SECOND GENERATION PROBLEMS FACING EMPLOYERS IN EMPLOYMENT DISCRIMINATION CASES: CONTINUING VIOLATIONS, PENDENT STATE CLAIMS, AND DOUBLE ATTORNEYS' FEES

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I
INTRODUCTION

Even though Title VII of the Civil Rights Act of 1964[1] has been in effect only twenty years, and the Age Discrimination in Employment Act[2] (hereinafter "the ADEA") only eighteen years, the published decisions interpreting the Acts are numerous, the unreported cases are extensive, and the filing of charges and the institution of lawsuits in the federal courts proceed at an accelerated pace.

Although a number of issues of law have been settled at this time by appellate rulings, this article focuses on three realities of litigation that have emerged and that face employers in the 1980's: problems that arise when (1) a plaintiff claims continuing acts of employment discrimination by the employer; (2) the plaintiff joins state claims to the federal claims, thereby increasing the complexity and cost of litigating the main issue; and (3) the double attorneys' fees and the high cost of litigation produce a chilling effect on the defendant.

II
CONTINUING VIOLATION

The timely filing of charges and actions continues to present problems for both plaintiffs and defendants. The ADEA and Title VII place on the plaintiff the burden of filing a charge of discrimination within 180 days of the date of the alleged unlawful employment practice (or within 300 days in states with

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1. 42 U.S.C. §§ 2000e to 2000e-5 (1982).
2. Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1982).

antidiscrimination agencies).[3] In addition, the plaintiff must comply with the statutes of limitations for the filing of private civil actions: under Title VII, within ninety days of receipt of the "Notice of Right to Sue";[4] under the ADEA or the Equal Pay Act,[5] (hereinafter "the EPA") within two years of the alleged violation (three years for a "willful" violation)[6] and, in the case of ADEA actions, more than sixty days after filing the charge;[7] and under the Civil Rights Act of 1866,[8] within the time specified by the "most appropriate" statute of limitations under state law.[9] Although compliance with these time limitations is not strictly jurisdictional, failure to comply will force the plaintiff to demonstrate equitable reasons for tolling the running of the limitations period.[10]

From the outset, these procedural requirements have been the subject of frequent litigation and have been described as a procedural maze and trap for the unwary plaintiff. To alleviate the harshness resulting from rigid application of these statutes of limitations, the doctrine of "continuing violation" has evolved. Because this doctrine revives otherwise stale claims and usually expands and complicates the litigation, it is of special concern to employers and the defendants' bar.

A. General Nature of the Theory

The continuing violation theory is most frequently applied in an attempt to avoid the requirement that a charge be filed within 180 days (although it may also have application in the timely filing of section 1981, EPA, and other civil rights actions). The doctrine is most often characterized as a series of related acts which continue into the 180 day period.[11] Despite numerous cases invoking this doctrine in a wide variety of fact situations, "the precise contours and theoretical bases of [this theory] are at best unclear."[12] The cases applying this doctrine are appropriately described as "inconsistent and confusing."[13]

There was speculation that the doctrine of continuing violation had been largely discarded by the Supreme Court in its decisions in *United Air Lines v.*

3. 29 U.S.C. § 626(d) (1982) (ADEA timeliness provision); 42 U.S.C. § 2000e-5(e) (1982) (Title VII timeliness provision).

4. 42 U.S.C. § 2000e-5 (1982).

5. 29 U.S.C. § 206 (1982).

6. 29 U.S.C. § 626(e) (1982) (ADEA statute of limitations), *incorporating by reference* 29 U.S.C. § 255(a) (1982); 29 U.S.C. § 216 (1982) (EPA statute of limitations), *incorporating by reference* 29 U.S.C. § 255(a) (1982).

7. 29 U.S.C. § 626(d) (1982).

8. 42 U.S.C. § 1981 (1982).

9. Johnson v. Railway Express Agency, 421 U.S. 454, 462 (1975); *see also* Annotation, *State Statute of Limitations as Affecting Federal Civil Rights Actions under 42 USCS § 1981*, 29 A.L.R. FED. 710, 715 (1976).

10. Zipes v. Trans World Airlines, 455 U.S. 385, 393 (1982).

11. B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1042-43 (2d ed. 1983).

12. Berry v. Board of Supervisors, 715 F.2d 971, 979 (5th Cir. 1983).

13. Scarlett v. Seaboard Coast Line R.R., 676 F.2d 1043, 1049 (5th Cir. 1982); Dumas v. Town of Mount Vernon, 612 F.2d 974, 977 (5th Cir. 1980).

Evans,[14] *Delaware State College v. Ricks,*[15] and *Chardon v. Fernandez.*[16] These cases prompted one commentator to draw the following conclusion: "The United States Supreme Court seems to have signaled the demise of the doctrine of 'continuing violations' in employment discrimination actions."[17]

In *Evans,* the plaintiff was fired under the defendant's no-marriage rule in 1968. The no-marriage rule was later held to be violative of Title VII. In 1972, plaintiff was rehired. Approximately one year later she filed her charge of discrimination alleging that she had been wrongfully denied credit for her seniority from her first period of employment and that this discrimination was continuing.[18] The Supreme Court held:

> Respondent [plaintiff employee] is correct in pointing out that the seniority system gives present effect to a past act of discrimination. But United [defendant employer] was entitled to treat that past act as lawful after respondent failed to file a charge of discrimination within the 90 days then allowed by § 706(d). A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. It may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately considered, it is merely an unfortunate event in history which has no present legal consequences.[19]

The Court then rejected plaintiff's suggested application of the continuing violation theory to these facts, noting that the seniority system had a continuing *impact* but that no present *violation* existed.[20]

In *Ricks,* the plaintiff was informed that he would be denied tenure and would be awarded the standard one-year termination contract. He unsuccessfully sought review of the tenure decision through the college's grievance procedure. Shortly before the end of his one-year terminal contract, but more than 180 days after being notified that he would be denied tenure, plaintiff filed his charge of discrimination.[21] The Court held that the limitations period began running on the date plaintiff was informed of the decision:

> In sum, the only alleged discrimination occurred—and the filing limitations periods therefore commenced—at the time the tenure decision was made and communicated to Ricks. That is so even though one of the *effects* of the denial of tenure—the eventual loss of a teaching position—did not occur until later.[22]

This conclusion was reaffirmed in *Chardon* when the Court again stated that *notification* of the decision to terminate begins the running of the applicable statute of limitations, not the actual termination of employment.[23]

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14. 431 U.S. 553 (1977).
15. 449 U.S. 250 (1980).
16. 454 U.S. 6 (1981).
17. Jacobs, *Employment Discrimination and Continuing Violations: An Update of* Ricks *and Recent Decisions,* 33 LAB. L.J. 684, 684 (1982).
18. *Evans,* 431 U.S. at 554-55.
19. *Id.* at 558.
20. *Id.*
21. Delaware State College v. Ricks, 449 U.S. 250, 252-54 (1980).
22. *Id.* at 258 (emphasis in original) (footnote omitted).
23. Chardon v. Fernandez, 454 U.S. 6, 8 (1981).

However, in a subsequent Fair Housing Act case, *Havens Realty Corp. v. Coleman,*[24] the Supreme Court unanimously endorsed the continuing violation theory. The Fair Housing Act[25] requires that a civil action be brought within 180 days of the alleged occurrence of a discriminatory practice.[26] In *Havens,* two of the three plaintiffs, Coleman and Willis, were testers who "posed as renters for the purpose of collecting evidence of unlawful steering practices."[27] They and the other plaintiff, Coles, asked the defendant/apartment owner about the possibility of renting an apartment in Richmond, Virginia, and were the victims of illegal "steering."[28] Coles was steered on one occasion *within* 180 days of the institution of the suit, and Coleman was steered on earlier occasions, more than 180 days prior to filing the complaint.[29] The complaint also alleged that Coleman and Willis were deprived of their right under the Act to truthful housing information when they were falsely informed that no housing was available (which cause of action is referred to by the Court as a "tester claim").[30] All of the tester claims and steering incidents involving Coleman and Willis occurred more than 180 days prior to the institution of this action.[31] The district court dismissed the claims of all plaintiffs except Coles, whose steering claim was the only event within 180 days of the institution of the action.[32] Relying on a continuing violation theory, the Fourth Circuit Court of Appeals reversed.[33] The Supreme Court affirmed in part, holding that the allegation of a continuing *steering* violation prevented the application of the 180-day statute of limitations to the *steering* claims of Willis and Coleman:

> Like the Court of Appeals, we therefore conclude that where a plaintiff, pursuant to the Fair Housing Act, challenges not just one incident of conduct violative of the Act, but an unlawful practice that continues into the limitations period, the complaint is timely filed when it is filed within 180 days of the last asserted occurrence of that practice . . . . Plainly the claims, as currently alleged, are based not solely on isolated incidents involving the two respondents [Willis and Coleman], but a continuing violation manifested in a number of incidents—including at least one (involving Coles) that is asserted to have occurred within the 180-day period.[34]

However, since the steering event involving Coles did not also involve a tester claim, the tester claims by Coleman and Willis were barred, there being no allegation of an occurrence of a tester claim violation within the 180-day period.[35]

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24. 455 U.S. 363 (1982).
25. 42 U.S.C. §§ 3601-31 (1982).
26. 42 U.S.C. § 3612(a) (1982).
27. 455 U.S. at 373.
28. Racial steering encourages patterns of racial segregation by directing members of racial groups to housing areas already occupied primarily by members of that group. *Id.* at 366 n.1.
29. *Id.* at 368, 380 (Willis was white and consequently was not "steered").
30. *Id.* at 369, 373-74.
31. *Id.* at 380.
32. *Id.* at 369.
33. Coles v. Havens Realty Corp., 633 F.2d 384 (4th Cir. 1980), *aff'd in part sub nom.* Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982).
34. 455 U.S. at 380-81 (footnote omitted).
35. *Id.* at 381.

Havens thus clarified two points with regard to the continuing violation theory: (1) it is still viable, and (2) the plaintiff must allege the existence of an unlawful practice that has continued into the limitations period, the last specific occurrence of which must be within the limitations period. Other than these two points, the decision is of little help to litigants in determining the nature of the continuing violation theory. For example, it does not assist in differentiating "isolated incidents" which would be barred under *Ricks*, from a "continuing violation manifested by a number of incidents" which would be actionable under *Havens*. Disturbingly, the only apparent requirement is an *allegation* that the events are not isolated but rather make up a pattern evidencing a continuing practice.[36]

Arguably, *Havens* does prevent a plaintiff from reviving a stale claim of one nature by alleging that it is part of a pattern of discrimination which has been evidenced within the limitations period by a different form of discrimination. Permitting a discriminatory termination claim alleged to be part of a pattern of discrimination against the plaintiff to revive a time-barred failure-to-promote claim would appear to be inconsistent with *Havens*.[37] Conversely, however, a failure to promote which has become time-barred could conceivably be revitalized by a subsequent failure to promote if the court, through standards which are unclear, concludes that the two are not isolated events but are a continuing pattern.[38] Even though precisely the same facts could be involved in defending the first failure to promote in either case, the policy against litigation of stale claims will not be applied in the second example, but will be applied to the first.

The problems presented for employers by the continuing violation theory are self-evident: the theory acts to revive otherwise time-barred claims, presenting not only the evidentiary problems inherent in the defense of stale claims, but contributing markedly to the complexity of the litigation, with the additional delay and cost inherent in complex cases. Events not apparently significant at the time are quickly forgotten and witnesses depart, or are not even identifiable. Discovery becomes particularly burdensome; voluminous interrogatories, directed at a series of now-distant events, attempt to discern "patterns" by delving into hundreds or thousands of other decisions and events. Instead of focusing on why, for example, vacancy *X* was filled by employee *Y* rather than the plaintiff, the lawsuit becomes an investigation and analysis of the employer's employment practice history.

B. Application of the Theory to Back Pay

In addition to clouding and complicating liability issues, the continuing violation doctrine casts substantial uncertainty over the damages issue. While Title VII limits back pay liability to a period not more than two years prior to the filing of a charge, it is unclear what effect will be given to events occurring

36. *See id.* at 380-81.
37. *See id.* at 381.
38. *See, e.g.*, Cedeck v. Hamiltonian Fed. Sav. & Loan Ass'n, 551 F.2d 1136, 1137 (8th Cir. 1977).

prior to the back pay period.[39] In *Verzosa v. Merrill Lynch, Pierce, Fenner & Smith,*[40] plaintiff was denied promotions in 1969, 1970, and 1971. After being denied a promotion again in 1973, plaintiff filed a charge of discrimination and subsequently filed suit.[41] The defendant's stipulation to jurisdiction was an admission that the alleged unlawful practices were a continuing violation.[42] The court found that the plaintiff had been wrongfully denied a promotion in July 1970 (three years before the charge was filed). Since the charge was filed in November of 1973, the back pay period extended back only to November of 1971. "In computing the award, however, the [district] court assumed appellee would have been promoted in July 1970 and therefore would have gained more than a year's experience at the time the damage period began (November 1971)."[43] Therefore, the court concluded the plaintiff should have been paid at the average rate for similarly experienced employees.[44] Of necessity, this calculation of back pay takes into account events *prior* to the two year back pay period and considers their effect on pay within the back pay period. Applied in this manner, there is no statute of limitations under the continuing violation doctrine, but only a cut off of *monetary* relief for any period more than two years prior to the charge.

In contrast, in *White v. Carolina Paperboard Corp.,*[45] the court limited the back pay inquiry to events within the two year statute of limitations. There, the employer was found to have discriminatorily prevented a class of black employees from entering a particular line of progression.[46] In order to determine back pay, the court of appeals instructed the district court to consider placement opportunities during the back pay period and compare this "hypothetical" employment history to the class member's actual employment history.[47] This approach would not give effect to opportunities prior to the back pay period, as the *Verzosa* approach did.

An example of a case in which the continuing violation doctrine presents both liability and back pay proof problems is *Jenkins v. Home Insurance Co.*[48] Plaintiff was hired in September of 1969 as a claims representative and was promoted on October 8, 1973, to the position of claims supervisor, in which position she worked until December 30, 1977, when she retired. She alleged that in January of 1975 she became aware that she was being paid less than male counterparts who were performing the same work. On May 3, 1978, she filed a charge with the EEOC. Thereafter she filed her lawsuit alleging Title VII and Equal Pay Act violations. The district court granted the employer's

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39. *See, e.g.,* O'Keefe, *The Effect of the Continuing Violations Theory on Title VII Back Pay Calculations,* 13 SETON HALL L. REV. 262 (1983).
40. 589 F.2d 974 (9th Cir. 1978).
41. *Id.* at 975.
42. *Id.* at 977.
43. *Id.* at 976.
44. *Id.*
45. 564 F.2d 1073 (4th Cir. 1977).
46. *Id.* at 1077.
47. *Id.* at 1084-85.
48. 635 F.2d 310 (4th Cir. 1980).

motion for summary judgment, finding that "the discriminatory violation which gave rise to her claim occurred when she was hired [in 1969] at a lower salary, and that her cause of action accrued on that date or, at the latest, upon her discovery of the violation in 1975-76."[49] In a per curiam decision, the Fourth Circuit reversed, finding that the alleged discriminatory violation was "a series of separate but related acts throughout the course of Jenkins' employment" in that she received a paycheck every two weeks that was less than that paid to males for the same work.[50] "Thus, the Company's alleged discrimination was manifested in a continuing violation which ceased only at the end of Jenkins' employment."[51] Assuming, as the district court stated, that Ms. Jenkins' pay was set at the hiring date, and that this hiring rate caused her salary to remain lower than comparably situated males, the liability determination in this case on remand would turn on events occurring in 1969, nearly nine years prior to her filing of the charge of discrimination. The plaintiff would presumably be entitled to discover pay records of all comparable male employees for the full period of her employment. Each pay change for plaintiff and for each male would be scrutinized to determine its effect, if any, on the resultant pay disparity observed within two years of her charge. Explanations for each pay change (and, presumably, for each failure to change pay) would be necessary. Moreover, the comparability of workloads (the crux of plaintiff's claim) would also have to be examined for the entire period. Even assuming the employer could reconstruct these thousands of decisions, the lawsuit would have achieved disproportionate complexity because of the removal of any effective stale claim bar. Clearly, cases such as *Jenkins* do little to put an employer on prompt notice of a potential claim of discrimination and hence do not foster voluntary compliance.

C. Standards for Application of the Theory

Application of the continuing violation doctrine has been inconsistent. Unfortunately, appellate courts have not developed identifiable standards for determining its proper scope and application. Whether the courts will conclude that the array of events are separate, isolated incidents or a chain of related occurrences extending into the limitations period cannot be predicted.

One court—the Fifth Circuit in *Berry v. Board of Supervisors*[52]—has attempted to put this determination into an analytical framework. This attempt is significant because it enunciates standards of general applicability that are not in the conclusory terms so often invoked by appellate courts on this subject. In *Berry,* the plaintiff was hired as an associate professor and began work in August of 1975. She alleged that, at that time, she was assigned substantially more work but was paid the same as comparable male associate professors. In October of 1976, she was informed that her contract,

49. *Id.* at 311.
50. *Id.* at 312.
51. *Id.*
52. 715 F.2d 971 (5th Cir. 1983).

due to expire in May of 1977, would not be renewed. Her employment ended May 21, 1977 and she filed a charge of discrimination (alleging violations of Title VII and the Equal Pay Act) on October 12, 1977.[53]

Reversing the district court's dismissal of her Title VII claim as untimely, the Fifth Circuit remanded the case for a determination of whether or not her allegations constituted a sufficient showing of a continuing violation such as to avoid the bar of the statute.[54] The court first attempted a general definition of a continuing violation: "To establish a continuing violation for these purposes, it is said that the plaintiff must show 'a series of related acts, one or more of which falls within the 180 day period . . . .' "[55] Next, the court analyzed various characterizations of Berry's claim. After *Ricks* and *Chardon,* a claim for wrongful termination was clearly untimely since her charge came nearly one year after she was notified she would be terminated.[56] Similarly, a claim for failure to rehire is usually considered a discrete, noncontinuing event which must be the subject of a timely charge.[57] The court struggled with the possibility that her salary claim (equal pay for *more* work) might be continuing, citing *Jenkins,* but then noted that "not every case of unequal salary resulting from discrimination presents a 'continuing violation' situation."[58] Noting that her salary claim was actionable under the Equal Pay Act anyway, the court concluded that the thrust of her continuing violation theory was on the work load discrimination theory: Berry alleged that her additional work load was a condition that existed throughout her employment.[59] Because neither the lower court nor the parties had focused on this theory, the record was devoid of facts pertinent to the determination of the existence of a continuing violation, and the Fifth Circuit accordingly remanded, with the following observations and instructions:

> This inquiry, of necessity, turns on the facts and context of each particular case. Relevant to the determination are the following three factors, which we discuss, but by no means consider to be exhaustive. The first is subject matter. Do the alleged acts involve the same type of discrimination, tending to connect them in a continuing violation? The second is frequency. Are the alleged acts recurring (*e.g.,* a biweekly paycheck) or more in the nature of an isolated work assignment or employment decision? The third factor, perhaps of most importance, is degree of permanence. Does the act have the degree of permanence which should trigger an employee's awareness of and duty to assert his or her rights, or which should indicate to the employee that the continued existence of the adverse consequences of the act is to be expected without being dependent on a continuing intent to discriminate? . . . As noted, the particular context of individual employment situations requires a fact-specific inquiry by a trial judge which cannot easily be reduced to a formula. We feel, however, that consideration of the above factors will generally be appropriate, and we

53. *Id.* at 973-74.

54. *Id.* at 982-83.

55. *Id.* at 979 (citations omitted) (quoting Clark v. Olinkraft, Inc., 556 F.2d 1219, 1223 (5th Cir. 1977), *cert. denied,* 434 U.S. 1069 (1978)).

56. *See Berry,* 715 F.2d at 980.

57. *See id.*

58. *Id.* at 980-81 (citing United Air Lines v. Evans, 431 U.S. 553, 558 (1977)).

59. *Berry,* 715 F.2d at 981.

> leave their application here, as well as whether trial on the merits is required for their resolution, in the first instance to the district court.[60]

Of the three factors, it now appears that the first—same type of discrimination—has been mandated by *Havens.*[61] The third factor—degree of permanence—is identified as the most important and will undoubtedly be the crux of most cases. Analytically, it provides the framework for differentiating cases which heretofore have been lumped together, such as failure to promote, only because the same type of discrimination was involved. For example, under *Berry,* if a specific vacancy occurs and the plaintiff is rejected and so notified, a *Ricks* analysis will probably be applied, whereas a continuing failure to upgrade a position (which does not depend on the existence of a particular vacancy) may, because of the apparent lack of permanence to the decision, be deemed to be continuing. From an evidentiary point, a stale claim in the first example will present particular problems because facts specific to that event are no longer fresh, whereas, in the second example, the rationale for the failure to upgrade is presumably still applicable.

The final point of particular interest to the defense bar is the suggestion by the *Berry* court that the determination of whether or not the continuing violation doctrine is applicable will be a matter for the court. Thus, if the suggestion is followed, where the facts relevant to the application of the doctrine are not disputed, a preliminary resolution of the issue is possible, avoiding at least in some cases the necessity of a trial on the merits.

D. Conclusion

Since Title VII encompasses any term or condition of employment, employers are making potentially actionable decisions on a virtually continuous basis. The plaintiff is free, under the continuing violation theory, to reach back, not just weeks or months, but years to select the events which he or she now deems to be significant, and about which the employer must attempt to resurrect memories and records.

> Moreover, in calculating the effect of unlawful acts or omissions alleged to have occurred in the distant past, courts will, of necessity, be required to make factual determinations based upon the vague recollections of witnesses and often incomplete or nonexistent employer records. Such determinations could frequently result in mere exercises in speculation. Accordingly, in enacting Title VII, Congress fixed extremely short filing periods . . . apparently based in part on a desire to avoid litigation of stale claims grounded on long-past events. . . . [A]ttempts to determine an individual's career advancement over a period of ten or more years often becomes not fact finding, but judicial speculation. It is submitted that such speculation is unwarranted in light of Congress' firm resistance to extend Title VII's time limitations beyond the short period now in force.[62]

The *Berry* court has laid a workable foundation for evaluation of claims under the continuing violation theory. The factors identified help focus the analysis on the distinction drawn by the Supreme Court in *Evans* between

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60. *Id.* at 981-82 (footnote omitted).
61. *See* Havens Realty Corp. v. Coleman, 455 U.S. 363, 381 (1982).
62. O'Keefe, *supra* note 39, at 288-89 (footnote omitted).

continuing *impact* and a continuing, current *violation.*[63] Building upon this foundation, trial and appellate courts hopefully will be able to construct a coherent body of law which will both protect the rights of employers not to be subjected to stale claims and the rights of employees to challenge long standing practices. By giving structure and definition to the theory, the courts will foster predictability in its application, simultaneously reducing unwarranted litigation and encouraging voluntary compliance.

III

PENDENT STATE CLAIMS

During the last few years, defendant employers have increasingly been confronted with the phenomenon of plaintiffs appending state claims to their employment discrimination claims under Title VII, section 1981, or the ADEA in federal court suits. Thus, in a typical case where a female employee is discharged, an employer today might expect not only a Title VII suit in federal court, but also the appending to that federal claim of one or more state claims such as intentional infliction of emotional distress, wrongful or abusive discharge, or breach of the implied covenant of good faith and fair dealing. The erosion in many states of the employment-at-will doctrine has presented plaintiff's counsel with a variety of additional causes of action to attach to the federal claim, especially in a discharge case. Even in states such as North Carolina, where the employment-at-will doctrine continues to be very much alive,[64] there are still available to plaintiff's counsel several traditional state causes of action (for example, intentional infliction of emotional distress), which can be appended to employment discrimination claims in federal court.

The dilemma facing an employer when a state claim is appended to a federal employment discrimination claim is this: Does the employer proceed with the state claim appended to the federal employment discrimination claim and run the risk that the evidence concerning the state claim will unduly influence the federal claim, or should the employer defend two claims from the plaintiff in two different forums (the state court action in state court and the federal employment discrimination action in federal court)? Neither choice is particularly attractive. Indeed, many employers would opt for the first alternative strictly on the basis that defending two actions in different forums would be more expensive.[65] Most employers who have thought through the entire process, however, seem to have decided that they would rather take the risk of having to defend claims in two forums rather than having federal employment discrimination claims commingled with state claims, thereby virtually insuring that extrinsic factors that should not be

63. *See* United Air Lines v. Evans, 431 U.S. 553, 558 (1977).

64. *See, e.g.*, Nantz v. Employment Sec. Comm'n, 290 N.C. 473, 477, 226 S.E.2d 340, 343 (1976).

65. Such reasoning may be questionable given the potential for complications and confusion in a federal trial where state claims are appended and the employer is really defending several different lawsuits.

considered will not greatly influence the federal claims. Thus, most employers seek to have such pendent state court claims dismissed for lack of subject matter jurisdiction.

The article next examines the reasons for the proliferation of cases in which plaintiffs append state claims to employment discrimination claims in federal court, reviews the standards the federal courts have applied in determining whether to allow such state claims to be appended, and discusses some of the issues and problems which have arisen as a result of this trend.

A. Reasons for Appending State Claims

The reasons most often given for a plaintiff's attempt to append a state claim to a Title VII or ADEA claim are that (1) traditional remedies under federal employment discrimination statutes are inadequate and the state claims provide additional potential remedies for the plaintiff; (2) plaintiff's counsel may be concerned that the plaintiff has not met some of the administrative prerequisites to suit under Title VII or the ADEA; and (3) by appending the state claim, the plaintiff may be entitled to a jury trial, at least as to the appended state claim and perhaps, in some instances, on all claims.[66]

Consideration of several typical fact situations clarifies the reasoning of plaintiffs' counsel in seeking to expand a federal employment discrimination suit by appending a state claim. For example, a female employee who prevails in a Title VII action in which she contends that she has been terminated because of her sex is entitled, under traditional Title VII remedies, to reinstatement, back pay,[67] and costs (including reasonable attorney fees).[68] She is not entitled to a jury trial and may not recover compensatory and punitive damages under Title VII.[69] In many instances, the discharge circumstances are such that the plaintiff does not desire reinstatement, especially if her case comes to trial two to three years after her termination and if she has already obtained satisfactory employment elsewhere. By appending a state claim of abusive discharge, the plaintiff is then entitled to a jury trial at least on the state claim, and perhaps on all of her claims,[70] and may seek both compensatory and punitive damages.

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66. Plaintiffs who bring suit under the ADEA are entitled to a jury trial under that Act in any event. Lorillard v. Pons, 434 U.S. 575, 583 (1978); 29 U.S.C. § 626(c)(2) (1982). Similarly, in a race discrimination case, the plaintiff can obtain a jury trial by seeking compensatory and punitive damages and bringing his action under 42 U.S.C. § 1981 (1982). Setser v. Novack Ins. Co., 638 F.2d 1137, 1140 (8th Cir.), *cert. denied*, 454 U.S. 1064 (1981); *see also* Curtis v. Loether, 415 U.S. 189 (1974). Although the Supreme Court has never squarely ruled on this issue, the circuits are of the view that a party is not entitled to a jury trial under Title VII. *See, e.g.*, Slack v. Havens, 522 F.2d 1091, 1094 (9th Cir. 1975); EEOC v. Detroit Edison Co., 515 F.2d 301, 308 (6th Cir. 1975), *vacated on other grounds*, 431 U.S. 951 (1977); Robinson v. Lorillard Corp., 444 F.2d 791, 802 (4th Cir. 1971).

67. Any back pay award will be taxed as "wages." Rev. Rul. 78-176, 1978-1 C.B. 303.

68. 42 U.S.C. § 2000e-5(g), (k) (1982).

69. *See* Johnson v. Railway Express Agency, 421 U.S. 454, 458-60 (1975); Shah v. Mt. Zion Hosp. & Medical Center, 642 F.2d 268, 272 (9th Cir. 1981).

70. As noted by the court in Reiver v. Murdoch & Walsh, 625 F. Supp. 998 (D. Del. 1985), "[a]lthough typically a plaintiff has no Seventh Amendment right to a jury trial in a Title VII action, when there are overlapping issues of law and equity, as here, with the breach of contract claims and

Sexual harassment cases present an even clearer instance of why a plaintiff would want to append a state claim to a Title VII claim. Under current law, a victim of sexual harassment who cannot show that the harassment resulted in the loss to her of any employment opportunity is probably only entitled, under Title VII, to injunctive relief and her costs in bringing the action including reasonable attorney's fees.[71] By adding a state claim for assault or intentional infliction of emotional distress or both (and perhaps joining the offending supervisor or coemployee as a defendant), the plaintiff has an opportunity to recover compensatory and punitive damages as well as to obtain a jury trial.

The ADEA, which may be more pliant in some ways, still limits available remedies. An ADEA plaintiff is entitled to a jury trial.[72] While there are indications that courts may be more flexible in fashioning additional remedies under the ADEA than under Title VII (for example, front pay in lieu of reinstatement),[73] compensatory and punitive damages are not available under the ADEA.[74]

The remedies afforded by state law are a great incentive to an employment discrimination plaintiff in federal court to attempt to append state claims to his federal claim.[75] A review of employment discrimination cases in the last several years indicates that plaintiffs have not been reluctant to attempt to expand their federal employment discrimination claims. The imagination of plaintiffs' counsel in this area is made apparent by a review of the various combinations of claims which are being filed.[76]

B. Standards for Allowing Pendent State Claims to be Appended to Federal Claims

United Mine Workers v. Gibbs[77] is the seminal case on the issue of whether a federal court has jurisdiction to entertain state court claims appended to a federal claim, and under what circumstances it should do so. Gibbs sued the union in federal court, alleging that the union had brought improper pressure

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the discrimination in termination claim, the right to a jury decision in the contract claim extends to any issue of fact common to the breach of contract and Title VII actions." *Id.* at 1006 n.7; *accord* Guyette v. Stauffer Chem. Co., 518 F. Supp. 521, 527 (D.N.J. 1981).

71. For a full discussion of remedies available to a sexual harassment victim under Title VII, see Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981).

72. 29 U.S.C. § 626(c) (1982).

73. *See* Naton v. Bank of Cal., 649 F.2d 691, 700 (9th Cir. 1981); Loeb v. Textron, Inc., 600 F.2d 1003, 1023 (1st Cir. 1979); *see also* Note, *Making Plaintiffs Whole: The Need for Front Pay Under the ADEA and Other Antidiscrimination Statutes,* LAW & CONTEMP. PROBS. Autumn 1986, at 239. *But see* Jaffee v. Plough Broadcasting Co., 19 Fair Empl. Prac. Cas. (BNA) 1194, 1195 (D. Md. 1979).

74. Naton v. Bank of Cal., 649 F.2d 691, 698-99 (9th Cir. 1981); Walker v. Pettit Constr. Co., 605 F.2d 128, 129-30 (4th Cir. 1979).

75. It has further been the experience of the authors' firm that state claims, with accompanying exorbitant demands for compensatory and punitive damages, are often appended to federal employment discrimination claims in order to increase the plaintiff's leverage for settlement purposes.

76. For a sample listing of the various combinations of federal and state claims which plaintiffs have advanced, see B. SCHLEI & P. GROSSMAN, *supra* note 11, at 741-42 n.14.

77. 383 U.S. 715 (1966).

on his employer to discharge him.[78] The plaintiff asserted not only a claim under the Taft-Hartley Act, but also a state court claim of unlawful conspiracy to interfere with his contract of employment.[79] The Supreme Court, although holding for the union on the merits, expressly decided that there was pendent jurisdiction to decide the state claim.[80] The *Gibbs* Court noted that there really were two issues to be decided—first, whether the federal court had the *power* to entertain the pendent state claim and, second, if so, whether the federal court properly exercised its discretion in asserting that jurisdiction. On the first question, a unanimous Court, speaking through Justice Brennan, said:

> Pendent jurisdiction, in the sense of judicial *power,* exists whenever there is a claim "arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . .," U.S. Const., Art. III, § 2, and the relationship between that claim and the state court claim permits the conclusion that the entire action before the court comprises but one constitutional "case." The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. [citations omitted] The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole.[81]

Thus, if there is a substantial federal claim which gives the court jurisdiction, there is power to hear pendent state claims that "derive from a common nucleus of operative fact" if those claims are such that a plaintiff would "ordinarily be expected to try them all in one judicial proceeding."

This first issue—the power of a federal court to entertain pendent state court claims—has not been a particularly troublesome one for the courts, especially in the context of federal employment discrimination statutes. Actions under those statutes certainly present a substantial federal claim, and it is relatively simple to determine whether the pendent claims "derive from a common nucleus of operative fact."[82] Although there is a line of cases considering the power issue in a different context in a Title VII situation and concluding that Title VII, because of its unique judicial history and purpose, reveals an implied congressional command negating pendent jurisdiction of state claims,[83] the vast majority of cases are decided on the basis of the second step of the *Gibbs* test.

After finding that a federal court has power to exercise jurisdiction over pendent state claims under the specific guidelines, the *Gibbs* Court then clearly

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78. *Id.* at 720.

79. *Id.* at 717-18, 720.

80. *Id.* at 725-29.

81. *Id.* at 725 (emphasis in original).

82. The requirements that there be a common nucleus of operative fact and that the claims be such that they would ordinarily be expected to be tried in a single proceeding are generally thought to be cumulative. *See* 13B C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3567.1, at 116 (1984).

83. *See infra* note 98 and accompanying text.

indicated that the exercise of such pendent jurisdiction in a particular case is committed to the sound discretion of the district court:

> That power need not be exercised in every case in which it is found to exist. It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right. Its justification lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims . . . . Needless decisions of state law should be avoided, both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law . . . . [I]f it appears that the state issues substantially predominate, whether in terms of proof, the scope of the issues raised, or the comprehensiveness of the remedy sought, the state claims may be dismissed without prejudice and left for resolution to state tribunals.[84]

The following factors, gleaned from *Gibbs* and from subsequent cases and authorities applying *Gibbs* to employment discrimination cases, are traditionally considered in determining whether or not the federal court should exercise jurisdiction over pendent state claims:

(1) Whether adjoining the state claim would require additional parties not necessary for the federal claim;

(2) Whether the state claim presents an unsettled or novel issue of state law;[85]

(3) Whether the state claim would so dominate the trial that the federal claim would become a mere appendage;

(4) Whether different statutes of limitation, elements of proof, and remedies are at issue in the state claim than in the federal claim;

(5) Whether the state claim is the only one on which a jury trial is available or requested;

(6) The likelihood of confusion to a jury by appending the state claim;

(7) Considerations of judicial economy; and

(8) Considerations of convenience and fairness to the litigants.

As might be expected, application of the above standards in employment discrimination cases has led to widely divergent trial court decisions, all of which are only subject to reversal by an appellate court if an abuse of discretion is found.[86] A detailed comparison of two 1983 district court decisions best illustrates the different jurisprudential approaches leading to different results in similar cases. In *Frykberg v. State Farm Mutual Automobile Insurance Co.*,[87] the plaintiff brought a Title VII action alleging discrimination, harassment, and constructive discharge by the defendants on account of her sex. She also appended a state law claim for intentional infliction of emotional distress for which she sought compensatory and punitive damages.[88] The defendant moved to dismiss the state court claim, arguing, inter alia: (1) that the compensatory and punitive damages being sought

84. *Gibbs*, 383 U.S. at 726-27.

85. For example, if a plaintiff suing under Title VII sought to append a state court claim of abusive discharge in a state in which it was unclear whether or not such a cause of action was cognizable, this factor would be a strong argument that a federal court should not exercise pendent jurisdiction.

86. Schlei and Grossman illustrate the divergent results under these factors on virtually indistinguishable facts. *See* B. SCHLEI & P. GROSSMAN, *supra* note 11, at 89-90 n.3, 741-42 n.14 (2d ed. 1983 & Supp. 1983).

87. 557 F. Supp. 517 (W.D.N.C. 1983).

88. *Id.* at 517.

under the intentional infliction of emotional distress claim were not available under Title VII and were therefore more comprehensive than the remedies provided under federal law; (2) that different elements of proof were involved in the state claim, whose issues would predominate over the issues related to the federal claim; (3) that the state claim, but not the federal claim, would be tried to a jury; and (4) that the law of intentional infliction of emotional distress in North Carolina was unsettled and consequently, that interpretation of such law should be left to the state courts.[89] The federal district judge, in denying the defendant's motion and allowing the state claim to be appended to the federal claim, found that the advantages of trying all of the plaintiff's claims in one action, thereby furthering the interests of convenience and judicial economy, far outweighed the factors advanced by the defendant. The district court dismissed the defendant's arguments with regard to splitting the state and federal claims between jury and nonjury trials by stating that "[t]rying state claims to a jury and federal claims to a court makes no big deal of the case. Jury trials here frequently take less time and are cheaper than non-jury trials."[90] The court further indicated that it might decide to use the jury in an advisory capacity under Federal Rule of Civil Procedure 39(c) with respect to the nonjury claim.[91] While acknowledging that the state court issue might adduce some additional evidence and that additional relief was being sought under that claim, the court determined that the state court issues did not "substantially predominate" over the federal issues.[92] Noting that the North Carolina Supreme Court had recently defined the scope and elements of the tort of intentional infliction of emotional distress, the court indicated that it felt the law in North Carolina on the subject of intentional infliction of emotional distress was clear and gave that element little weight.[93]

In *Kelly v. Western Air Lines,*[94] the plaintiff brought an action under the ADEA as a result of his discharge by the defendant. Plaintiff sought to append actions for breach of an implied covenant of good faith and fair dealing, wrongful discharge, and intentional infliction of emotional distress. The defendant moved to dismiss the three state law causes of action.[95] After reciting the *Gibbs* criteria, the district judge, in his discretion, declined to exercise jurisdiction over the state claims. In the view of the court, exercise of pendent jurisdiction would not "advance judicial economy" because the considerations underlying the state claims were substantially different than those underlying the ADEA action. Noting that it would always be more convenient to try all the issues in one forum, the federal judge stated that "[t]hat factor alone is insufficient to mandate exercise of pendent

89. *Id.* at 518.
90. *Id.*
91. *Id.*
92. *Id.* at 518-19.
93. *Id.* at 519-20.
94. 33 Fair Empl. Prac. Cas. (BNA) 1082 (D. Utah 1983).
95. *Id.* at 1083.

jurisdiction."[96] The court gave considerable weight to the various arguments of the defendant: (1) the unsettled nature of the state causes of action, especially the actions for wrongful discharge and breach of implied covenant of good faith and fair dealing, indicated that a "proper degree of comity to the state court system" required that those matters be left to initial determination by a state court; (2) the state issues appeared to predominate substantially both in terms of proof and the scope of the issues raised; (3) the facts necessary to prove intentional infliction of emotional distress were quite different from those required to prove violations of the ADEA and therefore significant potential for jury confusion existed; and (4) the scope of relief sought in the state court actions was far greater than under the ADEA.[97]

The one firm conclusion to be drawn from a review of employment discrimination cases interpreting *Gibbs* is that the greatest single factor which will determine the issue of whether a state claim may be appended to an employment discrimination case is the philosophy of the district court judge.

Other courts, while acknowledging that they have the power to entertain appended state court claims under the first prong of the *Gibbs* test, have held that Title VII and its judicial history reveal an implied congressional command negating pendent jurisdiction in Title VII based actions.[98] These cases (which will be referred to collectively as the *Mongeon-Wescott* line of cases) reasoned that while *Gibbs* delineated the limits of federal judicial power under article III of the Constitution, subsequent Supreme Court cases indicated that acknowledgement of the existence of article III power does not end the inquiry into whether a federal court has power to hear the nonfederal claims along with the federal ones.[99] Beyond the "constitutional minimum,"

> [T]here must be an examination of the posture in which the nonfederal claim is asserted and of the specific statute that confers jurisdiction over the federal claim, in order to determine whether "Congress in [that statute] has . . . expressly or by implication negated" the exercise of jurisdiction over the particular nonfederal claim.[100]

The *Mongeon-Wescott* line of cases concluded that, under *Aldinger v. Howard*[101] and *Owen Equipment & Erection Co. v. Kroger*,[102] the federal courts must, before considering the discretionary factors set forth in *Gibbs*, consider whether the statutory grant of federal jurisdiction in question, either expressly or by implication, excluded the state claim from federal court jurisdiction. All of those cases concluded that Title VII's legislative history revealed an

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96. *Id.*
97. *Id.* at 1083-84.
98. *E.g.*, Mongeon v. Shellcraft Indus., 590 F. Supp. 956 (D. Vt. 1984); Wescott v. Wackenhut Corp., 581 F. Supp. 9 (S.D. Cal. 1983); Frye v. Pioneer Logging Mach., 555 F. Supp. 730 (D.S.C. 1983); Bennett v. Southern Marine Management Co., 531 F. Supp. 115 (M.D. Fla. 1982); Jong-Yul Lim v. International Inst., 510 F. Supp. 722 (E.D. Mich. 1981); Kiss v. Tamarac Util., 463 F. Supp. 951 (S.D. Fla. 1978).
99. *See* Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 371-73 (1978); Aldinger v. Howard, 427 U.S. 1, 17-18 (1976).
100. *Owen Equip.*, 437 U.S. at 373 (quoting *Aldinger*, 427 U.S. at 18).
101. 427 U.S. 1 (1976).
102. 437 U.S. 365 (1978).

implied congressional command negating pendent jurisdiction in Title VII based actions.[103] Among the factors considered by the *Mongeon-Wescott* courts in reaching this determination concerning Title VII were the following:[104]

> (1) The relief which Congress has provided under Title VII is equitable in nature, including only reinstatement and back pay. The statutory exclusion of legal remedies under Title VII reveals a congressional desire to restrict the type of relief awarded in discrimination claims brought under the statute. Joinder of state law claims, under which a plaintiff might be entitled to compensatory and punitive damages, directly conflicts with the congressional intent of limited relief under Title VII.[105]
>
> (2) Several procedural provisions of Title VII strongly support the finding of a congressional negation of the exercise of pendent jurisdiction. Title VII cases are tried by a judge, not a jury; also, Title VII indicates a clear congressional policy that Title VII cases are to be given preference and adjudicated as promptly as possible.[106] To consider state contract and tort claims in a Title VII action would conflict with these policies by expanding the scope of issues to be resolved and by making those issues resolvable by a jury, all of which would undoubtedly result in delay in trying the claims.[107]
>
> (3) When additional defendants are named in the state claim who were not named in the EEOC charge or the Title VII suit (as is often the case), the public policy favoring cooperation and voluntary compliance as the preferred means for eliminating discrimination in the area of employment opportunities is subverted since the additional defendants in the nonfederal claim have not been involved in any conciliation process.[108]

Although most federal courts have not considered the reasoning of the *Mongeon-Wescott* line of cases but have immediately gone from step one to step two under the *Gibbs* test to examine the various discretionary factors in determining whether to exercise pendent jurisdiction over state claims, in view of the *Aldinger* and *Owen* Supreme Court cases (which were decided subsequent to *Gibbs*), federal courts should address the issues raised in the *Mongeon-Wescott* cases. Alternatively, the *Mongeon-Wescott* line of cases held that even if their interpretation of *Aldinger* and *Owen* were incorrect, an application of the *Gibbs* discretionary factors would also lead to a declination of pendent jurisdiction.[109] Such an "alternative" approach suggests that even if a district court does not follow the *Mongeon-Wescott* rationale completely, the factors mentioned in those cases should be afforded great weight in applying the discretionary factors outlined in *Gibbs*.

C. Jury Trial Issues

The current circuit court view is that while there is no right to a jury trial in Title VII actions, there is a right to a jury trial under the ADEA and section

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103. *See, e.g.*, Mongeon v. Shellcraft Indus., 590 F. Supp. at 958-60 (D. Vt. 1984); Wescott v. Wackenhut Corp., 581 F. Supp. at 9 (S.D. Cal. 1983).

104. While all of the *Mongeon-Wescott* cases were Title VII cases, the same policy considerations which led to those decisions should apply in ADEA actions.

105. *E.g.*, *Wescott*, 581 F. Supp. at 10; Frye v. Pioneer Logging Mach., 555 F. Supp. 730, 734 (D.S.C. 1983).

106. 42 U.S.C. § 2000e-5(f)(5) (1982).

107. *E.g.*, *Mongeon*, 590 F. Supp. at 959-60; *Frye*, 555 F. Supp. at 733-34.

108. *E.g.*, *Frye*, 555 F. Supp. at 734 ; Kiss v. Tamarac Util., 463 F. Supp. 951, 953-54 (S.D. Fla. 1978).

109. *E.g.*, *Mongeon*, 590 F. Supp. at 960-61; *Frye*, 555 F. Supp. at 735-36.

1981 claims where compensatory and punitive damages are sought.[110] A federal court's decision to exercise pendent jurisdiction over appended state claims, however, may affect the availability of a jury trial.

In a situation where a nonjury federal claim (for example, a Title VII claim) has appended to it a state claim which does carry the right to a jury trial (for example, assault or slander), and both claims arise out of the same operative facts, there is considerable authority for the proposition that the right to a jury trial exists on "all issues common to both claims."[111] In the typical case of a pendent state (legal) claim being appended to a Title VII (equitable) claim, many, if not all, of the issues will be common to both claims. Indeed, under *Gibbs,* the power of the federal court to entertain the state court claim in the first instance arises only if the state court claim arises out of a "common nucleus of operative fact." There have been several cases which have applied the *Curtis v. Loether*[112] rationale, which would permit juries to decide all issues common to both claims, to allow jury trials on issues common to Title VII and section 1981 claims (where "legal" damages are sought under section 1981).[113] Some federal courts have indicated that they might have a jury both decide the state claims and act as an advisory jury on the Title VII claim under Federal Rule of Civil Procedure 39(c).[114] Whether such a procedure would pass constitutional muster is questionable in a situation where *Curtis v. Loether* principles would mandate a jury trial on all issues common to both claims.

D. Conclusion

Although many federal district courts have utilized the discretion afforded them in *Gibbs* to *expand* federal jurisdiction, *Gibbs* itself clearly recognized the basic constitutional precept that federal courts are courts of *limited* jurisdiction.[115] *Gibbs* placed the burden on the plaintiff to show the article III power of the federal court and to demonstrate to the satisfaction of the federal district court that concerns of convenience, judicial economy, and fairness were so great that the trial court should exercise its discretion in favor of accepting jurisdiction over pendent state claims. The cardinal principle that federal courts are courts of limited jurisdiction is especially important in the area of federal employment discrimination cases for the reasons set forth in the *Mongeon-Wescott* line of cases. Concepts which are basic to the structure of Title VII and the ADEA are jeopardized when a jury, or even a federal

110. *See supra* note 66.

111. *See* Curtis v. Loether, 415 U.S. 189, 196 n.11 (1974); *see also* Beacon Theatres v. Westover, 359 U.S. 500, 508 (1959). The *Beacon Theatres* and *Curtis* principles apply, of course, only where there are issues common to both the legal and the equitable claim.

112. 415 U.S. 189 (1974).

113. *See* Jones v. Metropolitan Hosp. & Health Centers, 88 F.R.D. 341 (E.D. Mich. 1980); Clarke v. American Cyanamid Co., 25 Empl. Prac. Dec. (CCH)¶ 31,645 (D.N.J. 1980); Page v. Schlumberger Well Serv., 23 Empl. Prac. Dec. (CCH)¶ 31,104 (S.D. Tex. 1980); Tucker v. Harley Davidson Motor Co., 19 Empl. Prac. Dec. (CCH)¶ 9,111 (E.D. Wis. 1978).

114. *See, e.g.,* Frykberg v. State Farm Mut. Auto. Ins. Co., 557 F. Supp. 517, 518 (W.D.N.C. 1983).

115. *See* 13 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 82, § 3522, at 60 (1984).

district court judge, is subjected to evidence concerning compensatory and punitive damages, pain and suffering, emotional distress, and so forth, at the same time that it is considering a Title VII or ADEA claim. The spillover effect of that type of evidence on the Title VII or ADEA claim is inevitable and is inconsistent with a statutory scheme where every effort was made to remove those emotional factors from consideration. If Congress deems that the remedies under Title VII and the ADEA are inadequate, it is the appropriate entity to deal with that issue. Federal district courts, however, should not undermine important congressional considerations concerning the appropriate atmosphere for trial of a federal employment discrimination case and ignore the basic concept of limited federal court jurisdiction in the name of expediency.

IV

THE CHILLING EFFECT OF DOUBLE ATTORNEYS' FEES

A defendant in an employment discrimination action is faced with an expensive lawsuit with virtually no chance of recovering his expenses even when he prevails. The risk of an adverse judgment is substantial, given the complexity and fluidity of the law. If the defendant loses the action on a substantial point, he has threshold expenses to fear: payment of plaintiff's attorneys' fees; his own attorneys' fees; and the vast man-hour expenses involved in preparing his defense, answering interrogatories, attending depositions, obtaining the service of experts, and other case preparation. The costs to the defendant are especially high if the suit is a class action.

As a result, many practices that were never considered by Congress to be in violation of the discrimination acts may be abandoned without contest solely due to cost. A prudent employer, confronted with the substantial financial risks inherent in defending his labor practices, may conform them, not to the construction of the acts rendered by the courts, but to a reading of the acts that avoids these threshold risks. For many defendants, settlement—even of nonmeritorious claims—may be the most economical avenue available. The number of defendants otherwise disposed to defend their practices, but deterred by double attorneys' fees and the high cost of litigation, is probably extensive.[116]

This situation applies to small, medium, and large defendants alike. Although a small defendant has fewer employees to originate discrimination claims, the impact of a lawsuit in the federal court can bear heavily on its limited human and financial resources. A large defendant has many more employees who may be induced to file a claim and seek recovery in the courts, with a correspondingly heavier risk factor.

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116. *See* Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 422 n. 20 (1978) ("The other side of this coin is the fact that many defendants in Title VII claims are small and moderate size employers for whom the expense of defending even a frivolous claim may become a strong disincentive to the exercise of their legal rights.").

This section of the article will examine the proposition that the award of substantial attorneys' fees and litigation expenses[117] to a prevailing plaintiff encourages employment discrimination litigation in a manner not contemplated by Congress. The more incentive a complainant has to sue, the more likely it is that he will disregard a finding of no probable cause by the EEOC, efforts to conciliate his claim by the EEOC, or offers by his employer to settle his claim short of resorting to the courts.

Justice Powell, speaking of section 1988 (which allows a "prevailing party" in section 1981, 1983, and 1985 cases to recover attorneys' fees) in his dissenting opinion in *Pulliam v. Allen,*[118] observed:

> Finally, harassing litigation and its potential for intimidation increases in suits where the prevailing plaintiff is entitled to attorney's fees. Perhaps for understandable reasons, the Court's opinion passes lightly over the effect of § 1988. In fact, that provision has become a major additional source of litigation. Since its enactment in 1976, suits against state officials under § 1983 have increased geometrically. Congress enacted § 1988 for the specific purpose of facilitating and encouraging citizens of limited means to obtain counsel to pursue § 1983 remedies. But sections 1983 and 1988 are available regardless of the financial ability of a plaintiff to engage private counsel. *The lure of substantial fee awards, now routinely made to prevailing § 1983 plaintiffs, assures that lawyers will not be reluctant to recommend and press these suits.*[119]

Formerly, civil rights plaintiffs could pursue private enforcement of their claims only insofar as their wealth permitted.[120] The prevailing party in American federal litigation is, absent statutory authorization or enforceable contract, not ordinarily entitled to recover attorneys' fees from the losing party.[121] Attorneys' fees are currently available, however, to prevailing litigants in employment discrimination actions brought under Title VII,[122] in actions brought under the ADEA,[123] and in actions brought under sections

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117. *See* Heiar v. Crawford County, 746 F.2d 1190 (7th Cir. 1984):

> Since the oral argument of this appeal, this court, joining the other circuits that have considered the question, has held that expenses of litigation that are distinct from either statutory costs or the costs of the lawyer's time reflected in his hourly billing rates—expenses for such things as postage, long-distance calls, xeroxing, travel, paralegals, and expert witnesses—are part of the reasonable attorney's fee allowed by the Civil Rights Attorney's Fees Awards Act.

Id. at 1203.

118. 466 U.S. 522 (1984).

119. *Id.* at 555-56 (Powell, J., dissenting) (emphasis added) (footnotes omitted). The same reasoning would apply in Title VII and ADEA cases.

120. *See* Newman v. Piggie Park Enters., 390 U.S. 400, 402 (1968); *see also Christiansburg*, 434 U.S. at 417. In *Newman*, a Title II action, the Court stated that "if successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts." 390 U.S. at 402. The Court stated in *Christiansburg* that "[i]n *Albemarle Paper Co. v. Moody*, 422 U.S. 405, the Court made clear that the *Piggie Park* standard of awarding attorney's fees to a successful plaintiff is equally applicable in an action under Title VII of the Civil Rights Act." 434 U.S. at 417.

121. Alyeska Pipeline Serv. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975).

122. 42 U.S.C. § 2000e-5(k) (1982).

123. Section 16(b) of the Fair Labor Standards Act, incorporated by reference into the ADEA by § 7(b), 29 U.S.C. § 626(b) (1976), provides: "The court in such action shall, in addition to any judgment awarded the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant and costs of action." This language has been interpreted as precluding an award of attorneys' fees to a prevailing defendant. *See* Richardson v. Alaska Airlines, 750 F.2d 763, 766 (9th Cir. 1984); Fellows v. Medford Corp., 16 Fair Emp. Prac. Cas. (BNA) 764, 768 (D. Ore. 1978).

1981 and 1983 through the Civil Rights Attorney's Fees Awards Act of 1976 (section 1988).[124] Together these comprehensive provisions provide the statutory foundation for fee shifting in virtually all private civil rights litigation.

Congress expressed concern that fee shifting provisions would encourage barratry—proliferation of frivolous suits initiated to generate statutory fees—during its consideration of section 1988.[125] Critics of the provision argued that section 1988 would provide "bonanzas to the legal profession" and a "relief fund for lawyers."[126]

The importance of fee shifting in employment discrimination actions has been demonstrated by the fact that four attorneys' fees cases have been litigated in the Supreme Court in recent terms.

The first case grew out of a black female's application for work at the New York Gaslight Club.[127] She was denied employment and she filed a charge with the EEOC alleging that the defendant had denied her a position because of her race. As required by section 706(c) of Title VII, plaintiff's complaint was forwarded to the New York State Division of Human Rights. The plaintiff ultimately prevailed in the state proceedings, but prior to their conclusion she filed a suit in the federal district court, alleging that defendant did not hire her because she was black. By consent, the federal action was dismissed upon the favorable ruling in the state court except for plaintiff's request for attorneys' fees for the time spent both in the federal court and in the state proceedings.[128] The plaintiff was held to be the "prevailing party" within the meaning of section 706(k), and consequently was entitled to an award of attorney fees "for work done at the state and local levels" as well as in the federal court.[129]

In *Hensley v. Eckerhart,*[130] the issue was whether a partially prevailing plaintiff may recover attorneys' fees for legal services on unsuccessful claims.

> [T]he extent of a plaintiff's success is a crucial factor in determining the proper amount of an award of attorney's fees . . . . [W]here the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claims should be excluded in considering the amount of a reasonable fee . . . . [W]here a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised. But where the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained.[131]

In the third case to come before the Supreme Court, the plaintiffs in a section 1983 action were represented by attorneys from The Legal Aid

124. 42 U.S.C. § 1988 (1982).
125. 122 CONG. REC. 31,474 (1976).
126. *Id.* at 33,314 (remarks of Sen. Kennedy).
127. New York Gaslight, Inc. v. Carey, 447 U.S. 54 (1980).
128. *Id.* at 56-59.
129. *Id.* at 63.
130. 461 U.S. 424 (1983).
131. *Id.* at 440.

Society of New York, a private nonprofit law office.[132] The court decided that reasonable fees under section 1988 are to be calculated according to the prevailing market rates in the relevant community regardless of whether the prevailing party is represented by private or nonprivate counsel.[133] An upward adjustment of attorneys' fees would be permissible under section 1988, but under the circumstances of the present case, a fifty percent upward adjustment was not justified.[134]

Two individuals brought a section 1983 suit against a state magistrate in *Pulliam v. Allen*,[135] the fourth case to come before the Supreme Court. The plaintiffs claimed that the magistrate's practice of imposing bail on persons arrested for nonjailable offenses under state law and of incarcerating those persons if they could not meet bail was unconstitutional. The district court enjoined the practice and also awarded the plaintiffs costs and attorneys' fees under section 1988. The Court of Appeals for the Fourth Circuit rejected the defendant's appeal and the Supreme Court affirmed the award.[136]

A. Liberality in Determination of Prevailing Plaintiff and Fee Awards

In a civil rights action, the plaintiff need not prevail on all claims asserted in the complaint in order to be the "prevailing party" for the purposes of a fee award. Thus, the Supreme Court pointed out in *Hensley v. Eckerhart*[137] that the standard for determining initially whether a plaintiff was a "prevailing party" so as to be entitled to recover attorney fees has been framed in various ways, and stated: "A typical formulation [of the determination] is that 'plaintiffs may be considered "prevailing parties" for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.' "[138]

Where several plaintiffs are involved, where several different acts of discrimination are alleged to have taken place, and where both injunctive and monetary awards are sought, some of the plaintiffs will probably be considered to be "prevailing parties" and, therefore, entitled to an award of attorneys' fees.

"The initial estimate of a reasonable attorney's fee is properly calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate."[139] In addition to this "lodestar" sum, "[a]djustments to that fee then may be made as necessary in the particular case."[140] However, the court observed that the legislative history of section 1988 "explains that 'a reasonable attorney's fee' is one that is 'adequate to

132. Blum v. Stenson, 465 U.S. 886 (1984).
133. *Id.* at 894.
134. *Id.* at 901-02.
135. 466 U.S. 522 (1984).
136. *Id.*
137. 461 U.S. 424 (1983).
138. *Id.* at 433 (quoting Nadeau v. Helgemoe, 581 F.2d 275, 278-79 (1st Cir. 1978)).
139. Blum v. Stenson, 465 U.S. 886, 888 (1984).
140. *Id.*

attract competent counsel, but . . . [that does] not produce windfalls to attorneys.' "[141] Accordingly, an upward adjustment should be reserved for cases of exceptional success rather than the norm.

In the 1960's and 1970's, the amounts of attorneys' fees awarded to prevailing parties in employment discrimination suits were, for the most part, modest and could be borne by most defendants without undue burden.[142] However, with the passage of time, the size of attorneys' fees for prevailing plaintiffs has increased to the point that they now represent a significant factor in the burden of defending these actions in the federal courts. Examples of this upward trend in attorneys' fees follow.

In *Pulliam v. Allen,*[143] a section 1983 action brought against a state magistrate, the district court held that the defendant magistrate's practice of imposing bail on persons arrested for nonjailable offenses under Virginia law and of incarcerating those persons if they could not meet the bail was unconstitutional, and enjoined the practice. Although the court held that the magistrate was immune from a judgment for damages, it awarded the plaintiff attorneys' fees in the amount of $7,038.00. The Supreme Court affirmed the award of attorneys' fees. Justice Powell, in dissent, pointed out that "[t]he lure of substantial fee awards . . . now routinely made to prevailing § 1983 plaintiffs, assures that lawyers will not be reluctant to recommend and press these suits."[144] In support of this statement, Justice Powell pointed out that "[r]ecent fee awards under § 1988 have increased with the precipitous rise in hourly rates."[145] Justice Powell further noted that the burdens of litigation do not necessarily end when a district court approves a fee as reasonable, since a request for additional fees will probably be made for services rendered in the appellate courts. "Regrettably, disputes over the reasonableness of § 1988 fee awards often become the major issue in the entire litigation."[146]

In another instance of high attorneys' fees, female employee plaintiffs in a sex discrimination class action recovered a substantial monetary award and injunctive relief.[147] Counsel for the parties were unable to negotiate the amount of attorneys' fees and expenses that should be awarded to the plaintiffs. The attorneys for the plaintiffs, who had successfully litigated the merits of the action, retained another law firm to negotiate and, if necessary, litigate the attorneys' fee award. Following extensive hearings, the district court awarded plaintiffs $3,469,829. This award reflected a lodestar of $1,471,241 on the merits, a doubling of that lodestar to account for the "risk

141. *Id.* at 897 (quoting S. REP. No. 1011, 94th Cong., 2d Sess. 6 (1976)).

142. *See* Heinsz, *Attorney's Fees for Prevailing Title VII Defendants: Toward a Workable Solution,* 8 YALE L.J. 259, 268 n.45 (1977).

143. 466 U.S. 522 (1984).

144. *Id.* at 556 (Powell, J., dissenting) (citation omitted).

145. *Id.* at 556 n.17. In Blum v. Stenson, 465 U.S. 886, 899 (1984), for example, hourly rates of $95 to $105 for second- and third-year associates were found to be "prevailing rates" in the community.

146. Pulliam v. Allen, 466 U.S. 522, 556 n.18 (Powell, J., dissenting).

147. Laffey v. Northwest Airlines, 746 F.2d 4, 7 (D.C. Cir. 1984).

premium," an attorneys' fee lodestar of $194,324 and costs and expenses of $216,972.[148]

The court of appeals held that the fee award must be recalculated according to the market rates established by the law firms in their everyday practice rather than the rates charged by firms in the community.[149] The court pertinently observed with respect to the claimed fee award by plaintiffs' attorneys:

> [M]ore attorneys worked on the fee request than ever worked on the merits, and more hours were billed on the fee request than were billed in any given year on the merits. We are, quite frankly, aghast at the hours devoted to the fee request. The award of fees for 3,400 hours of attorney time shows clearly that this fee request did turn into just the sort of "second major litigation" feared by both this and the Supreme Court; the prodigious consumption of lawyers' hours and judicial time should give pause to anyone concerned with the allocation of legal resources.[150]

Nearly two million dollars in attorneys' fees and costs were awarded plaintiffs in a class action brought against the University of Minnesota for engaging in employment discrimination based upon sex and national origin.[151] Successful job bias claimants were awarded a total of $1,983,098 in attorneys' fees, to be paid by the defendant employer in *Chrapliny v. Uniroyal, Inc.*[152] This amount was arrived at as follows:

1.	District court lodestar figure	$1,547,471.00
2.	Quality award	$ 100,000.00
3.	Risk award	$ 50,000.00
4.	Total district court award	$1,697,471.00
5.	Award for litigation before the court of appeals	$ 285,627.22
6.	Total award	$1,983,098.22[153]

The published decisions of awards to prevailing plaintiffs in a number of employment discrimination cases amply demonstrate that Congress does not have to be concerned that this field of litigation does not "attract competent counsel" for any person who has a meritorious claim. Any person with a meritorious claim will have little difficulty in finding a competent attorney to represent him.

B. The High Risk Factor in Class Actions

In class actions brought under the employment discrimination acts, the cost of litigation to the defendant assumes even higher proportions. The larger the number of employees in the putative class, the greater the cost exposure to the defendant. Generally, class actions are bifurcated and if

148. *Id.* at 9.
149. *Id.* at 30.
150. *Id.* at 29.
151. Rajender v. University of Minn., 546 F. Supp. 158, 173 (D. Minn. 1982).
152. 583 F. Supp. 40 (N.D. Ind. 1983).
153. *Id.* at 52.

liability is established at the stage one proceedings, then the defendant must bear the high cost of the proceedings at stage two, which are conducted before a special master. Inasmuch as the plaintiffs at stage two proceedings will normally be the "prevailing party," the defendant will be required to pay the plaintiffs' attorneys' fees, its own attorneys' fees, costs of notification to the class, transcripts of court proceedings and the special master's fee for such proceedings.[154]

The extent of this problem is demonstrated by the order in *Kyriazi v. Western Electric Co.*,[155] a sex discrimination action brought against an employer by a female employee. Following determination of liability, the district court held that: (1) a finding of class-wide discrimination shifted the burden to the defendant employer to prove that any individual class member was not discriminated against,[156] (2) the defendant would be required to bear the costs of notice to the class members,[157] and (3) backpay awards would be computed on an individual basis by three appointed special masters who would hear the claims of 10,000 potential claimants.[158] One master would be paid an hourly rate of $125 and two would be paid at hourly rates of $115.[159]

C. Different Fee Standards Apply to Prevailing Defendants

A defendant who is the "prevailing party" in an employment discrimination action cannot reasonably expect to recover its attorneys' fees from the unsuccessful plaintiff because the courts apply different standards in such instances. The Supreme Court in *Christiansburg Garment Co. v. EEOC*[160] stated that "a district court may, in its discretion, award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation . . . ."[161] Because of the potential chilling effect that fee awards may have on plaintiffs, the court identified the fee award as a conservative tool, to be used sparingly in those cases in which the plaintiff presses a claim which he knew or should have known was groundless, frivolous, or unreasonable.[162] The district courts have obeyed the admonition of the Supreme Court and have only sparingly awarded fees to a successful defendant.

Even when the defendant is awarded attorneys' fees from the plaintiff, it is faced with two additional obstacles. First, in appropriate circumstances, district courts are admonished to give weight to the relative financial positions

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154. *See, e.g.*, Sledge v. J.P. Stevens & Co., 585 F.2d 625 (4th Cir. 1978); Stastny v. Southern Bell Tel. & Tel. Co., 458 F. Supp. 314 (W.D.N.C. 1978).
155. 465 F. Supp. 1141 (D.N.J. 1979).
156. *Id.* at 1144.
157. *Id.*
158. *Id.* at 1146-47.
159. *Id.* at 1148.
160. 434 U.S. 412 (1978).
161. *Id.* at 421.
162. *Id.* at 422.

of the litigants.[163] Some courts reason that the policy of deterring frivolous suits is not served by forcing the misguided Title VII plaintiff into financial ruin simply because he prosecuted a groundless case.[164] In *Arnold v. Burger King Corp.*,[165] where a modest fee award by the district court to the prevailing defendants was affirmed on appeal, the court noted that "the financial position of the plaintiff is but one among the several other relevant factors which a trial judge should consider," and "the trial court has broad discretion to reduce the fee award in light of mitigating factors, such as the difficulty of the case, the motivation of the plaintiff, and the relative economic status of the litigants."[166] Second, most fee awards allowed against unsuccessful plaintiffs are not collectible. This is particularly true in actions brought by wage earners and pro se plaintiffs.

V

CONCLUSION

The prospect of increased litigation in the employment discrimination field is enhanced by the reorganization plan approved by the EEOC in February, 1984. Under this plan, the EEOC is, through its Expanded Presence Program, reaching out into less urbanized areas where traditionally there has not been much EEOC-related activity. The EEOC is now sending teams of its personnel into specific areas not currently convenient to EEOC offices. These visits will be preceded by announcements and media coverage. These teams are receiving EEOC charges, assisting individuals in drafting EEOC charges, and meeting with local groups or individuals to educate them regarding the antidiscrimination requirements of the various acts enforced by the EEOC. Such a program will undoubtedly heighten awareness, both of the substantive law and the procedures for enforcement, resulting in more charges of discrimination, particularly against employers heretofore largely ignored.

Based on prior experience, this new program will undoubtedly result in increased litigation and defendants should be afforded some reasonable protection from the seemingly endless streams of unfounded, and often stale, lawsuits brought against them. The Supreme Court acknowledged in *Christiansburg Garment Co. v. EEOC*[167] that Congress, by the enactment of section 706(k) of the Civil Rights Act of 1964, "wanted to protect defendants from burdensome litigation having no legal or factual basis," and identified this purpose as having roughly the same importance as the congressional goal of encouraging plaintiffs to challenge invidious employment practices.[168] It

163. *See, e.g.*, Durrett v. Jenkins Brickyard, Inc., 678 F.2d 911, 917 (11th Cir. 1982); Faraci v. Hickey-Freeman Co., 607 F.2d 1025, 1028 (2d Cir. 1979).
164. *Faraci*, 607 F.2d at 1028.
165. 719 F.2d 63 (4th Cir. 1983), *cert. denied*, 464 U.S. 826 (1984).
166. *Id.* at 68.
167. 434 U.S. 412 (1978).
168. *Id.* at 420.

remains to be seen whether defendants are to be afforded this protection during the 1980's.