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State Deferral of Complaints under the Age Discrimination in Employment Act

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STATE DEFERRAL OF COMPLAINTS UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT

I. Introduction

The Age Discrimination in Employment Act[1] (ADEA) was enacted "to promote employment of older persons based on their ability rather than age" and "to prohibit arbitrary age discrimination in employment."[2] ADEA provides federal relief for victims of age discrimination, while preserving similar state laws.[3]

Difficulties have arisen, however, in defining the federal-state relationship under the Act and in determining the circumstances under which federal jurisdiction may be asserted over a complaint. Specifically unsettled is whether complainants in those states that have age discrimination laws are required to pursue state remedies as a jurisdictional prerequisite to the filing of a complaint under ADEA. The few courts which have considered the issue have determined that if an ADEA plaintiff has not previously filed his complaint with the appropriate state agency, federal courts should refuse to assert jurisdiction over the matter.[4]

This construction of the statute, however, may well be ill-founded. The basis underlying this interpretation is an analogy between § 633 of ADEA and § 2000e-5(c) of Title VII of the Civil Rights Act of 1964.[5] Section 2000e-5(c) requires a plaintiff to initially take his complaint to state authorities, if an appropriate state authority exists, prior to seeking a federal remedy under the statute. Courts considering ADEA have construed § 633 to require the same state deferral requirement, purportedly relying upon an interpretation of § 2000e-5(c). An examination of judicial constructions of § 2000e-5(c), however, reveals that reliance on these decisions to support mandatory state deferral under ADEA is improper. In construing § 2000e-5(c), the courts have established a rule allow-

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1 29 U.S.C. §§ 621-34 (1970).
2 29 U.S.C. § 621(b) (1970).
3 29 U.S.C. § 633(a) (1970).
4 There is no requirement that a complainant must exhaust state remedies before commencing a federal suit. While state remedies must be pursued, they need not be exhausted. Goger v. H. K. Porter Co., 492 F.2d 13 (3d Cir. 1974).
29 U.S.C. § 633 (1970) provides:
"(a) Nothing in this Act shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of action under this Act such action shall supersede any State action.
(b) In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 7 of this Act before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated. . ."
5 42 U.S.C. § 2000e-5(c) (1970) provides in part:
"(c) 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 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."

ing complainants who fail to seek state remedies before commencing a federal action under the statute to obtain relief either from state or federal authorities; this is allowed in spite of their failure to adhere to the state deferral requirement of Title VII. Additionally, Title VII courts have approved the implementation of procedural regulations which ensure that a complainant who fails to initially seek state remedies will not lose his rights under the federal statute.

Thus, the analogy between § 633 of ADEA and § 2000e-5(c) of Title VII has not been closely followed by courts construing § 633; the results obtained under the two statutes are clearly inconsistent. In addition, since a large number of ADEA actions are brought pro se, the strict state deferral requirement may create a procedural pitfall for many complainants, which of course would thwart the achievement of ADEA's purposes.

II. The Validity of the Analogy Between § 633 and § 2000e-5(c)

The propriety of analogizing from § 633 to § 2000e-5(c) as a basis for interpretation of § 633 is the subject of dispute. An analysis of the arguments both in support of and in opposition to the validity of the analogy aids in determining whether the analogy should continue.

A. § *633 of ADEA is a Counterpart of* § *2000e-5(c) of Title VII*

One basis of comparison between § 633 and § 2000e-5(c) is the provisions' similar language. This similarity led the Third Circuit, in *Goger v. H. K. Porter Co.*,[6] to establish the analogy as the basis for construction of § 633. Indeed, an examination of the language of the two provisions reveals that it is virtually identical,[7] and therefore the *Goger* court decided that interpretations of § 633 must conform to constructions of § 2000e-5(c). Since courts have construed § 2000e-5(c) to require that appropriate state agencies be given an opportunity to consider discrimination complaints before a complainant may resort to federal authorities, the Third Circuit established a similar mandatory state deferral requirement under ADEA.

The legislative history of ADEA also indicates that the statute is closely related to Title VII. By 1964, significant federal legislation to bar discrimination in employment on the basis of race, religion, color, and sex had been enacted, yet the problem of age discrimination was left untouched.[8] Under the provisions of § 715 of Title VII, the Secretary of Labor was required to study the problem of age discrimination in employment.[9] The Secretary's Report, submitted in June 1965, indicated the full significance of the problem.[10] Congress then required the Secretary to submit legislative proposals to implement the recom-

6 492 F.2d 13 (3d Cir. 1974).
7 *Compare* 29 U.S.C. § 633 (1970), *with* 42 U.S.C. § 2000e-5(c) (1970).
8 H.R. Rep. No. 805, 90th Cong., 1st Sess. 2 (1967).
9 42 U.S.C. § 2000e (1970).
10 House Comm. on Educ. & Labor, The Older American Worker: Age Discrimination in Employment, H.R. Rep. No. 3708, 89th Cong., 1st Sess. (1965).

mendations and conclusions contained in his report.[11] The resultant proposed ADEA was submitted to Congress in February 1967, and was enacted into law in December of that year. ADEA is thus regarded as "remedial legislation,"[12] since it extends the protection available under Title VII to those who suffer age discrimination. Since ADEA essentially supplements the protection afforded by Title VII, and since the language of § 633 is virtually identical to the language of § 2000e-5(c), the ADEA provision should arguably be construed in the same manner as the Title VII provision.

Additional support for parallel constructions of Title VII and ADEA is found from the similar circumstances in which each of these statutes was enacted. Although fair employment legislation existed in 25 states prior to the enactment of Title VII,[13] pervasive inequality in employment continued.[14] Similarly, when ADEA was passed, 24 states had local legislation dealing with age discrimination.[15] Studies of the effectiveness of these age discrimination laws, however, were inconclusive.[16] The continued existence of discrimination in employment based on race, color, religion, sex, or national origin, despite state statutes prohibiting such discrimination, suggested the need for federal legislation to provide protection for persons in states which had no discrimination laws, and to fill the gaps in existing state laws. Title VII was passed to meet this need. When a similar need arose for federal legislation prohibiting age discrimination, ADEA was enacted. Thus, the remedial nature of ADEA and the similar objectives of it and Title VII seemingly warrants an analogous approach to the two statutes.

B. § *633 Is Not Analogous to* § *2000e-5(c)*

Several arguments may be advanced in opposition to an interpretation of § 633 based on an analogy drawn between § 633 and § 2000e-5(c). Structurally, the jurisdictional requirements under Title VII are contained in § 2000e-5(c). Under ADEA, however, procedural prerequisites to federal jurisdiction are not contained in the analogue § 633 but instead in § 626(b). Section 633 is directed primarily towards the federal-state relationship regarding the handling of age discrimination complaints and only secondarily to procedural requirements; § 2000e-5(c) is directed primarily towards the establishment of procedural prerequisites to federal suit under Title VII.[17] Thus, the purpose of § 633 is significantly different from that of § 2000e-5(c). Since their respective functions are distinguishable, however similar may be their language, it is improper to draw an analogy between the two provisions.

Moreover, subsection (a) of § 633, which has no counterpart under Title VII, specifically provides that ADEA shall not preempt similar state law. The

11 Pub. L. No. 89-601, § 601, 80 Stat. 844 (1966).
12 492 F.2d at 17.
13 2 U.S. CONG. & ADM. NEWS 2515 (1964).
14 *Id.*
15 H.R. REP. No. 805, 90th Cong., 1st Sess. 2 (1967).
16 *Id.* Only one state positively indicated that there had been a decrease of age discrimination in actual hiring.
17 492 F.2d at 17 (Garth, J., concurring).

fact that ADEA contains § 633(a) and that Title VII contains no similar provision reinforces the notion that § 633 should not be analogized to § 2000e-5(c). Section 633(a) reveals that § 633 deals with the federal-state relationship; that provision indicates the circumstances under which federal authority over an age discrimination complaint may be asserted. It is not concerned with the jurisdictional prerequisites to federal suit, which are found in § 626(b) of the Act. The limitations of § 633 operate only after the federal-state choice has been made in favor of the state.[18] There is no requirement that an aggrieved party must always proceed first with a state agency.[19]

Section 633(a) provides that state proceedings are superseded by the filing of a federal action. This provision, which dictates that commencement of a federal proceeding supersedes a state action, is not consistent with an intent to require strict state deferral. A more plausible interpretation of congressional intent is that the § 633 limitations on the right to bring a federal action become effective only where the complainant has chosen to initiate proceedings with the state agency.[20]

C. *Inconsistencies in the Analogy of § 633 to § 2000e-5(c)*

In spite of disagreement about the proper construction of § 633, the provision does establish concurrent federal and state jurisdiction in the area of age discrimination.[21] The legislative history reveals that Congress recognized the value of new and different legislative approaches to the problem of age discrimination by preserving state jurisdiction in the area.[22] The preservation of state power to prohibit age discrimination in employment also allows states to go beyond the federal minimum requirements.[23]

However, the effect of § 633 is unclear. As construed in *Goger*, § 633 requires the complainant to pursue available state remedies prior to filing a federal suit.[24] Whether this interpretation is justified is uncertain. The primary obstacle to a conclusive interpretation of the provision is the lack of clear congressional intent both in the language of the statute and in its legislative history. The *Goger* court characterized the legislative history of ADEA as "devoid of any intention of Congress to deviate from the basic philosophy of the 1964 Act Title VII of initially giving state agencies sixty days to resolve the problem."[25] But the amicus brief filed on behalf of the Secretary of Labor in *Goger* indicates that the legislative history is "devoid of any indication that Congress intended to restrict an individual's right to file suit under the Act to cases in which pro-

18 Levien, *The Age Discrimination in Employment Act: Statutory Requirements and Recent Developments*, 13 DUQ. L. REV. 227, 234 (1974).
19 *Id.*
20 492 F.2d at 18.
21 *Hearings on S. 830 Before the Subcomm. on Labor of the Comm. on Labor & Public Welfare*, 90th Cong., 1st Sess. 39 (1967).
22 *Id.*
23 *Id.* at 48.
24 *See* text accompanying note 30 *infra.*
25 492 F.2d at 16.

ceedings have first commenced under State law."[26] It is evident, then, that constructions of § 633, whatever they may be, are necessarily unsatisfactory due to an absence of discernible congressional intent.

While there is a lack of clarity in the statute and the legislative history, an analysis of the problems which arise as a result of the *Goger* interpretation of the statute is possible. Section 633 cases following *Goger* are inconsistent with cases construing § 2000e-5(c).[27] If the analogy made by the Third Circuit is improper, and § 633 can be construed without resort to the provisions of § 2000e-5(c), then these problems will dissipate as courts reverse decisions denying federal remedies to complainants under § 633. But even if the analogy is valid, then at a minimum it should be followed logically so as to produce an even-handed application of the state deferral requirement to individuals with discrimination complaints; presently, however, such an evenhandedness is clearly lacking.

III. The Improper Basis for the *Goger* Court's Construction of § 633

The Third Circuit held in *Goger v. H. K. Porter Co.*[28] that § 633 of ADEA and § 2000e-5(c) of Title VII are analogous provisions. Noting that the language of the two provisions is "virtually identical,"[29] the court concluded that § 633, like § 2000e-5(c), must be interpreted to require that "appropriate state agencies be given a prior opportunity to consider discrimination complaints before resorting to federal courts."[30] As authority for this interpretation of § 2000e-5(c), the court cited the Supreme Court's decision in *Love v. Pullman.*[31] A close reading of *Love,* however, reveals that the reliance of the *Goger* court upon *Love* is ill-founded,[32] and some doubt is cast, therefore, upon the accuracy of the analogy which served as the basis of the *Goger* court's decision.

The central issue before the court in *Goger* was whether an aggrieved individual under ADEA is required to seek redress from a state agency before going into federal court. Goger alleged that her employment with H. K. Porter Co. had been terminated because of her age. The district court dismissed Goger's complaint, holding that it did not have jurisdiction since Goger had not previously filed her complaint with the appropriate state agency.[33] The Third Circuit, finding that the "minor differences" between § 633 and § 2000e-5(c) were "insignificant," affirmed the district court's decision, holding that there was "no support for an interpretation of . . . [§ 633] which is contrary to

26 Brief for the Secretary of Labor as Amicus Curiae at 12, Goger v. H. K. Porter Co., 492 F.2d 13 (3d Cir. 1974).

27 These inconsistencies are discussed in Part IV *infra.*

28 492 F.2d 13 (3d Cir. 1974).

29 *Id.* at 15.

30 *Id.* at 15-16.

31 404 U.S. 522 (1972).

32 The Third Circuit in *Goger* also cited Crosslin v. Mountain States Tel. & Tel. Co., 422 F.2d 1028 (9th Cir. 1970), *vacated and remanded,* 400 U.S. 1004 (1971), and Electrical Workers Local 5 v. EEOC, 398 F.2d 248 (3d Cir.), *cert. denied,* 393 U.S. 1021 (1968). *Crosslin* is discussed in the text accompanying notes 48-52 *infra.* The issue in *Electrical Workers* was whether a letter sent by a complainant to the EEOC, before state proceedings on his complaint had been terminated, could qualify as a valid charge under the statute. The Third Circuit held that such a letter did qualify as an effective charge.

33 5 E.P.D. ¶ 8562 (D.N.J. 1973).

the Supreme Court's construction [of § 2000e-5(c)] in *Love v. Pullman.*"[34] The court nevertheless granted Goger equitable relief, since her failure to first pursue state remedies was due to her reliance upon the advice of a compliance officer of the Labor Department.[35] However, the court stated unequivocally that ADEA requires a complainant to seek relief from appropriate state agencies prior to instituting suit in federal court, adding that this requirement "should be strictly followed and enforced" in the future.[36]

While *Goger* considered the construction of § 633, *Love* confronted the validity of regulations promulgated by the Equal Employment Opportunity Commission (EEOC)[37] to comply with the state deferral requirement of Title VII. Love had filed complaints alleging age discrimination with the Colorado Civil Rights Commission in 1963 and 1965. Dissatisfied with the Commission's determination, Love contacted the EEOC in 1966 concerning his complaint. To ensure compliance with the the state deferral requirement contained in § 2000e-5(c) of Title VII, the EEOC deferred the matter to the Colorado Commission, pursuant to procedural regulations set up by the EEOC in 1965.[38] The Colorado Commission waived its right to take further action, and the EEOC proceeded with its own investigation, finding probable cause to support the charge of discrimination. When Pullman, his employer, failed to comply with measures recommended by the EEOC to end the alleged discrimination, Love filed suit in federal district court.

Due to the complexity of Title VII's procedural requirements, a state deferral procedure had been established by the EEOC to avoid the accidental forfeiture of a complainant's rights under the statute.[39] The EEOC had found that many actions filed under Title VII were pro se complaints, and that these complainants were frequently deprived of their rights under the statute due to their lack of awareness of the statute's state deferral requirement.[40] Under these procedures, the EEOC deferred complaints to the appropriate state agency, holding the federal action in "suspended animation"[41] pending the termination of the state proceeding. If the state agency failed to take action within 60 days, or did not terminate its proceedings within this period, the EEOC took action on the matter. A refiling of the complaint by the aggrieved party after the termination of state proceedings was not required.

The Tenth Circuit held, however, that this procedure was neither contemplated nor permitted by the statute.[42] Concluding that the filing requirements of Title VII mandated that Love refile his complaint with the EEOC after the

34 492 F.2d at 16.
35 Additionally, equitable relief was considered to be appropriate since no court had yet construed the provision in question; Goger was barred from seeking state remedies since the applicable statute of limitations period had elapsed.
36 492 F.2d at 17.
37 The EEOC is authorized by 42 U.S.C. § 2000e-4 (1970) to handle discrimination complaints arising under the statute.
38 29 C.F.R. § 1601.12(a) (1965).
39 *Id.*
40 *Id.*
41 404 U.S. at 526.
42 430 F.2d 49 (10th Cir. 1969).

state proceedings had terminated, the court held the EEOC deferral procedure to be invalid.

The Supreme Court reversed,[43] holding that the procedure followed by the EEOC fully complied with the purpose of the statute. The Court found no suggestion in the language of the legislation that state proceedings could not be commenced by the EEOC acting on behalf of the complainant rather than by the complainant himself. Therefore, the Court concluded, the EEOC had properly exercised its authority in establishing procedural regulations which effectively held a complaint in "suspended animation" while the matter was deferred to the state authority.[44] The Court decided that requiring a second filing of the complaint by the aggrieved party was an unwarranted procedural technicality.

The issue of mandatory state deferral presented in *Goger* was thus only tangentially related to the issue that confronted the Court in *Love,*[45] which was the validity of the EEOC's state deferral procedure. Moreover, the effects of these two decisions are inconsistent. The effect of *Goger* is that a complainant under ADEA may be denied a federal remedy because of his failure to initially pursue his claim at the state level. This is precisely the effect which the EEOC sought to avoid in the state deferral procedure instituted under Title VII and sanctioned by the Supreme Court in *Love.*[46] *Goger,* by establishing a mandatory state deferral requirement, creates a procedural technicality which may result in the loss of a complainant's federal remedy. *Love* approves procedures which obviate the possible loss of a federal remedy. In relying upon an incidental aspect of *Love,* the Third Circuit in *Goger* disregarded the essential thrust of *Love.*

The ADEA complainant will not have the same protection against the inadvertent forfeiture of his federal rights as does his counterpart under Title VII unless the same procedural safeguard that exists under Title VII is instituted under ADEA. The need for such protection has been demonstrated under Title VII; the EEOC found that complainants under Title VII often accidentally lost their federal rights before the institution of this safeguard.[47] The supplementation of ADEA with similar procedures would correct the present inconsistencies in the § 633-§ 2000e-5(c) analogy. If the *Goger* analysis requiring mandatory state deferral is correct, then the *Love* sanction of those Title VII procedures should be equally applicable to procedures established under ADEA.

IV. The Case Law: Disparate Judicial Constructions of § 633 and § 2000e-5(c)

Court decisions construing the state deferral requirement of ADEA have

43 Love v. Pullman, 404 U.S. 522 (1972).
44 *Id.* at 526.
45 In *Love,* the only direct reference to the issue confronted by the *Goger* court is found in the opening sentence of the decision:

> A person claiming to be aggrieved by a violation of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, may not maintain a suit for redress in federal district court until he has first unsuccessfully pursued certain avenues of potential administrative relief.

404 U.S. at 523.
46 29 C.F.R. § 1601.12(a) (1969).
47 *Id.*

differed significantly from those interpreting the same requirements of Title VII, with important differences in results. Title VII courts have emphasized the importance of providing the complainant with a remedy, and have granted relief in spite of procedural irregularities in the state deferral process. This flexibility in dealing with the state deferral requirement is totally lacking in court decisions under ADEA. As a result, though the *Goger* court's construction of § 633 was based upon an analogy between § 2000e-5(c) and § 633, ADEA's state deferral requirement differs substantially in effect from that of Title VII.

Crosslin v. Mountain States Telephone and Telegraph Co.,[48] relied upon by the Third Circuit in *Goger* as authority for its state deferral rule, provides an example of court interpretations of Title VII's state deferral requirement. Erlene Crosslin filed a charge of employment discrimination with the EEOC alleging that the Mountain States Telephone and Telegraph Company had refused to hire her solely because she was black. Although Arizona law prohibited the alleged discrimination and established a state Civil Rights Commission to deal with violations of the law, Crosslin did not file her complaint with the state agency, but initiated her action instead with the EEOC.[49] After an EEOC investigation had established reasonable cause to believe that a violation had occurred, a suit was filed in federal court. The defendant moved to dismiss Crosslin's suit on the ground that Crosslin had not pursued her state remedies prior to filing suit in federal court, as required by § 2000e-5(c). The Ninth Circuit, reversing the lower court, sustained the defendant's motion to dismiss.[50] Since there was a state agency authorized to seek relief, the court held that the EEOC was without authority to process Crosslin's complaint until the state agency had had 60 days to settle the dispute. However, the period of filing complaints under the Arizona law had already expired, and consequently Crosslin was left without a remedy.

The Supreme Court, in a brief opinion, vacated and remanded the case to the district court with instructions to follow the suggestions in the amicus brief filed by the Solicitor General.[51] The Solicitor's brief had suggested that when a complainant fails to comply with the state deferral requirement of the statute before instituting a federal action, the district court should be permitted to retain

48 422 F.2d 1028 (9th Cir. 1970), *vacated and remanded*, 400 U.S. 1004 (1971).

49 The EEOC did not believe that the Arizona Commission was an agency authorized to "grant or seek relief" within the meaning of Title VII, and advised Crosslin that she need not file her complaint with the state commission. The only remedy or sanction provided by Arizona law for unlawful discrimination was a criminal penalty which would not exceed $300.00. While Title VII provides federal courts with power to grant various forms of personal relief to the aggrieved person, Arizona law provided no such remedies. The EEOC believed that the state agency must be authorized to grant suitable relief to the aggrieved person before the state deferral requirement would become operative.

The issue, therefore, was the scope of the relief intended by Title VII. The Ninth Circuit decided that the relief intended by the statute is not that which the courts may grant in response to a petition by an aggrieved person; it is rather the relief which may be sought by the state or local authority itself. The Arizona Commission sought to eliminate unlawful discrimination practices through conciliation conference, and persuasion. The court decided that this was the relief intended by Title VII, and thus reasoned that the Arizona Commission was an agency authorized to grant or seek relief within the meaning of Title VII. Crosslin's failure to seek relief from the Arizona Commission operated as a jurisdictional bar to her federal suit. 422 F.2d at 1032.

50 422 F.2d 1028 (9th Cir. 1970).

51 400 U.S. 1004 (1971).

jurisdiction over the matter for a period sufficient to allow the complainant or the EEOC to seek redress under the procedures authorized by state law. If the state authority elects not to act on the complaint, the district court should then consider the case.[52] Following this decision, both the Sixth[53] and Ninth[54] Circuits have reversed lower court orders dismissing Title VII actions because the complainant or the EEOC had failed to initially file complaints with the appropriate state agency.

Thus, a mitigating practice has emerged under Title VII whereby a complainant is allowed a second opportunity to seek redress, and is allowed this second chance in spite of the running of the statute of limitations. The *Crosslin* decision clearly indicates the importance which the Supreme Court attaches to the full consideration of a complainant's rights under Title VII. In a variety of situations involving defects in compliance with the procedural regulations of Title VII, courts have been "extremely reluctant to allow procedural technicalities to bar claims brought under the Act."[55] It is recognized that since Title VII is an "intricate statute hedged about with definitional, substantive, and procedural limitations, restrictions, and requirements . . . [its] provisions are not to be interpreted too literally or too technically."[56] In the *Love* decision, the Supreme Court, approving regulations intended to minimize complications in the filing of complaints, regarded procedural technicalities as "inappropriate" in the statutory scheme of Title VII.[57]

These decisions construing the procedural requirements of Title VII, however, have not been followed by courts dealing with analogous situations under ADEA. The United States District Court for the District of New Jersey, in *McGarvey v. Merck & Co.*,[58] considered McGarvey's allegation that his employer had dismissed him after 21 years of service because of his age (he was 59). Although the decision was later vacated and remanded by the Third Circuit,[59] the district court, citing *Goger*, dismissed the complaint because McGarvey had failed to initially seek relief from the state agency.

Outside the Third Circuit, the only court to follow *Goger* has been the United States District Court for the Eastern District of Michigan, in *Vaughn v. Chrysler Corp.*[60] The difference between the results obtained under Title VII and those obtained under ADEA is aptly demonstrated by a comparison of *Vaughn* and *EEOC v. Mah Chang Albany Corp.*[61] In dismissing the ADEA

52 Brief for the Solicitor General as Amicus Curiae, Crosslin v. Mountain States Tel. & Tel. Co., 400 U.S. 1004 (1971), *quoted in* Mitchell v. Mid-Continent Spring Co., 466 F.2d 24, 26 (6th Cir. 1972).

53 Mitchell v. Mid-Continent Spring Co., 466 F.2d 24 (6th Cir.), *cert. denied*, 410 U.S. 928 (1972).

54 EEOC v. Mah Chang Albany Corp., 499 F.2d 187 (9th Cir. 1974); Oubichon v. North Am. Rockwell Corp., 482 F.2d 569 (9th Cir. 1973); Parker v. General Tel. Co., 476 F.2d 595 (9th Cir. 1973); Motorola, Inc. v. EEOC, 460 F.2d 1245 (9th Cir. 1972).

55 Sanchez v. Standard Brands, Inc., 431 F.2d 46 (5th Cir. 1970).

56 EEOC v. Mah Chang Albany Corp., 499 F.2d 187, 189 (9th Cir. 1974).

57 404 U.S. at 527.

58 356 F. Supp. 525 (D.N.J. 1973), *vacated and remanded*, 493 F.2d 1401 (3d Cir.), *cert. denied*, 419 U.S. 836 (1974).

59 493 F.2d 1401 (3d Cir. 1974).

60 382 F. Supp. 143 (E.D. Mich. 1974).

61 499 F.2d 187 (9th Cir. 1974).

action in *Vaughn,* the district court decided that the complainant's failure to make timely resort of state remedies was a "fatal jurisdictional defect."[62] The Ninth Circuit, in *Mah Chang,* noted that Title VII decisions "necessarily imply that deferral is not a jurisdictional fact in the sense that its absence deprives the court of power to act."[63]

ADEA courts, then, while purporting to accept the § 633-§ 2000e-5(c) analogy, do not correspondingly adhere to the further substantive constructions of § 2000e-5(c) cases. Courts, being reluctant to allow procedural technicalities to bar claims brought under Title VII, have been generally flexible in dealing with the procedural regulations of the statute. On the other hand, courts dealing with ADEA have been rigid and inflexible regarding such procedural matters. If § 633 is to be deemed analogous to § 2000e-5(c), the case law developed under § 2000e-5(c) should control similar situations arising under § 633. Currently, the analogy has not been fully followed, resulting in the irony that complainants under Title VII are permitted to seek federal relief in spite of procedural irregularities in the state deferral process, while complainants under ADEA are not.

If ADEA is supplemented with a procedural safeguard analogous to that which exists under Title VII, and the case law developed under § 2000e-5(c) is applied to similar situations arising under § 633, the analogy made between § 2000e-5(c) and § 633 would be followed to its logical and proper conclusion.

While valid considerations lie behind the requirement of initial deference to state remedies, the significant numbers of pro se complaints dictate that procedural complexities, with their resultant forfeitures, be minimized. Under Title VII, the state deferral regulations set up by the EEOC accommodate this concern. If the laudable goal of eliminating age discrimination in employment in this country is to be realized, ADEA must be supplemented with similar procedures. In addition, the flexibility exhibited by courts in dealing with the state deferral requirement of Title VII must be adopted by courts construing this same requirement under ADEA, and the Title VII case law should be applied to similar situations arising under ADEA. Unless these steps are taken, the achievement of the purposes of ADEA will be thwarted.

V. The Role of ADEA's State Deferral Requirement

An examination of the purposes of the ADEA state deferral requirement indicates that the suggestions made here—that the case law under § 2000e-5(c) should be applied to similar situations under § 633, and that procedures similar to those protecting complainants under § 2000e-5(c) should be instituted to protect § 633 complainants—do not undercut the objectives of § 633. An understanding of the important role the state deferral requirement was intended to play in the statutory framework of ADEA may be derived from a comparison

62 382 F. Supp. at 146.
63 499 F.2d at 189.

of § 633 and § 2000e-5(c). However, the importance of a state deferral requirement must be balanced with the necessity of achieving effective enforcement of the Act. Since many complaints under ADEA are pro se actions, the absence of procedural regulations to safeguard complainants' rights similar to those that exist under § 2000e-5(c) hinders the achievement of full enforcement of the Act and finally only thwarts the accomplishment of Congress' purpose in enacting the statute.

A. *The Role of State Deferral Procedures in Balancing Federal and State Power*

At the time of Title VII's enactment, Congress confronted resistance to growing federal power and authority in areas in which the states had previously exercised sole authority.[64] Some opponents of the Civil Rights Act of 1964 (wherein Title VII is contained) expressed fears that the Act was another step in the extension of federal power to the point that the "vitality, autonomy, and even the viability of State and local governments . . . [were] seriously threatened."[65]

The state deferral requirements included under Title VII represent a compromise between the need for a federal program to end discrimination and fears of federal infringement upon state power. Congress sought to leave "primary, exclusive jurisdiction" over enforcement of discrimination laws in the hands of state agencies "for a sufficient period of time to let them work out their own problems at the local level."[66]

State deferral requirements under Title VII, then, seem to be an effective means of balancing important political interests rather than a mere procedural technicality. If the analogy between § 633 and § 2000e-5(c) is valid, then the same considerations apply with like force under ADEA.

B. *Pro Se Complaints Necessitate Minimal Procedural Technicalities*

The purpose of state deferral regulations must be considered together with the need for effective enforcement of both Title VII and ADEA. The typical complaint under both statutes is initiated by a layman without the aid of an attorney.[67] In interpreting Title VII, courts generally have been aware that the layman's crucial role in the statutory scheme[68] is important to achieving effective enforcement of the statute.[69] For example, in *Love* the Supreme Court considered procedural technicalities to be inappropriate under Title VII because

64 *See* 2 U.S. CONG. & ADM. NEWS 2413-19 (1964).
65 *Id.* at 2419.
66 110 CONG. REC. 13087 (1964) (remarks of Senator Dirksen). *See id.* at 12707 (remarks of Senator Humphrey); *id.* at 13081 (remarks of Senator Clark); *id.* at 13088 (remarks of Senator Humphrey).
67 404 U.S. at 527. *See also* Wetzel v. Liberty Mut. Ins. Co., 511 F.2d 199 (3d Cir. 1975); Sanchez v. Standard Brands, Inc., 431 F.2d 455 (5th Cir. 1970); Willis v. Chicago Extruded Metals Co., 358 F. Supp. 848 (N.D. Ill. 1973).
68 *See* 431 F.2d at 461.
69 511 F.2d at 202; 431 F.2d at 461.

the legislation contemplates "a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process."[70] The EEOC, which has been delegated the responsibility of enforcing Title VII, has also indicated its awareness of the layman's vital role in the statutory scheme. In setting up procedural regulations to effect the state deferral requirement, the EEOC recognized the importance of simplified filing procedures.[71] This simplification of filing procedures enhances the ability of people who do not have legal training to secure their rights under the statute, and thereby helps achieve the full potential of the layman's role in securing the statute's enforcement.

The significance played by the pro se complainant in furthering effective enforcement of ADEA has also been recognized.[72] Employers, employment agencies, and labor organizations are required to post notices to their employees, applicants for emeployment, and union members pertaining to the rights and protections afforded by ADEA. These notices must be posted in prominent and accessible places where they may be readily observed.[73] People who may be protected by ADEA must be given the opportunity to learn of their rights under the statute.[74] It is hoped that by these measures the pro se complainant, in securing his own rights under the statute, will assume an active role in the enforcement of ADEA.

The need for encouraging the participation of the layman in enforcing ADEA is particularly acute. ADEA violations, often subtle, are difficult to uncover and document.[75] Although ADEA became law in 1967, five years later age discrimination in employment was not only still prevalent, but was actually increasing.[76] In 1974, substantial age discrimination violations were still being disclosed;[77] these discovered violations of ADEA are estimated to represent only a minor portion of the actual number of violations covered by the law.[78] Although greater public awareness of ADEA has resulted in a consistent increase in the number of complaints filed under the Act during the past few years,[79] these great increases in the number of complaints and investigations which reveal age discrimination practices demonstrate the continuing pervasiveness of age discrimination in employment. They also point to the need for efficacious means of eliminating such discriminatory practices. The layman's vital role in

70 404 U.S. at 527.

71 The complexity of these filing procedures had often caused the accidental forfeiture of the federal rights of people who sought aid from the EEOC. 29 C.F.R. § 1601.12 (a) (1965).

72 *See* 29 C.F.R. § 850.10 (1973).

73 *Id.*

74 An analysis of a survey conducted by the Manpower Administration of the Department of Labor in May-June 1963, concluded that the volume of age discrimination complaints is related to public awareness of the law as a result of promotional activity, rather than to the effect of discrimination. 2 U.S. CONG. & ADM. NEWS 2215 (1967).

75 1975 SEC. OF LABOR ANN. REP. 12.

76 SPECIAL COMM. ON AGING, U.S. SENATE, DEVELOPMENTS ON AGING: 1971 AND JANUARY-MARCH 1972, S. REP. No. 92-784, 92d Cong., 2d Sess. XXII, at 50 n.3 (1972) [hereinafter cited as DEVELOPMENTS ON AGING].

77 1975 SEC. OF LABOR ANN. REP. 7. During the fiscal year 1974, 7,983 investigative actions by the Department of Labor resulted in a finding of $6,315,484 in damages owed to complainants under ADEA. New job opportunities, made available by the removal of discriminatory age barriers, totalled 84,207 in the same year.

78 DEVELOPMENTS ON AGING, *supra* note 76, at XXII 50.

79 1975 SEC. LABOR ANN. REP. 8.

enforcing ADEA must be encouraged, since without his participation in enforcing the statute there is little likelihood of ending age discrimination in employment. The supplementation of ADEA with procedures to accommodate the strict state deferral requirement would serve as a means of encouraging the layman's role; this opportunity to enhance the effectiveness of the statute should be fully utilized.

VI. Conclusion

The issue of whether the analogy made between § 633 of ADEA and § 2000e-5(c) of Title VII is valid will remain the subject of dispute, due to the lack of clear congressional intent regarding § 633. However, problems and inconsistencies resulting from the analogy must be examined and corrected. While courts purport to follow this analogy in construing § 633, they do not actually do so. As a result, the complainant under ADEA is required to adhere to a strict state deferral rule, while the complainant under Title VII is not.

Moreover, procedures exist under Title VII whereby a complainant who files a complaint with the EEOC need never be concerned with the state deferral requirement. Because ADEA is not supplemented with similar procedures, the results reached under the two "analogous" statutes are inconsistent. Title VII's procedural safeguard, and the case law principle developed under the statute which allows the complainant a second opportunity to seek redress for his grievance, combine to afford the complainant significantly more aid and protection in securing his rights under Title VII than is available to a complainant under ADEA.

The supplementation of ADEA with procedures for state deferral similar to those existing under Title VII would serve the purposes for which this deferral requirement was included in the statute and would enhance the enforcement of the Act. Since age discrimination in employment remains a pervasive reality in the United States, such a step to achieve greater effectiveness of ADEA is acutely needed.

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