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INTRODUCTION

From 1935 until about 1960, the role of the Maryland labor lawyer representing management was generally confined to company-union relations and the federal sphere. Since Congress had enacted statutes requiring national uniformity in labor policy, state and local governments were preempted from enacting similar legislation affecting employers in interstate commerce.[1] During this same period, neither state nor local legislation was enacted in Maryland which significantly affected employers engaged in intrastate activities. Therefore, the rights and obligations of Maryland employers and employees were determined primarily by federal law. An employee's remedies, other than his common law right to sue for breach of contract, generally were entrusted to the care and control of the National Labor Relations Board.

The role of the Maryland labor lawyer has, however, become greatly expanded in the last decade due to the enactment, at all levels of government,[2] of various statutes and ordinances which prohibit discrimination in employment. These statutory enactments, together with an expanded application of older legislation, affect all employees, both union and non-union, and all employers and bring the labor lawyer and his client into both state and local, as well as federal, forums.

As a result, Maryland employers and their counsel are for the first time confronted with various procedural problems resulting from the plethora of legal remedies available to an employee alleging discrimination. An employer may well find himself defending the same allegedly discriminatory act in a number of forums, either simultaneously or consecutively. The disposition of a charge in one forum may

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1. National Labor Relations Act, ch. 372, 49 Stat. 449 (1935), as amended and re-enacted by the Labor Management Relations Act (Taft-Hartley), ch. 120, 61 Stat. 136 (1947), and last amended by the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 151 *et seq.* (1964). *See* Guss v. Utah Labor Bd., 353 U.S. 1 (1957); Weber v. Anheuser-Busch, Inc., 348 U.S. 468 (1955); Garner v. Teamsters Local 776, 346 U.S. 485 (1953).

2. *See* Note, *Municipal Fair Employment Practice Ordinances and Commissions: A Legal Survey and Modern Ordinance,* 45 NOTRE DAME LAW. 258 (1970).

not preclude another forum from rendering a decision conflicting with the prior one. The applicability of traditional legal concepts such as exhaustion of remedies, election of remedies and *res judicata* has sometimes been rejected in the employment discrimination area.

In short, the labor lawyer and his client are faced with the problem of "multiple jeopardy" in employment discrimination cases. It is the purpose of this article to discuss the procedural problems which have arisen in these cases and to recommend solutions which are fair to all concerned.

I. REMEDIES AVAILABLE TO EMPLOYEES IN EMPLOYMENT DISCRIMINATION CASES

One cannot appreciate the complexity of the procedural problems arising in employment discrimination cases until he is aware of all the remedies which are available to an employee. Since the availability of such remedies is, in part, dependent upon the location of the employer's business, let us assume that the employer's operations are located exclusively in Baltimore City. An employee who has suffered employment discrimination may resort to any one or more of several agencies, tribunals, or courts.

1. *The EEOC and the Federal Court — Title VII — Civil Rights Act of 1964*

The most well-known of all employment discrimination legislation is Title VII of the Civil Rights Act of 1964[3] which established the Equal Employment Opportunity Commission (hereinafter EEOC). Title VII applies to any employer engaged in an industry affecting interstate commerce who has twenty-five or more employees,[4] and declares that it shall be unlawful for an employer to commit any of the following acts because of an individual's race, color, religion, sex or national origin:

a. to fail or refuse to hire any individual;

b. to discharge any individual;

c. to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment;

d. to limit, segregate or classify employees in any way which would deprive or tend to deprive them of employment oppor-

3. Civil Rights Act of 1964 § 701 *et seq.*, 42 U.S.C. § 2000e *et seq.* (1964) (enacted as Act of July 2, 1964, Pub. L. No. 88-352, § 701 *et seq.*, 78 Stat. 253). The cases discussing Title VII refer to those section numbers which are contained in the Act as enacted by Congress (Pub. L. 88-352) and that practice will be followed in this article.

4. Civil Rights Act of 1964 § 701(b). However, the Act excludes from its definition of the term "employer" (1) the United States or a corporation wholly owned by the United States; (2) Indian tribes; (3) state and political sub-divisions; and (4) private membership clubs exempt from taxation under section 501(c) of the Internal Revenue Code of 1954, other than labor organizations. It also should be noted that the statutory prohibitions are applicable as well to labor unions and employment agencies.

tunities or otherwise adversely affect their status as an employee; or

e. to discriminate against any individual as to admission or employment in any program established to provide apprenticeship or other training.[5]

The Act further provides that it is an unlawful employment practice for an employer to print or publish or cause to be printed or published any notice or advertisement relating to employment which indicates any preference, limitation, specification, or discrimination, based on race, color, religion, sex or national origin except where religion, sex or national origin is a bona fide occupational qualification for such employment.[6]

An employee alleging discrimination against a Baltimore City employer covered by Title VII may not file a charge with the EEOC without first resorting to the Maryland or Baltimore City agency charged with the responsibility of enforcing the state or city law prohibiting the alleged unlawful employment practice in question.[7] Upon the expiration of sixty days after proceedings have been commenced under state or city law or upon the termination of state or local proceedings, whichever is earlier, the employee may file a charge in writing under oath with the EEOC. However, the charge in any case must be filed within 210 days after the occurrence of the alleged discriminatory act or within thirty days after receiving notice that the state or city agency has terminated its proceedings, whichever is earlier.[8]

Once a charge has been timely filed with the EEOC, the EEOC furnishes a copy of the charge to the employer and conducts an investigation. If it finds that there is "reasonable cause to believe that the charge is true," the Commission is required to attempt to eliminate the charged discriminatory practice by informal methods

5. Civil Rights Act of 1964 § 703(a), (d). In order to avoid unnecessary confusion, this article will not discuss the Equal Pay Act of 1963 which, in general, prohibits an employer covered by the Fair Labor Standards Act from engaging in wage discrimination based on sex. The Equal Pay Act overlaps with Title VII in terms of prohibited conduct but is different in terms of jurisdiction and procedure.

6. *Id.* § 704(b).

7. *Id.* § 706(b). For a good discussion of this and other procedural issues arising under Title VII, see Comment, *A Primer to Procedure and Remedy Under Title VII of the Civil Rights Act of 1964,* 31 U. PITT. L. REV. 407 (1970).

8. Civil Rights Act of 1964 § 706(d). The EEOC has adopted regulations providing that where a charge is initially filed with the EEOC but deferral to a state agency is required, the EEOC will transmit the charge to the state agency and then consider it as automatically filed with the EEOC on the termination of the state proceedings or after 60 days, whichever occurs first. Where such a charge is filed with the EEOC more than 150 days after the alleged offense but less than 210 days therefrom, the EEOC will consider the charge to have been filed with it on the 209th day following the alleged offense. EEOC Rules and Regulations, 29 C.F.R. § 1601.12 (1971). There is a serious question whether this attempt by the EEOC to preserve charges which otherwise might be untimely comports with the language of Title VII. A decision by the Tenth Circuit that such procedure is improper is now pending before the Supreme Court. Love v. Pullman Co., 430 F.2d 49 (10th Cir. 1970), *cert. granted,* 401 U.S. 907 (1971). *See also* Comment, *A Primer to Procedure and Remedy Under Title VII of the Civil Rights Act of 1964,* 31 U. PITT. L. REV. 407 (1970).

of conference, conciliation and persuasion.[9] If the Commission is unable to obtain voluntary compliance with Title VII, it must notify the aggrieved employee that he may institute a civil action within thirty days in the United States District Court against his employer.[10] Such notice will in any event be issued by the Commission at any time after the expiration of sixty days from the date of the employee's filing of a charge or upon the Commission's dismissal of the charge, when demanded in writing by the employee.[11] Should the court find that the employer has intentionally engaged in the unlawful employment practice charged, it is authorized by statute to enjoin the employer from engaging in such practice and to order such "affirmative action" as may be appropriate, including the reinstatement or hiring of the employee, with or without back pay.[12] In addition, the court may allow the prevailing party a reasonable attorney's fee as part of the costs.[13]

2. *Federal Court — Civil Rights Act of 1866 — 42 U.S.C. § 1981*

A part of section 1 of the Civil Rights Act of 1866,[14] which was re-enacted with minor changes by section 16 of the Enforcement Act[15] and is now codified in 42 U.S.C. § 1981, provides that all persons shall have, *inter alia,* the same right to make and enforce contracts as is enjoyed by white citizens. Prior to 1968, section 1 of the 1866 act was interpreted as prohibiting discrimination only if effected by state legislation or state action.[16] However, on June 17, 1968, the Supreme Court held in *Jones v. Alfred H. Mayer Co.*[17] that a

9. Civil Rights Act of 1964 § 706(a).

10. *Id.* § 706(e). The EEOC proceedings leading to a civil suit by the aggrieved party, discussed in the text above, may be initiated by the filing of a charge by a member of the EEOC who has reasonable cause to believe that a violation of Title VII has occurred as well as by the filing of a charge by the aggrieved party himself. However, only the aggrieved party may file a civil suit. *Id.* §§ 706(a), (e).

In addition, the Attorney General of the United States is authorized to bring a civil action in the appropriate District Court of the United States where he has reasonable cause to believe that an employer is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by Title VII. *Id.* § 707(a).

11. EEOC Rules and Regulations, 29 C.F.R. § 1601.25a (1971). This EEOC regulation appears to ignore the statutory language of § 706(e) of the Act which directs the Commission to issue notice of the availability of civil suit, where it has not secured voluntary compliance, no later than 60 days after a charge has been filed with the Commission regardless of whether the Commission has received a demand in writing from the aggrieved employee.

12. Civil Rights Act of 1964 § 706(g). *See, e.g.,* Local 53, Int'l Ass'n of Heat and Frost I. & A. Workers v. Vogler, 407 F.2d 1047 (5th Cir. 1969).

13. Civil Rights Act of 1964 § 706(k).

14. Civil Rights Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27.

15. Enforcement Act of 1870, Act of May 31, 1870, ch. 114, § 16, 16 Stat. 144. As enacted in 1866, the statute applied only to citizens. It was changed in 1870 to apply to "persons" and, after being codified as Rev. Stat. § 1977 (1874), now reads:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to make full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

16. *See, e.g.,* Virginia v. Rives, 100 U.S. 313 (1880); Waters v. Paschen Contractors, Inc., 227 F. Supp. 659 (N.D. Ill. 1964), and cases cited therein.

17. 392 U.S. 409 (1968).

provision in section 1 of the Civil Rights Act of 1866, now codified as 42 U.S.C. § 1982,[18] barred racial discrimination in the sale or rental of property by private parties as well as by governmental bodies or through governmental action. The basis of the Court's decision was that section 1 was "meant to prohibit *all* racially motivated deprivations of the rights enumerated in the statute," be it governmental or private.[19] The Court reasoned that since section 2 of the 1866 act specifically exempted private violations of section 1 from criminal sanctions, section 2 would have made little sense had section 1 only been applicable to governmental interference.

Since section 1981 was also a part of section 1 of the Civil Rights Act of 1866 and its legislative history was identical to that of section 1982, it was inevitable that civil rights proponents would attempt to revitalize section 1981 so that it too would apply to private as well as public discrimination. In October, 1968, the United States District Court for the Southern District of Ohio, referring to *Jones v. Mayer,* held that strictly private action interfering with the right to enter into an employment contract gave rise to a cause of action under section 1981.[20] While some of the United States district courts have held to the contrary,[21] all of the United States Courts of Appeal which have considered the question have held that section 1981 prohibits private racial discrimination in the making and enforcing of employment contracts.[22] These decisions now have the additional support of the Supreme Court's holding in the recent case of *Griffin v. Breckinridge*[23] that 42 U.S.C. § 1985(3) prohibits private conspiracies entered into for the purpose of depriving persons of the equal protection of the law.

An employee may sue his employer for alleged racial discrimination in employment under section 1981 by filing suit in a United States District Court and, because there is no statute of limitations specifically covering suits brought under that section, federal courts are required to refer to the applicable state statute of limitations to determine the

18. "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

19. 392 U.S. at 426.

20. Dobbins v. Local 212, IBEW, 292 F. Supp. 413 (S.D. Ohio 1968); *see* Note, *Jones v. Mayer: The Thirteenth Amendment and the Federal Anti-Discrimination Laws,* 69 COLUM. L. REV. 1019 (1969); Note, *A "New" Weapon to Combat Racial Discrimination In Employment: The Civil Rights Act of 1866,* 29 MD. L. REV. 158 (1969).

21. *See, e.g.,* Smith v. North American Rockwell Corp., 50 F.R.D. 515 (N.D. Okla. 1970); Young v. International Tel. & Tel. Co., 63 CCH Lab. Cas. ¶ 9536 (E.D. Pa. 1970), *rev'd and remanded,* 3 CCH EPD ¶ 8118 (3d Cir. 1971); Harrison v. American Can Co., 61 CCH Lab. Cas. ¶ 9353 (S.D. Ala. 1969); Evans v. Local 2127, IBEW, 313 F. Supp. 1354 (N.D. Ga. 1969).

Harrison and *Evans* have been overruled, in effect, by Sanders v. Dobbs Houses, Inc., 431 F.2d 1097 (5th Cir. 1970), *cert. denied,* 401 U.S. 948 (1971).

22. Young v. International Tel. & Tel. Co., 3 CCH EPD ¶ 8118 (3d Cir. 1971); Sanders v. Dobbs Houses, Inc., 431 F.2d 1097 (5th Cir. 1970), *cert. denied,* 401 U.S. 948 (1971); Waters v. Wisconsin Steel Wks. of Int'l Harvester Co., 427 F.2d 476 (7th Cir. 1970), *cert. denied,* 400 U.S. 911 (1970).

23. 403 U.S. 88 (1971). In Richardson v. Miller, 3 CCH EPD ¶ 8285 (3d Cir. 1971), the court relied upon *Griffin v. Breckenridge* in holding that a non-negro plaintiff had stated a cause of action under section 1985(3) by alleging that he was discriminatorily discharged because he opposed the defendants' racially discriminatory employment practices.

appropriate time in which a suit may be brought.[24] In Maryland, the question is open as to whether a suit based on section 1981 would fall under the three-year statute of limitations generally applicable to contract or tort suits[25] or, as a suit to enforce a statutory right[26] not existing at common law, under the twelve-year statute of limitations applicable to suits on specialties.[27] The Maryland precedents are so confusing that then-Chief Judge Thomsen of the United States District Court for the District of Maryland stated, in a case involving section 1983, that he was unable to reconcile the Maryland cases.[28] Thus, it appears that the applicable limitation period under section 1981 must remain unsettled until the courts decide this question or until the legislature acts to settle the matter.[29]

In *Jones v. Mayer* the Court, while affording the plaintiff injunctive relief, specifically avoided deciding whether a party aggrieved by a violation of section 1982 might also properly assert a right to compensatory damages. However, recently the United States Court of Appeals for the Fifth Circuit held that an employee is entitled to both injunctive relief and damages under section 1981.[30]

3. *The National Labor Relations Board*

In *Packing, Food and Allied Workers v. NLRB,*[31] the United States Court of Appeals for the District of Columbia held that an employer's practice of invidious discrimination on account of race or national origin constituted an unfair labor practice in violation of section 8(a)(1) of the National Labor Relations Act.[32] In finding that such a practice violates this section, the court stated:

> . . . (1) racial discrimination sets up an unjustified clash of interests between groups of workers which tends to reduce the likelihood and the effectiveness of their working in concert to achieve their legitimate goals under the Act; and (2) racial discrimination creates in its victims an apathy or docility which inhibits them from asserting their rights against the perpetrator

24. *See* West v. Board of Educ., 165 F. Supp. 382, 387 (D. Md. 1958); 2 J. MOORE, FEDERAL PRACTICE ¶¶ 3.07[2], 3.07[3] (1970).

25. MD. ANN. CODE art. 57, § 1 (1968).

26. *See* Mattare v. Cunningham, 148 Md. 309, 129 A. 654 (1925).

27. MD. ANN. CODE art. 57, § 3 (1968).

28. West v. Board of Educ., 165 F. Supp. 382, 387 (D. Md. 1958). *See* discussion of Maryland cases in Roland Elec. Co. v. Black, 163 F.2d 417, 423–27 (4th Cir. 1947).

29. The possibility of the federal courts' holding that the 12-year statute of limitations applies could be eliminated if the Maryland legislature were to enact a statute which provided that all actions brought under section 1981 shall be brought within three years from the time that a cause of action accrues. Such action was taken by the legislature in 1945 in regard to actions brought under the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–19 (1964), after a Maryland court in Manhoff v. Thomson-Ellis-Hutton Co., 6 CCH Lab. Cas. ¶ 61,498 (Sup. Bench of Balto. City 1943), and the federal court in Bright v. Hobbs, 56 F. Supp. 723 (D. Md. 1944), had held that the right to bring an action under the FLSA was governed by the 12-year statute of limitations applicable to specialties. *See* MD. ANN. CODE art. 57, § 19 (1968).

30. Sanders v. Dobbs Houses, Inc., 431 F.2d 1097 (5th Cir. 1970), *cert. denied,* 401 U.S. 948 (1971).

31. 416 F.2d 1126 (D.C. Cir. 1969), *cert. denied,* 396 U.S. 903 (1969).

32. 29 U.S.C. § 158(a)(1) (1964).

of the discrimination. *We find that the confluence of these two factors sufficiently deters the exercise of Section 7 rights as to violate Section 8(a)(1).*[33]

While the National Labor Relations Board has examined employer discrimination in other contexts,[34] it has never advanced the theory that discrimination itself violated section 8(a)(1) of the Act. Since the Board's General Counsel did not proceed on such a theory, the court remanded the case and instructed the Board to conduct a hearing and determine whether the employer had a practice of invidious discrimination based on race or national origin and, if so, to order an appropriate remedy. Pursuant to these instructions the Board reopened the record in the case but, pending a factual determination by the trial examiner, refused to pass upon the legal issue of whether discrimination by an employer against an employee solely on the basis of the latter's race or national origin is, as a matter of law, a violation of section 8(a)(1) of the Act.[35] The majority of the Board's panel did not feel bound by the court's legal conclusions.

If the court's rationale prevails, an employee may file an unfair labor practice charge with the NLRB if his employer practices invidious discrimination.[36] If upon a preliminary investigation the Board concludes that the charge has merit and is unable to resolve the matter by settlement, it will issue a complaint against the employer and conduct a full evidentiary hearing.[37] It should be noted that the Board is precluded from issuing a complaint based upon any unfair labor practice which occurred more than six months prior to the filing of the charge.[38]

If, after conducting the evidentiary hearing, the Board finds that the employer has engaged, or is engaging, in the alleged unfair labor practice, it is empowered to issue a cease-and-desist order against such practice and may also order affirmative action, including the payment of back pay.[39] Decisions of the Board are reviewable by the United States Courts of Appeals.[40]

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33. 416 F.2d at 1135.

34. *See, e.g.*, Miranda Fuel Co., 140 N.L.R.B. 181, 1962 CCH N.L.R.B. ¶ 11,848 (1962) (when employer participates in a union's arbitrary action against an employee in violation of the union's duty of fair representation, the employer violates section 8(a)(1) of the Act), *enf. denied*, 326 F.2d 172 (2d Cir. 1963); Sewell Manufacturing Co., 138 N.L.R.B. 66, 1962 CCH N.L.R.B. ¶ 11,504 (1962) (an employer violates the Act if during an election to certify union, the employer makes flagrant appeals to racial prejudice). *See also* Fuchs and Ellis, *Title VII: Relationship and Effect on the National Labor Relations Board*, 7 B.C. IND. & COMM. L. REV. 575 (1966).

35. United Packinghouse Food & Allied Workers, 1969 CCH N.L.R.B. ¶ 21,260 (1969). On June 30, 1970, Trial Examiner Alba B. Martin found that the employer had a policy of invidious discrimination against its employees on account of their race or national origin, and recommended relief. 1 CCH LAB. L. REP., EMPLOYMENT PRACTICES ¶ 5085 (1970). The Board has not yet reviewed this trial examiner's decision.

36. 29 U.S.C. § 160(b) (1964); *see* NLRB Statements of Procedure, 29 C.F.R. § 101.2 (1959).

37. *See* NLRB Statements of Procedure, 29 C.F.R. §§ 101.4–101.8 (1959).

38. 29 U.S.C. § 160(b) (1964).

39. *Id.* § 160(c).

40. *Id.* § 160(f).

4. Federal Court — The Age Discrimination in Employment Act of 1967

The Age Discrimination in Employment Act of 1967[41] applies to any employer engaged in an industry affecting commerce who has twenty-five or more employees.[42] The Act states that it is unlawful for an employer to commit any of the following acts because of an individual's age, where the individual is at least forty years of age but less than sixty-five years of age,[43] unless age is a bona fide occupational qualification:

a. to fail or refuse to hire any individual;

b. to discharge any individual;

c. to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment;

d. to reduce the wage rate of any employee in order to comply with this Act.[44]

It is also unlawful for an employer to print or publish, or cause to be printed or published, any notice or advertisement relating to employment which indicates any preference, limitation, specification, or discrimination based on age, except where age is a bona fide occupational qualification for the particular business.[45]

An employee alleging age discrimination may institute suit in federal court provided the following two prerequisites have been satisfied and the Secretary of Labor does not bring an action on behalf of the employee:

(1) the employee has instituted proceedings with the state agency empowered to protect against age discrimination violations and sixty days have run since the instituting of same, unless such proceedings have been earlier terminated;[46] and

(2) the employee has given at least sixty days notice of intention to sue to the Secretary of Labor. This notice must be filed with the Secretary within 300 days after the occurrence of the alleged discriminatory act or within thirty days after notice of termination of proceedings under the State law, whichever is earlier.[47]

Once a notice of intention has been timely filed, the Secretary of Labor notifies the employer of the charge and attempts to eliminate

41. *Id.* § 621 *et seq.*
42. *Id.* § 630(b). However, the Act excludes from the term "employer" (1) the United States; (2) any corporation wholly owned by the United States; and (3) state and political sub-divisions.
43. *Id.* § 631.
44. *Id.* §§ 623(a), (f).
45. *Id.* § 623(e).
46. *Id.* § 633(b).
47. *Id.* § 626(d).

the unlawful practice by informal methods of conciliation, conference and persuasion.[48] Unlike the EEOC, the Secretary of Labor has discretionary authority to institute suit on behalf of an employee who claims that he has wages due as a result of the employer's violation of the Act.[49] If the Secretary elects to file such an action, the employee is not permitted to bring an individual action despite his compliance with (1) and (2) above.[50]

Assuming that the employee has satisfied (1) and (2) above and the Secretary of Labor elects not to bring an action in his behalf, the employee may file his own civil action, provided such action is instituted within two years after the occurrence of the alleged discriminatory act or within three years in the event of a willful violation.[51] The employee may recover any wages due[52] as well as reasonable attorney's fees and court costs.[53] The court is authorized to grant any legal or equitable relief which it deems appropriate including judgments compelling employment, reinstatement or promotion.[54]

5. *Commission on Human Relations — Maryland Fair Employment Practices Act*

The coverage of the Maryland Fair Employment Practices Act[55] is very similar to that of Title VII of the federal act, with the addition of the factor of age, except that this Act imposes greater restrictions upon and covers more employers than do the federal acts outlined above.[56] It applies to all employers of twenty-five or more employees, regardless of whether they are involved in interstate commerce or an industry which affects interstate commerce;[57] it provides no limitation period in which a complaint must be filed;[58] and it prohibits age discrimination regardless of the age of the employee in-

48. *Id.*

49. The Age Discrimination in Employment Act, 29 U.S.C. §§ 621–34 (1964), grants the Secretary of Labor those powers of enforcement outlined in sections 11(b), 16 (except 16(a)) and 17 of the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 211(b), 216, 217 (1964). *See* 29 U.S.C. § 626(b) (1964).

50. 29 U.S.C. § 626(c) (1964).

51. The Age Discrimination in Employment Act adopts those provisions relating to time limitations for the bringing of suits which are contained in section 6 of the Portal-to-Portal Act of 1947, 29 U.S.C. § 255 (1964). *See* 29 U.S.C. § 626(e) (1964).

52. 29 U.S.C. § 626(b) (1964).

53. The Age Discrimination in Employment Act adopts the provisions of section 16(b) of the Fair Labor Standards Act, 29 U.S.C. § 216(b) (1964), which grants employees a reasonable attorney's fee and costs of the action where judgment is rendered in favor of the plaintiffs. 29 U.S.C. § 626(b) (1964).

54. 29 U.S.C. § 626(b) (1964).

55. MD. ANN. CODE art. 49B, §§ 17–20 (1968 and Supp. 1970).

56. *See* Note 4 *supra* and accompanying text.

57. MD. ANN. CODE art. 49B, § 18(b) (Supp. 1970). However, the term "employer" does not include the State or a bona fide private membership club (other than a labor organization) which is exempt from taxation under § 501(c) of the Internal Revenue Code of 1954.

58. Although the statute fails to establish any time limitations whatsoever, it is suggested that an aggrieved employee's rights of action do not continue in existence forever. The equity courts charged with enforcing commission orders probably will apply the doctrine of laches against those employees who do not pursue their claims in a timely fashion.

volved.[59] The Act prohibits any of the following acts if based on an individual's race, color, creed, sex, age or national origin:

a. to fail or refuse to hire any individual;

b. to discharge any individual;

c. to discriminate against any individual with respect to his compensation, terms, conditions or privileges or employment;[60] or

d. to discriminate against any individual in admission to, or employment in, any program established to provide apprenticeship or other training.[61]

The use of discriminatory notices and advertisements is also prohibited by language substantially identical to that of Title VII, with the addition of the factor of age.[62]

Where an employee feels that he has been discriminated against in violation of the Act, he may file a complaint with the Commission on Human Relations.[63] Thereafter, the Commission's staff proceeds to investigate the complaint, and the results are reduced to written findings.[64] If it finds that there is "probable cause" for believing that a discriminatory act has been or is being committed, the staff is required to attempt to eliminate such discrimination by "conference, conciliation and persuasion."[65] If the Commission is able to effectuate an agreement eliminating the alleged discriminatory practice, such agreement is reduced to writing and signed by the employer, after which an order is entered by the Commission setting forth the terms of the agreement.[66]

Where the Commission is unable to reach an agreement with the employer, the staff enters findings of fact to that effect and the employer will be required to answer the charges of the complaint in a public hearing before the Commission.[67] Prior to the time that a case is set in for public hearing, all activities of the Commission in regard to investigations and attempts to eliminate the discriminatory practice by conference, conciliation and persuasion are required to be conducted "in confidence and without publicity;" the Commission is required to hold confidential any information relating thereto, including the identity of the employer and the employee involved, unless the employer and the employee agree in writing to the release of such information.[68]

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59. *Compare* this *with* note 43 and accompanying text.
60. MD. ANN. CODE art. 49B, § 19(a) (Supp. 1970).
61. *Id.* § 19(d).
62. *Id.* § 19(e).
63. *Id.* § 12(a). Where the Commission itself has received reliable information regarding a violation of the Act, after investigation by its staff, it may issue its own complaint. *Id.* § 12(b).
64. *Id.* § 13(a).
65. *Id.* § 13(b) (1968).
66. *Id.* § 13(c).
67. *Id.* § 14(a) (Supp. 1970).
68. *Id.* § 16.

If, after a public hearing, the Commission finds that the employer has engaged in a discriminatory practice, the Commission is authorized to issue a cease and desist order against the employer and to take any other affirmative action which will effectuate the purposes of the Act.[69] If an employer refuses to comply with any order of the Commission, the Commission may enforce the order by instituting litigation in the appropriate equity court of the county (or of Baltimore City) wherein the alleged discriminatory act took place.[70]

6. Baltimore City Community Relations Commission

Article 4 of the Baltimore City Code[71] applies to employers who employ fifteen or more persons[72] and prohibits the following employment practices based on an employee's race, color, religion, national origin or ancestry, except when such factors are reasonably required as an essential qualification in a particular occupation or position:

a. discriminating against an individual with respect to hiring, tenure, promotion, terms, conditions or privileges of employment, or any matter directly or indirectly related to employment;

b. denying or limiting, through a quota system or otherwise, employment opportunities to any group or individual;

c. inquiries concerning, or the recording of the race, color, religion, national origin or ancestry of any applicant for employment; or using any form of application for employment for personnel containing questions or entries regarding race, color, religion, national origin or ancestry;

d. causing to be printed, published, or circulated any notice or advertisement relating to employment which indicates any preference, limitation, specification, or discrimination based upon race, color, religion, national origin or ancestry.[73]

An employee alleging discrimination in any of these manners may file a complaint with the Baltimore City Community Relations Commission.[74] Unlike under the state act,[75] no complaint may be filed unless it is filed within thirty days of the occurrence of the alleged discriminatory act.[76] After the timely filing of such complaint,

69. *Id.* § 14(e) (1968).

70. *Id.* § 15(a) (Supp. 1970).

71. BALTO. CITY CODE art. 4, §§ 8-21 (1966).

72. *Id.* § 9(2). However, the term "employer" excludes fraternal and religious organizations, and parents, spouses or children are not counted in determining whether an employer has 15 employees.

73. *Id.* §§ 10(1)-(3).

74. *Id.* § 17(a). The Commission may issue its own complaint when it has reason to believe that any person has engaged or is engaging in any unlawful practice. *Id.* § 17(b).

75. *See* note 58 *supra.*

76. BALTO. CITY CODE art. 4, § 16(2) (1966).

the Commission by a majority vote may refer the matter to its staff for investigation. The results of the investigation are reduced to written findings of fact and where there is "probable cause" for believing that an unlawful act has been or is being committed, the staff is required to attempt to eliminate the unlawful practice by conference, conciliation, and persuasion. Where agreement can be reached concerning the elimination of such an unlawful practice, the agreement must be reduced to writing and signed by the employer; thereafter, an order is entered by the Commission setting forth the terms of the agreement.[77]

Where the staff is unable to reach an agreement with the employer for the elimination of the unlawful practice, the matter is referred to public hearing.[78] If, after this hearing the Commission finds that the employer has engaged in an unlawful practice, it may issue a cease-and-desist order and take such further action as will effectuate the purposes of the ordinance.[79] The Commission is specifically authorized in its discretion to upgrade or to reinstate the employee discriminated against, with or without an award of back pay.[80] Should an employer refuse to comply with any order the Commission may invoke the aid of an appropriate equity court for enforcement. The court has the power to pass an order enforcing, modifying, or setting aside, in whole or in part, the order of the Commission.[81]

It is interesting to note that the Baltimore City ordinance, unlike the state act, fails to declare unlawful the above-mentioned employment practices when they are based on age or sex. For this reason, it is arguable that the Baltimore City ordinance is completely preempted by the state law, which provides that local laws dealing with employment discrimination shall be preempted by the state law where

> the local law . . . contains penalties, provisions, or applications less restrictive or of lesser coverage than the comparable provisions of the subtitle of this article.[82]

Such language demonstrates the legislature's intention to reserve to itself the exclusive right to legislate in the area of employment discrimination when a local law fails to meet the state standard. While the Maryland Court of Appeals has been hesitant to apply the doctrine of preemption, it has stated that ". . . there may be times when the legislature may so forciby express its intent to occupy a specific field of regulation that the acceptance of the doctrine of preemption by occupation is compelled. . . ."[83] The above-quoted language certainly appears to be a forcible expression of such intent and would suggest that the Commission is operating entirely without authority.

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77. *Id.* §§ 18(a)-(c).
78. *Id.* § 19(a).
79. *Id.* § 19(d).
80. *Id.*
81. *Id.* § 20.
82. MD. ANN. CODE art. 49B, § 28 (Supp. 1970).
83. Baltimore v. Sitnick, 254 Md. 303, 323, 255 A.2d 376, 385 (1969).

7. Arbitration Tribunals or Federal or State Courts

If an employer is unionized, his collective bargaining agreement will probably contain the usual anti-discrimination clause which prohibits any discrimination based on race, creed, color, national origin, sex and age. Under the typical labor agreement, when such a clause has been violated the employee who has been discriminated against is permitted to file a grievance; if the matter is not resolved under the various steps outlined in the collective bargaining agreement, it will eventually be resolved by an arbitrator. While most labor contracts provide that the decision of the arbitrator is to be final and binding, the employer or the union may file suit in either a federal court or state court to review the decision where the arbitrator's award exceeds the scope of the parties' submission or where the award does not draw "its essence from the collective bargaining agreement."[84] Most collective bargaining agreements provide a time within which a grievance must be filed, usually a few days or perhaps up to a month. If the labor agreement is silent on this question, arbitrators have generally determined that the grievance must be filed within a reasonable time, the length of which would vary with the circumstances of the case.[85] Once a grievance is filed, the normal labor agreement provides time limitations for proceeding from one grievance step to another, culminating in arbitration. If these steps are not followed within the prescribed time periods, the grievance will normally be dismissed.[86]

Where a collective bargaining agreement contains the usual anti-discrimination clause but does not contain provisions for arbitration, the employee may sue directly for breach of contract. Such a suit may be brought either in a state or federal court,[87] and Maryland's three-year period of limitations would apply regardless of where the suit is filed.[88]

II. FACETS OF MULTIPLE JEOPARDY AND SUGGESTED SOLUTIONS

Assume the following situation: an employee works for a company in Baltimore City which has a union contract containing what has now become a standard clause prohibiting discrimination against employees because of race, creed, color, national origin, sex or age. The union contract also contains a typical grievance and arbitration procedure whereby an aggrieved employee may ultimately refer the matter for the consideration and decision of an impartial arbitrator.

84. United Steelworkers v. Enterprise Wheel & Car. Corp., 363 U.S. 593, 597 (1960). *See* United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960).

85. *See* Southside Distrib. Co., 68-2 CCH Lab. Arb. Awards ¶ 8372 (J.A. Sinclitico, Jr., 1968), and cases cited therein; Macomber, Inc., 68-2 CCH Lab. Arb. Awards ¶ 8476 (M.E. Nichols, 1968).

86. *See* F.E. Olds & Son, Inc., 70-2 CCH Lab. Arb. Awards ¶ 8558 (H.M. Somers, 1970).

87. Smith v. Evening News Ass'n, 371 U.S. 195 (1962); Jenkins v. Wm. Schluderberg-T.J. Kurdle Co., 217 Md. 556, 559-60, 144 A.2d 88, 90 (1958).

88. International Union, UAW v. Hoosier Cardinal Corp., 383 U.S. 696 (1966); *see* note 25 and accompanying text.

The employer discharges the employee for alleged incompetence, but the employee maintains that he was discharged because of his race. The employee, who is well-informed on his legal rights, files the following papers:

1. a grievance under his union contract;
2. a charge with the Federal Equal Employment Opportunity Commission;
3. a complaint with the Maryland Human Relations Commission;
4. a complaint with the Baltimore City Community Relations Commission;
5. a charge with the National Labor Relations Board;
6. a suit in federal court under section 1981 of the Civil Rights Act.

A. The Right to Pursue Two Remedies Simultaneously

May the employee pursue these remedies concurrently so as to place a burden of defending six actions at the same time on the employer and his counsel or does the availability of one remedy preclude the employee's resort to another?

1. Deferral to State Agencies Under Title VII

There is one situation in which the availability of a remedy clearly requires an aggrieved employee to attempt to exhaust that remedy before he resorts to another avenue of relief. An aggrieved employee in Baltimore City may not file a charge with the EEOC unless he has given the state or city agencies an opportunity to resolve the problem, and no charge may be filed with the EEOC before the expiration of sixty days after proceedings have been commenced with the state or city agency unless such proceedings have been terminated prior to the sixty day period.[89] As a practical matter, this deferral requirement merely delays the filing of a charge with the EEOC for a period of sixty days. The EEOC has entered into a memorandum of understanding with various State Fair Employment Practice commissions, including the Maryland Human Relations Commission, outlining the procedure to be followed where a charge is filed with the EEOC and must be deferred to the state agency. This memorandum assures that after the expiration of the statutory sixty-day period, the charging party is permitted to press his charge with the EEOC if he so desires.[90] Since the normal employment discrimination case will not be resolved within a sixty-day period, the Civil Rights Act of 1964 at most gives the state or city agencies a headstart on resolving the problem but does not seriously deter an aggrieved person from concurrently pursuing his remedies under Title VII.

89. Civil Rights Act of 1964 § 706(b).
90. EEOC Policy on Deferral to State FEP Agencies, ¶¶ 2, 3, 2 CCH LAB. L. REP., EMPLOYMENT PRACTICES ¶ 16,905.

2. The Availability of a Grievance and Arbitration Procedure

The existence of a grievance and arbitration procedure in a collective bargaining agreement is generally considered to preclude suit based upon such agreement until the grievance and arbitration procedure has been exhausted. In a series of decisions, the Supreme Court has made clear that there is a national policy of encouraging private settlements of labor disputes arising under collective bargaining agreements and that the federal courts should refrain from hearing such cases as long as arbitration is available.[91] Such abstention is required even though section 301 of the Taft-Hartley Act[92] expressly grants jurisdiction to the federal courts to hear such cases. The Maryland Court of Appeals has announced a similar rule for the state courts.[93] Therefore, on these same policy grounds it could be argued that the availability of a grievance and arbitration procedure should prohibit an employee from seeking any relief — from either a court or an agency — in a discrimination case until he has exhausted all rights under such procedure.

There is, of course, a difference between the collective bargaining agreement cases decided by the Supreme Court and the Maryland Court of Appeals and the employment discrimination situations under discussion. In the collective bargaining agreement cases, the only substantive rights possessed by the employee were created by the agreement itself. Thus the only issue in those cases was whether the employee's rights under the collective bargaining agreement were to be ascertained under the contractual procedure or by a court. In employment discrimination cases, however, employees have statutory rights which are in addition to any rights under a collective bargaining agreement. Although such a difference exists, the question still remains whether the national policy favoring private settlement of labor disputes should apply with equal force to employment discrimination situations in which a contractual arbitration procedure is available to the aggrieved employee.

There is a great deal of authority in cases involving the National Labor Relations Board which may be helpful in answering this question by analogy. Over a period of years, the Supreme Court has considered the question of whether the NLRB could proceed on an unfair labor practice charge when the activity involved was also a violation of a collective bargaining agreement having a grievance and arbitration procedure. Although the earlier cases indicated some indecision by the court in answering this question,[94] a recent decision states clearly that the NLRB could not be precluded from proceeding in such a case. In

91. *E.g.*, Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965); Smith v. Evening News Ass'n, 371 U.S. 195, 196 n.1 (1962); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960).

92. 29 U.S.C. § 185(a) (1964).

93. Meola v. Bethlehem Steel Co., 246 Md. 226, 228 A.2d 254 (1967); Henthorn v. Western Md. Ry. Co., 226 Md. 499, 174 A.2d 175 (1961); Jenkins v. Wm. Schluderberg-T.J. Kurdle Co., 217 Md. 556, 144 A.2d 88 (1958).

94. *See* NLRB v. C.&C. Plywood Corp., 385 U.S. 421 (1967); NLRB v. Acme Industrial Co., 385 U.S. 432 (1967); Carey v. Westinghouse Elec. Corp., 375 U.S. 261 (1964).

NLRB v. Strong[95] the Court reviewed its earlier decisions and concluded:

> Hence, it has been made clear that in some circumstances the authority of the Board and the law of the contract are overlapping, concurrent regimes, neither pre-empting the other.[96]
>
> . . . .
>
> Firing an employee for union membership may be a breach of contract open to arbitration, but whether it is or not, it is also an unfair labor practice which may be remedied by reinstatement with back pay under § 10(c) even though the Board's order mandates the very compensation reserved by the contract.[97]

Nevertheless, the NLRB has voluntarily adopted a policy of refusing to proceed with unfair labor practice charges which are also contract violations where the contract provides for grievance and arbitration procedures. This policy is stated clearly in the following quotation from the decision in *Joseph Schlitz Brewing Co.*:[98]

> Thus, we believe that where, as here, the contract clearly provides for grievance and arbitration machinery, where the unilateral action taken is not designed to undermine the Union and is not patently erroneous but rather is based on a substantial claim of contractual privilege, and it appears that the arbitral interpretation of the contract will resolve both the unfair labor practice issue and the contract interpretation issue in a manner compatible with the purposes of the Act, then the Board should defer to the arbitration clause conceived by the parties.[99]

Thus the NLRB has achieved an accommodation between its statutory powers and the national policy of favoring arbitration so that the Board procedure will not be used simultaneously to correct any violations of the National Labor Relations Act when arbitration is available.

There have been a number of federal court decisions dealing with the question of whether Title VII suits in federal courts should be deferred pending resort to the grievance and arbitration procedures. While these cases for the most part concern the binding effect of an arbitration award on an employee who later seeks relief under Title VII, the rationale and language of these cases is relevant to the question of whether prior resort to the grievance and arbitration procedures is necessary.

In *Hutchings v. United States Industries, Inc.*,[100] an employee alleged racial discrimination when the company denied him a pro-

95. 393 U.S. 357 (1969).
96. *Id.* at 360.
97. *Id.* at 362.
98. 175 N.L.R.B. No. 23, 1969 CCH N.L.R.B. ¶ 20,675 (1969).
99. *Id.* at 26, 112. The NLRB has reaffirmed this position (by a 3–2 vote) in Collyer Insulated Wire, 192 N.L.R.B. No. 150, 1971 CCH N.L.R.B. ¶ 23,385 (1971).
100. 428 F.2d 303 (5th Cir. 1970).

motion. The Fifth Circuit held that the employee had separate rights[101] under Title VII and his labor agreement and that a final decision via arbitration of his claim under the labor agreement did not act as a bar to a later suit to vindicate his Title VII rights. While the court noted that the utilization of private grievance-arbitration procedures comports with the national labor policy favoring arbitration and also with the enforcement policy of Title VII favoring voluntary compliance with the Act over compliance compelled by court orders, it emphasized that the ultimate decision on questions of Title VII rights rested with the federal courts. The clear inference from the court's rationale is that arbitration is never a prerequisite to suit under Title VII.

In *Bowe v. Colgate-Palmolive Co.*,[102] employees claimed that they were discriminated against by use of a job classification system. When they filed suit under Title VII, the trial court required them to elect whether they would proceed in the Title VII case or seek a remedy under the collective bargaining agreement through arbitration. The Seventh Circuit held that the trial court erred in requiring the employees to make this election, stating that the employees should be permitted to utilize dual or parallel prosecution in court and through arbitration so long as an election of remedies is made after adjudication so as to preclude duplicate relief. The court also stated that the analogy to labor disputes involving concurrent jurisdiction of the NLRB and the arbitrator was not merely compelling but was conclusive. It is interesting to note that the Seventh Circuit made no reference to the policy of the National Labor Relations Board, discussed above, of deferring to arbitration whenever possible.

In *Dewey v. Reynolds Metals Co.*,[103] the Sixth Circuit held that an arbitration award, if rendered within the scope of the contractual provisions for grievance and arbitration submission, was binding on the employee when he filed suit under Title VII. However, the court carefully stated that the question was not whether arbitration and resort to the courts could be maintained at the same time but whether suit might be brought in court after a grievance was finally adjudicated by arbitration. Thus the question of prior resort to grievance and arbitration procedures was expressly left open by the Sixth Circuit.

In *Oubichon v. North American Rockwell Corp.*,[104] a California federal district court recognized the Seventh Circuit's position that an aggrieved employee is entitled to pursue his remedies both through grievance proceedings and through proceedings under Title VII, thus indicating that deferral to arbitration is not required.

While the foregoing authorities indicate that a federal court in a Title VII case need not require exhaustion of an arbitration remedy prior to entertaining suit, the validity of these decisions is questionable.

101. The Court said, "In view of the dissimilarities between the contract grievance-arbitration process and the judicial process under Title VII, it would be fallacious to assume that an employee utilizing the grievance-arbitration machinery under the contract and also seeking a Title VII remedy in court is attempting to enforce a single right in two forums." *Id.* at 312–13.

102. 416 F.2d 711 (7th Cir. 1969).

103. 429 F.2d 324 (6th Cir. 1970), *aff'd per curiam (4–4)*, 401 U.S. 932 (1971).

104. 3 CCH EPD ¶ 8071 (C.D. Calif. 1970).

The cases holding that the NLRB need not defer to arbitration proceedings are not truly analogous to cases arising under Title VII. The NLRB has absolute control over cases involving violations of the National Labor Relations Act. If the General Counsel of the NLRB refuses to issue a complaint, his decision is final, and an aggrieved party may neither force him to file suit[105] nor file suit in his own name.[106] Since the NLRB is the expert tribunal for the decision of cases involving claimed violations of the National Labor Relations Act, the courts recognize the specialized competence of the NLRB in this area and give great weight to its decisions.[107] On the other hand, the Equal Employment Opportunity Commission has virtually no control over Title VII litigation, and the EEOC does not serve as the expert tribunal for the decision of cases involving Title VII violations.[108] Title VII cases are tried before the federal district courts which cannot claim specialized competence in cases of this nature similar to that possessed by the NLRB. In reality, a Title VII proceeding is little more than the ordinary type of civil litigation based upon a statutory right. Therefore, it may be argued that, because of the court's lack of expertise, the national policy of encouraging the settlement of labor disputes through arbitration need not be sacrificed; and that this policy requires the federal courts in Title VII cases to defer to arbitration where the statutory basis of liability and the contractual basis of liability are the same. An argument to the contrary, that a plaintiff in a Title VII case may be acting as a representative of others who are also discriminated against and that therefore the court should retain jurisdiction over such a proceeding as one in the nature of a class suit, would have merit only if, in fact, the arbitrator were powerless to award relief against a general practice of discrimination. However, there would appear to be no reason why a grievance could not be filed by a group of employees or by a union acting as the representative of all of the employees in a class. In fact, it is a common occurrence for unions to arbitrate grievances involving employees as a group. It is therefore suggested

105. *E.g.,* Mayer v. Ordman, 391 F.2d 889 (6th Cir. 1968), *cert. denied,* 393 U.S. 925 (1968); Balanyi v. Local 1031, IBEW, 374 F.2d 723 (7th Cir. 1967). In Vaca v. Sipes, 386 U.S. 171, 182 (1967), the Supreme Court said: ". . . the Board's General Counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint."

106. Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b) (1964), expressly provides that only the NLRB shall have the power to issue a complaint. This provision, coupled with the Supreme Court's rule that courts are generally preempted from hearing cases involving conduct prohibited or protected under the National Labor Relations Act, permits individual court suits in only a number of special situations. *See, e.g.,* Vaca v. Sipes, 386 U.S. 171 (1967); San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959).

107. *See, e.g.,* Radio Officers' Union v. NLRB, 347 U.S. 17 (1954); Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951); Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945).

108. A bill has been passed by the House of Representatives, H.R. 1746, 92d Cong., 1st Sess. (1971), which gives the EEOC the authority to file suit under Title VII and drastically changes the rights of individual employees in discrimination cases. BNA Retail Lab. Rep. No. 1159, p. C-1 (Sept. 23, 1971). Another bill, S. 2515, 92d Cong., 1st Sess. (1971), giving the EEOC authority to enforce its own orders and making other important changes in Title VII suits, has passed the Senate Labor Committee. *Id.* No. 1164, pp. A-13-14 (Oct. 28, 1971).

that in a Title VII suit the court should ascertain whether effective relief against the alleged discrimination is available to the employee through arbitration, and that, if it is, the court should require exhaustion of the grievance and arbitration procedures.

A deferral to arbitration is also suggested for the state and local agencies enforcing the anti-discrimination laws in their respective jurisdictions. It is true that the discretionary authority and powers of these agencies approach those of the National Labor Relations Board. Nevertheless, the Board itself has adopted a policy of refusing to proceed with cases involving statutory violations which are also contractual violations where the contract provides for grievance and arbitration procedures. The adoption of a similar policy by state and local anti-discrimination agencies will serve as a practical and efficient method of reducing the multitude of concurrent legal remedies available in cases of this type.

3. *Exhaustion of Title VII Remedies in Section 1981 Suits*

As noted earlier,[109] the current view among the federal courts of appeals is that section 1981 of the Civil Rights Act of 1866 permits suits in federal court based upon private racial discrimination in employment. The question then arises whether an employee seeking relief under section 1981 is compelled to first file a charge with the EEOC if his employer is covered by Title VII. It is possible to read the 1964 and 1866 Acts together and conclude that it was the intention of Congress that the conciliation machinery of the EEOC be employed before suit in federal court could be maintained under either of the two Civil Rights Acts. On the other hand, since Congress has not expressly required such exhaustion by section 1981 plaintiffs it is arguable that this Congressional silence means that no duty to exhaust EEOC remedies exists.

The federal courts have reached different conclusions on this issue. In *Waters v. Wisconsin Steel Works,*[110] the Seventh Circuit concluded that because of the stress placed in the legislative history on conciliation efforts by the EEOC, had Congress been aware during the debates of the existence of a cause of action under section 1981, it would have modified the absolute right to sue under that section to the extent of requiring prior resort to the EEOC conciliation machinery. Consequently, the court expressly held as follows:

> . . . in order to avoid irreconcilable conflicts between the provisions of section 1981 and Title VII, a plaintiff must exhaust his administrative remedies before the EEOC unless he provides a reasonable excuse for his failure to do so.[111]

The court also held that the plaintiffs in this case had presented allegations sufficient to justify their failure to file a charge with the EEOC against their union, one of the defendants in the case, since they had

109. *See* note 22 *supra.*
110. 427 F.2d 476 (7th Cir.), *cert. denied,* 400 U.S. 911 (1970).
111. *Id.* at 481.

already filed a similar charge against their company, another defendant, for allegedly conspiring with the union to maintain a discriminatory employment policy. The court believed that under these circumstances the union must have been aware of the nature of the problem and could have rectified the results of any acts of discrimination on its part. Thus the court concluded that requiring the plaintiff to file another charge at the EEOC level against the union would have been an unnecessary observance of technicality.

The Third and Fifth Circuits, however, have refused to follow the *Waters* rationale. In *Young v. International Tel. & Tel. Co.*,[112] the Third Circuit held as follows:

> We conclude that nothing in Title VII of the Civil Rights Act of 1964 imposes any jurisdictional barrier to a suit brought under § 1981 charging discrimination in private employment.[113]

But the court emphasized that the conciliation machinery existing under Title VII should not be ignored in a section 1981 suit and that therefore the courts, in granting equitable relief, particularly preliminary injunctions, should encourage in appropriate cases a resort to the EEOC during the pendency of section 1981 cases so as to effectuate the policies of both statutes. In *Caldwell v. National Brewing Co.*,[114] the Fifth Circuit agreed *in toto* with the position of the Third Circuit and expressly rejected the contrary position of the Seventh Circuit.

4. *EEOC Conciliation Efforts and Title VII Suits*

Unfortunately, it appears that further concurrent remedies are available to an employee under Title VII alone. The courts have permitted individual employee suits in Title VII cases where the EEOC has not yet begun its conciliatory efforts. It is at this point, after an employee has filed suit, that he has in effect concurrent remedies because the EEOC is still free to pursue conciliation on the employee's behalf.[115]

In *Johnson v. Seaboard Air Line R.R. Co.*, [116] the Fourth Circuit court held, by a two-to-one vote,[117] that an individual employee may file suit where the EEOC has not yet undertaken conciliation attempts because of its workload, as long as the employee has been notified of his right to sue. The majority of the court found that the legislative history of the Civil Rights Act of 1964, although extremely ambiguous, suggested a statutory purpose of insuring timely remedial action. For this reason, the majority concluded that an individual should not be precluded from filing suit merely because the EEOC has not been

112. 438 F.2d 757 (3d Cir. 1971).
113. *Id.* at 763.
114. 3 CCH EPD ¶ 8241 (5th Cir. 1971). The Fifth Circuit's decision was foreshadowed by a similar holding of one of the district courts of that circuit, in Banks v. Seaboard Coast Line R.R., 3 CCH EPD ¶ 8211 (N.D. Ga. 1971).
115. *Cf.* McGriff v. A.O. Smith Corp., 3 CCH EPD ¶ 8124 (D.S.C. 1971).
116. 405 F.2d 645 (4th Cir. 1968), *cert. denied*, 394 U.S. 918 (1969).
117. Judges Craven and Winter constituted the majority while Judge Boreman was the dissenter.

able to achieve conciliation, no matter what the reason for its failure. The dissenting opinion emphasized that the purpose of the legislation, as illustrated by it legislative history, was to encourage conciliation in order to prevent a multitude of civil suits, and that this policy would be undermined if an employee were allowed to file suit before the EEOC had a chance to reach a private settlement. The Fifth Circuit in *Carr v. Conoco Plastics, Inc.*,[118] and a California federal district court in *Noon v. Kaiser Steel Corp.*,[119] have also held that actual conciliation efforts by the EEOC are not a prerequisite to suit under Title VII.

Because of the confused and self-contradictory legislative history of the Civil Rights Act of 1964[120] it is impossible to ascertain any clear Congressional intention respecting this matter. The legislative history emphasizes the value of providing for both conciliation attempts by the EEOC and the right of an aggrieved individual to seek prompt relief through the judicial process. Yet these two values are basically contradictory, in that a deference towards one must necessarily limit the other. While the cases referred to above indicate that no actual conciliation attempt is necessary, the matter will remain in doubt until the Supreme Court settles the dispute.

B. The Effect of Settlement

Whether or not an employee's charge of discrimination is valid, it may well be advisable for an employer to attempt to settle the charge in order to avoid adverse publicity and litigation.

1. Subsequent Proceedings Under the Same Statute

Assume in our hypothetical situation that the employee properly filed a charge with an appropriate agency (other than the EEOC)[121] alleging a discriminatory act. What happens if the employer decides to reach a private settlement with the employee in order to avoid litigation? Would such a settlement be a defense to any subsequent proceeding based on the alleged act brought under the same statute?

In resolving this question, one must recognize that the positions of the employer and of the employee in a discrimination case are significantly different from that of the parties in normal civil litigation. In the latter situation, the aggrieved party is suing to vindicate a personal right and has exclusive control over the status of his case; therefore, he is in a position to settle his claim on any basis considered fair by him. However, in employment discrimination cases based upon a statute which has given primary jurisdiction for enforcing the statute to an agency, the agency and not the employee controls the outcome of the case. From an analysis of decisions involving other agencies

118. 423 F.2d 57 (5th Cir. 1970), *cert. denied*, 400 U.S. 951 (1970).

119. 60 CCH Lab. Cas. ¶ 9313 (C.D. Calif. 1969).

120. *Compare* the majority *and* dissenting interpretations in Johnson v. Seaboard Air Line R.R., 405 F.2d 645 (4th Cir. 1968).

121. Because of the atypical nature of a Title VII proceeding, EEOC cases are discussed separately, *infra* at note 129 *et seq.*

charged with enforcing statutory rights, it would appear that *only* the agency can effectively settle an employee's claim regardless of any private settlement between the employer and the employee.

For example, the National Labor Relations Board in dealing with the usual unfair labor practice charge is not bound by any settlement reached between the parties themselves;[122] moreover, the NLRB may agree to settle such a case without the consent of the charging party and even against his wishes.[123] These powers exist because, under the litigation machinery set forth in the National Labor Relations Act, the Board is in complete charge of the proceeding and is entitled to make discretionary decisions as it sees fit. Similarly, employee settlements of wage claims under the Fair Labor Standards Act do not seem to be binding on any one, under decisions of the Supreme Court,[124] unless the settlement is effected by the Secretary of Labor acting in the interests of the employee.[125] The rationale behind the NLRB and the FLSA cases is that there exists a public, as well as a private, interest in the resolution of such controversies and that there are dangers in permitting employees to settle their claims, since their bargaining position may be inferior to that of their employers.

The Maryland Fair Employment Practices Act and article 4 of the Baltimore City Code follow the orthodox rule in this area. Section 13 of the Maryland Fair Employment Practices Act[126] provides that if the Commission on Human Relations finds probable cause for believing that a discriminatory act has been committed, the Commission's staff should endeavor to eliminate the discrimination by conference, conciliation and persuasion. If an agreement is reached for the elimination of such discrimination, the agreement must be reduced to writing and "signed by the respondent," and an order must be entered by the Commission setting forth the terms of the agreement. Since only the respondent's signature is required, it seems clear that technically the Commission can agree to a settlement contrary to the wishes of the charging party. Once such an agreement is reached by the Commission, no further litigation is available under the Maryland act since section 14[127] states that a hearing should be held only "[i]n case of failure to reach an agreement for the elimination of the acts of discrimination. . . ." It is clear, therefore, that the Maryland Commission may reach a binding settlement of a dispute without the concurrence of the charging party and thereby bind him for purposes of the Maryland act. On the other hand, the Maryland Commission could

122. *E.g.*, NLRB v. Revlon Products Corp., 144 F.2d 88 (2d Cir. 1944); NLRB v. General Motors Corp., 116 F.2d 306 (7th Cir. 1940). An exception occurs regarding jurisdictional disputes in that section 10(k) of the National Labor Relations Act prevents the NLRB from acting in such a case if the parties reach a voluntary adjustment of the dispute. 29 U.S.C. § 160(k) (1964).

123. 29 C.F.R. §§ 101.7, 101.9(c)(1) (1971). The authority of the NLRB to settle a case without the concurrence of the charging party is the logical extension of its authority to dismiss a charge against the wishes of the charging party, discussed *infra*.

124. D.A. Schulte, Inc. v. Gangi, 328 U.S. 108 (1946); Brooklyn Savings Bank v. O'Neil, 324 U.S. 697 (1945).

125. Fair Labor Standards Act § 16(c), 29 U.S.C. § 216(c) (1964).

126. MD. ANN. CODE art. 49B, § 13(b) (1968).

127. *Id.* § 14(a) (1970 Supp.).

proceed with a hearing under the act regardless of any private settlement entered into between the charging party and his employer since the agreement referred to as precluding a hearing is, by the wording of the statute, obviously an agreement reached by the Commission.

Similarly, article 4 of the Baltimore City Code[128] empowers the Baltimore Community Relations Commission's staff to endeavor to eliminate discrimination by conference, conciliation and persuasion. Where agreement is reached it need only be "signed by the respondent," thus enabling the Commission to agree to a settlement despite the personal desires of the complainant. Once such agreement is reached, no further litigation may be pursued and, in effect, the complainant is bound regardless of his nonconcurrence. However, as under the Maryland act, the Baltimore City Commission could proceed with a hearing regardless of any *private* settlement since the agreement which terminates all litigation, by the wording of the ordinance, is one which is reached by the Commission.

The role of the EEOC in the settlement of Title VII cases is not clear. Unlike the typical state agency, the EEOC does not have exclusive control of the litigation arising under the statute which it administers. The aggrieved employee, and not the EEOC, is the moving party in bringing a suit to court.[129] Thus the question arises of whether a settlement by the employee without the concurrence of the EEOC, or by the EEOC without the concurrence of the employee, would be binding in a Title VII proceeding.

It has not been decided whether a private settlement between the employer and the employee would preclude the employee from thereafter pursuing his claims under Title VII. However, the Federal District Court for South Carolina has recently stated in dictum that such a private settlement would preclude a subsequent suit.[130] On one hand, since Title VII gives the employee exclusive authority to file his own suit after receipt of a thirty-day suit letter, he is not in a position much different from that of any other plaintiff involved in normal civil litigation. For this reason, he should be in a position to waive his claim unless public policy forbids such a result. On the other hand, recognizing the public harm implicit in employment discrimination, as well as the inferior bargaining position of many employees vis-à-vis their employers, an analogy can be drawn to those Fair Labor Standards Act cases[131] in which the Supreme Court has held that an employee's release does not afford a defense in subsequent litigation against his employer.

As for a settlement by the EEOC alone, it seems that such a settlement is not binding on a non-consenting employee whether reached before or after the employee first had the right to institute suit. The language of Title VII clearly dictates a different result where settlement has been reached *prior* to the employee's acquiring the right to institute suit — that the EEOC can preclude an employee's right

128. BALTO. CITY CODE art. 4, § 18 (1966).
129. *See* note 10 and accompanying text.
130. McGriff v. A.O. Smith Corp., 3 CCH EPD ¶ 8124 (D.S.C. 1971).
131. *See* note 124 *supra.*

to sue when it has agreed to a settlement with the employer. Title VII permits an employee to file suit only after the EEOC notifies him that it has been unable to obtain voluntary compliance.[132] Where the Commission has entered into a prompt settlement with an employer, it could not possibly send such notice, and therefore the employee would appear to be precluded from instituting suit. In support of this argument, it should be noted that the statute does *not* provide that the charging party must concur in a settlement in order to validate it.[133] Despite the statutory language, it has been held that a settlement reached by the EEOC alone before an employee has the right to institute suit does not preclude him from filing a Title VII suit. In *Cox v. United States Gypsum Co.*,[134] the employee plaintiffs filed a Title VII suit before the issuance of a thirty-day suit letter from the EEOC. The defendant employer had consented to a proposed conciliation agreement with some changes, but the plaintiffs rejected the proposed agreement. The defendant contended that "conciliation" had been reached between the Commission and itself and that the plaintiffs were therefore barred from seeking judicial relief since Title VII only permits the issuance of a thirty-day suit letter when the Commission itself has been unable to obtain voluntary compliance. A federal district court in Indiana rejected this argument and held that Title VII did not prohibit a private suit where the EEOC and the employer agree to a proposal which is totally unacceptable to a charging party. In reaching its holding the district court concluded that Title VII does not mean what it says,[135] since the legislative history indicates that Congress intended the individual employee to be the moving force in a Title VII proceeding with the EEOC acting only as an informal negotiator.

Where an EEOC settlement is reached *after* the Commission has already notified the employee that it was unable to obtain voluntary compliance, it is clear that the employee may exercise his right to sue. In *McGriff v. A. O. Smith Corp.*,[136] various charges were filed with the EEOC alleging racial discrimination on the part of an employer. The EEOC sent out a suit letter when the matter was not settled promptly. As a result of conciliation efforts by the Commission occurring thereafter, the employer and the Commission entered into an agreement. The agreement included a provision stating that the charging party waived the right to sue the employer with respect to any matters alleged in the charges filed with the EEOC subject to performance by the employer of its promises, contained in the agreement. However, this agreement was not executed or approved by

132. Civil Rights Act of 1964 § 706(e).

133. *Id.* That section provides that the EEOC shall send a 30-day suit letter if "*the Commission* has been unable to obtain voluntary compliance with this title" (emphasis added).

134. 284 F. Supp. 74 (N.D. Ind. 1968), *aff'd on this point*, 409 F.2d 289 (7th Cir. 1969).

135. It is amusing to note that the district court rejected the defendant's argument, based on clear statutory language, with the following comment: "The defendant U.S. Gypsum has no authority to support this position other than the language of the act itself." 284 F. Supp. at 83.

136. 3 CCH EPD ¶ 8124 (D.S.C. 1971).

the charging party. Thereafter, the charging party filed suit under Title VII. The South Carolina federal district court held that the settlement agreement did not bar the suit since the charging party did not execute it or agree to it. Nevertheless, the court refused to grant injunctive relief on the ground that the conciliation agreement effectively resolved the problem in the case and that, therefore, no injunctive relief was necessary unless the employer did not comply with its agreement in good faith.

2. Subsequent Proceedings in a Different Forum

This discussion has concerned only the effect of the settlement of an individual's complaint filed with a particular tribunal on future proceedings before that same tribunal. Will the settlement of a case before one tribunal also be determinative of the result in a proceeding brought by the same individual before another tribunal? At present this appears to be an open question, due to the sparsity of authority. In *Voutsis v. Union Carbide Corp.*,[137] a New York federal district court held that a state agency settlement would be binding in a subsequent civil action brought under Title VII. An employee filed a complaint with the New York Division of Human Rights charging employment discrimination by her employer. During the course of the ensuing proceeding, the employee and the employer executed a "stipulation of settlement" which was enforced by an order of the Division. Thereafter, the employee sued in federal court under Title VII. The court held that the stipulation of settlement barred the Title VII suit since the employee had voluntarily entered into the settlement in the state proceeding. The court reasoned that even though there was concurrent state and federal jurisdiction and that, therefore, there may be two proceedings which exist contemporaneously for some period of time, when one proceeding has gone to judgment the other must come to an end.

In *Washington v. Aerojet-General Corp.*,[138] an employee agreed to the settlement of his grievance under a collective bargaining agreement. Holding that he was bound by this settlement for purposes of a Title VII case, the California federal district court said:

> Initially he may pursue his remedies in both forums but at some point a choice must be made. This point, as in the case of concurrent jurisdiction between State and Federal courts, is reached when a litigant has pursued his remedies in one forum to decision, be it *by settlement,* the decision of an arbitrator, or the decision of a judge.[139]

A different conclusion may be indicated by the Fifth Circuit's decision in *Hutchings v. United States Industries, Inc.*[140] In holding

137. 321 F. Supp. 830 (S.D.N.Y. 1970).

138. 282 F. Supp. 517 (C.D. Calif. 1968).

139. *Id.* at 523 (emphasis added).

140. 428 F.2d 303 (5th Cir. 1970). *See* note 100 *supra* and accompanying text.

that an arbitration award does not preclude an employee's suit under Title VII, the court said in dictum:

> . . . nor is an intermediate grievance determination deemed "settled" under the bargaining contract to be given this effect.[141]

The basic policy question regarding the use of settlements as defenses in employment discrimination cases seems to center around the procedural fairness of the settlement and the position of the aggrieved employee as a representative of the public in addition to his position as a private litigant. The question of procedural fairness is not a new one in the law, and it should be relatively easy to decide whether a given settlement was a fair one. If an employee seeks the aid of his union, an administrative agency, or a court in correcting the discriminatory acts of his employer, and if during the course of such a proceeding the union, agency or court approves a settlement, it is submitted that the employee should be bound by that settlement in his capacity as a private litigant. It would also seem that he should be bound despite his representing the public interest, for the following reasons: (1) if there are other individuals being discriminated against, they would be in a position to proceed in their own behalf; (2) neither a union, an agency nor a court is likely to approve a settlement which would leave unresolved a problem of widespread discrimination; (3) the Attorney General of the United States,[142] the EEOC,[143] and state agencies such as the Maryland Commission on Human Relations[144] have the authority to initiate their own proceedings if there is widespread discrimination on the part of an employer. Thus the public interest and the interests of others similarly situated can be preserved despite the settlement of any one particular suit.

A special problem exists regarding the effect on Title VII cases of settlements reached by the Maryland Commission. In a memorandum of understanding entered into between the EEOC and the Maryland Commission, the statement is made that settlement of a case on terms satisfactory to the state agency shall not be deemed dispositive of the charging party's rights under Title VII unless the charging party has accepted the terms as being equitable and has voluntarily executed a written waiver upon a form to be supplied by the Commission.[145] At first blush, this statement would seem to afford a ready method of simultaneously ending liability under both the state act and Title VII, since the only requirement is that the employee must have accepted the settlement — a result which would probably follow as a matter of course before the State Commission would agree to a settlement. However, this procedure is not presently available because the Commission has thus far failed to supply a form for the voluntary

141. 428 F.2d at 311.

142. Civil Rights Act of 1964 § 707.

143. *Id.* § 706(a).

144. MD. ANN. CODE art. 49B § 12(b) (1968).

145. EEOC Policy on Deferral to State FEP Agencies, ¶ 6, 2 CCH LAB. L. REP., EMPLOYMENT PRACTICES ¶ 16,905.

waiver. It seems that the Commission is so suspicious of the abilities of the state agencies that it has refused to supply them with such a form.

C. *The Effect of a Final Decision in one Forum on Subsequent Litigation in Another Forum*

The ultimate question raised by the hypothetical situation is whether an employee who has pursued one of his available procedural remedies to a conclusion (other than a settlement) and has obtained either a favorable or unfavorable decision may thereafter resort to another forum which initially was available to him. A first reaction might be that the employee is precluded from doing so by *res judicata* principles. However, it must be remembered that, technically, *res judicata* is a principle which applies only to the binding effect of a *judicial* decision upon subsequent litigation. In employment discrimination cases, the first decision may well be rendered by an arbitrator or an administratve agency, neither of which are courts. Regarding the binding effect of an administrative agency's decision, federal decisions were not, until recently, completely clear,[146] but in 1966 the Supreme Court at last stated without qualification that *res judicata* is a principle which is applicable to the decisions of administrative agencies acting in a judicial capacity.[147] The Court of Appeals of Maryland, on the other hand, has stated repeatedly that administrative agency decisions, being non-judicial, are not entitled to *res judicata* effect.[148] Generally, a court will not hear an arbitration case until the arbitration procedures have been exhausted,[149] and even then the court will only review the award to assure itself that there are facts to support the arbitrator's findings and that the award is within the "essence of the contract."[150] The courts, in effect, hear such cases almost as if they were an appellate court reviewing a *nisi prius* decision, and the issue of *res judicata* does not arise.

Nevertheless, there is analogous precedent suggesting that an arbitration award should be given binding effect in subsequent litigation. Although the Supreme Court has stated that the National Labor Relations Board is not required to follow an arbitration award,[151] it

146. *See, e.g.,* Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940); Arizona Grocery Co. v. Atchison, Topeka & Sante Fe Ry., 284 U.S. 370 (1932); Churchill Tabernacle v. FCC, 160 F.2d 244 (D.C. Cir. 1947); K. DAVIS, ADMINISTRATIVE LAW TEXT, § 18.02 (1958).

147. United States v. Utah Construction & Mining Co., 384 U.S. 394 (1966). *See also* Painters District Council No. 38 v. Edgewood Contracting Co., 416 F.2d 1081 (5th Cir. 1969); Pacific Seafarers, Inc. v. Pacific Far East Line, Inc., 404 F.2d 804 (D.C. Cir. 1968), *cert. denied,* 393 U.S. 1093 (1969); K. DAVIS, ADMINISTRATIVE LAW, § 18.02 (Supp. 1970).

148. *E.g.,* Gaywood Community Ass'n, Inc. v. Metropolitan Transit Auth., 246 Md. 93, 227 A.2d 735 (1967); Knox v. Baltimore, 180 Md. 88, 23 A.2d 15 (1941). *See generally* Cohen, *Some Aspects of Maryland Administrative Law,* 24 MD. L. REV. 1, 20 (1964).

149. *See* note 91 *supra.*

150. *E.g.,* United Steelworkers v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960); Ludwig Honold Mfg. Co. v. Fletcher, 405 F.2d 1123 (3d Cir. 1969).

151. Carey v. Westinghouse Elec. Corp., 375 U.S. 261 (1964). *See also* NLRB v. Hribar Trucking, Inc., 406 F.2d 854 (7th Cir. 1969); Illinois Ruan Transp. Corp. v. NLRB, 404 F.2d 274 (8th Cir. 1968); F.J. Buckner Corp. v. NLRB, 401 F.2d 910 (9th Cir. 1968), *cert. denied,* 393 U.S. 1084 (1969).

has also recognized and approved the validity of the long-standing policy of the National Labor Relations Board of following an arbitration award where the proceedings were fair and regular and the decision was not clearly repugnant to the purposes of the National Labor Relations Act.[152] The Labor Board has, in fact, stated that it has a "policy of encouraging the finality of settlements reached through voluntarily agreed-upon dispute settlement machinery."[153]

In determining whether an arbitration award will be given binding effect in Title VII litigation, a number of federal courts have used the doctrine of election of remedies in reaching their decisions. The Restatement of Judgments provides as follows:

> Where the plaintiff obtains judgment for the payment of money against the defendant in an action to enforce one of two or more alternative remedies, he cannot thereafter maintain an action to enforce another of the remedies.[154]

and:

> Where a judgment on the merits is rendered in favor of the defendant in an action to enforce one of two or more alternative remedies, the plaintiff cannot thereafter maintain an action to enforce another of the remedies.[155]

Thus the general policy of this equitable doctrine is that a plaintiff may choose one of a number of alternate avenues of relief, but once a decision is reached in the proceeding which he has chosen, he is bound by that decision.

This approach was followed by the Sixth Circuit in *Dewey v. Reynolds Metals Co.*,[156] where an employee claimed that his employer had wrongfully discharged him because of his religious beliefs. The employee filed a grievance under the provisions of his collective bargaining agreement; the grievance was subsequently dismissed by an arbitrator. Contemporaneously with the submission of his grievance, the employee applied to the Michigan Civil Rights Commission for the issuance of a complaint against his employer based on identical facts. The Commission found insufficient grounds on which to issue a complaint and denied the application. The employee then initiated a proceeding under Title VII which eventually resulted in his filing suit in the federal court. The Sixth Circuit held that the complaint should be dismissed because of the prior arbitration award. It stated that if the arbitrator had granted an award to the employee, his employer would have been bound by the award. Consequently, the court held that where a grievance is based on an alleged civil rights violation and the parties consent to arbitration, the arbitrator has the

152. Carey v. Westinghouse Elec. Corp., 375 U.S. 261, 270–71 (1964).

153. Local 1522, IBEW, 180 N.L.R.B. No. 18, 1969 CCH N.L.R.B. ¶ 21,450, at 27,442 (1969).

154. RESTATEMENT, JUDGMENTS § 64 (1942).

155. RESTATEMENT, JUDGMENTS § 65(1) (1942).

156. 429 F.2d 324 (6th Cir. 1970), *aff'd per curiam (4–4)*, 402 U.S. 904 (1971).

right to reach a final determination of the merits of the allegations. Otherwise the employer, but not the employee, would be bound by the arbitration award. The dissenting judge refused to find that the employee had made an election of remedies because his rights under the collective bargaining agreement and those created by Title VII were separate and distinct. When the Supreme Court granted certiorari in the *Dewey* case, it was expected that a resolution of the conflict between the majority and dissenting opinions would be forthcoming. However, an equally divided Supreme Court affirmed the Sixth Circuit per curiam, Justice Harlan not having participated in the consideration of the decision of the case. Thus the issue remains open. The Sixth Circuit reaffirmed its position in *Spann v. Kaywood Division, Joanna Western Mills Co.*,[157] where the arbitrator had given the grievant part, but not all, of the requested relief.

Other federal court decisions on this question are conflicting. In *Oubichon v. North American Rockwell Corp.*,[158] a California federal district court dismissed a complaint under Title VII where the plaintiff had filed grievances under a contractual grievance procedure and obtained the relief sought without the necessity of arbitration, and nevertheless had sued in federal court under Title VII claiming the same acts of discrimination. The court relied upon the doctrine of election of remedies, stating that while an aggrieved party is entitled to pursue his remedies both through grievance proceedings and through proceedings under Title VII, he should not be able to subject his employer to multiple actions based upon the same claim where he has pursued his remedies in one forum to a decision. The court further stated that the use of this doctrine should not depend on whether the result in the grievance procedure was favorable or unfavorable.

There is some doubt as to whether the decision of the Seventh Circuit in *Bowe v. Colgate-Palmolive Co.*[159] is contrary to the two decisions just mentioned. In that case, the court held that a plaintiff could utilize dual or parallel prosecution both in court and through arbitration so long as an election of remedies was made after adjudication so as to preclude duplicate relief, which would result in an unjust enrichment or windfall to the plaintiff. It is not clear whether the court would permit a plaintiff to obtain two judgments and then select the one he likes best, or whether the court would dismiss a second proceeding once the first proceeding had gone to judgment.

The Fifth Circuit, however, has clearly stated that it will not follow the doctrine of election of remedies in employment discrimination cases. In *Hutchings v. United States Industries, Inc.*[160] an employee lost his claim of discrimination in an arbitration proceeding under his collective bargaining agreement. He later filed suit under Title VII. The court held that the employee's invocation of his contractual

157. 3 CCH EPD ¶ 8314 (6th Cir. 1971).
158. 3 CCH EPD ¶ 8071 (C.D. Calif. 1970).
159. 416 F.2d 711 (7th Cir. 1969).
160. 428 F.2d 303 (5th Cir. 1969). *See* Tockman, *Multiple Equal Employment Opportunities In Illinois*, 54 ILL. BAR J. 24, 36–37 (1965). For a contrary view, see Gould, *Labor Arbitration of Grievances Involving Racial Discrimination*, 24 ARB. J. (n.s.) 197, 214–18 (1969).

remedies did not bar him from seeking a Title VII remedy in the federal courts. The court referred to the difference between a trial judge's responsibility in a Title VII case to resolve the employment dispute in the public interest and the arbitrator's duty in the grievance-arbitration procedure to carry out the aims of the agreement. The court concluded that such an employee should not be penalized for resorting to his contractual remedies, through application of either the doctrine of election of remedies or the principle of *res judicata.*

It is submitted that an arbitration or agency decision in an employment discrimination case should preclude a subsequent decision by another tribunal in a factually similar case involving the same persons, on the grounds of either *res judicata* or election of remedies.[161] Because of the distinctive substantive and procedural law applicable to cases of this type, it is further submitted that analogies from other areas of the law are of dubious value. The principles which should be emphasized are those of affording the individual a fair hearing and of avoiding endless multiple litigation; where the individual has had a fair hearing, further litigation should be precluded.

It has been argued that an employee cannot receive a fair arbitration hearing in employment discrimination cases because the arbitration process is deficient, in that (1) the arbitrator's function is to resolve conflicts between union and management so as to promote industrial harmony rather than to protect the rights of an individual employee; (2) the arbitrator may attempt to "curry favor" with union and management, at the expense of the individual employee, in order that he will be chosen to arbitrate future disputes; (3) the individual employee has no voice in determining either the terms of the collective bargaining agreement or the selection of the arbitrator; (4) the interests of the employee may so conflict with the interests of the union as to prevent his claims from being pressed to the fullest extent possible; and, finally, (5) the entire arbitration procedure is usually informal, without rules of evidence and often without sworn witnesses, and many times neither the employee's representative at the hearing nor the arbitrator have formal legal training.[162] It is submitted that such an indictment of the arbitration process is based upon theory rather than practice. Most of the arguments are directed toward alleged procedural "deficiencies" in the arbitration process. It is the writers' experience that as a general rule such fears are unfounded, because: (1) the employee's claims are persuasively presented by an attorney or a union representative trained in this area; (2) the informality and absence of legal rules of evidence at an arbitration hearing do not prevent discovery of the truth, and sometimes further it; and (3) the fact that arbitrators are selected by the parties tends to insure their fairness and competence, since unfair and incompetent arbitrators are not often

161. There is a paucity of state court decisions on this point. *Compare* Cluett, Peabody & Co. v. New York State Div. of Human Rights, 59 Misc. 2d 536, 299 N.Y.S.2d 974 (Sup. Ct. 1969) (an arbitration award did not bar a complaint filed with a state agency) *with* Corey v. Avco-Lycoming Div., Avco Corp., 63 CCH Lab. Cas. ¶ 9480 (Conn. Super. Ct. 1970) (an arbitration award was binding upon a state agency under *res judicata* principles).

162. *See* Note, 45 N.Y.U. L. REV. 1316 (1970).

selected. That the union's interest may be antagonistic to that of the aggrieved employee is not peculiar to employment discrimination cases. For example, such conflicts exist when the union represents employees covered by its labor agreement but not members of the union or employees who belong to a minority political faction within the union itself. Despite its personal antipathy toward an employee's claim, a union generally arbitrates the claim fairly in order to avoid a suit by the employee against the union. Thus as a practical matter the arbitration process works, and the Supreme Court has recognized this by declaring a national labor policy which encourages and promotes arbitration. In short, despite any theoretical limitations, arbitration affords the individual the opportunity for a fair hearing.

EEOC Finding of "No Reasonable Cause"

A related problem exists in a Title VII action where the EEOC has made a finding that there is no reasonable cause to believe that discrimination has taken place. Under its procedure, if the Commission makes such a finding it dismisses the charge. Upon the dismissal of a charge the charging party may demand, and the EEOC will issue, a notice that the EEOC is unable to obtain voluntary compliance notwithstanding that the reason for dismissal is the Commission's belief that no violation occurred.[163]

Since EEOC conciliation efforts are an essential element of the Title VII procedure, should an employee be able to sue when the EEOC has found that conciliation is unnecessary? Although there are some federal district court decisions to the contrary,[164] recent circuit court decisions are unanimous in holding that an employee may maintain a Title VII suit despite a finding of no reasonable cause by the EEOC.[165] The courts recognize that the statute itself does not provide an answer to the problem and that the legislative history is too confusing and contradictory to lend much help. Therefore, they have made the assumption that Congress intended to entrust enforcement of Title VII rights to the federal courts, upon proper application by the individuals involved, rather than to the EEOC.

D. The Defense of Limitations

As discussed in the first part of this article, the availability of each of the various remedies established for employees in employment discrimination cases is (with the glaring exception of proceedings brought under the Maryland Fair Employment Practices Act) conditioned upon

163. EEOC Rules and Regulations, 29 C.F.R. §§ 1601.19d, 1601.25a(c) (1971).

164. *E.g.*, Chavez v. Rust Tractor Co., 62 CCH Lab. Cas. ¶ 9400 (D.N.M. 1969); Green v. McDonnell-Douglas Corp., 299 F. Supp. 1100 (E.D. Mo. 1969).

165. Beverly v. Lone Star Lead Const. Corp., 3 CCH EPD ¶ 8092 (5th Cir. 1971); Fekete v. United States Steel Corp., 424 F.2d 331 (3d Cir. 1970); Flowers v. Local 6, LIUNA, 431 F.2d 205 (7th Cir. 1970). A majority of district court opinions have reached this same conclusion. *See, e.g.*, McDonald v. American Fed'n of Musicians, 308 F. Supp. 664 (N.D. Ill. 1970); Brown v. Frontier Airlines, Inc., 305 F. Supp. 827 (D. Colo. 1969); Ross v. Continental Tel. Serv. Corp., 61 CCH Lab. Cas. ¶ 9376 (D.N.M. 1969); Walker v. Keathley's, Inc., 62 CCH Lab. Cas. ¶ 9405 (W.D. Tenn. 1969); Grimm v. Westinghouse Elec. Corp., 300 F. Supp. 984 (N.D. Calif. 1969).

the aggrieved employee's having initiated the prosecution of his charge in conformity to certain time requirements. An employee who is tardy in instituting proceedings under a particular statute will be precluded from seeking relief under that statute. Thus the availability of the defense of limitations should be considered carefully by an employer's attorney. While the defense of limitations may somewhat reduce an employer's exposure to "multiple jeopardy," since the availability of some remedies is subject to a short limitations period, there is little likelihood that statutes of limitations will serve as a panacea for the ills of such exposure until a considerable amount of time has elapsed. All Maryland employers are subject to suit under section 1981 and will be exposed to the possibility of such suit for at least three years following the incident.[166] Moreover, unless the Maryland legislature or courts establish some time limitation for the filing of complaints under the state act,[167] exposure to liability theoretically will never end for those Maryland employers covered by the act.

In considering the defense of limitations, the attorney will have to determine the amount of time which has elapsed since the occurrence of the allegedly discriminatory act. When doing so, he may well encounter the problem of the so-called "continuing offense." This expression is often used to cover two different types of situations: (1) a series of repetitive discriminatory acts, each of which has adverse consequences and (2) a single discriminatory act with continuing adverse consequences. In the first type of situation — an example of which would be the discriminatory layoff of an employee followed by repeated discriminatory failures to recall the employee to available work — each failure to recall would constitute a separate violation. Consequently, limitations would begin to run anew as of the date of each violation.[168]

As an example of the second type of situation, the failure to promote an individual because of his race could cause damage to him throughout his employment. It therefore could be argued that this situation is analogous to the first type of situation and that limitations begin to run anew on each day that damage is suffered. If the employee in our hypothetical situation were so discriminated against during ten years of employment, the argument would be that actions based upon discrimination occurring during the last three years of employment might not be barred by limitations even though actions for discrimination occurring during the first seven years would be barred. This argument has not been accepted by the courts, however, and the law is settled that limitations begin to run from the time when the wrong is initially committed.[169] This proposition was illustrated clearly in *West v. Board of Education*,[170] decided by the Maryland federal district

166. *But see* notes 25–28 *supra* and accompanying text.
167. *See* note 58 *supra*.
168. *E.g.*, Cox v. U.S. Gypsum Co., 409 F.2d 289 (7th Cir. 1969); Sciaraffa v. Oxford Paper Co., 310 F. Supp. 891 (D. Me. 1970).
169. *E.g.*, Pickett v. Aglinsky, 110 F.2d 628 (4th Cir. 1940); Muskin Shoe Co. v. United Shoe Mach. Corp., 167 F. Supp. 106 (D. Md. 1958); Winand v. Case, 154 F. Supp. 529 (D. Md. 1957).
170. 165 F. Supp. 382 (D. Md. 1958).

court, where a teacher alleged that she had been damaged during many years of her teaching career as a result of a discriminatory rating given to her early in her career. Then-Chief Judge Thomsen held that her claim was barred by the statute of limitations even though she continued to receive a lower salary over a period of years close to the time of suit. The court held that under the Maryland decisions there was no question but that the period of limitations ran from the time when the wrong was committed and the cause of action accrued.

Conclusion

The employment discrimination laws and other legislation provide a multitude of remedies to employees alleging discrimination. The decisions to date generally have failed to require aggrieved employees to exhaust one remedy before proceeding to another. Even worse, there is a serious question of whether the settlement or determination of one employment discrimination action will preclude the prosecution of a similar charge by the same person in another proceeding. Thus labor lawyers and their clients are confronted with a legal nightmare. It can only be hoped that in the years to come legislative and judicial bodies will reach a reasonable resolution of the problem and will reduce somewhat the employer's dilemma. Until then, attorneys and their clients in employment discrimination cases will have to learn to live under the burden of "multiple jeopardy."