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# Title VII of the Civil Rights Act of 1964: Obtaining Jurisdiction Over Defendants Who Were Not Named as Respondents in a Charge to the EEOC

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# TITLE VII OF THE CIVIL RIGHTS ACT OF 1964: OBTAINING JURISDICTION OVER DEFENDANTS WHO WERE NOT NAMED AS RESPONDENTS IN A CHARGE TO THE EEOC

## INTRODUCTION

Title VII of the Civil Rights Act of 1964[1] makes discrimination based on race, color, religion, sex or national origin an unlawful employment practice.[2] It is the most comprehensive legislation ever enacted to eliminate private employment discrimination.[3] Discrimination in hiring, firing, promoting, granting privileges and compensation is prohibited, as is any form of segregation or classification which would "deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee. . . ."[4] Section 2000e-5 of the Act specifies the provisions a person claiming to have been discriminated against must follow to come within the protection of the statute.[5] Because of

1. 42 U.S.C. §§ 2000e to e-15 (1964) [hereinafter referred to as Title VII of the Act].

2. *Id.* § 2000e-2. This section specifically prohibits discrimination by employers, employment agencies and labor organizations. Section 2000e limits the definition of "employer" to those "engaged in an industry affecting commerce" with twenty-five or more employees. Federal, state and local governments are excluded from this definition, as are private membership clubs (other than labor organizations) which are tax exempt under 26 U.S.C. § 501(c) (1964).

Additional exemptions are made in section 2000e-2(e) where religion, sex or national origin—but not race—is a bona fide occupational qualification. For a rather critical discussion of these and other exceptions to Title VII coverage see Rachlin, *Title VII: Limitations and Qualifications*, 7 B.C. IND. & COM. L. REV. 473 (1966).

3. M. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT (1966):

> Equal employment opportunity measures have taken many forms, including, most recently, a federal statute. Title VII of the Civil Rights Act of 1964 is the first comprehensive equal employment opportunity law ever passed by Congress.

*Id.* at 8.

4. 42 U.S.C. § 2000e-2(a) (1964).

5. An aggrieved party must file a written charge, under oath, with the Equal Employment Opportunity Commission [hereinafter referred to as the Commission] within 90 days of the alleged discriminatory act. If the act occurred in a jurisdiction which has a state or local fair employment practice law, the aggrieved party must first file his charge with the appropriate state or local agency. Where the charge has been deferred to a state or local agency the time limit for filing with the Commission is extended to 210 days or 30 days after the aggrieved party has been informed of the termination of state or local action, whichever is sooner. If, after a maximum of 60 days, the Commission has been unable to obtain voluntary

"the ambiguous structure of the enforcement provisions of Title VII,"[6] most of the cases dealing with charges of employment discrimination have involved procedural questions.[7] In fact, "[o]nly a few Title VII cases have been decided on the merits."[8] The problem faced by the courts in determining procedural questions, caused by the absence of clear statutory guidelines, is compounded by the conflicting legislative history of the Act which seems to offer something for everyone.[9]

The right to employment free from discrimination is wholly statutory. Therefore, each person bringing an action in a district court for redress of alleged employment discrimination, pursuant to section 2000e-5(e) of the Act, must have complied with all the jurisdictional prerequisites specified in the statute. After several

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compliance with the Act through the informal methods of "conference, conciliation and persuasion," the aggrieved party is so notified and has 30 days to file a civil action in federal district court against the respondent named in his charge to the Commission. *Id.* § 2000e-5.

6. Hall v. Werthan Bag Corp., 251 F. Supp. 184, 186 (M.D. Tenn. 1966).

7. For an early view of some of the procedural problems presented by § 2000e-5 see Walker, *Title VII: Complaint and Enforcement Procedures and Relief and Remedies*, 7 B.C. IND. & COM. L. REV. 495 (1966). For later discussions of general procedural problems see Berg, *Title VII—A Three Years' View*, 44 NOTRE DAME LAWYER 311 (1969); Coleman, *Title VII of the Civil Rights Act: Four Years of Procedural Elucidation*, 8 DUQUESNE L. REV. 1 (1969-70). An extensive list of cases dealing with Title VII procedure is given in Comment, *A Primer to Procedure and Remedy Under Title VII of the Civil Rights Act of 1964*, 31 U. PITT. L. REV. 407, 436-42 (1970).

8. *Title VII, Civil Rights Act of 1964: Present Operation and Proposals for Improvement*, 5 COLUM. J.L. & SOC'L PROBLEMS 1, 48 (1969).

9. For example, during the debate on the bill Senator Sam J. Ervin stated that

> the Commission holds the key to the courthouse door, which cannot be unlocked for the aggrieved party's benefit unless the Commission finds that there is reasonable cause to believe the employer guilty of the charge of discrimination and fails to adjust the complaint by conciliation.

110 CONG. REC. 14188 (1964). In contrast Senator Jacob Javits stated:

> In short the Commission does not hold the key to the courthouse door. The only thing this title gives the Commission is time in which to find that there has been a violation and time in which to seek conciliation.
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> . . .
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> But . . . that is not a condition precedent to the action of taking a defendant into court. A complainant has the absolute right to go into court and this provision does not affect that right at all.

*Id.* at 14191. Likewise, Senator Hubert Humphrey, who was floor leader of the bill, stated:

> The individual may proceed in his own right at any time. He may take his complaint to the Commission, he may by-pass the Commission, or he may go directly to the court.

*Id.* at 14188.

*See* Johnson v. Seaboard Air Line R.R., 405 F.2d 645, 649-51 (4th Cir. 1968), *cert. denied*, Pilot Freight Carriers Inc. v. Walker, 394 U.S. 918 (1969); Mondy v. Crown Zellerbach Corp., 271 F. Supp. 258, 262-63 (E.D. La. 1967), *rev'd sub nom.* Oatis v. Crown Zellerbach Corp., 398 F.2d 496 (5th Cir. 1968). For a complete account of the lengthy and involved legislative history leading to the enactment of Title VII see Vass, *Title VII: Legislative History*, 7 B.C. IND. & COM. L. REV. 431 (1966).

years of litigation most courts have settled on two statutory prerequisites which must be met before they will allow a civil action under Title VII: (1) the aggrieved person must have filed a charge with the Equal Employment Opportunity Commission naming the parties charged with discrimination within the time limits prescribed in the Act;[10] and (2) the complainant must have received notice from the Commission that it was unable to secure voluntary compliance with the Act.[11] After these two requirements have been fulfilled, the aggrieved person has thirty days to file a complaint in a district court.[12] In determining whether these prerequisites have been properly met, courts have often been forced to choose between enforcing the underlying purpose of the statute, the elimination of all forms of employment discrimination, or strictly following the rather restrictive enforcement procedures specified in section 2000e-5.[13] Although a number of procedural areas are still unsettled, an increasing number of courts have liberally construed the requirements of section 2000e-5 to permit the action to be maintained.[14]

One area of Title VII procedure which has not generally been liberally construed, however, is the requirement embodied in the first prerequisite that all persons who are named in a complaint to a district court must have previously been named as respondents in a charge to the Commission.[15] Courts initially dealing with this problem held that any person who was not a respondent in the initial charge to the Commission could not be joined as a defendant in a subsequent court action since this would circumvent the statutory preference for "conference, conciliation and persuasion" by the Commission as the primary method of eliminating employment discrimination.[16] While this is still the prevailing view, several re-

10. Bowe v. Colgate Palmolive Co., 416 F.2d 711, 719 (7th Cir. 1969). For the time limits prescribed by section 2000e-5 see note 5 *supra.*

11. Dent v. St. Louis-S.F. Ry., 406 F.2d 399, 403 (5th Cir. 1969).

12. Miller v. International Paper Co., 408 F.2d 283, 288 n.21, 291 (5th Cir. 1969); Mondy v. Crown Zellerbach Corp., 271 F. Supp. 258, 263 (E.D. La. 1967).

13. See note 5 *supra.*

14. *See, e.g.,* Bowe v. Colgate Palmolive Co., 416 F.2d 711 (7th Cir. 1969); Miller v. International Paper Co., 408 F.2d 283 (5th Cir. 1969); Dent v. St. Louis-S.F. Ry., 406 F.2d 399 (5th Cir. 1969); Johnson v. Seaboard Air Line R.R., 405 F.2d 645 (4th Cir. 1968); Choate v. Caterpillar Tractor Co., 402 F.2d 357 (7th Cir. 1968); Oatis v. Crown Zellerbach Corp., 398 F.2d 496 (5th Cir. 1968). For a discussion of the trend toward a more flexible interpretation of Title VII procedure, see Section III of this Comment.

15. This requirement is drawn from section 2000e-5(e), discussed at text accompanying notes 28-31 *infra.*

16. Bowe v. Colgate Palmolive Co., 416 F.2d 711 (7th Cir. 1969);

cent cases have permitted the joinder of unnamed parties at the trial stage in certain circumstances.[17] This Comment will examine both lines of authority, the rationale behind the holdings, the burden placed on persons aggrieved by the requirement that all parties be named versus the desirability of having all parties before the Commission, and methods of obtaining jurisdiction over those who were not originally named in the charge to the Commission.

## I. How the Problem Arises

One of the reasons Congress established the Commission as the prime method for the settlement of employment discrimination charges was to provide "an inexpensive and uncomplicated remedy for aggrieved parties, most of whom were poor and unsophisticated."[18] While some charges have been filed by civil rights groups on behalf of aggrieved parties, "the average complainant is not initially represented by counsel, has no knowledge of the niceties of the statute, and generally makes his 'charge' in a crude homemade fashion."[19] The result of these "homemade" charges has been that in many instances parties involved in the discriminatory practice, and who should be defendants in any civil action, have been omitted from the initial complaint.[20]

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Miller v. International Paper Co., 408 F.2d 283 (5th Cir. 1969); Oatis v. Crown Zellerbach Corp., 398 F.2d 496 (5th Cir. 1968); Mickel v. South Carolina State Employment Serv., 377 F.2d 239 (4th Cir.), *cert. denied*, 389 U.S. 877 (1967); Butler v. Local 4, Laborers' Union, 308 F. Supp. 528 (N.D. Ill. 1969); Green v. McDonnell Douglas Corp., 299 F. Supp. 1100 (E.D. Mo. 1969); Spell v. Local 77, IATSE, F. Supp. , 71 L.R.R.M. 2811 (D.C.N.J. 1969); Samuel v. Wannamaker, Inc., F. Supp. , 70 L.R.R.M. 2637 (D.C.S.C. 1968); Edmonson v. Wackenhut Corp., F. Supp. , 2 F.E.P. Cases 39 (M.D. Fla. 1968); Sokolowski v. Swift & Co., 286 F. Supp. 775 (D. Minn. 1968); Cox v. United States Gypsum Co., 284 F. Supp. 74 (N.D. Ind. 1968); Mondy v. Crown Zellerbach Corp., 271 F. Supp. 258 (E.D. La. 1967); Moody v. Albemarle Paper Co., 271 F. Supp. 27 (E.D.N.C. 1967); Freese v. John Morrell & Co., F. Supp. , 70 L.R.R.M. 2924 (S.D. Iowa 1966).

17. Waters v. Wisconsin Steel Works, 427 F.2d 476 (7th Cir. 1970); McDonald v. American Fed'n of Musicians, 308 F. Supp. 664 (N.D. Ill. 1970); State v. Baugh Constr. Co., 313 F. Supp. 598 (W.D. Wash. 1969); Bremer v. St. Louis S.W.R.R., 310 F. Supp. 1333 (E.D. Mo. 1969); Taylor v. Armco Steel Corp., F. Supp. , 60 CCH Lab. Cas. ¶ 9266 (S.D. Tex. 1969).

18. Waters v. Wisconsin Steel Works, 427 F.2d 476, 486 (7th Cir. 1970).

19. Georgia Power Co. v. EEOC, 295 F. Supp. 950, 953 (N.D. Ga. 1968), *aff'd*, 412 F.2d 462 (5th Cir. 1969). The Act provides for court appointed counsel "in such circumstances as the court may deem just," when the action is filed with the district court, but not before. 42 U.S.C. § 2000e-5(e) (1964).

20. By far the most common defect in charges made to the Commission relating to the naming of respondents has been the failure of the complainant to name his union in addition to his employer as the discriminating party. *See, e.g.*, Waters v. Wisconsin Steel Works, 427 F.2d 476 (7th Cir. 1970); Bowe v. Colgate Palmolive Co., 416 F.2d 711 (7th Cir. 1969); Norman v. Missouri Pac. R.R., 414 F.2d 73 (8th Cir. 1969); Miller v. International Paper Co., 408 F.2d 283 (5th Cir. 1969); Edmonson v. Wackenhut Corp., F. Supp. , 2 F.E.P. Cases 39 (M.D. Fla. 1968); Cox v. United

In the leading case of *Mickel v. South Carolina State Employment Service*,[21] the aggrieved party was seeking a job with Exide Battery Service, who had registered with the State Employment Service as a prospective employer. When the State Employment Service repeatedly refused to administer the necessary aptitude tests or refer her to Exide, she filed a charge with the Commission alleging discrimination by the State Employment Service but failed to name Exide as a respondent in the charge. When the Commission was unable to arrive at a suitable conciliation, the aggrieved party filed suit in district court. At trial, the district court granted Exide's motion for summary judgment which was upheld on appeal to the Fourth Circuit Court of Appeals:

> [I]t is a sufficient basis for our decision that Exide was not "named in the charge" filed with the Commission, and the Commission was not required to enter into any conciliatory negotiations with Exide.[22]

The real danger for those who file incomplete charges is that the defendant they fail to name as a respondent in their charge to the Commission may be an "indispensable party" under Rule 19 of the Federal Rules of Civil Procedure.[23] Should the court follow the prevailing view and refuse to take jurisdiction over the unnamed

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States Gypsum Co., 384 F. Supp. 74 (N.D. Ind. 1968); Freese v. John Morrell & Co., F. Supp. , 70 L.R.R.M. 2924 (S.D. Iowa 1966).

Other instances where charges to the Commission failed to name all parties: McDonald v. American Fed'n of Musicians, 308 F. Supp. 664 (N.D. Ill. 1970) (local union and international union named in charge; recording secretary of local union not named); Taylor v. Armco Steel Corp., F. Supp. , 60 CCH Lab. Cas. ¶ 9266 (S.D. Tex. 1969) (employer and local union named in charge; international union not named); Local 329, ILA v. South Atl. & Gulf Coast Dist., ILA, 295 F. Supp. 599 (S.D. Tex. 1968) (union district council named in the charge; various local unions who are members of the district council not named).

21. 377 F.2d 239 (4th Cir. 1967).

22. *Id.* at 242.

23. Rule 19, "Joinder of Persons Needed for Just Adjudication," is stated as follows:

> (a) Persons to be Joined if Feasible.
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> A person . . . shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring . . . inconsistent obligations by reason of his claimed interest. . . .
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> (b) Determination by Court Whenever Joinder not Feasible.
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> If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent party being thus regarded is indispensable.

FED. R. CIV. P. 19.

party, it would be forced to dismiss the entire complaint since all parties "needed for just adjudication" under Rule 19(b) are not before the court. If, in such a circumstance, the time limit for filing charges as set out in section 2000e-5 had elapsed since the alleged discriminatory practice occurred,[24] the aggrieved party would be left without a remedy, since it would then be too late to file new charges with the Commisson.[25]

## II. The Prevailing View

Federal courts in the third, fourth, fifth, seventh and eighth circuits have held that each defendant in a Title VII suit must have been made a respondent in a charge to the Commission as a jurisdictional prerequisite to any civil action.[26] This view is founded on a judicial interpretation of Title VII which emphasizes conciliation by the Commission as the primary means of securing compliance with the employment discrimination provisions of the Act.[27]

The statutory basis for the majority view is found in section 2000e-5(e):

> If . . . the Commission has been unable to obtain voluntary compliance with this title, the Commission shall so notify the person aggrieved and a civil action may, within thirty days thereafter, be brought *against the respondent named* in the charge.[28]

Most courts interpret this language to mean that only the respondent to the charge can be named as a defendant.[29] One of the first procedural determinations made concerning Title VII was that all complaints must go through the Commission to afford a chance for voluntary settlement.[30] There is no language in the statute which specifically requires resort to the Commission as a prerequisite to court action. The courts have concluded, however, that the elaborate administrative machinery established in the Act for the settlement of discrimination charges is a clear indication that Congress intended resort to the Commission for settlement by "conference, conciliation and persuasion" to be a prerequisite to the filing of a civil action.[31] When faced with a suit that includes parties who

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24. *See* note 5 *supra.*

25. This is exactly the result reached by the district court in Waters v. Wisconsin Steel Works, 301 F. Supp. 663 (N.D. Ill. 1969), *rev'd,* 427 F.2d 476 (7th Cir. 1970). The decision in the *Waters* case is discussed in the text accompanying notes 64-67 *infra.*

26. Cases cited note 16 *supra.*

27. *See, e.g.,* Bowe v. Colgate Palmolive Co., 416 F.2d 711, 719 (7th Cir. 1969); Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 498 (5th Cir. 1968).

28. 42 U.S.C. § 2000e-5(e) (1964) (emphasis added).

29. Cases cited note 16 *supra.*

30. Stebbins v. Nationwide Mut. Ins. Co., 382 F.2d 267 (4th Cir. 1967).

31. Waters v. Wisconsin Steel Works, 427 F.2d 476, 486 (7th Cir. 1970). This method of discerning Congressional intent is much more persuasive than relying on the conflicting statements made during the Senate debate on Title VII. *See* authorities cited note 9 *supra.*

were not named in the charge to the Commission, most courts have coupled the reasoning requiring the filing of a charge and the language of section 2000e-5(e) authorizing civil actions "against the respondent named in the charge" to dismiss the action against the unnamed party.[32] Since the unnamed defendant has never been before the Commission and was not included in the attempts at voluntary settlement, the prevailing view is that the jurisdictional prerequisites to suit have not been met as to that defendant.

In *Bowe v. Colgate Palmolive Co.*,[33] the court was faced with a complaint against a defendant who was not a respondent to the charge before the Commission. The plaintiffs' charge to the Commission named the employer as the respondent but did not name the union. At trial the plaintiffs sought to join the union as a defendant. Following the prevailing rule, the court refused to take jurisdiction over the union. Even though it recognized "that the Union was not entirely blamelesss in permitting discrimination to exist and could have worked harder to eliminate the residual and continuing effects of the blatant prior discrimination,"[34] the court refused to hold the union liable for any damages resulting from the discrimination, since the union had never been named in a charge to the Commission as a "party in violation of Title VII."[35]

In addition to the purely statutory reasons for requiring resort to the Commission, several other reasons for requiring conciliation have been advanced. An informal settlement through Commission mediation is advantageous for the party charged with employment discrimination since he is able to avoid the stigma of a public action for discriminatory practices.[36] Section 2000e-5(a) makes all proceedings before the Commission confidential.[37] Commission hearings and attempts at conciliation are not even admissible as evidence in subsequent proceedings without the written consent of the parties.[38] Where conciliation is successful, it also benefits the aggrieved party. A voluntary settlement will minimize the antagonism between the parties while "more coercive remedies [are]

32. See cases cited note 16 *supra*.
33. 416 F.2d 711 (7th Cir. 1969).
34. *Id.* at 719.
35. *Id.* Less than a year later the Seventh Circuit Court of Appeals reversed itself on this point, at least where the attempt to join an unnamed defendant was coupled with an allegation of jurisdiction under section 1 of the Civil Rights Act of 1866, 42 U.S.C. § 1981 (1964), *formerly* 14 Stat. 27 (1866). Waters v. Wisconsin Steel Works, 427 F.2d 476 (7th Cir. 1970). See discussion at notes 132 to 140 and accompanying text *infra*.
36. Waters v. Wisconsin Steel Works, 427 F.2d 476, 486 (7th Cir. 1970).
37. 42 U.S.C. § 2000e-5(a) (1964).
38. *Id.*

likely to enflame respondents and encourage them to employ subtle forms of discrimination."[39]

### III. Procedural Requirements Liberally Interpreted

One interesting facet of the prevailing view is that a number of the courts which have strictly interpreted the provisions of section 2000e-5(e) to prohibit the joinder of parties who were not respondents in the charge to the Commission have been quite flexible in their interpretation of other procedural requirements of the Act.[40] In *Choate v. Caterpillar Tractor Co.*,[41] the Seventh Circuit Court of Appeals held that despite the language of section 2000e-5(a)[42] which requires the charge to the Commission to be "in writing under oath," failure of the aggrieved party to swear to the charge was not a jurisdictional defect.[43]

Another procedural area which has been liberally interpreted involves the joinder of plaintiffs in cases arising under Title VII. Although the enforcement provisions of Title VII do not specifically authorize its use, the class action[44] has been allowed in employment discrimination cases.[45] Not only are class actions maintainable, but membership in the class is not restricted to those parties who have previously filed charges before the Commission, as long as one member of the class has filed a charge with the Commission.[46] This conclusion was reached in *Bowe v. Colgate Palmolive Co.*,[47] where the court not only allowed plaintiffs who had not filed charges with the Commission to join in a class action but granted affirmative relief for the non-filing members in the form of back pay.[48]

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39. Waters v. Wisconsin Steel Works, 427 F.2d 476, 486-87 (7th Cir. 1970).

40. Cases cited note 14 *supra*.

41. 402 F.2d 357 (7th Cir. 1968).

42. 42 U.S.C. § 2000e-5(a) (1964).

43. Choate v. Caterpillar Tractor Co., 402 F.2d 357 (7th Cir. 1969):

> Given the fact that the administrative remedy alone may be insufficient to vindicate the rights of aggrieved parties, we believe that it would be unnecessarily harsh and in derogation of the interests of those whom the act was designed to protect to interpret the statutory language as denying substantive rights in the district court because of procedural defects before the Commission. . . . To deny relief under these circumstances [failure to swear to charge filed with Commission] would be a meaningless triumph of form over substance.

*Id.* at 360.

44. Fed. R. Civ. P. 23(a) and (b) specifies the instances when a class action may be maintained.

45. *See, e.g.*, Hall v. Werthan Bag Corp., 251 F. Supp. 184 (M.D. Tenn. 1966).

46. Oatis v. Crown Zellerbach Corp., 398 F.2d 496 (5th Cir. 1968): "It would be wasteful, if not in vain, for numerous employees, all with the same grievance, to have to process many identical complaints with the EEOC." *Id.* at 498.

47. 416 F.2d 711 (7th Cir. 1969).

48. *Id.* at 720. The court, however, followed the prevailing view in refusing to permit the plaintiffs to join their union as a defendant in this suit, since the union had not been named in the plaintiffs' charge to the Commission. See notes 33 to 35 and accompanying text *supra*.

A third area where the courts have interpreted the procedural language of section 2000e-5 as directory rather than mandatory involves the necessity of actual Commission conciliation as a prerequisite to the filing of a charge. An early district court case, *Dent v. St. Louis-San Francisco Railway Co.*,[49] held that the language of section 2000e-5(e) made conciliation attempts a "jurisdictional prerequisite to the institution of a civil action under Title VII and that actions instituted without this prerequisite must accordingly be dismissed."[50] This case was reversed on appeal[51] and a number of other cases have rejected actual Commission conciliation as a prerequisite to civil action.[52] This liberal interpretation was adopted by the Fifth Circuit Court of Appeals in *Miller v. International Paper Co.*[53] to permit a suit against an employer where the Commission had made no attempt at conciliation.[54]

A procedural area where the courts are still in conflict involves the necessity of a Commission determination that there is reasonable cause to believe a violation of the Act has occurred.[55] Several

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49. 265 F. Supp. 56 (N.D. Ala. 1967).

50. *Id.* at 58.

51. Dent v. St. Louis-S.F. Ry., 406 F.2d 399 (5th Cir. 1969).

52. *See, e.g.*, Johnson v. Seaboard Air Line R.R., 405 F.2d 645 (4th Cir. 1968), *cert. denied*, 394 U.S. 918 (1969); Quarles v. Phillip Morris, Inc., 271 F. Supp. 842 (E.D. Va. 1967); Mondy v. Crown Zellerbach Corp., 271 F. Supp. 258 (E.D. La. 1967).

53. 408 F.2d 283 (5th Cir. 1969).

54. The court in *Miller* stated:

> Granting that conciliation is important and that it precedes court action, the question is, what effect should the EEOC's failure to conciliate have upon the charging party's right to file suit? The appellees assume a crushing burden when they attempt to convince this court that the value of conciliation should supercede the value of enforcement. The means devised cannot be more important than the end envisioned. We do not believe that the procedures of Title VII were intended to serve as a stumbling block to the accomplishment of a statutory objective.

*Id.* at 290. In spite of this ruling that actual Commission action on the complaint filed against the employer was unnecessary, the court refused to take jurisdiction over the union involved because it had not been named as a respondent in a charge to the Commission. The court reasoned that to allow an action against a party who had not been named in a charge to the Commission would "virtually eliminate the Commission established by Congress to encourage fair employment practices." *Id.* at 285, 291.

55. 42 U.S.C. § 2000e-5(a) (1964) provides that the Commission "shall endeavor to eliminate any . . . unlawful employment practice by informal methods of conference, conciliation and persuasion." First, however, it must make an investigation based on the charge and determine that "there is reasonable cause to believe that the charge is true." Where a finding of "no reasonable cause" is made, the Commission so notifies the complainant and no further Commission action is taken. In fiscal 1969 the Commission received 17,272 charges of employment discrimination; in 2,801 cases the Commission ruled that it had "no probable jurisdiction" over the charge. 4 EEOC ANN. REP. 34 (1969).

courts,[56] and at least one commentator,[57] have held that a finding of reasonable cause by the Commission is a prerequisite to judicial enforcement. The opposite interpretation, which is the view taken by the Commission,[58] is that an aggrieved party may bring his action in federal court despite a Commission finding of "no reasonable cause."[59]

It is submitted that the better interpretation permits court action even where the Commission has found "no reasonable cause" to believe a violation of the Act exists. A requirement that the Commission find "reasonable cause" in every instance before court action is permissible is an over-extension of the Commission's delegated powers of "conference, conciliation, and persuasion."[60]

Thus, whenever possible, most courts have chosen to enforce the underlying purpose of the statute rather than deny the substantive relief it provides because of procedural errors and defects. Two prominent factors in the evolution of this liberal interpretation are the lay-drafted charges to the Commission, which often contain defects in form and content, and the overwhelming number of complaints made to the Commission, which has overburdened its staff to the point where it is impossible to attempt serious conciliation efforts in many instances.[61] In light of these factors and the liberal interpretation given to most of the procedural aspects of Title VII, it is necessary to re-examine the rationale behind the prevailing view that no action can be maintained against a defendant who was not named as a respondent in the initial charge to the Commission.[62]

## IV. The Prevailing View Criticized

On its face, the language of section 2000e-5(e), specifically authorizing the filing of a civil action by the aggrieved party "against the respondent named in the charge,"[63] makes the prevailing interpretation that action can be brought only against the respondent

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56. *See* Green v. McDonnell-Douglass Corp., 299 F. Supp. 1100 (E.D. Mo. 1969); Burrell v. Kaiser Aluminum & Chemical Corp., 287 F. Supp. 289 (E.D. La. 1968).

57. Coleman, *Title VII of the Civil Rights Act: Four Years of Procedural Elucidation*, 8 Duquesne L. Rev. 1, 14 (1969-70).

58. *EEOC Legal Interpretations* (General Counsel Opinion Letter of September 7, 1965), CCH Employment Practices Guide ¶ 17,251.083 (1965); *accord*, Berg, *Title VIII, A Three Years' View*, 44 Notre Dame Lawyer 311, 317-18 (1969).

59. *See, e.g.*, McDonald v. American Fed'n of Musicians, 308 F. Supp. 664 (N.D. Ill. 1970); Taylor v. Armco Steel Corp., F. Supp. , 60 CCH Lab. Cas. ¶ 9266 (S.D. Tex. 1969).

60. See also McDonald v. American Fed'n of Musicians, 308 F. Supp. 664, 668 (N.D. Ill. 1970).

61. In 1968 the Commission received 15,058 charges of employment discrimination. In 1969, 17,272 charges were received. 4 EEOC Ann. Rep. 4-5 (1969). *See also* Miller v. International Paper Co., 408 F.2d 283, 288-89 n.22 (5th Cir. 1969).

62. See discussion at Section II of this Comment, *supra*.

63. 42 U.S.C. § 2000e-5(e) (1964).

to the charge, and no other, appear reasonable. The result of this requirement, however, has sometimes been to place form over substance, often leading to the denial of the very freedom from employment discrimination which the Act was designed to eliminate. A classic example of the dangers inherent in the prevailing view was presented in the case of *Waters v. Wisconsin Steel Works*.[64] The plaintiffs filed a charge with the Commission alleging racial discrimination by their employer, the Wisconsin Steelworks of the International Harvester Company. After a finding of "reasonable cause" by the Commission and subsequent notification that conciliation efforts had failed, the plaintiffs filed a complaint in district court naming as defendants their employer and their union, Local 21 of the United Order of American Bricklayers and Stone Masons.[65] Since the union had not been named as a respondent in the charge to the Commission, the district court, following the prevailing rule, dismissed the complaint against the union. The court then dismissed the plaintiffs' claim against the company, since the union and the bricklayers it represented were parties "needed for just adjudication" under Rule 19 of the Federal Rules of Civil Procedure.[66] The harshness of this decision was noted by the Seventh Circuit Court of Appeals:

> If this action were dismissed against both Harvester and Local 21, plaintiffs would be forced to file new charges before the EEOC. Section 706 (d) of Title VII requires that charges be filed with [sic] 210 days after the occurrence of the alleged unlawful employment practice. Unless the failure to hire plaintiffs in April 1966 were considered to be a continuing violation, new charges against Harvester and Local 21 would be deemed untimely and plaintiffs would be left without a remedy.[67]

The first basis for criticism of the prevailing view is that the

64. 301 F. Supp. 663 (N.D. Ill. 1969), *rev'd*, 427 F.2d 476 (7th Cir. 1970).

65. The complaint stated a cause of action under four separate statutes: Section 1 of the Civil Rights Act of 1866, 42 U.S.C. § 1981 (1964), *formerly* 14 Stat. 27 (1866); Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to e-15 (1964); section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a) (1964); and the National Labor Relations Act, 29 U.S.C. §§ 151-67 (1964). Waters v. Wisconsin Steel Works, 427 F.2d 476, 479 (7th Cir. 1970). Only the first two causes of action are within the scope of this Comment: the cause of action based on section 1 of the Civil Rights Act of 1866, 42 U.S.C. § 1981 (1964), *formerly* 14 Stat. 27 (1866), is discussed at text accompanying notes 132-37 *infra*.

66. Waters v. Wisconsin Steel Works, 301 F. Supp. 663, 666-67 (N.D. Ill. 1969). FED. R. CIV. P. 19 and its application to parties in a Title VII action is discussed at the text accompanying notes 23-25 *supra*.

67. Waters v. Wisconsin Steel Works, 427 F.2d 476, 487 n.20 (7th Cir. 1970).

reasoning on which it is based is faulty. Courts have correctly interpreted the statute as placing strong emphasis on voluntary settlement through "conference, conciliation and persuasion" by the Commission. Therefore, they have consistently ruled that the Commission may not be completely bypassed.[68] However, it does not necessarily follow that each person ultimately made a defendant in a civil action must also have been a respondent to the initial charge to accomplish this goal. The policy behind the requirement of resort to the Commission is functional, not technical; it permits the quickest, easiest and most inexpensive alleviation of employment discrimination possible. The preference for conciliation is adequately fulfilled when the Commission is notified of a discriminatory practice by a given employer, employment agency, or union against a named individual or class. Oversight or ignorance by the lay-drafter of the charge to the Commission which leads to the failure to name a party which may also be involved in the discriminatory practice does not sufficiently jeopardize the policy favoring conciliation by the Commission to justify a possible loss of remedy against one or all of the discriminating parties. If the Commission is aware that certain discriminatory practices exist in a given area, and has been able to investigate them, and is still unable to reach a satisfactory result, the policy favoring resort to the Commission and voluntary settlement has been adequately fulfilled to allow judicial resolution.

One of the most frequently cited reasons for requiring all defendants to be named in the charge to the Commission is to provide notification to the charged party of the alleged violation.[69] Of course, each defendant in an employment discrimination case should have notice that it has been charged. It is questionable, however, how great a role the naming of additional respondents to the charge actually plays in giving notice. In many instances, the unnamed party (usually the union), has actual notice that a discriminatory practice is under investigation by virtue of its close association with the employer and the complainant.

In the *Waters* case,[70] for example, the plaintiffs' primary charge of employment discrimination was based on an amendment to the collective bargaining agreement between the employer and the local union. During the course of the Commission's investigation of the charge filed against the employer, an investigator for the Commission met twice with the president of the local union at which time the union president was fully informed of the nature of the charges filed against the employer.[71] In such instances, the preju-

68. Stebbins v. Nationwide Mut. Ins. Co., 308 F.2d 267 (4th Cir. 1967); *see* cases cited note 16 *supra*.

69. Bowe v. Colgate Palmolive Co., 416 F.2d 711, 719 (7th Cir. 1969).

70. Waters v. Wisconsin Steel Works, 427 F.2d 476 (7th Cir. 1970).

71. *Id.* at 487 and n.19. Such inclusion of unnamed parties by the Commission in its efforts at conciliation seems to be a standard practice.

dice to the unnamed party caused by the failure to make it a respondent to the Commission charge is slight.

The contention that defendants must be named in the charge to the Commission to provide them with notice is further weakened by the recognition that in at least one instance where the Commission failed to notify the named respondents of the charges against them, as required by section 2000e-5(a),[72] an action was allowed.[73] The court held that the service of the charge upon the respondent by the Commission was not a jurisdictional prerequisite to the filing of a suit under Title VII.[74] It should also be noted that the action in the district court is *de novo*, and not a determination based on the findings of the Commission.[75] Therefore, all defendants in the district court action are protected by all the procedural requirements specified in the Federal Rules of Civil Procedure which are adequate notice to prevent unfair surprise in every other type of adjudication in the federal courts.

The second rationale for the prevailing view is that each defendant in a Title VII action must be named in the charge to provide the Commission with an opportunity to secure voluntary compliance with the Act.[76] If every charge submitted to the Commission actually reached the stage of conciliation, there would be a great deal of merit in this contention. Since the courts have ruled, however, that actions may be maintained where the Commission has made no attempt at conciliation,[77] to require that each defendant in the action be previously named in the charge to the Commission is to demand recourse to an administrative remedy which, in many cases, is neither necessary nor available. Where the Commission has not attempted conciliation, nothing is gained by a requirement that all defendants be named in the charge.

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"In instances of the charging party citing only one respondent, the conciliator frequently included either the union or the company as interested parties in order to resolve the employment issue totally." 4 EEOC ANN. REP. 9 (1969).

72. This section provides that when the Commission receives a charge alleging employment discrimination it "shall furnish such employer, employment agency, or labor organization . . . with a copy of such charge. . . ." 42 U.S.C. § 2000e-5(a) (1964).

73. Spell v. Local 77 IATSE, F. Supp. , 71 L.R.R.M. 2811 (D.C.N.J. 1969).

74. *Id.* at 2812. *See, also* Miller v. International Paper Co., 408 F.2d 283, 291 (5th Cir. 1969) (court indicates a similar holding without deciding the issue).

75. See note 37 and accompanying text *supra*.

76. Bowe v. Colgate Palmolive Co., 416 F.2d 711, 719 (7th Cir. 1969).

77. Cases holding that actions are maintainable where there was no attempt at Commission conciliation were discussed previously at notes 49-54 and accompanying text *supra*.

The goal of the Act is the elimination of employment discrimination, through Commission action where possible, but in all other instances by court order. This policy is not served by decisions which dismiss complaints against individuals charged with discrimination without a trial on the merits. In most instances, the failure to name a defendant as a party has resulted only in the dismissal of the action against the unnamed party.[78] While this procedure often affords some relief to the aggrieved party, there is a good possibility that the relief granted is incomplete due to the absence of one or more involved parties.[79] The Commission recognizes that "when co-respondents are named, conciliation is more effective and comprehensive."[80] There is no reason to assume that the same is not also true as to the presence of all involved parties in the judicial resolution of alleged employment discrimination. By strictly limiting civil actions under Title VII to those parties who were respondents in the charge to the Commission, the prevailing rule has limited the scope and availability of judicial relief to the victims of employment discrimination. This narrow construction of the Act is inconsistent with the purpose of the statute and the liberal interpretation accorded other procedural issues.[81] As long as the private suit remains the sole method of compelling those who violate the law to comply with its provisions,[82] it is essential that the procedural provisions be liberally construed to effectuate the broad purpose of the Act and not be used as "stumbling blocks" to deny relief to those whom the Act was designed to protect.

## V. Limited Joinder Permitted

As yet, no court has explicitly rejected the prevailing interpretation. In several instances, however, plaintiffs have been permitted to join defendants who were not named in charges before the Commission.[83] In general, these exceptions have arisen in one of three situations: (1) where the court has determined that an agency relationship exists between the respondent named in the charge to the Commission and the unnamed party which the plaintiff is seeking to join in the action;[84] (2) where the joinder of the

78. *See, e.g.*, Bowe v. Colgate Palmolive Co., 416 F.2d 711 (7th Cir. 1969); Miller v. International Paper Co., 408 F.2d 283 (5th Cir. 1969).
79. See text accompanying notes 33-35 *supra*.
80. 4 EEOC Ann. Rep. 9 (1969).
81. See discussion at Section III of this Comment *supra*.
82. 4 EEOC Ann. Rep., *Facts About Title VII*, (1969):

> Legislation is currently before the Congress which would enable the Equal Employment Opportunity Commission to seek enforcement of its determinations in the Federal courts, should conciliation efforts fail. The Commission regards such authority as essential and recommends its prompt passage.

83. Cases cited note 17 *supra*.
84. McDonald v. American Fed'n of Musicians, 308 F. Supp. 664 (N.D. Ill. 1970); Taylor v. Armco Steel Corp., F. Supp. , 60 CCH Lab. Cas. ¶ 9926 (S.D. Tex. 1969). *Contra*, Butler v. Local 4, Laborers' Union, 308 F. Supp. 528 (N.D. Ill. 1969).

unnamed party is necessary to prevent wasteful or inconsistent results or when no purpose would be served by further Commission action;[85] (3) where the plaintiff based the court's jurisdiction of the case on section 1 of the Civil Rights Act of 1866,[86] thus avoiding the necessity of compliance with the procedural steps necessary to the initiation of a suit based on Title VII.[87]

As noted earlier, most of the charges received by the Commission are "homemade,"[88] and the provision for the appointment of counsel is not applicable until Commission action has been completed and the aggrieved party's only recourse is to a civil action.[89] An attorney coming into the case at this juncture faces serious disabilities in those instances where the original charge to the Commission did not name all possible defendants. In order to have any chance of broadening the relief available to his client by making defendants of unnamed parties, he generally must plead jurisdiction over the unnamed party based on one of the three grounds listed above.

### *A. Agency*

The most frequently attempted method of obtaining jurisdiction over a defendant who was not named in the original charge has been an effort to show the existence of an agency relationship between the respondent in the original charge and the party to be joined.[90] The most liberal finding of an agency relation sufficient to permit the joinder of an unnamed defendant is found in *Taylor v. Armco Steel Corp.*[91] In his charge to the Commission the plaintiff named Armco Steel and Local 2708 of the United Steelworker's Union as the respondents. The complaint filed in district court, however, also named the international union as a defendant. The international union moved to dismiss the action against it, since it

85. State v. Baugh Constr. Co., 313 F. Supp. 598 (W.D. Wash. 1969); Bremer v. St. Louis-S.W.R.R., 310 F. Supp. 1333 (E.D. Mo. 1969).

86. 42 U.S.C. § 1981 (1964), *formerly* 14 Stat. 27 (1866).

87. Waters v. Wisconsin Steel Works, 427 F.2d 476 (7th Cir. 1970). *Contra*, Smith v. North American Rockwell Corp., F. Supp. , 2 F.E.P. Cases 561 (N.D. Okla. Feb. 25, 1970).

88. See text accompanying note 19 *supra*.

89. 42 U.S.C. § 2000e-5(e) (1964) provides that "[u]pon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant. . . ."

90. Cases cited note 84 *supra*. *See also* Mickel v. South Carolina State Employment Serv., 377 F.2d 239, 241 (4th Cir. 1968) (dictum); Sokolowski v. Swift & Co., 286 F. Supp. 775, 782 (D. Minn. 1968) (dictum); Moody v. Albermarle Paper Co., 271 F. Supp. 27, 29 (E.D.N.C. 1968) (dictum).

91. F. Supp. , 60 CCH Lab. Cas. ¶ 9266 (S.D. Tex. 1969).

was not a respondent to the charge before the Commission. In denying the international union's motion to dismiss, the court recognized that "[t]he Act obviously contemplates the aggrieved individual will join all parties with whom he has a grievance in his charge before the Commission. . . ."[92] The court also noted that a number of decisions have construed section 2000e-5(e) of the Act to mean that a plaintiff's failure to name the international union as a respondent precludes its being named as a defendant in a civil action.[93] In declining to follow these decisions the court stated: "*However, this construction is not absolute.*"[94] The court reasoned that section 2000e-1(d) of the Act,[95] which defines a labor organization to include its agents, will permit the joinder of the international union "if it can be shown that the local union is, for some purposes, the agent of the international. . . ."[96] The court found that the facts indicated "much more than a simple 'affiliation'" between Local 2708 and the international union and permitted the joinder of the international.[97] The holding in *Armco Steel* was foreshadowed by dicta in a series of opinions which refused to join the unnamed party based on agency but which indicated that the result could be different if an adequate agency relationship was proven.[98]

The District Court for the Northern District of Illinois specifically rejected the holding of *Armco Steel* in *Butler v. Local 4, Laborers' Union.*[99] The *Butler* court refused to apply the definition of "labor organization" found in section 2000e-1(d)[100] to permit joinder of the union district council in an action where only the local union had been named as a respondent in a charge to the Commission. The action against the district council of the union was dismissed.[101]

> Defining a labor organization to include its agents delineates the scope of application of the sections of Title VII prohibiting unlawful employment practices. It does not suggest that the term "respondent" as used in 42 U.S.C. § 2000e-5(e) has the same meaning. According to the definition, the activities of agents of labor organizations are subject to the provisions of Title VII. However, the charging of one before the EEOC does not make a respondent of

92. *Id.* ¶ 9266 at 6604.
93. *Id.*
94. *Id.* (emphasis in original).
95. This section provides: "the term 'labor organization' means a labor organization engaged in an industry affecting commerce, *and any agent of such organization. . . .*" (emphasis added). 42 U.S.C. § 2000e-1 (d) (1964).
96. Taylor v. Armco Steel Corp., F. Supp. , 60 CCH Lab. Cas. ¶ 9266 at 6604.
97. *Id.*
98. Cases cited note 90 *supra.*
99. 308 F. Supp. 528 (N.D. Ill. 1969).
100. 42 U.S.C. § 2000e-1(d) (1964). For applicable text see note 95 *supra.*
101. Butler v. Local 4, Laborers' Union, 308 F. Supp. 528, 531 (N.D. Ill. 1969).

the other.[102]

However, the court recognized that "[t]he situation may be different where there is substantial identity between the parties . . . ."[103]

In a more recent case, *McDonald v. American Federation of Musicians*,[104] the *Butler* court elaborated on the distinction between an agency relationship and "substantial identity," and the circumstances when it would permit the joinder of defendants who were not respondents in the charge to the Commission.[105] The court affirmed its decision in *Butler* but went on to find that "where there is substantial identity between the defendants" a defendant could be joined with those who had been respondents, even if he was not named in the charge, since "no useful purpose would be served" by the filing of another charge with the Commission.[106]

Viewed together, the cases permitting the joinder of defendants who were not respondents to the charge before the Commission based on agency do not present a very large exception to the majority rule. Although a number of cases have attempted such joinder, with the exception of the *Armco Steel* case, the courts have been reluctant to base jurisdiction on a simple agency relationship.[107] Whenever possible, the attorney for the aggrieved person should attempt to etablish "substantial identity" between the party named in the charge and the party he seeks to join in the action. The possibility of joinder may be enhanced if the attorney can show actual notice by the unnamed party as well as a legal relationship in the nature of agency between the respondent to the charge and the party he seeks to join in the action.[108]

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102. *Id.*
103. *Id.*
104. 308 F. Supp. 665 (N.D. Ill. 1969).
105. *Id.* at 669.
106. The court accepted jurisdiction over the recording secretary of the local union even though he had not been a respondent in the charge to the Commission. The complaint involved the collection of allegedly discriminatory fees by the local union. Since the recording secretary collected the fees, the court concluded that there was "substantial identity" between the parties so that any investigation of the charges against the local union must have included the recording secretary. *Id.* at 669.
107. Mickel v. South Carolina State Employment Serv., 377 F.2d 239 (4th Cr. 1968); Butler v. Local 4, Laborers' Union, 308 F. Supp. 528 (N.D. Ill. 1969); Sokolowski v. Swift & Co., 286 F. Supp. 775 (D. Minn. 1968); Moody v. Albemarle Paper Co., 271 F. Supp. 27 (E.D.N.C. 1968).
108. *See, e.g.*, McDonald v. American Fed'n of Musicians, 308 F. Supp. 665 (N.D. Ill. 1969).

*B. Exceptions Arising out of a Concern for the Orderly Administration of Justice*

Two well reasoned decisions[109] have disregarded the prevailing view and permitted Title VII actions against parties who were never named as respondents in a charge before the Commission. In *Bremer v. St. Louis Southwestern R.R.*,[110] the court actually *ordered* the plaintiff to join her union and the individual holding the disputed position despite the fact that neither party had been named in the charge to the Commission.[111] The case arose out of an allegation of sexual discrimination in the railroad's promotion practices. Noting that "prior to the enactment of the Civil Rights Act of 1964, disputes of this nature were unquestionably solely within the province of the Railway Adjustment Board," the court ruled that Title VII "created an additional remedy without eliminating the prior one."[112] Since there were two separate avenues of relief available, the court felt constrained to join all parties involved in the situation to avoid the hazard of "possible inconsistencies and fragmentation."[113]

In *State v. Baugh Construction Co.*,[114] the court permitted a Title VII action to be maintained even though no formal charge had been filed with the Commission.[115] While this was admittedly a rather extraordinary situation, it nevertheless evidences a judicial attitude which is willing to take jurisdiction of a Title VII action when resort to the detailed procedures established in the Act would be "frivolous."[116]

The *Baugh* case arose out of a series of legal[117] and public confrontations concerning the employment of minority group tradesmen on public construction projects in the Greater Seattle area. After a series of demonstrations by minority groups, the contractors agreed to hire more minority trainees, whereupon the unions

109. Bremer v. St. Louis-S.W.R.R., 310 F. Supp. 1333 (E.D. Mo. 1969); State v. Baugh Constr. Co., 313 F. Supp. 598 (W.D. Wash. 1969).

110. 310 F. Supp. 1333 (E.D. Mo. 1969).

111. *Id.* at 1340.

112. *Id.* at 1339.

113. *Id.* at 339-40. The court stated:

> There is only one job in dispute. The individual now holding that job and the union representing him are not now parties to this suit. Any judgment in this suit is not binding upon those not parties to this suit. If plaintiff were to prevail, the individual in the disputed position may well decide to initiate and pursue proceedings for reinstatement under the collective bargaining agreement and the Railway Labor Act, with the possibility of an inconsistent result. At best there would be fragmentation and duplication of proceedings. At worst there would be confusion, a multiplicity of proceedings involving the same facts, and two persons entitled to one position.

Id. at 1339-40.

114. 313 F. Supp. 598 (W.D. Wash. 1969).

115. *Id.* at 605.

116. *Id.*

117. *See also* Central Contractors Ass'n v. Local 46, IBEW, 312 F. Supp. 1388 (W.D. Wash. 1969).

walked off the job site and another series of demonstrations ensued. Although no charge had been filed with the Commission, it had been actively engaged in attempting to resolve the major issues in conflict.[118] Therefore, when the complaint was filed alleging jurisdiction under Title VII, the court held that resort to the procedural requirements for the institution of a Title VII suit would be to no avail and that speedy court action was of greater importance.[119] Although the circumstances surrounding this decision are diferent from most actions covered by Title VII, this case does provide precedent for a ruling that resort to the Commission is not a jurisdictional prerequisite where all the defendants are aware of the charges against them and further resort to settlement by "conference conciliation and persuasion" would be useless.

The decisions in both *Bremer* and *Baugh* deal with rather specialized circumstances. The type of reasoning they apply toward resolving the conflicts between the substance and procedure of Title VII, however, could well be applied to less specialized situations where it appears that strict adherence to the procedural requirement that all defendants be respondents before the Commission may limit the scope of judicial enforcement of the Act or prevent enforcement entirely.

### *C. Obtaining Jurisdiction under the Civil Rights Act of 1866*

The third method of obtaining jurisdiction over defendants who were not named in a charge to the Commission goes outside the confines of Title VII and places jurisdiction in the federal courts by virtue of section 1 of the Civil Rights Act of 1866.[120] When the Supreme Court revived the long dormant 1866 Civil Rights Act in the landmark case of *Jones v. Alfred H. Mayer Co.*,[121] it opened a whole new area of potential federal court jurisdiction over private employment discrimination.[122]

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118. State v. Baugh Constr. Co., 313 F. Supp. 598, 605 (W.D. Wash. 1969).
119. *Id.*
120. Section 1 of the Civil Rights Act of 1866, Act of April 9, 1866, ch. 31, 14 Stat. 27 is divided into two sections in the current code:

> 1981. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens. . . .
> 1982. All citizens of the United States shall have the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property.

42 U.S.C. § 1981-82 (1964), *formerly* 14 Stat. 27 (1866).
121. 392 U.S. 409 (1968).
122. *See generally* Comment, *Racial Discrimination in Employment Under the Civil Rights Act of 1866*, 36 U. CHI. L. REV. 615 (1969).

The question which has yet to be revolved conclusively is whether the right to "make and enforce contracts" guaranteed by section 1981[123] provides an independent cause of action for racial employment discrimination in addition to the protection afforded by Title VII. In the *Jones* decision, the Supreme Court seemed to indicate that section 1981 does provide a cause of action for private discrimination.[124] This interpretation was adopted and applied in *Dobbins v. International Brotherhood of Electrical Workers*[125] to permit an action based on section 1981 by a Negro against his union for discriminatory job referral practices.[126] The two most recent cases to consider this issue have, after extensive analysis, reached directly contradictory holdings on the availability of a cause of action under section 1981 as a remedy for private racial employment discrimination.[127]

In *Smith v. North American Rockwell Corp.*[128] the court refused to recognize section 1981 as an independent jurisdictional basis for a suit to prevent private employment discrimination. In refusing to recognize a cause of action for employment discrimination based on section 1981 the court stated that "to construe 42 U.S.C. section 1981 as supporting this court's subject matter jurisdiction . . . would make Title VII of the Civil Rights Act of 1964 a redundancy and in large part an absurdity."[129] In reaching this conclusion the court emphasized the widespread feeling that Congress, in enacting Title VII, was entering a new field of legislation.[130] The court also noted that if an action were permitted under section 1981, the whole statutory scheme of investigation and conciliation established in Title VII as the primary means of eliminating employment discrimination could be bypassed.[131]

A limited cause of action based on section 1981 was recognized, however, in *Waters v. Wisconsin Steel Works.*[132] The court in-

123. That portion of section 1 of the Civil Rights Act of 1866 which guarantees equal contract rights is now found in section 1981 of the current code and will hereinafter be referred to as section 1981.

124. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 441-43 n.78 (1968). The court overruled Hodges v. United States, 203 U.S. 1 (1906), which had refused to apply section 1981 to a situation in which a group of white men had terrorized several Negroes to prevent them from working in a sawmill.

125. 292 F. Supp. 413 (S.D. Ohio 1968).

126. The court stated:

> At least since *Jones v. Mayer,* a strictly private right, be it in the property field as such, or the contract field as such, is within the protection of the Civil Rights Act of 1866 against interference by a private citizen or a group of citizens.

*Id.* at 442.

127. Waters v. Wisconsin Steel Works, 427 F.2d 476 (7th Cir. 1970); Smith v. North American Rockwell Corp., F. Supp. , 2 F.E.P. Cases 561 (N.D. Okla. Feb. 25, 1970).

128. F. Supp. , 2 F.E.P. Cases 561 (N.D. Okla. Feb. 25, 1970).

129. *Id.* at 564.

130. *Id.* at 564-65.

131. *Id.*

132. 427 F.2d 476 (7th Cir. 1970). For a discussion of the facts of the

terpreted section 1981 as a prohibition of private job discrimination, but recognized that "the difficulties in reconciling section 1981 and Title VII are great and that the areas of possible conflict are numerous."[133] Since Title VII does not expressly repeal any prior legislation, the only basis on which jurisdiction under section 1981 could be denied would be a finding that this section was repealed by implication by Title VII. Relying on "the cardinal rule . . . that repeals by implication are not favored," as stated by the Supreme Court in *Posadas v. National City Bank*,[134] the court in *Waters* determined that the absolute right to sue under section 1981 was modified by the "strong preference for resolution of disputes by conciliation rather than court action" expressed in Title VII.[135] Accordingly, the court held that "an aggrieved person may sue directly under section 1981 if he pleads a reasonable excuse for his failure to exhaust EEOC remedies."[136] In this case sufficient "reasonable excuse" was found and an action under section 1981 was permitted against the employer and the union where the original charge to the Commission, which had been drafted by a layman, failed to name the union as a respondent and it appeared that the union had actual notice of the charges against the employer.[137]

Should the holding of the *Waters* case, that jurisdiction over employment discrimination suits is permissible under section 1981 where the plaintiff can show reasonable excuse for failure to exhaust his administrative remedies under Title VII, become the accepted view, it will undoubtedly be of great assistance to plain-

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*Waters* case and the district court decision which this decision reversed, see the text accompanying notes 64-67 *supra*.

133. *Id.* at 485.

134. 296 U.S. 497 (1936). In this case the Supreme Court established rules governing repeal by implication:

> The cardinal rule is that repeals by implication are not favored. Where there are two acts upon the same subject, effect should be given to both is possible. There are two well-established categories of repeals by implication—(1) where the provisions of the two acts are in irreconcilable conflict, the latter act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the latter act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act.

*Id.* at 503.

135. Waters v. Wisconsin Steel Works, 427 F.2d 476, 486 (7th Cir. 1970).

136. *Id.* at 487.

137. *Id.* The concurring opinion in the *Waters* case would have permitted the action based on Title VII jurisdiction without resort to section 1981. Based on the facts of the case the opinion writer felt

> that a strict reading of the statutory authorization of an action "against the respondent named in the charge" [was] unwarranted and that the plaintiff could properly bring an action against both the employer and the union.

*Id.* at 492 (concurring opinion).

tiffs' attorneys who come into the case at the trial stage and are faced with a defective charge to the Commission. The decision seems to indicate that the failure of the aggrieved party to name all defendants in his charge before the Commission is, by itself, a reasonable excuse sufficient to justify jurisdiction under section 1981.[138] Even a wide acceptance of this view, however, does not obviate the desirability of a more liberal interpretation of the requirement in section 2000e-5(e) of Title VII that an action may be brought "against the respondent named in the charge." As the Supreme Court pointed out at the beginning of the *Jones* decision, the Civil Rights Act of 1866[139] "deals only with racial discrimination. . . ."[140] The more comprehensive provisions of Title VII, on the other hand, prohibit discrimination based on sex, religion, and national origin as well as discrimination based on race or color. There is no justification for a rule that would permit the joinder of defendants who were not respondents in the charge to the Commission in cases involving racial discrimination (based on section 1981) and deny similar latitude to plaintiffs filing charges of sex discrimination under Title VII.

## VI. An Alternate Means of Permitting Joinder

The Equal Employment Opportunity Commission filed an amicus brief on behalf of the plaintiff in the *Waters* case outlining a procedure which could be followed in instances where necessary parties have not been named as respondents before the Commission.[141] Under their proposal, the district court would stay further proceedings pending the filing of a charge by the plaintiff against the unnamed defendant. The action would then revert to the Commission for another attempt at conciliation. Should the Commission again fail to reach a voluntary settlement, the plaintiff would be able to join the now-named defendant and proceed to judgment in the district court, having fulfilled all of the prerequisites to civil action.[142] Such a procedure is authorized in section 2000e-5(e)[143] and has been followed in two cases.[144]

Assuming that in such a situation the time limits for filing charges of alleged discrimination[145] would be waived, such a pro-

138. 427 F.2d at 487-88.
139. 42 U.S.C. §§ 1981-82 (1964), *formerly* 14 Stat. 27 (1866).
140. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 413 (1968).
141. The Commission's amicus brief is reported in the concurring opinion of Waters v. Wisconsin Steel Works, 427 F.2d 476, 492 (7th Cir. 1970).
142. Waters v. Wisconsin Steel Works, 427 F.2d 476, 492 (7th Cir. 1970).
143. This section provides that "[u]pon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of . . . the efforts of the Commission to obtain voluntary compliance." 42 U.S.C. § 2000e-5(e) (1964).
144. Norman v. Missouri Pac. R.R., 414 F.2d 73 (8th Cir. 1969); Local 329, ILA v. South Atl. & Gulf Coast Dist., ILA, 295 F. Supp. 599 (S.D. Tex. 1968).
145. 42 U.S.C. § 2000e-5(d) (1964). See note 5 *supra*.

cedure might permit a more complete opportunity for a negotiated settlement. As was noted earlier,[146] the Commission has achieved greater success in reaching voluntary compliance when it has been able to deal with all parties to the discriminatory practices. This increased possibility of settlement must be balanced, however, against the additional delay which it would occasion and the attendant possibility that an agreeable conciliation could still not be achieved, resulting in the same civil action being filed at a later date. While this procedure is preferable to the prevailing interpretation, since it merely delays settlement rather than denying relief altogether, it should not be a mandatory requirement where an attempt is made to join defendants who were not respondents before the Commission. In those instances, for example, where the unnamed defendant had actual notice of the charges before the Commission and was a party to the conciliation efforts, further attempts at voluntary compliance would appear futile. In other instances, as where the plaintiff would suffer additional injury by further delay, the court should be able to proceed without further resort to the Commission.

## SUMMARY AND CONCLUSIONS

> Discrimination is still pervasive in America. The challenge to make equal employment opportunity a reality for all Americans, regardless of race, color, religion, sex or national origin, is greater than ever before.[147]

The enactment of Title IV of the Civil Rights Act of 1964 signaled the beginning in earnest of one of the most difficult, yet most important, tasks of our time: the elimination of all forms of employment discrimination. The size of the problem is matched only by the urgency with which we must confront it. Most of those involved in this struggle have recognized that the failure of Title VII to grant enforcement power to the Equal Employment Opportunity Commission is a serious drawback. Since most of the compulsory enforcement of the Act must come from private litigation, it is essential that the courts interpret the procedural requirements of Title VII in a manner which is consistent with its overall purpose. Title VII, like any major enactment, has forced the courts to determine first the procedural grounds on which the Act will be enforced. The liberal judicial interpretation of such procedural questions as the formality required in the charge, the flexibility permitted in actual Commission action and the availability of class

146. See text accompanying note 80 *supra*.
147. 4 EEOC ANN. REP. 2 (1969).

actions, will certainly aid in the elimination of employment discrimination. A similarly liberal interpretation of the statute to permit the joinder of defendants at trial, who were not previously named as respondents in a charge before the Commission, is now in order.

The groundwork for such an interpretation has been laid. The courts have already recognized that on its face the language of section 2000e-5(e) does not demand that the complaint name each defendant in a charge to the Commission as a prerequisite to civil action. The prevailing rule that requires each defendant in the civil action to have been before the Committion is judge-made. It was founded on a sincere effort by the courts to give effect to an important policy expressed in the Act favoring voluntary settlement where possible. However, the prevailing rule is in error insofar as it creates a purely procedural barrier to complete judicial relief. The prime policy the courts should endeavor to enforce in their procedural determinations is the policy which lies at the center of the Act: the elimination of employment discrimination, by conciliation if possible, but by compulsion if necessary.

Hopefully, the judicial preference for enforcing the spirit of the Act will permit an extension of jurisdiction over defendants who were not named in the charge to the Commission. The three instances in which jurisdiction may be obtained[148] are entirely too limited, both in scope and in acceptance, to insure that adequate relief from employment discrimination will be granted in all cases.

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148. See text accompanying notes 84-87 *supra*.