b) (1990).

203. *Hornick*, 507 F. Supp. at 1098.

204. *Id.* at 1098.

205. 519 U.S. 202 (1997).

[were] counted as employees only on days when they [were] actually at work and on days of paid leave."[206] Other circuits used a payroll method that focused on "whether an employer has employment relationships with fifteen or more individuals for each working day in twenty or more weeks during the year in question."[207] The United States Supreme Court resolved the split in *Walters* by holding that the payroll method was the correct way to count employees.[208] The Court reasoned that the payroll method "represents the fair reading of the statutory language" and embodied "the ordinary, contemporary, common meaning" of "has an employee."[209] Primary reliance on the phrase "for each working day" suggests that the employee be actually at work on a certain day, and such a test was an improbable interpretation of remedial statutes like Title VII and the ADEA.[210]

The Supreme Court, in choosing the broader interpretation embodied in the payroll method, recognized the remedial nature of acts like Title VII and the ADEA while not abandoning the legislative intent embodied in the Acts' requirements. This holding recognized that the Acts were meant to protect workers against unlawful discrimination, and that highly technical or superfluous interpretations had no place in interpreting anti-discrimination statutes. Holdings of courts outside the Tenth Circuit have interpreted the requirements of anti-discrimination laws more broadly, thus increasing the coverage of both state and federal anti-discrimination acts.

#### 4. *Abrogating or limiting the small employer exemption*

Significant policy factors exist for abrogating or limiting the employee minimum requirement within courts of the Tenth Circuit. The determination that small employers should not be covered by acts like Title VII was a product of legislative compromise.[211] There was an effort to protect small businesses—like family owned agricultural and livestock operations, and small family owned enterprises, who would likely hire workers of their own ethnicity from the burdens imposed by legislative regulation.[212] This same reasoning is the motivation behind many small employer exemptions at the state level.[213]

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206. Zimmerman v. North Am. Signal Co., 704 F.2d 347, 353 (7th Cir. 1983).
207. Walters v. Metro. Educ. Ent., 519 U.S. 202, 203 (1997).
208. *Id.*
209. *Id.* at 207.
210. *Id.* at 203.
211. *See Armbruster*, 711 F.2d at 1337 n.4.
212. *See id.*
213. *See e.g. Exam Center*, 994 P.2d 1261.

The major policy principle behind the enactment of state and federal anti-discrimination acts was the eradication of employment discrimination in all levels of society. However, the small business exemption present in federal and state acts turns a blind eye to discrimination by small businesses. The dissent in *Exam Center* stated that small employers made up nearly seventy percent of all Utah employers,[214] leaving the majority of Utah workers open to the very discrimination the UADA sought to eliminate. Nationwide, similar policy reasons exist for exceptions, if not abrogation, of small employer exemptions in anti-discrimination legislation. In 1998 there were at least 8,047,650 workers employed by 1,238,972 employers with nineteen employees or less.[215] The United States Small Business Association estimates that twenty million small businesses produce thirty-nine percent of our nation's GNP.[216] Thus the small business exemption ignores at least eight million workers employed by small businesses, which are growing in number and importance. As a practical matter, state and federal legislation have different protections for workers employed by small businesses and those employed by larger employers, which is essentially a double standard. As a policy matter, it sends a message that though elimination of workplace discrimination is important for some of the workforce, it is not important enough to cover the entire workforce.

## V. CONCLUSION

Several courts within the Tenth Circuit, at both the state and federal level, are predictably employer friendly when interpreting the requirements of state and federal anti-discrimination legislation.[217] The core policy factor behind the enactment of statutes like the EPA, Title VII, the ADEA, and the ADA, was to eliminate a national history of workplace discrimination based on race, gender, religion, national origin, disability, and age. Legislative enactments were aimed at providing relief to those that had historically been harmed by such discrimination. However, an unbalanced approach toward strict statutory interpretation tends to favor employers, often leaving employees without remedy.

There are three areas where courts within the Tenth Circuit could

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214. *Id.* at 1269.

215. U.S. CENSUS BUREAU, *Statistics about Business Size from the U.S. Census Bureau: Table 2a-Employment Size of Employer Firms*, 1998, *at* http://www.census.gov/epcd/www/smallbus.html/#EmpSize (last visited Nov. 12, 2001).

216. U.S. SMALL BUSINESS ADMINISTRATION, *Mission of the U.S. Small Business Administration: Why Are Small Businesses Important?*, *at* http://www.sba.gov/intro.html (last modified Aug. 2, 2001).

217. *See supra* note 7.

give broader interpretations to legislative requirements in order to give greater meaning to their remedial purpose. First, bright line rules concerning attorney assistance at any point of the filing process should not be the focus when deciding whether to toll time limitations. Rather, the focus should be the due diligence of the claimant in filing claims, the claimant's good faith belief that such claims are well founded, whether the employer would be prejudiced by a late filing, the overall remedial purpose of the statutes, and consideration for the technical nature of the filing process in light of the fact that laymen usually initiate the process. Also, the circumstances surrounding a plaintiff's representation by counsel should be considered, although they should not be the core factor, in deciding whether equitable tolling of the time limitations is appropriate.

Second, courts within the Tenth Circuit should look at the acts and omissions of employers in making adverse employment decisions. Employers should not benefit from misrepresentation and concealment. Time limits should be tolled when employers proffer pretextual reasons for discriminatory decisions. Time limitation should trigger from the date the employee discovers or should have reasonably discovered the discriminatory motivation.

Finally, the term "employee" should be given a broad interpretation. Courts could implement public policy exceptions to state and federal employee minimum requirements, thus allowing for a balance between the eradication of employment discrimination and protection of small businesses. Also, courts could look at the economic realities of relationships between principals and agents and not at technical or superfluous labels. The payroll method of counting should be broadly interpreted when counting employees. In addition, small employers should be held to the same standards as other employers and their employees offered the same protection afforded employees of larger employers even if there is an abrogation or limitation of the small employer exemption. By implementing these three approaches, the remedial nature of anti-discrimination acts will be greatly enhanced, and employees will be given a more evenhanded approach in employment discrimination suits in state and federal courts within the Tenth Circuit.

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