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The Early Right-to-Sue Letter: Has the EEOC Exceeded Its Authority? Henschke v. New York Hosptial-Cornell Medical Center, 821 F. Supp. 166 (S.D.N.Y. 1993)

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CASE COMMENTS

THE EARLY RIGHT-TO-SUE LETTER: HAS THE EEOC EXCEEDED ITS AUTHORITY?

Henschke v. New York Hospital-Cornell Medical Center 821 F. Supp. 166 (S.D.N.Y. 1993).

In *Henschke v. New York Hospital-Cornell Medical Center*,[1] the United States District Court for the Southern District of New York concluded that the issuance of an "early" right-to-sue letter[2] by the Equal Employment Opportunity Commission (EEOC)[3] fails to invoke federal subject matter jurisdiction over a Title VII claim and requires a suspension and remand of the claim to the EEOC.[4]

Dr. Claudia Henschke, a treating physician and professor of radiology, filed gender-based discrimination charges with the EEOC against New York Hospital and Cornell Medical Center.[5] After receiving an early right-

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1. 821 F. Supp. 166 (S.D.N.Y. 1993).

2. A right-to-sue letter constitutes official notice from the Equal Employment Opportunity Commission (EEOC) to an aggrieved party that the party may institute a Title VII claim in federal court. 42 U.S.C. § 2000e-5(f)(1) (1988). *See also* Michelle Kissell Price, Note, *Relief from Retaliation: Does Title VII Allow a Private Right to Preliminary Injunctive Relief?*, 25 TULSA L.J. 639, 640 (1990). The EEOC issues an "early" right-to-sue letter when it issues a letter to a claimant within 180 days from the date the claimant filed charges with the EEOC. *See* Price, *supra*, at 640.

3. By enacting Title VII of the Civil Rights Act of 1964, Congress intended "to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin." Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974) (citations omitted). To further this goal, Congress created the EEOC to investigate charges of discrimination, promote voluntary cooperation with Title VII, and institute civil actions against employers named in a charge. *Id. See* 42 U.S.C. § 2000e-4 (1988). In addition, Title VII requires cooperation between an individual claimant and the EEOC. *See* 42 U.S.C. § 2000e-5 (1988). Each claimant must file charges with the EEOC and obtain a right-to-sue letter from the EEOC before instituting a private Title VII civil action. 42 U.S.C. § 2000e-5(a), (f) (1988). *See also* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 798 (1973).

4. *Henschke*, 821 F. Supp. at 170-71. This Case Comment focuses upon whether the EEOC's failure to wait 180 days before issuing a right-to-sue letter deprives a federal court of subject-matter jurisdiction in a private civil action. The propriety of injunctive relief during that same time period is beyond the scope of this Case Comment. For a discussion on Title VII injunctive relief procedure, see generally Price, *supra* note 2.

5. 821 F. Supp. at 168. Dr. Henschke claimed that the defendants appointed "a less qualified male" as acting chief of the radiology department and denied her access to necessary information, equipment, and personnel. *Id.*

to-sue letter from the EEOC, Dr. Henschke filed suit in federal court.[6] The defendants moved to dismiss on the basis that Dr. Henschke failed to wait the 180 days mandated by Title VII[7] before requesting her letter and filing suit in federal court.[8] Dr. Henschke argued that the early right-to-sue letter complied with EEOC regulations interpreting Title VII.[9] The district court rejected Dr. Henschke's argument and held that an early right-to-sue letter divests the court of jurisdiction requiring suspension and remand[10] of a Title VII claim to the EEOC.[11]

The conflict in the *Henschke* decision stemmed from the Title VII provision that guarantees an individual the right to a private civil suit.[12] Section 2000e-5(f)(1) provides that if the EEOC has not filed a civil action or achieved a conciliation agreement within 180 days of the filing of a charge, the EEOC must notify the person aggrieved.[13] The person aggrieved may then bring a private civil action within ninety days.[14] The

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6. *Id.* Dr. Henschke filed charges with the EEOC on September 21, 1992 and simultaneously requested an early right-to-sue letter. On October 22, the EEOC issued the letter. On November 16, Dr. Henschke filed suit in federal court. *Id.*

7. Section 2000e-5(f)(1) provides:

> 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 . . . the Commission has not filed a civil action under this section . . . or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission . . . shall so notify the person aggrieved and within ninety days after giving such notice a civil action may be brought . . . .

42 U.S.C. § 2000e-5(f)(1) (1988).

8. 821 F. Supp. at 168.

9. *Id.* at 170. In 1977, the EEOC codified its long-standing practice of issuing early right-to-sue letters in 29 C.F.R. § 1601.28(a)(2). The EEOC regulations provide:

> When a person claiming to be aggrieved requests, in writing, that a notice of right to sue be issued . . . the Commission may issue such notice as described in 1601.28(e) with copies to all parties, at any time prior to the expiration of 180 days from the date of filing with the Commission; provided that [a director] has determined that it is probable that the Commission will be unable to complete its administrative processing of the charge within 180 days from the filing of the charge. . . .

29 C.F.R. § 1601.28(a)(2) (1993).

10. *Henschke*, 821 F. Supp. at 170. The court suspended the plaintiff's claim pending resubmission of the charges to the EEOC for the remainder of the 180 day waiting period. *Id.* at 171. The court also granted Dr. Henschke leave to amend her Title VII claim and gave her the opportunity to reactivate her claim upon five days' notice. *Id.*

11. *Id.* at 170.

12. 42 U.S.C. § 2000e-5(f)(3) (1988) (conferring jurisdiction over Title VII claims on the federal district courts).

13. *Id.* § 2000e-5(f)(1).

14. *Id.* Originally, section 706(e) of the Civil Rights Act of 1964 provided:

> If within thirty days after a charge is filed with the Commission, . . . the Commission has been unable to obtain voluntary compliance with this title, the Commission shall so notify the

EEOC typically uses right-to-sue letters to give claimants the notice required by section 2000e-5(f)(1).[15] Although courts generally agree that the provision requires the EEOC to issue a right-to-sue letter *after* 180 days have passed,[16] courts differ over whether the EEOC may voluntarily issue a right-to-sue letter *within* that same 180 day period, relinquishing jurisdiction over a Title VII claim.[17] While only one circuit court has directly addressed the validity of the early right-to-sue letter,[18] the district courts have debated the issue for nearly twenty years.

The validity of the early right-to-sue letter turns upon whether Congress intended to make the passage of 180 days a jurisdictional prerequisite to private civil action[19] or merely a time limit after which the EEOC must formally notify a claimant of the exhaustion of administrative remedies.[20] Unfortunately, the legislative history of amended section 2000e-5(f)(1) fails to address directly the early right-to-sue letter. In discussing section 2000e-5(f)(1), Congress expressed two competing concerns: maintaining the EEOC's primary role in Title VII disputes while protecting a claimant's

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person aggrieved and a civil action may, within 30 days thereafter, be brought against the respondent named in the charge . . . .

Civil Rights Act of 1964, Pub. L. No. 88-352, § 706(e), 78 Stat. 241, 260 (1964) (prior to 1972 amendment) (codified as amended at 42 U.S.C. § 2000e-5(f)(1) (1988)).

In 1972, Congress amended § 2000e-5(f) as part of the Equal Employment Opportunity Act. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 4, 86 Stat. 103, 104 (1972) (codified at 42 U.S.C. § 2000e-5(f)(1) (1988)). The new provision retains the individual's right to private civil action, but extends the time period for EEOC action from 30 to 180 days and private civil action from 30 to 90 days. 42 U.S.C. § 2000e-5(f)(1) (1988).

15. *See* 821 F. Supp. at 170. The EEOC's procedural regulations for right-to-sue letters are found at 29 C.F.R. § 1601.28. The EEOC's regulations provide in pertinent part:

> The notice of right to sue shall include: (1) Authorization to the aggrieved person to bring a civil action under Title VII . . . within 90 days from receipt of such authorization; (2) Advice concerning the institution of such civil action by the person claiming to be aggrieved, where appropriate; (3) A copy of the charge; (4) The Commission's decision, determination, or dismissal, as appropriate.

29 C.F.R. § 1601.28(e) (1993).

16. *See, e.g.*, Bryant v. California Brewers Ass'n, 585 F.2d 421, 425 (1978). *See also* Price, *supra* note 2, at 640.

17. *Compare* Howard v. Mercantile Trust Co., 8 Empl. Prac. Dec. (CCH) ¶ 9842, at 6502 (E.D. Mo. Nov. 27, 1974) (upholding early right-to-sue letter) *with* Budreck v. Crocker Nat'l Bank, 407 F. Supp. 625 (N.D. La. 1976) (finding 180 days a condition precedent to jurisdiction).

18. The Ninth Circuit approved the early right-to-sue letter in *Bryant*, 585 F.2d at 425. In Weise v. Syracuse Univ., 522 F.2d 397 (2d Cir. 1975), the Second Circuit, in dictum, disapproved of the early right-to-sue letter, *id.* at 412.

19. *Budreck*, 407 F. Supp. at 645 (finding that 180 day requirement is jurisdictional). *See infra* notes 31-40 and accompanying text.

20. *See Howard*, 8 Empl. Prac. Dec. (CCH) at 6504 (holding that a letter can be sent within 180 days). *See infra* notes 26-28, 53-56 and accompanying text.

right to speedy relief.[21] However, these dual concerns support the opposing sides of the *Henschke* conflict with equal force. If the EEOC constitutes the primary source of relief for Title VII claimants, then neither the claimant nor the EEOC should bypass EEOC jurisdiction.[22] On the other hand, if the EEOC recognizes the impossibility of settlement or investigation within 180 days,[23] an early right-to-sue letter protects the claimant's right to speedy relief.[24]

In *Howard v. Mercantile Trust Co.*,[25] the United States District Court for the Eastern District of Missouri became one of the first courts to uphold the early right-to-sue letter. In *Howard*, the court found that the language in section 2000e-5(f)(1), "within one hundred and eighty days," gave the EEOC discretion to interpret the procedure.[26] In addition, the court relied upon the Supreme Court's decision in *McDonnell Douglas Corp. v. Green*,[27] which held that a plaintiff need only file charges with the EEOC and receive a statutory right-to-sue letter before filing a private civil action

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21. The *Senate Conference Report from the Equal Employment Opportunity Act of 1972* provides:

> It is hoped that recourse to the private lawsuit will be the exception and not the rule, and that the vast majority of complaints will be handled through the offices of the EEOC or the Attorney General, as appropriate. However, as the individual's rights to redress are paramount under the provisions of Title VII, it is necessary that all avenues be left open for quick and effective relief.

118 CONG. REC. 7166, 7168 (1972) (statement of Sen. Williams).

22. *See id.* at 7168 (stating that recourse to a private lawsuit should be the "exception and not the rule"); H.R. REP. NO. 238, 92nd Cong., 2d Sess. 13 (1971), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2148 (stating that individual complainants should not cut short the administrative process merely to encounter similar delays in court proceedings).

23. The applicable regulations authorize an early right-to-sue letter when the EEOC has determined improbable its processing of a charge within 180 days. 29 C.F.R. § 1601.28(a)(2) (1993). *See supra* note 9.

24. This right was recognized by Congress:

> [The bill] provides the aggrieved party a means by which he may be able to escape from the administrative quagmire which occasionally surrounds a case caught in an overloaded administrative process. . . . The primary concern must be protection of the aggrieved person's option to seek a prompt remedy in the best manner available.

H.R. REP. No. 238, *supra* note 22, at 12-13, *reprinted in* 1972 U.S.C.C.A.N. at 2147-48.

25. 8 Empl. Prac. Dec. (CCH) ¶ 9842, at 6502 (E.D. Mo. Nov. 27, 1974).

26. 8 Empl. Prac. Dec. (CCH) at 6503. In addition, the court reasoned that because the language could easily indicate a maximum rather than minimum time period, courts should not strictly enforce the provision. *Id.* Indeed, in Milner v. National Sch. of Health Technology, 409 F. Supp. 1389, 1392 (E.D. Pa. 1976), the court found that "[t]he statute does not require a minimum of 180 days for conciliation; rather, it requires issuance of a right-to-sue letter *within* 180 days." *See also* Wells v. Hutchinson, 499 F. Supp. 174, 189 (E.D. Tex. 1980) (holding that the EEOC must issue a right-to-sue letter within 180 days).

27. 411 U.S. 792, 798 (1973).

under Title VII.[28] While generally approving of the early right-to-sue letter, the *Howard* court left open the possibility that a reviewing court could remand cases in which the EEOC had abused its discretion in issuing the letter.[29] The court concluded that returning to the EEOC a case in which it would take no further action within the 180 day period served no useful purpose.[30]

Two years later, in *Budreck v. Crocker National Bank*,[31] the United States District Court for the Northern District of California wrote an extensive opinion rejecting the reasoning in *Howard*.[32] The *Budreck* court found that section 2000e-5(f)(1)[33] makes the passage of 180 days a condition precedent to a private civil action.[34] In so holding, the court dismissed *McDonnell Douglas* as dictum[35] because the 180 day provision was not before the court in either of the cases and because it contained inconsistencies.[36] In addition, the court pointed to a number of policy reasons for rejecting early right-to-sue letters. The court reasoned that dismissal of premature claims would deter other plaintiffs and the EEOC from avoiding statutory procedure,[37] give parties more time to settle

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28. 8 Empl. Prac. Dec. (CCH) at 6503. The *Howard* court inferred that because the Supreme Court in *McDonnell Douglas* did not mention the 180 day period as a prerequisite to suit, the plaintiff need not wait 180 days before filing a private civil action. *Id.* Courts have criticized this inference, however, stating that the Court was addressing a separate issue and may have assumed that the EEOC would wait 180 days before issuing a right-to-sue letter. *See, e.g.*, Budreck v. Crocker Nat'l Bank, 407 F. Supp. 635, 641-42 (N.D. Cal. 1976).

29. 8 Empl. Prac. Dec. (CCH) at 6504.

30. *Id.* The court noted, "Delay for the sake of delay is of no value." *Id. Accord Milner*, 409 F. Supp. at 1392; Lewis v. FMC Corp., 11 Fair Empl. Prac. Cas. (BNA) 31 (N.D. Cal. July 28, 1975).

31. 407 F. Supp. 635 (N.D. Cal. 1976).

32. *See supra* notes 26-30 and accompanying text.

33. *See supra* note 7.

34. 407 F. Supp. at 645. The court stated that a plaintiff may file a private civil action only if: (1) 180 days have passed since the plaintiff filed charges with the EEOC, or if the charges have been dismissed, and (2) the plaintiff has obtained a right-to-sue letter. *Id.* at 639. The court based its determination on the plain language of the statute. *Id.* The court also found support for its ruling in the legislative history. *Id.* at 690.

35. The court considered and rejected McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and Johnson v. Railway Express, 421 U.S. 454 (1975), as binding authority. 407 F. Supp. at 641-42.

36. 407 F. Supp. at 641-42. The court contrasted *McDonnell Douglas*, which stated that a plaintiff need only file charges with the EEOC and receive a right-to-sue letter before filing a private civil suit, with *Johnson*, which held that "the claimant, after the passage of 180 days, may demand a right to sue letter." The court rejected *McDonnell Douglas* because the 180 day provision was not at issue and the Supreme Court could have assumed that no civil action would be brought before 180 days. *Id.* at 641-42.

37. *Id.* at 645. The court noted that early right-to-sue letters merely shift EEOC congestion to an "already overburdened federal judiciary." *Id.* at 643. Similarly, the court found *Johnson* dictum

privately,[38] and would comport with appropriate prudential restraint by the judiciary to avoid rewriting the legislation.[39] The *Budreck* court concluded that if the statutory procedure needs revision, only the legislature can properly implement such a change.[40]

Several courts have taken an approach that lies between the *Howard* and *Budreck* positions by holding that, while theoretically the EEOC should not issue early right-to-sue letters, certain circumstances warrant an exception to the rule. For example, in *Weise v. Syracuse University*,[41] a claimant's initial Title VII charge remained before the EEOC for 180 days.[42] When the claimant added a second Title VII charge against the same employer,[43] the Second Circuit held that the EEOC did not need to wait an additional 180 days before issuing notice to the claimant of the right to sue.[44]

Similarly, in *Eldredge v. Carpenters 46 Northern California Counties Joint Apprenticeship & Training Committee*,[45] the court allowed the claimant to proceed under an early right-to-sue letter when she had previously filed a motion for a preliminary injunction.[46] The court found that a claimant must ordinarily wait 180 days after filing with the EEOC to bring suit in order to effectuate Congress' intent to promote conciliation

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because the Supreme Court did not have to consider the 180 day provision to decide whether the statute of limitations for section 1981 claims is tolled by a timely filing with the EEOC. *Id.* at 642.

38. *Id.* at 643-44. The *Budreck* court maintained that parties can reach informal settlement during the 180 day period without the EEOC's guidance. *Id.* at 644.

39. *Id.* at 643. The court opined that allowing early right-to-sue letters would "delay even longer a truly adequate solution to an exceedingly serious problem" and would "make the federal courts the primary, rather than secondary, forum for Title VII disputes." *Id.*

40. *Id.* *See* McGee v. Purolator Courier Corp., 430 F. Supp. 1285, 1288 (N.D. Ala. 1977) (refusing to permit private action absent a statutory right-to-sue letter).

41. 522 F.2d 397 (2d Cir. 1975).

42. *Id.* at 412. In *Weise*, the court consolidated two cases of sexual discrimination against Syracuse University. *Id.* at 400. Plaintiff Selene Weise filed an initial charge with the EEOC on May 8, 1972. *Id.* at 412. This charge was before the EEOC when she filed a second charge on June 25, 1973. *Id.*

43. *Id.*

44. *Id.* The Second Circuit acknowledged that technically the second charge should have remained before the EEOC for 180 days, unless dismissed. *Id.* However, the court found that because the initial charge had been before the EEOC for more than 180 days, conciliation was unlikely. Thus, strictly enforcing the 180 day provision would not have furthered the Congressional goal of settlement and would hinder expeditious relief. *Id.* The court's policy reasons mirror the *Howard* court's reasoning. *See supra* notes 25-30 and accompanying text.

45. 440 F. Supp. 506 (N.D. Cal. 1977). Notably, Judge Renfrew wrote both the *Eldredge* and *Budreck* opinions. For a discussion of *Budreck*, see *supra* notes 31-40 and accompanying text.

46. 440 F. Supp. at 517. Although the court denied the motion for preliminary relief, the court reasoned that the mere request for an injunction made settlement improbable. *Id.* at 516.

and voluntary settlement.[47] However, the court held that when the motion for preliminary relief is proper, a court has jurisdiction over the substantive claim.[48]

In 1977, the divergence between the *Howard* and *Budreck* camps grew even wider. The Supreme Court decided *Occidental Life Insurance Co. v. Equal Employment Opportunity Commission*,[49] stating, in dictum, that a private right of action under Title VII does not arise until 180 days after a claimant has filed charges with the EEOC.[50] However, the EEOC subsequently published procedural regulations specifically authorizing itself to issue early right-to-sue letters.[51] Accordingly, both sides of the conflict gained supporting authority.[52]

Only one year after *Occidental*, in *Bryant v. California Brewers Ass'n*,[53] the Ninth Circuit declared that a plaintiff need not wait 180 days before receiving a right-to-sue letter from the EEOC.[54] The *Bryant* court relied upon the plain statutory language in holding that although section 2000e-5(f)(1)[55] prohibits a claimant from *demanding* a right-to-sue letter during the 180-day waiting period, the statute does not prohibit the EEOC from *voluntarily* issuing a letter during that same period.[56] Further, the court reasoned that Congress would not force an individual to delay invoking a

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47. *Id.*

48. Preliminary relief is proper when there is "a high probability of success on the merits and the threat of irreparable harm." *Id.* While the court recognized that dismissal would "discourage the EEOC from divesting itself of claims prematurely," the court found it too harsh to deny jurisdiction when the EEOC would be unable to dispose of the case in any event because preliminary relief is appropriate. *Id.*

49. 432 U.S. 355 (1977).

50. *Id.* at 361. The court stated:

> The 180-day limitation provides only that this private right of action does not arise until 180 days after a charge has been filed . . . . [A] natural reading of [§ 2000e-5(f)(1)] can only lead only to the conclusion that it simply provides that a complainant whose charge is not dismissed or promptly settled or litigated by the EEOC may himself bring a lawsuit, but that he must wait 180 days before doing so.

Id. The court's statement is dictum.

51. *See supra* note 9. Section 2000e-12(a) provides that the EEOC "shall have authority . . . to issue, amend, or rescind suitable procedural regulations to carry out the provisions of [Title VII]." 42 U.S.C. § 2000e-12(a) (1988).

52. Although the Supreme Court's pronouncement in *Occidental* was dictum, the EEOC could have given effect to the Supreme Court's language by not seeking early right-to-sue letters. When the EEOC authorized early right-to-sue letters, however, it kept the issue alive and precipitated further litigation.

53. 585 F.2d 421 (9th Cir. 1978), *vacated on other grounds*, 444 U.S. 598 (1980).

54. *Id.* at 425.

55. *See supra* note 7.

56. 585 F.2d at 425.

right to relief until the EEOC had performed its duties.[57] Thus, the *Bryant* court concluded that it would be a "travesty" to require that the EEOC and claimant wait for the expiration of 180 days.[58]

By contrast, several district courts insisted that the EEOC had abused its administrative discretion in codifying[59] the early right-to-sue letter. For example, in *Spencer v. Banco Real, S.A.*,[60] the United States District Court for the Southern District of New York issued a scathing critique of the EEOC regulations and declared them invalid.[61] The court found that the EEOC regulations created a new discretionary power that the EEOC could potentially abuse.[62] Further, the *Spencer* court accused the EEOC of using the early letters as a guise to shift its workload to the federal court system[63] and suggested that the EEOC should instead improve its

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57. *Id.* (quoting Jefferson v. Peerless Pumps, 456 F.2d 1359, 1361 (9th Cir. 1972)).

58. *Id.* The court based this statement upon EEOC inability to handle charges within the 180 day period. *Id.* For other cases allowing jurisdiction over pre-180 day cases, see Saulsbury v. Wismer & Becker, Inc., 644 F.2d 1251, 1251 (9th Cir. 1981) (affirming *Bryant*); White & Allen v. Federal Express Corp., 729 F. Supp. 1536, 1552 (E.D. Va. 1990) (stating that Title VII must be construed generously to achieve a remedy for employment discrimination); Rolark v. University of Chicago Hosp., 688 F. Supp. 401, 404 (N.D. Ill. 1988) (noting that courts should grant deference to an EEOC interpretation unless it is contrary to congressional intent); Cattell v. Bob Frensley Ford, Inc., 505 F. Supp. 617, 621-22 (M.D. Tenn. 1980) (noting that requiring a plaintiff to "sit twiddling her thumbs" would not make sense).

The *Cattell* court correctly pointed out that denying federal jurisdiction could result in a "catch-22" situation: Suppose the EEOC issues a right-to-sue letter within 90 days of the date of filing charges with the EEOC. Because section 2000e-5(f)(1) requires that a claimant must file suit in federal court within 90 days of receipt of the right-to-sue letter, to force the claimant to wait 180 days from the date of filing with the EEOC would deprive him or her of a private civil action. 505 F. Supp. at 622 n.4.

59. *See supra* note 9.

60. 87 F.R.D. 739 (S.D.N.Y. 1980).

61. *Id.* at 747.

62. *Id.* at 746. The *Spencer* court feared that aggrieved persons would seek to litigate EEOC decisions granting or denying early right-to-sue letters. *Id.* Further, the court was concerned with the lack of standards to guide agency decisions under the new resolution. *Id.*

63. *Id.* The *Spencer* court stated, "It is hoped that recourse to the private lawsuit will be the exception and not the rule." *Id.* at 744 (quoting 118 CONG. REC. 7166, 7168 (1972)). The court noted that the EEOC could only speculate as to its inability to process a charge within 180 days. *Id.* Thus, early letters might possibly deprive the EEOC of jurisdiction over matters it could have decided. *Id.* Further, the court reasoned that if claimants remain before the EEOC during the 180 days, they will press the agency for action rather than right-to-sue letters, thus "spurring" the agency to greater efficiency. *Id.*

In declaring the regulations invalid, the *Spencer* court relied on Mohasco Corp. v. Silver, 447 U.S. 807 (1980). In *Mohasco*, the Court invalidated regulations that deviated from the literal language of Title VII. *Id.* at 825. The *Mohasco* court stated that the EEOC may not interpret Title VII in a way that supersedes the language chosen by Congress. The Court also warned, "Even if the interests of justice might be served by [a different reading of the statute], in the long run, experience teaches us that strict adherence to the procedural requirements specified by the legislature is the best guarantee of

efficiency.[64]

In *Henschke v. New York Hospital-Cornell Medical Center*,[65] the United States District Court for the Southern District of New York declared that the 1977 EEOC regulations[66] violated the express language of Title VII.[67] Henschke argued that because Congress had charged the EEOC with Title VII administration, courts should defer to the EEOC's interpretation of section 2000e-5(f)(1).[68] In response, the court stated that an EEOC interpretation warranted deference only if it adhered to congressional intent.[69] Because section 2000e-5(f)(1) makes the 180-day waiting period a condition precedent to federal subject-matter jurisdiction, no deference was warranted.[70]

In reaching its decision, the *Henschke* court acknowledged that the 180-day waiting period could lead to injustice.[71] The court reasoned that the parties might wait 180 days without achieving conciliation,[72] and noted the Ninth Circuit's characterization of such a waiting period as a "travesty."[73] However, without much discussion, the *Henschke* court concluded that the language of Title VII left no alternative but to remand Henschke's

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evenhanded administration." *Id.* at 826.

64. *Spencer*, 87 F.R.D. at 746. *See, e.g.*, True v. New York State Dep't of Correctional Servs., 613 F. Supp. 27, 30 (W.D.N.Y. 1984) (holding that the legislature, not the judiciary, must address the problem); Mills v. Jefferson Bank East, 559 F. Supp. 34, 36 (D. Colo. 1983) (declaring EEOC regulations invalid as inconsistent with congressional intent); Hiduchenko v. Minneapolis Medical & Diagnostic Ctr., 467 F. Supp. 103, 107 (D. Minn. 1979) (holding that failure to wait 180 days is a "jurisdictional defect"); Grimes v. Pitney Bowes, Inc., 480 F. Supp. 1381, 1385 (N.D. Ga. 1979) (charging EEOC with avoiding responsibility); Loney v. Carr-Lowrey Glass Co., 458 F. Supp. 1080, 1081 (D. Md. 1978) (finding EEOC regulations invalid).

65. 821 F. Supp. 166 (S.D.N.Y. 1993).

66. *See supra* note 9.

67. 821 F. Supp. at 170-71.

68. *Id.* at 170.

69. *Id.* The court relied upon Mohasco Corp. v. Silver, 447 U.S. 807, 825 (1980) (holding that courts should reject EEOC regulations inconsistent with statutory mandate), *see supra* note 63, and Aluminum Co. of Am. v. Central Lincoln People's Util. Dist., 467 U.S. 380, 402 n.3 (1984) (stating that courts must reject administrative constructions contrary to congressional intent, "whether reached by adjudication or rulemaking") (Stevens, J., dissenting) (quoting FEC v. Democratic Senatorial Campaign Comm'n, 454 U.S. 27, 31-32 (1981)).

70. 821 F. Supp. at 170-71. The Court found that the statutory language explicitly requires dismissal or the passage of 180 days as a condition precedent to the validity of a right-to-sue letter. *Id.* at 170.

71. *Id.* at 171.

72. *Id.*

73. *Id.* at 171 n.4 (quoting *Bryant*, 585 F.2d at 425). For a discussion of *Bryant*, see *supra* notes 53-58 and accompanying text.

claim to the EEOC.[74]

The *Henschke* court erred in holding that section 2000e-5(f)(1) requires 180 days to expire before the EEOC may voluntarily issue a right-to-sue letter. The court exaggerated the clarity of section 2000e-5(f)(1).[75] While section 2000e-5(f)(1) clearly provides a deadline for EEOC action,[76] it does not specifically address the situation in which the EEOC completely processes a charge within 180 days or declares that it will be unable to handle a charge within that time.[77] Therefore, although a claimant must wait 180 days before demanding a right-to-sue letter,[78] it does not necessarily follow from the statutory language that the EEOC may not issue a letter during those same 180 days.[79]

Moreover, the *Henschke* court failed to accord proper deference to the EEOC interpretation of section 2000e-5(f)(1). Because Congress expressly granted the EEOC power to issue procedural regulations to carry out Title VII,[80] the EEOC's interpretation of section 2000e-5(f)(1) should stand unless it clearly contradicts the language or intent of that section.[81] Because the twenty year split among the district courts demonstrates that reasonable minds can differ over the language and intent of section 2000e-5(f)(1),[82] the EEOC's interpretation of section 2000e-5(f)(1) warrants

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74. 821 F. Supp. at 171.

75. *Id.* at 170. For the statutory text, see *supra* note 7.

76. *See supra* note 7; H.R. REP. No. 238, *supra* note 22, at 12-13, *reprinted in* 1972 U.S.C.C.A.N. at 2147-48.

77. *See Bryant*, 585 F.2d at 425. The statutory language does not refer to these circumstances. *See supra* note 7.

78. *See Bryant*, 585 F.2d at 425. The statute clearly requires notice of the litigant's right-to-sue as a precondition to a private suit. *See supra* note 7. Further, the language indicates that there is no *right* to such notice before the expiration of 180 days. The word "shall" follows the 180 day limitation in section 2000e-(f)(1). *See supra* note 7.

79. *Bryant*, 585 F.2d at 425. On this point, the *Spencer* decision and like cases are open to attack. *Spencer*'s assertion that the "if" language in section 2000e-5(f)(1) denies the EEOC the opportunity to issue an early right-to-sue letter, 87 F.R.D. at 743, ignores the "within" language of the statute, *see id.* Further, the "if" language could just as easily describe the period in which the EEOC must issue a right-to-sue letter rather than restricting the EEOC's ability to issue a letter before the expiration of 180 days. *See id.*

80. *See supra* note 51.

81. Because the statutory language was ambiguous, the court's review of the EEOC regulations was limited to determining whether they were "a permissible construction of the statute," in this case, Title VII. Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 843 (1983). *See also supra* note 58.

82. *Compare* Howard v. Mercantile Trust Co., 8 Empl. Prac. Dec. (CCH) ¶ 9842 (E.D. Mo. Nov. 29, 1974) *and* Bryant v. California Brewers Ass'n, 585 F.2d 421 (9th Cir. 1978), *vacated on other grounds*, 444 U.S. 598 (1980) *with* Budreck v. Crocker Nat'l Bank, 407 F. Supp. 635 (N.D. Cal. 1976) *and* Spencer v. Banco Real, S.A., 87 F.R.D. 739 (S.D.N.Y. 1980).

deference in the absence of a specific statutory prohibition of the early right-to-sue letter.[83]

The *Henschke* decision reaffirms cases such as *Budreck* and *Spencer* in their refusal to defer to the EEOC's interpretation of Title VII.[84] Undoubtedly, the drafters of Title VII did not intend to cause a claimant alleging discrimination needless delay in filing a private civil suit.[85] Unfortunately, the *Henschke* court's reading of the statute does just that. Instead, district courts should defer to the EEOC's interpretation of Title VII. Future dismissals of cases due to early right-to-sue letters will result in a "travesty"[86] contrary to the letter and spirit of Title VII.

Valerie J. Pacer

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83. "We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer and the principle of deference to administrative interpretations." *Chevron*, 467 U.S. at 844. Such deference is not necessary "in the absence of an administrative interpretation." *Id.* However, because the EEOC has issued regulations allowing early right-to-sue letters, courts such as the one in *Henschke* fail to properly restrict their review. In particular, the *Spencer* court's consideration of policy beyond the statutory language and legislative history, 87 F.R.D. at 746-47, was clearly improper.

84. See cases cited *supra* notes 31, 60.

85. *See supra* notes 21, 24.

86. *Bryant*, 585 F.2d at 171.