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EMPLOYMENT DISCRIMINATION—THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND THE DEFERRAL QUAGMIRE

Stephen D. Shawe†

The deferral requirements of the equal employment provisions of the 1964 Civil Rights Act were intended to insure state participation in the enforcement of the Act and to lighten the caseload of the E.E.O.C. Their implementation, however, has raised numerous problems that have diminished the effectiveness of the Act. The author traces the history and purpose of these deferral requirements, discusses the problems they have created and suggests some possible solutions.

I. INTRODUCTION

The system for enforcing the federal laws against employment discrimination, provided by Title VII of the 1964 Civil Rights Act,¹ well illustrates the difficulties involved in designing a legal system to achieve an effective and efficient balance of power between the state and federal governments. The drafters of the Civil Rights Act [hereinafter referred to as “the Act” or “Title VII”] envisioned a pattern of dual enforcement of the Act, with the state and federal governments cooperating to eliminate employment discrimination.² The Equal Employment Opportunities Commission [hereinafter referred to as “the E.E.O.C.” or “the Commission”] was created to

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1. Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, 78 Stat. 253, amended by Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103, codified at 42 U.S.C. §§ 2000e-1 *et seq.* (1974). Unless otherwise noted, all statutory references to the Act are to the codified version of amended Act.

2. Section 709(b) of the Act, 42 U.S.C. § 2000e-8(b) (1974), states, in pertinent part:

The Commission may cooperate with State and local agencies charged with the administration of State fair employment practices laws and, with the consent of such agencies, may, for the purpose of carrying out its functions and duties under this subchapter and within the limitation of funds appropriated specifically for such purpose, engage in and contribute to the cost of research and other projects of mutual interest undertaken by such agencies, and . . . pay . . . such [state or local agencies for services rendered to assist the Commission]

Subsection (d) permits the Commission to consult with other interested State . . . agencies and . . . endeavor to coordinate its requirements with those adopted by such agencies. . . .

Other federal statutes provide additional means of securing redress for employment discrimination. See the Civil Rights Act of 1871, 42 U.S.C. §§ 1981, 1983 (1974); the Equal Pay Act, 29 U.S.C. § 206 (1974); the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34 (1974). The federal doctrine of fair representation enables a plaintiff to secure a remedy for discrimination by labor organizations. See *Local 12, United Rubber Workers v. NLRB*, 368 F.2d 12 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967).

oversee federal enforcement of the Act,³ but the concurrent jurisdiction of the state governments and the integrity of state antidiscrimination laws was specifically preserved.⁴ The core of the dual enforcement scheme is a deferral system that requires the E.E.O.C. to refer complaints of employment discrimination to a fair employment practices agency in the state in which a complaint arose, and refrain from taking action until the state has been given an opportunity to resolve the matter under its laws.⁵ This system was intended to insure state involvement in the enforcement process, and, at the same time, to lighten the heavy enforcement burden of the E.E.O.C.⁶

It has become increasingly obvious during its eleven years of operation that this dual enforcement scheme, especially the deferral system, has not fulfilled its purpose. The E.E.O.C.'s current backlog of cases exceeds 100,000,⁷ yet the agency has been remarkably reticent to

3. Section 705(a), 42 U.S.C. § 2000e-4(a) (1974).

4. See Section 708, 42 U.S.C. § 2000e-7 (1974). See also notes 17-18 *infra* and accompanying text.

5. See Section 706(c), (d), 42 U.S.C. § 2000e-5(c), (d) (1974). See also notes 24-27 *infra* and accompanying text.

6. Not only has the caseload of the E.E.O.C. increased dramatically, but the character of the complaints has also been broadened. Although the vast majority of the early discrimination cases brought before the E.E.O.C. and the federal courts were race-related, sex discrimination cases now are equally prevalent. During the 1970-71 fiscal year, of 16,309 charges recommended for investigation by the Commission, 3,889—or about 23 percent—were based upon sex discrimination. E.E.O.C., 6th ANNUAL REPORT 60 (1971). In comparison, for fiscal year 1973-74, of 84,783 actionable charges, 27,459—or about 33 percent—alleged sex discrimination. CCH LAB. L. REP. [1976 Emp. Prac. Guide] Rep. 99, at 36.

In addition, the potential for class actions has increased the E.E.O.C.'s enforcement burden. The federal courts have held that a charging party who is a member of a minority group whose members are the victims of discriminatory practices or policies may, if he meets the requirements of FED. R. CIV. P. 23, represent others of that group, whether they have filed a charge with the E.E.O.C. or not. See *Robinson v. Lorillard Corp.*, 444 F.2d 791 (4th Cir.), *petition for cert. dismissed*, 404 U.S. 1006 (1971). Thus, entire classes of persons may be affected by the disposition of one E.E.O.C. lawsuit.

In support of the inclusion of the deferral provisions in the original version of Title VII, Senator Clark suggested that:

[T]itle VII meshes nicely, logically, and coherently with the State and city legislation already in existence in a number of the States and a number of our cities, small as well as large. The Federal Government and the State governments could cooperate effectively and, to some extent at least, there would be a saving in the Federal budget in those areas where State laws are effective, discrimination is outlawed, and discriminators are prosecuted. 110 CONG. REC. 7205 (1964) (remarks of Senator Clark).

7. At the swearing-in of the last chairman of the E.E.O.C., Mr. Lowell W. Perry, on May 27, 1975, it was confirmed that the backlog of complaints pending at the Commission was "well over 100,000." 89 LAB. REL. REP. 137-38 (1975). The problem of the E.E.O.C.'s caseload was a concern of Congress when it held initial hearings before amending the original Act in 1972:

The Commission has stated, in testimony before this committee, that its caseload has increased even more rapidly than its projections had anticipated. The result . . . has led to lengthy delays in the administrative process and has frequently frustrated the remedial role of the agency. In the case of the Commission, the burgeoning workload, accompanied by insufficient funds and a shortage of staff, has, in many instances, forced a party to wait 2 to 3 years before final conciliation procedures can be instituted . . . H.R. REP. NO. 238, 92d Cong., 2d Sess. 12 (1972).

take advantage of provisions in the Act that enable it to effectively "farm out" portions of its workload to the state agencies.⁸ Moreover, in many cases the E.E.O.C. has attempted to evade the deferral requirements of the Act,⁹ and in other cases the states have agreed to waive the requirements.¹⁰

Part of the problem is the inconsistency of the state antidiscrimination laws and their variance with the provisions of Title VII.¹¹ The states are especially ill-equipped to handle broad-based charges of discrimination throughout an entire industry or network of plants. In addition, many states are prevented by their own financial problems from adequately assisting the E.E.O.C. with its heavy workload.¹² The state and federal enforcement efforts have thus been inconsistent and duplicative, resulting in confusion, delay and expense to complainants and employers alike.

The purpose of this article is to analyze the operation and the legal and practical effects of this dual system of equal employment enforcement, to point out its defects and to make some suggestions for improvement. First, the history and the development of the system will be traced to determine its intended role. Second, the relationship between the deferral requirements and the enforcement powers of the E.E.O.C. will be analyzed. Third, an attempt will be made to isolate the problems that have surfaced in the operation of this system, and to analyze the responses of the courts and the E.E.O.C. Finally, some proposals will be made for the resolution of the system's defects.

II. THE HISTORY AND DEVELOPMENT OF THE DUAL ENFORCEMENT SYSTEM

Equal employment opportunity had been enforced in varying degrees in some states for about 20 years prior to the passage of the 1964 Civil Rights Act.¹³ By 1964, some 25 states had fair employment practices

8. See Section 709(b), 42 U.S.C. § 2000e-8(b) (1974), discussed *infra* at notes 114-18 and accompanying text.

9. See notes 65-94 *infra* and accompanying text.

10. See notes 101-113 *infra* and accompanying text.

11. See notes 44-57 *infra* and accompanying text.

12. The states depend heavily on federal monies authorized by Congress under Section 709(b) of the Act, see note 2 *supra*, to staff and operate their local antidiscrimination agencies. In Maryland, for example, for the 1976 fiscal year, about one-quarter (\$171,734 of \$817,984) of the State Human Relations Commission's budget estimate consists of federal funds. MD. COMMISSION ON HUMAN RELATIONS, BUDGET ESTIMATE, 1976.

In a recent interview, former E.E.O.C. Chairman Perry noted that:

State and local fair employment practice agencies also should help EEOC resolve complaints. . . . With an additional \$2 million from EEOC's budget this year, these FEP agencies should take care of 18 percent of its charges. . . . 91 LAB. REL. REP. 126 (1976).

13. See Hill, *Twenty Years of State Fair Employment Practice Commissions: A Critical Analysis with Recommendations*, 14 BUFFALO L. REV. 22 (1964) [hereinafter cited as 14 BUFFALO L. REV. 22], for a discussion of a few of these early state commissions (*E.g.*, California, Massachusetts, New York, New Jersey, Minnesota).

commissions in operation, although a comprehensive analysis of these local and state commissions revealed that "from their very inception, [these agencies] were ineffectual agents of social change."¹⁴ Nevertheless, by 1964, a few states were effectively vindicating the causes of individuals discriminated against in employment matters, and the constitutionality of state and local fair employment practices legislation had been upheld by the Supreme Court against challenges that pre-1964 federal law had preempted the field.¹⁵

Congressmen from many states feared that the integrity of their local agencies would be jeopardized by federal civil rights enforcement, and to allay these concerns, the Act's leading sponsors, Senators Humphrey and Dirksen, presented a "leadership compromise" to the Senate.¹⁶ This compromise resulted in the dual enforcement scheme.

There are three major prongs to this dual enforcement plan. First, Section 708 of Title VII states:

Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.¹⁷

Complainants alleging employment discrimination that violates both state and federal law thus have the option of initiating proceedings to seek relief through either the federal or state agency, or both.¹⁸ Tracking the federal system, under the auspices of some 35 state

14. *Id.* at 32.

15. A leading pre-Title VII case was *Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc.*, 372 U.S. 714 (1963). Under a 1957 Colorado statute, an interstate air carrier had been ordered by Colorado's fair employment practices agency to cease and desist from using discriminatory hiring policies against black applicants in the state. Reversing the Colorado Supreme Court's finding that the state had unconstitutionally interfered in the activities of an interstate business, the United States Supreme Court held that the order imposed by that agency—to cease from discriminatory hiring practices—imposed no undue burden on interstate commerce, and that federal law and jurisdiction had not preempted the field in which the state agency had acted.

The court stated:

We are not convinced that commerce will be unduly burdened if Continental is required by Colorado to refrain from racial discrimination in its hiring of pilots in that State. Not only is the hiring within a State of an employee, even for an interstate job, a much more localized matter than the transporting of passengers from State to State but more significantly the threat of diverse and conflicting regulations of hiring practices is virtually nonexistent. . . . *Id.* at 721.

See also *Bob-Lo Excursion Co. v. Michigan*, 333 U.S. 28 (1948).

16. *See* 110 CONG. REC. 12721-25 (1964) (remarks of Senator Humphrey).

17. 42 U.S.C. § 2000e-7 (1974).

18. Of course, where deferral is mandated by statute, 42 U.S.C. § 2000e-5(b) (1974), a complainant must first seek relief at the local level before turning to the E.E.O.C. If he initially files his complaint with the E.E.O.C., that agency will, if appropriate, *see* notes 58-64 *infra*, defer the charge for up to 60 days while the local agency handles the case.

statutes are local and state fair employment practices agencies, boards, bureaus and departments created to handle employment discrimination at their level.¹⁹ For example, Maryland has established the Maryland Commission on Human Relations, which is authorized to accept, investigate and conciliate complaints of employment discrimination, and if conciliation fails, to seek compliance with the law through judicial enforcement.²⁰

The second prong of the dual enforcement system is provided by Section 709(b),²¹ which permits the E.E.O.C. and the states to enter into cooperation agreements under which the E.E.O.C. may delegate much of its responsibility for handling certain complaints arising in that state to the funded agency.

Finally, to insure the systematic involvement of the states in enforcement, the Act set up the deferral requirements.²² When a charge is made that a respondent has committed an unlawful employment practice,²³ the E.E.O.C. is required to refer the complaint to an appropriate agency²⁴ in the state in which the complaint arose and defer action for 60 days.²⁵ During this period, the state agency has

Following the Supreme Court's decision in *Love v. Pullman*, 404 U.S. 522 (1972), the Commission, after the expiration of the 60 days, automatically reassumes jurisdiction of the complainant's case, and he is not required to file a new charge.

19. Many of these local agencies predated the 1964 federal law by as many as 20 years. See 14 BUFFALO L. REV. 22.
20. MD. ANN. CODE art. 49B, §§ 1-30 (Supp. 1975).
21. 42 U.S.C. § 2000e-8(b) (1974). These agreements are discussed *infra* at notes 114-18 and accompanying text.
22. For a discussion of the legislative history of this portion of the 1964 Act, see Berg, *Equal Employment Opportunity under the Civil Rights Act of 1964*, 31 BROOKLYN L. REV. 62, 66-68 (1964); see also Sape & Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824, 829-30 and n. 28 (1972) [hereinafter referred to as 40 GEO. WASH. L. REV. 824].
23. Section 703 of the Act, 42 U.S.C. § 2000e-2 (1974) makes it an unlawful employment practice for respondents:
 - (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
 - (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.
- Employers are not the only potential targets for suits brought under Title VII. While Section 703 of the Act, 42 U.S.C. § 2000e-2 (1974), covers *employer* violations in Subsection (a), Subsection (b) proscribes unlawful activity on the part of "employment agencies," while Subsection (c) prohibits "labor organizations" from committing similar violations. Finally, Subsection (d) subjects "joint labor-management committee[s] controlling apprenticeship or other training . . . programs" to the prohibitions of the Act.
24. For a discussion of how the E.E.O.C. determines the local agencies to which it will defer under the Act, see text accompanying notes 58-64 *infra*.
25. The deferral process varies slightly depending on whether the complaint is filed by an individual or by a member of the Commission.

The requirement for deferral of individual charges is provided in Section 706(c), 42 U.S.C. § 2000e-5(c) (1974), which states:

In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the

the opportunity to begin proceedings to determine whether there has been a violation of its antidiscrimination laws. After the deferral period has expired, the E.E.O.C. is empowered to resume jurisdiction and investigate the charge, regardless of the stage to which a state proceeding has progressed, and regardless of whether a violation of state law has been found.²⁶ The institution of proceedings by the E.E.O.C. after the deferral period, however, does not bar the state from continuing its processing of a claim.²⁷ Thus a respondent may be the

unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (b) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

Although Section 706(c) prohibits the *filing* of a charge with the E.E.O.C. until the expiration of the appropriate (60- or 120-day) deferral period, this Section has been construed to permit an individual to first file his charge with the E.E.O.C., which will defer the case to the local agency for the proper time. The E.E.O.C. may then reassume its processing of the case without any need for the charging party to refile with the Commission.

The deferral requirement for commissioner charges is provided in Section 706(d), 42 U.S.C. § 2000e-5(d) (1974), which states:

In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

Because of the slight differences in the two provisions, proper terminology would require the use of the word "deferral" when speaking of individual complaints, while the word "referral" is more appropriate when referring to commissioner charges, since the commissioner charges only involve notification, and an opportunity for the local agency to act if it wishes. For the purposes of this article, however, both individual and commissioner's charges will be referred to as being *deferred*.

26. The E.E.O.C. need not necessarily wait until the local or state agency has completed its processing of charges, before it can begin its own investigation of the cases; it need only wait out the 60-day period before asserting jurisdiction. See 42 U.S.C. § 2000e-5(c) (1974).
27. The E.E.O.C. would not be bound by any determination of the state agency, however, since *res judicata* and collateral estoppel have little place under Title VII. *Batiste v. Furnco Constr. Corp.*, 503 F.2d 47 (7th Cir. 1974); *Cooper v. Phillip Morris, Inc.*, 464 F.2d 9 (6th Cir. 1972). This has accordingly led to a "reluctance to rely on the state agency," as reflected by statistics "showing that 66 per cent of the deferred complaints were returned to the EEOC or closed without action by the state agency." 5 COLUM. J. LAW & SOCIAL PROB. 1, 18-19 (1969).

subject of on-going proceedings in both a state agency and the E.E.O.C.

The potential for duplication of efforts and inconsistency of results that exists within this deferral system is manifest. The relationship between the deferral requirements and the enforcement powers of the E.E.O.C. enhances the gravity of the situation.

III. THE RELATIONSHIP BETWEEN THE DEFERRAL REQUIREMENTS AND THE ENFORCEMENT POWERS OF THE E.E.O.C.

The relationship between the deferral requirements and the E.E.O.C.'s enforcement powers is best understood by examining the manner in which they have evolved and become integrated as the case-handling provisions of the Act have changed. Charges of employment discrimination may be brought before the E.E.O.C. in two ways. First, Section 706(b)²⁸ of Title VII allows a private individual to file a charge with the Commission against a respondent who has allegedly committed an unlawful employment practice. Secondly, 706(b) also permits the E.E.O.C. Commissioners themselves to file charges in two circumstances: (1) when a private individual has complained of discrimination but wishes to remain anonymous,²⁹ or (2) when the Commission has determined that a respondent has been particularly deficient in meeting the requirements of the Act, that is, when the Commission finds a respondent to be the subject of an unusually large number of individual charges.³⁰

Both the individual and the commissioner charges are required to be processed through the deferral, investigation and conciliation stages in substantially the same manner.³¹ Under the 1964 Act, however, if

28. 42 U.S.C. § 2000e-5(b) (1974). Section 706(b) prescribes the procedures for the filing and processing of charges filed either by individual complainants or by members of the Commission, recognizing implicitly that charges may be filed by these persons. Section 706(b) is discussed further at note 31 *infra*.

29. The importance of preventing employer retaliation against charging parties was paramount in the Act itself. See Section 704, 42 U.S.C. § 2000e-3(a) (1974). However, the commissioner's charge was one device by which a Title VII action could be brought by an individual without any fear of retaliation.

30. The Commission's *Compliance Manual* [hereinafter cited as "MANUAL"], CCH E.E.O.C. COMPLIANCE MANUAL ¶ 221 ("Commissioner Charges") (1975) provides that:

[E.E.O.C.] District Directors may request the issuance of a Commissioner Charge when, in their judgment, the purposes of Title VII would be better served by this device. The most common reasons are to protect the anonymity of an aggrieved person; to initiate an investigation of a respondent in instances where the [charging party] cannot be located; or where the District Director has approved withdrawal of the charge, but desires an investigation; or to broaden the scope of inquiry in a specific instance.

31. The investigation and conciliation requirements for both individual and commissioner charges are provided in Section 706(b) of the Act, 42 U.S.C. § 2000e-5(b) (1974), which states in pertinent part:

Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the

conciliation failed the Commission had no further power to enforce its administrative decisions, either by giving remedies or imposing sanctions on its own, or by bringing a suit in federal court to secure the result that it deemed a particular complaint to warrant.³² Although individual complainants who had exhausted the E.E.O.C.'s procedures could and still may bring an action to enforce the Act in a federal district court,³³ at which a trial de novo will be held,³⁴ the Commission could not, under the 1964 Act, bring a suit on behalf of the individual who had charged a violation, nor could it bring suit to enforce its decisions on commissioner charges.³⁵ Thus, only those individual complainants who could afford the time and expense of federal court litigation could effect the ultimate enforcement of the Act's provisions.

Realizing, however, that piecemeal litigation was inadequate protection for minority groups suffering from unlawful discrimination, Congress included Section 707 in the Act.³⁶ This Section gave the

Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. . . .

The deferral requirements for individual and commissioner charges are provided in Sections 706(c) and 706(d), respectively, and vary slightly, as discussed in note 25, *supra*. See also text accompanying notes 97-100 *infra*.

32. In 1965 a bill was introduced, 111 CONG. REC. 14174 (1965), which passed the House as H.R. REP. NO. 10065, 89th Cong., 1st Sess. (1966), 112 CONG. REC. 9153-54 (1966). This bill would have given the E.E.O.C. the right to accept or initiate charges of unlawful employment discrimination, and to issue cease-and-desist orders. Despite the endorsement of President Johnson, however, the Senate failed to pass it. See 40 GEO. WASH. L. REV. at 831-32 and n. 34. The courts thus remained the only arm of enforcement under the Act, even after the passage of the 1972 amendments, discussed at notes 35-37 *infra* and accompanying text.
33. 42 U.S.C. § 2000e-5(f)(1) (1974), quoted at note 40 *infra*.
34. *Id.*
35. For a concise legislative history of the 1964 Act, and the limited enforcement powers originally granted the E.E.O.C., see Comment, *Title VII: How to Break the Law Without Really Trying*, 21 CATH. L. REV. 103 (1971).
36. 42 U.S.C. § 2000e-6 (1974). Section 707 now states in pertinent part:
 - (a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the

United States Attorney General the authority to bring a civil action in federal court when he had "reasonable cause to believe that any person . . . [was] engaged in a pattern or practice of resistance to the full enjoyment of any rights secured by this title. . . ."³⁷ The Attorney General's authority to bring "pattern or practice" suits was not predicated in any way on the exhaustion of the E.E.O.C.'s deferral and conciliation procedures, as was the right of an individual to bring suit.

Although Congress did not specifically define the term "pattern or practice," the legislative history of the 1964 Act reveals that Section 707 was aimed at eliminating systemic discriminatory practices.³⁸ Accordingly, Section 707 was of no aid to individuals whose claims did not relate to systemic practices, and who could not afford the time and expense involved in pursuing a remedy on their own in federal court.

Efforts to give the Commission some enforcement power continued,³⁹ culminating in the passage of the 1972 amendments to the Act. Section 706(f)(1) of the amended Act now gives the Commission, as well as individual complainants, the right to file an action in a United States District Court seeking a remedy against the subject of a charge with whom the Commission has failed to reach a satisfactory conciliated agreement.⁴⁰ The exhaustion of the E.E.O.C. deferral, investigation and conciliation procedures that was required of the

appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described. . . .

37. 42 U.S.C. § 2000e-6(a) (1964), *as amended*, 42 U.S.C. § 2000e-6(a) (1974).

38. For example, Senator Humphrey, a sponsor of the original 1964 Act, stated:

[A] pattern or practice would be present only where the denial of rights consists of something more than an isolated, sporadic incident, but is repeated, routine or of a generalized nature. . . . 110 CONG. REC. 14270 (1964).

In *U.S. v. Ironworkers Local 86*, 443 F.2d 544 (9th Cir. 1971), the court stated that "it was the intent of Congress that a 'pattern or practice' be found where the acts of discrimination are not 'isolated, peculiar or accidental' events." *Id.* at 552. *See also* *Griggs v. Duke Power Co.*, 420 F.2d 1225 (4th Cir. 1970), *rev'd on other grounds*, 401 U.S. 424 (1971); *U.S. v. Dillon Supply Co.*, 429 F.2d 800 (4th Cir. 1970).

39. *See* note 32 *supra*.

40. 42 U.S.C. § 2000e-5(f)(1) (1974), states in pertinent part:

If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. . . .

The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. 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) of this section, whichever is later, the Commission has not filed a civil action under

individual plaintiff in a suit prior to the amendment is made a condition precedent to suits brought by the E.E.O.C. as well.⁴¹

Section 707 of the Act was also amended to give the Commission the authority that the Attorney General had been given under the original Act to bring "pattern or practice" suits.⁴² As a prerequisite to a Section 707 "pattern or practice" suit, the Commission must first employ the charging, deferral, investigation and conciliation procedures that are a prerequisite to individual suits, even though this was not required of the Attorney General under the original Act.⁴³

The result of this evolution is that all of the E.E.O.C.'s enforcement powers have been made contingent on its adherence to the deferral requirements. While this arrangement might, in theory, serve some worthwhile purposes, its effectiveness is diminished by the deferral system's enormous potential for inconsistency and duplication. This potential is intensified by the Act's failure to impose specific standards for the state agencies to which the E.E.O.C. must defer.

this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, 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 (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

41. The courts have dismissed complaints brought pursuant to Section 706(f)(1) when, for instance, the plaintiff failed to first afford the employer an opportunity to conciliate, as required by the Act. See *E.E.O.C. v. Hickey-Mitchell Co.*, 507 F.2d 944 (8th Cir. 1974); *E.E.O.C. v. Westvaco Corp.*, 372 F. Supp. 985 (D. Md. 1974).
42. Section 707(c), 42 U.S.C. § 2000e-6(c) (1974), now provides:
Effective two years after March 24, 1972, the functions of the Attorney General under this section shall be transferred to the Commission, together with such personnel, property, records, and unexpended balances of appropriations, allocations, and other funds employed, used, held, available, or to be made available in connection with such functions unless the President submits, and neither House of Congress vetoes, a reorganization plan pursuant to chapter 9 of Title 5, United States Code, inconsistent with the provisions of this subsection. The Commission shall carry out such functions in accordance with subsections (d) and (e) of this section.
43. 42 U.S.C. § 2000e-6(e) (1974), states:
Subsequent to March 24, 1972, the Commission shall have authority to investigate and act on a charge of a pattern or practice of discrimination, whether filed by or on behalf of a person claiming to be aggrieved or by a member of the Commission. All such actions shall be conducted in accordance with the procedures set forth in 2000e-5 of this title.

IV. PROBLEMS POSED BY THE DEFERRAL PROCESS

A. *Variation in State Fair Employment Practices Legislation*

The legislative history of the Act fails to reveal Congress's recognition of a problem which is inherently built into a scheme, such as deferral, in which each of the 50 states is permitted to deal with employment discrimination in its own way. This problem is the disparate and widely divergent local legislation governing employment discrimination in each of the various jurisdictions.⁴⁴ As one federal court noted, "[s]tate and local [employment discrimination] laws vary widely in effectiveness. In many areas effective enforcement is hampered by inadequate legislation, inadequate procedures, or an inadequate budget. . . ."⁴⁵

Some states' enforcement agencies have broad powers, which they are not hesitant to assert. For example, the New York Division of Human Rights may, upon finding probable cause to believe a violation of that state's fair employment practices laws,⁴⁶ issue orders requiring the respondent to cease and desist from committing the alleged wrong, and go into the state supreme court for enforcement and an award of compensatory damages (such as back pay).⁴⁷ Likewise, courts in Illinois⁴⁸ have enforced local fair employment practices agency orders allowing for the full panoply of remedies, including injunctive relief and compensatory damages.

Conversely, some state agencies lack the broadly sweeping authority to issue and enforce appropriate orders in order to remedy certain discriminatory employment practices. For example, *Gutwein v. Easton Publishing Co.*,⁴⁹ a recent decision of the Maryland Court of Appeals, significantly limited the Maryland Commission's enforcement powers, by holding that it lacked the authority to award back pay upon a finding of wrongful discrimination in employment. In rejecting the Maryland Commission's position that its statutory authority to order "affirmative action"⁵⁰ included an implied right to award compensatory damages, the court replied that "a monetary damage remedy is not to be lightly implied."⁵¹

Other states whose courts have interpreted local legislation to deny

44. For an excellent analysis of the disparities in enforcement and procedure found among the various states' fair employment practices agencies, see Sutin, *The Experience of State Fair Employment Commissions: A Comparative Study*, 18 VAND. L. REV. 965 (1965). See also 2 T. EMERSON, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES ch. 18, § C. (3d ed. 1967).

45. *Voutsis v. Union Carbide Corp.*, 452 F.2d 889, 894 (2d Cir.), cert. denied 406 U.S. 918 (1971).

46. N.Y. EXECUTIVE LAW §§ 290-301 (McKinney's Supp. 1975).

47. N.Y. EXECUTIVE LAW § 297(4)(c) (McKinney's Supp. 1975).

48. *A. P. Green Servs. Div. of Bigelow-Liptak Corp. v. State Fair Employment Practices Comm'n*, 19 Ill. App. 3d 875, 312 N.E.2d 314 (1974).

49. 272 Md. 563, 325 A.2d 740 (1974).

50. MD. ANN. CODE art. 49B, § 14(e) (1957).

51. 272 Md. at 574, 325 A.2d at 746.

local agencies the power to award compensatory damages include Ohio,⁵² Pennsylvania,⁵³ Iowa,⁵⁴ and Wisconsin.⁵⁵ Some states' agencies, most of which are in the South, are limited to the powers of conciliation and persuasion in effectuating the purposes of the laws under which they were created.⁵⁶

The Arizona Civil Rights Commission, for instance, until recently, was empowered merely to attempt conciliation and, if that failed, to fine violators a nominal amount.⁵⁷ This apparent inability of the Arizona Commission to go beyond the use of nominal sanctions against respondents found to have violated the provisions of that state's laws has led to a number of significant court decisions, in which the deferral issue has met head-on with the problem of inadequate state remedies. This confrontation was the result of the E.E.O.C.'s refusal to acknowledge the Arizona agency as one that deserved the right to accept deferral of cases initially filed with the federal Commission.

B. The "706 Agency" Selection Process

The E.E.O.C.'s deliberate refusal to defer charges arising in Arizona to the Arizona Commission was the result of a decision it had reached, pursuant to Section 706(c) of the Act,⁵⁸ that the state agency was incapable of meeting the standards the E.E.O.C. had set for selecting which local agencies were capable of accepting deferred complaints. Section 706(c) loosely defines the requirements which a local agency must meet in order to be able to accept deferral of charges first filed with the E.E.O.C.: the state or local law must "prohibit . . . the unlawful employment practice alleged" in the charge filed with the E.E.O.C., and "establish . . . or authoriz[e] . . . a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto. . . ."⁵⁹

52. *Cf.*, Ohio Civil Rights Comm'n v. Lysyj, 38 Ohio St. 2d 217, 313 N.E.2d 3 (1974), *cert. denied*, 419 U.S. 1108 (1975) (Ohio Civil Rights Commission held to be without authority to grant compensatory or punitive damages to resident of trailer park who was forced to leave for entertaining black guest).

53. *Cf.*, Zamantakis v. Commonwealth, Human Relations Comm'n, 10 Pa. Comm. 107, 308 A.2d 612 (1973) (Pennsylvania Human Relations Commission was held to be without authority to grant compensatory damages to blacks for "mental anguish" resulting from the respondent's discriminatory rental practices).

54. *Iron Workers Local 67 v. Hart*, 191 N.W.2d 758 (Iowa 1971).

55. *Murphy v. Indus. Comm'n*, 37 Wis. 2d 704, 157 N.W.2d 568 (1968).

56. Alabama, Florida, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas and Virginia are considered by the E.E.O.C. as having agencies which lack "enforceable sanctions against . . . practice[s] prohibited by Title VII." 8 LAB. REL. REP. 451:9-451:13 (1975).

57. *See, e.g.*, ARIZ. REV. STAT. §§ 41-1481-85 (1965), *as amended*, ARIZ. REV. STAT. § 41-1481-85 (1974). The amended version of the Arizona statute now permits the state agency to bring a civil action against a respondent with whom it has failed to achieve conciliation and permits the court to order an injunction and back pay.

58. 42 U.S.C. § 2000e-5(c) (1974), discussed at note 25 *supra*.

59. *Id.*

The Commission's procedural regulations⁶⁰ provide more specific tests for determining which state and local agencies adequately conform with the requirements of Section 706(c) so as to merit the status of a "706 Agency."⁶¹ For example, Section 1601.12(c) of the regulations⁶² specifically requires that the local agency have the authority to prohibit "the unlawful employment practice alleged." The state law must cover those persons who are covered under the federal Act, and be "administered and interpreted by the state agency so that it does, in fact, prohibit the practices prohibited by Title VII and does, in fact, require the remedies required by Title VII."⁶³ Once a state agency achieves "706" status, the E.E.O.C., pursuant to Section 1601.12(k) of the regulations,⁶⁴ may periodically review its performance to determine whether it continues to qualify for the right to accept deferral from the federal Commission.

After deliberative study and review of Arizona's fair employment practices laws in the context of Section 706(c), the E.E.O.C.'s General Counsel had determined in December, 1965, that because Arizona's

fair employment practice law authorizes the issuance of a cease-and-desist order against a respondent but does not provide for enforcement thereof unless the respondent has been served with a cease-and-desist order involving a previous violation, the aggrieved person is not afforded a meaningful remedy unless there is an outstanding order against the respondent. Accordingly, the Commission will not defer to such state.⁶⁵

This decision sparked intense litigation on the Commission's "706 Agency" selection process. Upon review, the courts reversed the

60. 29 C.F.R. § 1601 (1975).

61. Hereinafter, "706 Agencies" refer to those state and local fair employment practices agencies which the E.E.O.C. has determined, after study and review pursuant to Section 706(c) of the Act, 42 U.S.C. § 2000e-5(c) (1974), merit the right to accept deferral of charges first filed with the federal Commission.

62. 29 C.F.R. § 1601.12 (1975), Section 1601.12(a) provides in pertinent part:

In order to give full weight to the policy of section 706(c) of the Act, which affords State and local fair employment practice agencies that come within the provisions of that section an opportunity to remedy alleged discrimination concurrently regulated by Title VII and State or local law, the Commission adopts the following procedures with respect to allegations of discrimination filed with the Commission where there is no evidence that such allegations were earlier presented to an appropriate 706 Agency. It is the intent of the Commission to thereby encourage the maximum degree of effectiveness in the State and local agencies. . . .

See Appendix for a chart of the Commission's latest determinations with respect to "706 Agencies."

63. CCH EMP. PR. GUIDE ¶ 2275 at 1821 (1974); see also 29 C.F.R. § 1601.12(j)(1) (1975).

64. 29 C.F.R. § 1601.12(k) (1975).

65. General Counsel Opinion No. 667-65, CCH EMP. PR. GUIDE ¶ 17,252 at 7370 (1965), cited in *Crosslin v. Mountain States Telephone and Telegraph Co.*, 422 F.2d 1028, 1030 (9th Cir. 1970), *vacated and remanded*, 400 U.S. 1004 (1971).

E.E.O.C.'s refusal to grant the Arizona agency "706" status, in *Crosslin v. Mountain States Telephone & Telegraph Co.*⁶⁶

In *Crosslin*, the complainant filed a charge with the E.E.O.C. alleging that the respondent, Mountain States Telephone & Telegraph Co., had refused to hire her because of her race. The complainant had been advised by the E.E.O.C. that under its 1965 directive, she was not required to first file her charge with the Arizona fair employment practices commission. After investigation, the E.E.O.C. determined that reasonable cause existed to believe that the violation had occurred, and unsuccessfully sought to secure voluntary compliance. The E.E.O.C. then gave the complainant notice of her right to sue,⁶⁷ and she brought an action in the District Court of Arizona. The defendant moved to dismiss the complaint, alleging, *inter alia*, the failure of the plaintiff to have first taken her case to the appropriate local agency (the Arizona Civil Rights Commission).⁶⁸ The District Court's rejection of the defendant's motion⁶⁹ was appealed to the Court of Appeals for the Ninth Circuit.

The Ninth Circuit reversed,⁷⁰ holding that the plaintiff's failure to first afford the Arizona Commission the opportunity to accept deferral of the charge was fatal, even though she had acted on the advice of the E.E.O.C. The court began by rejecting the E.E.O.C.'s determination that the Arizona civil rights laws failed to afford "a meaningful remedy" in cases of employment discrimination,⁷¹ noting that:

The "relief" intended by [Section 706(b)] . . . is not that which may be granted by courts in response to a petition by the aggrieved person—the teeth of the federal program and the comparative weakness of Arizona's. Rather it is the relief that may be sought by the state or local authority itself

. . . .

Since Congress has spoken in terms not of ultimate state remedy but of relief to be sought by a state authority, it may reasonably be supposed to have had in mind the type of relief which it had itself authorized the E.E.O.C. to seek: elimination of the unlawful practice by "conference, conciliation, and persuasion. . . ."⁷²

The court further noted that despite a state's failure to meet the

66. 422 F.2d 1028 (9th Cir. 1970), *vacated and remanded*, 400 U.S. 1004 (1971).

67. Pursuant to Section 706(f)(1), 42 U.S.C. § 2000e-5(f)(1) (1974). See note 40 *supra*.

68. The plaintiff pointed out to the court that she had not first advised the Arizona Commission of her charge of discrimination because the E.E.O.C. had expressly advised her that it would be unnecessary to do so. 422 F.2d at 1031.

69. *Crosslin v. Mountain States Telephone and Telegraph Co.*, 1 F.E.P. Cas. 803 (D. Ariz. 1969).

70. 422 F.2d 1028 (9th Cir. 1970).

71. See note 65 *supra*; this opinion by the Commission was discussed at 422 F.2d at 1030.

72. 422 F.2d at 1030.

requirements of Section 706(c), the state is, at the very least, entitled to "its sixty days' grace if the state commission merely has authority to institute criminal proceedings respecting the violation."⁷³

The circuit court's dismissal was appealed to the United States Supreme Court, which remanded the case to the district court "for reconsideration in light of the suggestions contained in the brief of the Solicitor General as *amicus curiae* . . ."⁷⁴ The Solicitor General suggested that the district court defer enforcement while the E.E.O.C. notified the Arizona agency and "allowed that Commission the statutory deferral period"⁷⁵ in which to act. On remand, the district court simply once more rejected Mountain States' motion to dismiss, without commenting on the Solicitor General's suggestion.⁷⁶

In *Motorola, Inc. v. E.E.O.C.*,⁷⁷ decided a year after *Crosslin*, the E.E.O.C. filed suit on a Commissioner's charge which it had failed to first defer to the Arizona Commission. The district court denied the respondent's motion to quash an E.E.O.C. demand for discovery,⁷⁸ and Motorola appealed. The Ninth Circuit followed the Solicitor General's suggestion to the Supreme Court in *Crosslin*,⁷⁹ and ordered that:

[T]he district court shall retain jurisdiction for a time sufficient to allow the E.E.O.C. to notify the Arizona Civil Rights Commission and to allow that commission the statutory deferral period in which to act upon it. See 29 C.F.R. § 1601.10, 1601.12(iv).⁸⁰ If the Arizona Commission elects not to act, the district court may then proceed as the rights of the parties may then appear. *Crosslin v. Mountain States*⁸¹

Notwithstanding the clear message of the Ninth Circuit in *Crosslin* and *Motorola*, in *Corne v. Bausch & Lomb, Inc.*,⁸² the E.E.O.C., rather than affording the relevant local agency—again, the Arizona Civil Rights

73. *Id.* at 1031 n. 4.

74. 400 U.S. 1004 (1971). *But cf.* Justice Douglas' dissent, 400 U.S. 1005 (1971).

75. This suggestion is quoted and discussed in *General Ins. Co. of America v. E.E.O.C.*, 491 F.2d 133 (9th Cir. 1974).

76. *Crosslin v. Mountain States Telephone and Telegraph Co.*, 4 F.E.P. Cas. 32 (D. Ariz. 1971).

77. 460 F.2d 1245 (9th Cir. 1972), *remanding with instructions*, 317 F. Supp. 282 (D. Ariz. 1968).

78. 317 F. Supp. 282 (D. Ariz. 1968).

79. See note 75 *supra* and accompanying text.

80. Section 1601.10 states in relevant part:

Any member of the Commission may file a charge in writing with the Commission. If section 706(d) of title VII should be applicable, the Commission, before taking any action with respect to the charge, shall notify the appropriate State or local 706 Agency, as defined in § 1601.12(c), and offer to refer the charge to it . . . The Commission will allow the State or local authority a 10-day period to request an opportunity to act under its law except when EEOC notifies the appropriate authority in writing of a different time period.

81. 460 F.2d at 1246.

82. 390 F. Supp. 161 (D. Ariz. 1975).

Commission—the right to accept deferral of the charge in issue, gave the local authorities mere pro forma notice of the charge which had been first filed with the E.E.O.C. Without waiting for the local Commission to act,⁸³ the E.E.O.C. took the case itself before the end of the 60-day deferral period. In rejecting the Commission's well-worn argument that the Arizona agency's powers were too limited to effectively vindicate the complainant's rights, the district court accused the E.E.O.C. of "deliberately bypass[ing] the state agency. . . ."⁸⁴ *Corne* is a unique decision, with a rather surprising result, because it is one of very few cases in which a federal court threw out an individual complainant because of procedural irregularities committed not by the charging party, but by the E.E.O.C. itself, acting on the plaintiff's behalf.⁸⁵

Despite these decisions in the Ninth Circuit, the E.E.O.C. has jealously guarded its right to remain the exclusive selector of proper "706" agencies, and has continued to apply its own strict standards in ascertaining whether the relevant local body was an appropriate "706" deferral agency. In its *Compliance Manual*, the E.E.O.C. categorically rejected the *Crosslin* and *Motorola* decisions in this Note:

The Commission adheres to the view that *Crosslin*, and the more recent 9th Circuit decision in *E.E.O.C. v. Motorola* . . . are incorrect and that State and local agencies that are lacking appropriate enforcement procedures, etc., are not the kind of deferral agencies contemplated by Section 706(c). . . .⁸⁶

Accordingly, the E.E.O.C. has determined that the remedial powers of the agencies in certain states⁸⁷ are too inadequate to justify an offer of deferral. In other states, where local fair employment practices legislation differs from the substantive or remedial provisions of Title VII, the E.E.O.C. has generally applied these strict standards, and, by refusing to defer cases involving charges that it felt were not cognizable under the local law, prompted further litigation similar to that in *Crosslin*, *Motorola* and *Corne*.

83. Again, as in *Crosslin* and *Motorola*, the local agency involved was the Arizona Commission. The E.E.O.C. continued to maintain that this agency was ineffective in prosecuting claims of employment discrimination, and that therefore, deferral was not required.

84. 390 F. Supp. at 165.

85. Generally, if a private individual is involved, the federal courts prefer to protect his rights, while merely admonishing the Commission that it should follow its regulations more carefully the next time. See, e.g., *Mitchell v. Mid-Continent Spring Co.* of Kentucky, 466 F.2d 24 (6th Cir. 1972), cert. denied, 410 U.S. 928 (1973) (held, failure of the E.E.O.C. to first defer private complaint to the Kentucky Human Rights Commission was not fatal to plaintiff's Title VII suit; court would retain jurisdiction while the Kentucky Commission was given an opportunity to act).

86. MANUAL at 3905.

87. Idaho, Maine, Montana, Ohio, Oklahoma, Tennessee and Vermont were cited in *Crosslin v. Mountain States Telephone and Telegraph Co.*, 400 U.S. 1004, 1005 (1971), discussed at notes 66-76 *supra*, as lacking a state agency with "706" status. But see Appendix *infra* for a current listing of "706" agencies.

In some of these cases, the courts have occasionally agreed with the Commission, excusing its failure to defer to the appropriate local agency when the relevant local law departed materially from the provisions of Title VII. For example, in *General Insurance Co. of America v. E.E.O.C.*,⁸⁸ the Commission proceeded to investigate charges of sex discrimination without deferring to the Washington state authorities. In adopting the E.E.O.C.'s determination that Washington lacked an appropriate "706 agency," the Court of Appeals for the Ninth Circuit observed:

The charge in question was wage discrimination due to sex which is prohibited by Washington law and is made a misdemeanor. . . .⁸⁹ However, no state or local authority is established either to seek relief or institute criminal proceedings.⁹⁰

Likewise, in *Nueces County Hospital District v. E.E.O.C.*,⁹¹ the Court of Appeals for the Fifth Circuit upheld the E.E.O.C.'s right to refuse deferral of a charge of retaliation,⁹² holding that the applicable state legislation failed to protect individuals from that particular form of discrimination.

In *Edwards v. North American Rockwell Corp.*,⁹³ a peculiar result was reached due to the fact that California law, while outlawing racial discrimination, failed to prohibit sex-based employment discrimination. The charging party, a black female, filed charges with the E.E.O.C. on both sex and race bases, without first going to the California Fair Employment Practices Commission. The district court dismissed the race claims, pointing out that the charging party failed to first exhaust her *state* remedies with respect to this charge. However, the court held that the complainant could pursue her sex discrimination claims exclusively through the E.E.O.C., because of the state's lack of sex discrimination provisions in its law.⁹⁴

As demonstrated by the above cases, the process of selecting appropriate deferral agencies has resulted in frequent conflict between the E.E.O.C. and various courts. The E.E.O.C. has jealously guarded its prerogative to select as "706" agencies only those agencies which meet the strict standards set out in its regulations. Even when the

88. 491 F.2d 133 (9th Cir. 1974).

89. REV. CODE WASH. § 49.12.175 (1962).

90. 491 F.2d at 134-35.

91. 518 F.2d 895 (5th Cir. 1975).

92. Section 704 of the Act, 42 U.S.C. § 2000e-3 (1974), specifically provides that no employer may discriminate against any employee because of the fact that the employee filed a charge with the E.E.O.C. In *Nueces*, the applicable Texas statutes failed to provide protection from this specific conduct.

93. 291 F. Supp. 199 (C.D. Cal. 1968).

94. *Id.* at 202. (Claim dismissed pursuant to FED. R. CIV. P. 12(b)(6) because, *inter alia*, the plaintiff's allegations were too confused and indefinite).

Commission has designated an agency as competent to process deferred charges, the reticence with which the Commission defers certain charges to that agency, and the weight it gives to that agency's final determinations and orders, illustrate additional problems with the E.E.O.C.'s present deferral policies and practices.

C. Deferral of Commissioner Charges and Pattern or Practice Cases: An Illustration of the Commission's Reticence to Effectively Utilize State and Local Agencies.

As previously discussed,⁹⁵ Section 707 of the amended Act now also provides the Commission with the power to bring a broad-based "pattern or practice" suit against a particular respondent or an entire industry.⁹⁶ Because Section 707(e) of the amended Act⁹⁷ requires the E.E.O.C. to process "pattern or practice" charges "in accordance with the procedures set forth in Section [706(d)] . . ." it appears that the Commission is obliged to defer 707 "pattern or practice" charges. The Commission has chosen to interpret narrowly its duty to defer in "pattern or practice" cases, and, as discussed *infra*, it has on at least one occasion employed procedures which effectively preclude any meaningful state or local action on these cases.

The deferral provisions of Section 706(d) require that:

In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days . . . unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.⁹⁸

The E.E.O.C.'s regulations⁹⁹ provide a ten-day period in which states must decide whether they will process this type of charge. Moreover, the Commission's *Compliance Manual* states that "[i]f the 706 Agency does not request an opportunity to process the charge within the 10-day period, [the Commission] may begin processing. . . ."¹⁰⁰ These

95. See notes 42-43 *supra* and accompanying text.

96. 42 U.S.C. § 2000e-6 (1974).

97. *Id.* § 2000e-6(e) (1974); see note 43 *supra*.

98. 42 U.S.C. § 2000e-5(d) (1974); see note 25 *supra*.

99. 29 C.F.R. § 1601.10 (1975), quoted at note 80 *supra*.

100. MANUAL, at ¶ 282.

internal directives clearly reflect the Commission's reluctance to share its functions with respect to "pattern or practice" cases.

The case of *E.E.O.C. v. United States Fidelity and Guaranty Co.*¹⁰¹ [hereinafter referred to as *U.S.F.&G.*], currently pending before the Court of Appeals for the Fourth Circuit, pointedly demonstrates this reluctance. Moreover, it illustrates the fact that a state agency may be a willing partner to the Commission's efforts to limit its deferral activities.

In *U.S.F.&G.*, the Commission had filed a charge against the company in August of 1974, pursuant to Sections 707 and 706(d) of the Act.¹⁰² An immediate investigation began, and the E.E.O.C. issued a subpoena *duces tecum*, requesting certain of U.S.F.&G.'s employment records. The company refused to submit to the subpoena and, in a motion to quash, argued that the Commission lacked jurisdiction to investigate the matter because it had failed to first refer the charge to the appropriate "706" Agency.¹⁰³ In a decision by Judge Herbert Murray of the District Court of Maryland,¹⁰⁴ the company prevailed. The court reprimanded the E.E.O.C. for failing to follow not only the requirements of the Act but of its own regulations,¹⁰⁵ and held that the pro forma notice given the Maryland Commission by the E.E.O.C. was inadequate:

Notification of the charge [to the state agency] is mandatory before any E.E.O.C. action may be taken with respect to such Commission charge.

In the instant matter, the attempt at notification was, in this Court's opinion, nothing more than a mere courtesy and as such did not constitute the type of notification envisioned by the statute. *See Corne v. Bausch & Lomb, Inc.*¹⁰⁶

101. 11 F.E.P. Cas. 859 (D. Md. 1975), presently pending appeal in the Court of Appeals for the Fourth Circuit, as Case No. 75-2376.

102. The Commissioner's Charge alleged, *inter alia*, that the company had refused and failed to recruit and hire minorities, refused and failed to assign, promote, transfer, and provide equal terms and conditions of employment for minorities, and utilized testing and selection procedures "which have a disparate effect on minorities . . ." (Brief and Appendix for United States Fidelity and Guaranty Company, Appellant, Case No. 75-2376, App. 2-3).

103. In this case, the company had argued that the deferral could have been made either to the Baltimore Community Relations Commission or the Maryland Commission on Human Rights; see Appendix I, *infra*. The E.E.O.C.'s procedural regulations provide:

Where both State and local 706 Agencies exist, the Commission reserves the right to defer to the State 706 Agency only. However, if the Commission determines that it would best serve the purposes of the Act, it may defer to either or both State and local 706 Agencies. 29 C.F.R. § 1601.12(g) (1975).

104. 11 F.E.P. Cas. 859 (D. Md. 1975).

105. 29 C.F.R. § 1601 (1975), discussed at note 60 *supra* and accompanying text.

106. 11 F.E.P. Cas. at 861. *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161 (D. Ariz. 1975) is more fully discussed at notes 82-85 *supra* and accompanying text.

Following dismissal of the subpoena motion, the E.E.O.C. filed an appeal with the Court of Appeals for the Fourth Circuit, and a concomitant motion under Rule 60(b) of the Federal Rules of Civil Procedure,¹⁰⁷ seeking to vacate the prior judgment. Attached to the Commission's Rule 60 motion was the affidavit of Elbert L. A. Guillory, Executive Director, Maryland Commission on Human Relations, which contained the following language:

It has been and continues to be a longstanding policy and practice of the [Maryland Commission] to decline all E.E.O.C. offers of referral which involved a charge filed by a Commissioner of the E.E.O.C. . . . I am, and have been, aware that [the Maryland Commission] has the prerogative to accept an E.E.O.C. offer of referral of an E.E.O.C. Commissioner's Charge. The staff of [the Maryland Commission] is similarly aware of [its] right in this regard.

. . . .

The actions taken by E.E.O.C. coincidental to referring the [Commissioner's] charge to [the Maryland Commission] were entirely consistent with the understanding and practice which has been established between E.E.O.C. and [the Maryland Commission] i.e., to proceed with the investigation of an E.E.O.C. Commissioner's Charge. . . .¹⁰⁸

Thereafter, by letter to the parties, Judge Murray responded to the Commission's Motion for Relief under Rule 60 and indicated that he

107. FED. R. CIV. P. 60(b) provides:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. . . .

108. Brief and Appendix for United States Fidelity and Guaranty Company, Appellant, Case No. 75-2376, at App. 32. This attitude of the Maryland Commission is further evidenced by the substance of a letter from Jacob J. Edelman, Chairman of that Commission, to Senator Edward T. Conroy, Chairman, Maryland Senate Committee on Constitutional and Public Law, dated August 7, 1975. This letter was in response to comments made before that Committee by the author, on behalf of the Maryland Chamber of Commerce. This letter noted that:

[A]n examination of the present caseload reveals that most complaints [before the State Commission] are processed on a single issue basis. Over ninety percent of the cases presently awaiting public hearing also deal only with single issues, i.e., terminations, failure to hire, failure to rent, etc. The Commission does not and cannot presently engage in numerous pattern and practice investigations as our limited resources and expanding caseload will not permit it. *Id.* at page 2 (Letter is on file with the Maryland Senate Committee on Constitutional and Public Law, Annapolis, Maryland).

would grant the E.E.O.C.'s motion if the court of Appeals remanded the case. The Commission's subsequent motion for remand to the district court was granted, and, on remand, the district court¹⁰⁹ reversed its previous decision, and ordered enforcement of the subpoena. This time, the court concluded that in light of the Maryland Commission's apparent unwillingness to assert jurisdiction,

requiring E.E.O.C. to tender a referral offer to the [Maryland Commission] within the technical requirements of the statute and regulations, would serve no practical purpose, nor is it required by the statute. . . .¹¹⁰

The Maryland Commission on Human Relations' acquiescence to the E.E.O.C. practices exposed in *U.S.F.&G.* is difficult to justify in view of the fact that this same agency has bitterly protested other efforts to limit the nature of the cases which it can investigate. In recent Maryland General Assembly hearings concerning legislation that could limit the powers which the Maryland Commission presently possesses, the agency's general counsel stated that unless it was given the power to order certain remedies, "the State is going to abdicate its responsibilities to others," referring to the E.E.O.C.¹¹¹ The general counsel further stated that if legislation was passed which would circumscribe the state commission's present powers, "the federal government will decertify us,"¹¹² referring to the Maryland Commission's status as a "706" agency.¹¹³

There is no way of knowing how many similar understandings and "longstanding policies" are in effect between the E.E.O.C. and the various "706" agencies throughout the United States. If the situation in *U.S.F.&G.* exemplifies a common trend in E.E.O.C.-state practice, the deferral provision of Section 706(d) is severely crippled. Allowing the states to waive the deferral requirements is particularly ludicrous in view of the fact that the Section 709(b) of the Act specifically provides for an almost totally opposite result: the E.E.O.C.'s *complete* deferral to the states. This provision indicates that Congress preferred that the E.E.O.C. bow to the states, if possible, and undermines any contention that the states should be allowed to bow out of the enforcement picture altogether.

109. *E.E.O.C. v. United States Fidelity and Guaranty Co.*, Civil Action No. HM-75-366 (D. Md. Oct. 31, 1975).

110. *Id.* at p. 8.

111. *Baltimore Sun*, October 9, 1975, at C2, col. 2.

112. *Baltimore Evening Sun*, October 9, 1975, at C2, col. 3.

113. See Appendix I *infra*.

D. The E.E.O.C.'s Failure to Use its Full Statutory Power to Refrain from Processing Charges Deferred to State and Local Agencies.

Section 709(b) of the amended Act permits the Commission to *cooperate with and assist in funding* state and local fair employment practices agencies, and further provides that the E.E.O.C. may:

[E]nter into written agreements with such State or local agencies and such agreements may include provisions under which the Commission shall refrain from processing a charge in any cases or class of cases specified in such agreements or under which the Commission shall relieve any person or class of persons in such State or locality from requirements imposed under this section. The Commission shall rescind any such agreements whenever it determines that the agreement no longer serves the interest of effective enforcement of this subchapter.¹¹⁴

It is clear that Congress intended that Section 709(b) be used to farm out much of the E.E.O.C.'s work. In a major statement explaining Title VII, Senator Clark gave a detailed explanation of the Senate's revisions of the House Bill. Speaking to Senator Dirksen's concern that the Act subjected an employee to both state and federal antidiscrimination laws, Senator Clark noted:

The Federal law will apply in all the States, but it will not override any State law or municipal ordinance which is not inconsistent. However, the Federal authorities will stay out of any State or locality which has an adequate law and is effectively enforcing it. This provision has two beneficial effects: (1) it will induce the States to enact good laws and enforce them, so as to have the field to themselves; and (2) it will permit the Federal [fair employment practices commission] to concentrate its efforts in the States which do not cooperate. . . .¹¹⁵

Unfortunately, there has been no use of Section 709(b) agreements between the E.E.O.C. and deferral agencies even though its sponsors believed that the Commission would "from sheer necessity avail itself to the fullest of [its] provisions. . . ."¹¹⁶ Instead, the Commission has

114. 42 U.S.C. § 2000e-8(b) (1974). The original Act also provided for such agreements and, in addition, permitted agreements which provided that civil suits brought under Section 706(f)(1), could not be brought in the federal courts once deferral to the state agency was made.

115. 110 CONG. REC. 7216 (1964) (remarks of Senator Clark).

116. *Id.* at 7214.

structured its rules of procedure so that deferral of its jurisdiction is qualified by the complainant's preservation of federal rights.¹¹⁷

In refusing to enter into 709(b) agreements, the E.E.O.C. has rejected what is perhaps its most important tool for inducing state and local governments to pass effective antidiscrimination laws that conform to the Commission's interpretation of the requirements of the Act. As a result, not only has the Commission failed to encourage local resolution of antidiscrimination matters, but has chosen to ignore an important means by which it might reduce its enormous backlog of unprocessed charges. Thus, to date, complainants and respondents have been denied the benefits which could accrue from final resolution of charges of discrimination at the state or local level.¹¹⁸

V. CONCLUSION

The history of the E.E.O.C.'s deferral policies and practices illustrates the agency's ambivalence towards the deferral provisions of the Act. Congress contemplated not only that the E.E.O.C. would defer most charges of employment discrimination to state and local agencies, but also that the Commission would permit *final* resolution of many of its cases at the local level. Instead, the E.E.O.C. has conspicuously failed to enter into 709(b) agreements with even the most effective state and local fair employment practices agencies. This attitude severely undermines the value of the Commission's constant review of and challenge to the state agencies that, in the Commission's opinion, fail to meet its stringent "706" agency requirements.¹¹⁹ Little can be gained from these efforts unless those state agencies that do meet the "706" requirements are utilized effectively. Moreover, even though the Commission has committed a substantial portion of its financial resources to assist the growth of strong local and state agencies,¹²⁰ it

117. For example, although Section 706(b), 42 U.S.C. § 2000e-5(b) (1974) of the Act states, in relevant part:

If the Commission determines after . . . [an] investigation [of a Title VII charge] that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge. . . . In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law. . . .

Section 1601.19b(e) of the Commission's regulations defines a "final finding and order" as "(i) The findings of fact and order incident thereto issued by a 706 Agency after a public hearing or (ii) The consent order or consent decree entered into by the 706 Agency prior to or during a public hearing . . . if such consent order or decree may be enforced by the courts." 29 C.F.R. § 1601.19b(e) (1975). Because most state cases are concluded without public hearings, this portion of the Act has little practical application.

118. Section 706(e), 42 U.S.C. § 2000e-5(e) (1974), makes this clear: a right to sue exists for either an individual complainant or the Commission itself, regardless of the outcome of any state proceeding on the same matters. Thus *res judicata* and collateral estoppel are inappropriate to Title VII litigation.

119. 29 C.F.R. § 1601.12(k) (1975).

120. See note 12 *supra* and accompanying text.

has afforded little weight to their decisions, preferring generally to process in a de novo fashion even those charges that previously had been fully processed by local agencies.¹²¹

The result of this ambivalence on the part of the Commission has been needless duplication of efforts, and no relief for the E.E.O.C.'s ever-increasing backlog of federal cases. These problems could best be solved by the Commission's effective, final deferral of charges to local agencies through Section 709(b) agreements. The problem of inconsistent state remedies and legislation could be resolved by the Commission's continued use of the stringent review powers it has adopted in its "706" agency selection process. The selection procedure should therefore be performed by the E.E.O.C. with the idea of entering into 709(b) agreements with the selected "706" agencies. While the immediate effect of this proposal might be to drastically reduce the present number of "706" agencies, the long-term result would be to require that those states desirous of resolving discrimination cases on a local level conform their legislation to the strict standards developed by the federal Commission.

On the issue of "pattern or practice" case deferral, the experience in *U.S.F.&G.* and elsewhere¹²² could best be avoided by federal legislation redefining the role of deferral in 707 cases. The Federal Civil Rights Commission,¹²³ in a report which vehemently criticized what it called the "patchwork" of conflicting policies and regulations governing the employment discrimination area, recommended the creation of a "superagency" which it calls the National Employment Rights Board, that would be given stronger enforcement powers than any existing agency:

[T]he board would stress the elimination of pattern and practices of discrimination. Although it would be empowered to act on individual complaints, most of them would be referred to state and local fair employment practices agencies [which] would be periodically reviewed by the board for consistency with board guidelines.¹²⁴

121. See notes 26-27 *supra* and accompanying text.

122. See notes 101-10 *supra* and accompanying text. See also *Lewis v. FMC Corp.*, 11 F.E.P. Cas. 31 (N.D. Cal. 1975), involving a similar agreement between the E.E.O.C. and the California Fair Employment Practices Commission. In *Lewis*, as in *U.S.F.&G.*, the district court refused to dismiss an action brought against the respondent in a situation in which the federal agency failed to defer the case to the local commission, because of the latter agency's assertion that it would not take jurisdiction of broad charges or charges on behalf of large classes of persons.

123. The Civil Rights Commission was created by 42 U.S.C. § 1975 *et seq.* (1974), and charged with the duty, among others, of study[ing] and collect[ing] information concerning legal developments constituting a denial of equal protection of the laws under the Constitution . . . [and] apprais[ing] the laws and policies of the Federal Government with respect to denials of equal protection of the laws . . . 42 U.S.C. §§ 1975c(a)(2), (3) (1974).

124. CIVIL RIGHTS COMMISSION REPORT: TO ELIMINATE EMPLOYMENT DISCRIMINATION (released July 15, 1975), 89 LAB. L. REP. 284, 285 (1975).

Thus the Civil Rights Commission envisions state involvement in individual cases, and the concentration of federal activity in "pattern or practice" and commissioner's charges. This is a realistic and compelling alternative to the present quagmire of federal-state enforcement behavior.

Unless these kinds of changes come about, we are likely to see a continuation of the Commission's backlog, an ever-burgeoning increase in civil rights litigation, and further confusion, bureaucratic duplication of effort, and delay.

APPENDIX

Section 1601.12(m) of the E.E.O.C.'s procedural regulations, 29 C.F.R. § 1601.12(m) (1976) lists the Commission's currently-selected "706 Agencies" for either deferral or notice, as follows:

(m) Designated 706 Agencies: The actions of the Commission in designating 706 Agencies, and in withdrawing such designations, from time to time, will be stated in amendments to this paragraph and published in the FEDERAL REGISTER as and when such actions are taken. The designed 706 Agencies are:

Alaska Commission for Human Rights
Allentown Human Relations Commission
Arizona Civil Rights Division
Baltimore Community Relations Commission
Bloomington Human Rights Commission
California Fair Employment Practices Commission
Charleston Human Rights Commission
Colorado Civil Rights Commission
Connecticut Commission on Human Rights and Opportunities
Dade County Fair Housing and Employment Commission
Delaware Department of Labor
District of Columbia Office of Human Rights
East Chicago Human Relations Commission
Fairfax County Human Rights Commission
Gary Human Relations Commission
Idaho Commission on Human Rights
Illinois Fair Employment Practices Commission
Indiana Civil Rights Commission
Iowa Commission on Civil Rights
Kansas Commission on Civil Rights
Kentucky Commission on Human Rights
Maine Human Rights Commission
Maryland Commission on Human Rights
Massachusetts Commission Against Discrimination
Michigan Civil Rights Commission

Minnesota Department on Human Rights
Minneapolis Department of Civil Rights
Missouri Commission on Human Rights
Montana Commission for Human Rights
Montgomery County Human Relations Commission
Nebraska Equal Opportunity Commission
Nevada Commission on Equal Rights of Citizens
New Hampshire Commission for Human Rights
New Jersey Division on Civil Rights, Department of Law and
 Public Safety
New York City Commission on Human Rights
New York State Division of Human Rights
Ohio Civil Rights Commission
Oklahoma Human Rights Commission
Omaha Human Relations Department
Oregon Bureau of Labor
Pennsylvania Human Relations Commission
Philadelphia Commission on Human Relations
Pittsburgh Commission on Human Relations
Rhode Island Commission for Human Rights
Rockville, Md. Human Rights Commission
Seattle Human Rights Commission
Springfield (Ohio) Human Relations Department
South Dakota Human Relations Commission
Tacoma Human Rights Commission
Utah Industrial Commission
Virgin Islands Department of Labor
Washington State Human Rights Commission
West Virginia Human Rights Commission
Wheeling Human Rights Commission
Wichita Commission on Civil Rights
Wisconsin Equal Rights Division, Department of Industry,
 Labor and Human Relations
Wyoming Fair Employment Practices Commission

The designated Notice Agencies are:

Arkansas Governor's Committee on Human Resources
Florida Commission on Human Relations
Georgia Governor's Council on Human Relations
Montana Department of Labor and Industry
North Dakota Commission on Labor
Ohio Director of Industrial Relations
South Carolina Human Affairs Commission

(Section 1601.12, as last amended, effective February 17, 1976.)