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Comment, A Primer to Procedure and Remedy Under the Title VII of the Civil Rights Act of 1964

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COMMENTS

A PRIMER TO PROCEDURE AND REMEDY UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

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I. INTRODUCTION

A. Purpose
Title VII of the Civil Rights Act of 1964, Pub. L. 88-352, Title VII, July 2, 1964, 79 Stat. 253, 42 U.S.C. 2000e et seq. [Hereinafter cited as Title VII], is intended to eliminate employment discrimination because of race, color, religion, sex, or national origin. Title VII was enacted on July 2, 1964 but its substantive provisions did not take effect until July 2, 1965. Since that time, there have been more than two hundred published federal court decisions involving private enforcement actions brought under Title VII.

The single most significant impression one draws from reading the decisions in Title VII cases is that this area of the law is a procedural quagmire. The rules are still in the developing stage and the trends of judicial thought are just beginning to appear as vague forms. Up to this time, no exhaustive examination of the cases has attempted to mark the procedural traps that exist or to suggest a safe route for the practitioner bringing a Title VII action. This study attempts to present such a guide.

This Comment will not attempt a detailed analysis of all of the procedural problems. Rather it will attempt to 1) identify the procedural problems, 2) refer the reader to every important Title VII case that has dealt with the problem, and 3) suggest what the trend seems to be or, if there is none, suggest what the courts might find persuasive when developing a trend.

This comment is not written primarily to assist the defendant in a Title VII action. His major difficulty is disproving, substantively, the allegation of discrimination. Rather, this comment is designed to assist the charging party whose complaint is often dismissed because of a procedural error in pleading, a failure to exhaust remedies or one of a myriad of other possible mistakes. This comment is written, therefore, to guide the plaintiff's attorney bringing a Title VII action.

B. Approach
A quick reading of the Table of Contents reveals the broad outline of this study. First, procedural requirements will be discussed. Since so
much of the case law deals with federal jurisdiction over the subject matter, that subject will be discussed first. Then, standing, jurisdiction over the person, and pleading will be examined. Secondly, this Comment will examine problems of remedy and some substantive rights under Title VII that are closely related to procedure. Under this heading the following will be discussed: court appointment of attorneys and the award of attorney fees, injunctions in Title VII actions, the right to a jury trial, and enforcement powers of the Equal Employment Opportunity Commission. Finally, the problem of Title VII as the exclusive remedy available to the aggrieved party will be explored.

II. PROCEDURAL PREREQUISITES IN BRINGING AN ACTION UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

A. Jurisdictional Prerequisites—Subject Matter

The greatest recurring battle under Title VII has been over the issue of what prerequisites must be satisfied to give the federal court subject matter jurisdiction when an aggrieved party attempts to vindicate his rights under the Act. § 7061 is entitled “Enforcement Provisions.” There seems to be little disagreement that § 706(e) requires, as a prerequisite to bringing a civil action, that the plaintiff (1) exhaust his administrative remedy under the Act by filing a timely charge with the Equal Employment Opportunity Commission [hereinafter cited as the EEOC], and (2) file a complaint with the court within thirty days after receiving notice from the EEOC that they have not been able to conciliate the problem.2 It is important to understand what is actually required by each of these two prerequisites.

I. EXHAUSTION OF REMEDIES:

a. Administrative remedies—state

The first thing the plaintiff’s attorney must do to insure that the plaintiff files a valid charge with the EEOC is to examine the state law where the alleged act took place.3 If the plaintiff is in a state which has a law prohibiting the unlawful employment practice he alleges the defendant to have committed, a valid EEOC complaint cannot be filed until the plaintiff first files a charge with the state Fair Employment Practices Commission (FEPC) if there is one in the state.4 This

1. All citations to sections refer to sections of the Statutes at Large under Title VII of the Civil Rights Act of 1964 unless otherwise indicated.
2. See § 706(a)-(e) and Dent v. St. Louis-S.F. Ry., 406 F.2d 399 (5th Cir. 1969).
3. See § 706(b).
4. See § 706(b) and EEOC v. Union Bank, 408 F.2d 867 (9th Cir. 1968); IBEW Local 5
requirement is only triggered if the state Fair Employment Practice Act (FEPA) specifically prohibits the discrimination complained of. Where the state FEPA only prohibits some of the acts allegedly committed by the defendant, the cases state that the plaintiff must still exhaust his state FEPC remedy before submitting a charge to the EEOC. For instance, if a state act prohibits discrimination in hiring but says nothing about promotions, and the plaintiff alleges discrimination in both hiring and promotion, he must exhaust his state remedy on the hiring charge before bringing an EEOC charge, alleging discrimination in both hiring and promotion. If at the time an EEOC charge is filed, the state law does not prohibit the acts alleged in the EEOC charge, a subsequent amendment of the state law to include the alleged act, although passed while the EEOC charge is pending, does not generate a requirement that plaintiff file a charge with the state before filing his civil action.

Not only must the plaintiff file a complaint with the state FEPC, (assuming there is one, and the state law prohibits the alleged act) but § 706(b) also requires that the plaintiff allow the state authorities sixty days to attempt to conciliate the problem, unless the proceedings have been earlier terminated by the state FEPC. It has been held that plaintiff must wait sixty days or until the state authorities officially terminate consideration of the matter whichever is sooner. Plaintiff may not assume the state authorities have terminated consideration of the state complaint until he receives formal, official notice from the state FEPC.

b. Administrative remedies—federal

(1) Timely filing

If the plaintiff must file a charge with the state first, he must also file a charge with the EEOC within thirty days from the date of the notice of the termination of state proceedings or within 210 days from the date of the alleged unlawful employment practice, whichever is sooner.


9. See § 706(d).
If no state charge need be filed, then the EEOC charge must be filed within 90 days from the date of the alleged unlawful employment practice. Failure to satisfy these requirements subjects a subsequent civil complaint to a dismissal because filing a timely complaint with the EEOC is a jurisdictional prerequisite. As simple as this rule may sound, it has caused a great deal of trouble.

A big problem has been to decide what procedure to follow when the charging party files a charge initially with the EEOC and the EEOC refers the charge to the appropriate state agency to satisfy the requirement of § 706(b). The courts uniformly hold that the EEOC may not validate the original charge by automatically assuming jurisdiction of the case upon the expiration of the sixty days from the date the EEOC referred the charge to the state. The courts do allow the original charge to be validated after the sixty day state deferral period has expired, if the charging party writes the EEOC requesting them to assume jurisdiction. The EEOC charge will be dated as of the date the EEOC is requested to assume jurisdiction. Clearly if this date is within 210 days from the date of the alleged unlawful employment practice, the regenerated EEOC charge satisfies the requirement of § 706(d).

What if the sixty day state deferral period ends on a date that is more than 210 days after the alleged act occurred? If the EEOC charge is viewed as dated as of the request for the EEOC to assume jurisdiction, it will be dated at a time in excess of 210 days from the date of the alleged discriminatory act and, therefore, the EEOC charge will be void under § 706(d). Only one court has dealt with this problem directly. It held that when the charging party asks the EEOC to assume jurisdiction, the request relates back to the date of the


original EEOC charge. If the original EEOC charge was made within 210 days from the date of the alleged act, it is valid and federal jurisdiction over a subsequent civil action is not thereby precluded.

There is one class of violations for which the 90 day rule of § 706(d) poses no threat, those within the concept of a continuing violation. Clearly, if the plaintiff can convince the court that the defendant is engaging in a pattern or practice of discrimination affecting him, this is a continuing offense and the limitation period of § 706(d) becomes inapposite. For example, where a collective bargaining agreement contains provisions that violate the act, the union’s failure to protect its members by not changing the contract has been held a continuing offense. A discriminatory layoff is a continuing offense as long as recalls are made in violation of the Act.

(2) Verified charge

§ 706(a) requires the charge made to the EEOC to be made under oath. It is clear now that if the charge was unsworn when made, the defect may be cured by having it sworn to at a later date. The amended verified complaint will relate back to the date of the original unverified complaint without prejudice to the charging party.

(3) Content of charge

The question of what must be included in a charge has caused the courts problems in two areas. First, when the charging party sends the EEOC a letter complaint, is that a “charge?” This question becomes critical if the 90 days allowed to file a “charge” with the EEOC have passed. The trend of thought is that the substantive requirements for a sufficient lay-initiated charge should be liberally construed. The courts follow the EEOC regulation 1601.11(b) which provides that to be a “charge,” a letter need only inform the EEOC generally “what the

grievance is all about." The Sixth Circuit has recently extended this principle and has authorized the EEOC to reframe the charges to articulate adequately the lay complainant's allegations before serving the charges on the defendant. It is fair to say that the courts generally take the position that since the charges to the EEOC are lay-initiated, the charging party should be allowed to amend his charge liberally without prejudice to conform with the requirements of the statute. Requiring that his charge conform initially to a set of procedural niceties would defeat the purpose of the Act.

A second area where the content of the charge has been important is when the EEOC makes a demand for evidence under the investigatory powers granted to it by § 710(a). The right to investigate and make enforceable demands for evidence is conditioned on the filing of a valid charge by either a private party or by one of the five commissioners of the EEOC under § 706(c). Three cases have dealt with the question of what specificity is required in a charge filed by an EEOC Commissioner to trigger the EEOC's general investigatory powers. Two district courts have held that a general charge of discrimination is insufficient. The charge must allege facts sufficient to demonstrate that the charging party is in possession of information which he believes to have basis in fact, and which, therefore, forms a basis for initiating the charge. These courts have held that the legislative history conclusively demonstrates that Congress intended that the EEOC not have the power to investigate simply because of official suspicion or curiosity. Another district court has held that the commissioner may generally allege that a particular defendant is engaging in a pattern or practice of discrimination without alleging any facts which tend to prove the existence of this pattern or practice. This court held that such a general allegation was a "valid charge" and was


therefore sufficient to give the EEOC jurisdiction to conduct a general investigation of the defendant's employment practices and procedures.

c. Contractual remedies

Most collective bargaining contracts today have provisions for grievance machinery. The courts have been asked many times whether an employee must exhaust this remedy under the collective bargaining agreement as a condition precedent to vindicating a statutory right to equal employment opportunity.

Courts have held that an employee must exhaust his contract remedy before proceeding either under the Railroad Labor Act, 45 U.S.C. § 151 et seq. (1964) or § 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1964). They have uniformly held that there is no requirement that the plaintiff exhaust his contract remedy before proceeding under Title VII.

d. Election of remedies and mootness

As will be demonstrated, many Title VII plaintiffs have had civil suits dismissed because the court has found that the plaintiff has made a binding election of remedy other than Title VII, or that the case is moot because of events that transpired subsequent to the alleged unlawful employment practice.

The easiest way to approach this problem is, perhaps, to delineate acts by the plaintiff that all courts have agreed do not constitute a binding election of remedies. As would seem apparent from the above discussion of exhausting state Fair Employment Practice remedies (as is required by § 706(b)), filing a charge with the state is not a binding election of remedy. This was expressly held in Marquez v. Sales Office, Ford Motor Co. Settlement agreements between the EEOC and the charged party that are unacceptable to the charging party are not binding on him and do not preclude his bringing a civil action. Nor is the charging party in any way affected by settlement agreements made by members of a class on whose behalf he may be suing.

Some courts have been troubled by the following situation. The plaintiff brings a class action alleging that he has been discriminated against by defendant employer and sues for an injunction on behalf of himself and those similarly situated. While the federal civil action is pending, the employer grants the plaintiff the affirmative relief he seeks, i.e. grants the promotion, hires the plaintiff, etc. The issue then becomes, since the plaintiff no longer has standing to sue on his own behalf, is the class action moot for the entire class? The two cases which have discussed the problem have held that the plaintiff may continue the class action. Although the specific act of discrimination has been relieved by the settlement, the plaintiff may continue the suit on behalf of himself and the class and seek to enjoin the defendant from continuing the unlawful pattern or practice if he can prove a pattern or practice of discrimination.

In other election of remedy situations, the courts are in substantial disagreement.

Has the plaintiff made a binding election of remedies by utilizing a collective bargaining grievance procedure that is available to him, before attempting to proceed under Title VII? There seems to be no question that if the plaintiff only filed a grievance, but, before any determination was made, decided not to continue to proceed under the grievance procedure, his initial filing, of itself, does not constitute a binding election remedy. The cases are in conflict as to whether, when the plaintiff files a grievance and prosecutes it to completion, this constitutes a binding election of remedy and precludes federal court jurisdiction. In *Fekete v. United States Steel Corp.*, the court held:

> [P]laintiff (alleging discriminatory discharge) elected his remedy by proceeding under the union contract grievance procedure. He did not wait for the determination of his grievance arbitration before filing his charge with the EEOC, but he received his specific remedy under the Act by reinstatement and back pay through the arbitration award, which preceded the filing of this suit. We believe that this would be a bar to any cause of action based on the dismissal.

Other cases have taken the same position, that pursuing the grievance procedure to completion bars federal jurisdiction over the matter in controversy.  

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Two cases have held that pursuit of a remedy under the grievance machinery does not preclude court jurisdiction over the same matter. In *Dewey v. Reynolds Metals Co.*, the plaintiff pursued her grievance to arbitration and lost. When plaintiff filed a civil court action under Title VII, the court noted that the doctrine of election of remedies has traditionally been applied to cases where the same or nearly identical issues were being pursued in two fora. It went on to reason that when the arbitrator, being a "creature of the contract", hears a case, he considers the rights and duties created by the contract, but a Title VII court is limited to the provisions of Title VII. The issues and remedies involved, therefore, differ substantially. The court held that the arbitration award should not preclude the court's jurisdiction.

Recently the 7th Circuit affirmed the reasoning of *Dewey* in *Bowe v. Colgate-Palmolive Co.* Here the court said that the plaintiff could pursue both remedies simultaneously. He is not required to make a binding election of remedies until after adjudication. The court held:

[W]e hold that it was error not to permit the plaintiffs to utilize dual or parallel prosecution both in court and through arbitration so long as election of remedy was made after adjudication so as to preclude duplicate relief which would result in an unjust enrichment or windfall to the plaintiffs.

It would be incorrect, however, to say there is a trend in the cases considering the issue of election of remedies when the arbitration machinery is used to completion. The problem is created by a conflict of policies. One policy is to promote the use of grievance machinery but not to allow its use to defeat the grievant's statutory rights under Title VII. The other policy goal is not to require the defendant to defend, in two fora, essentially the same allegations. The *Dewey* Court stated the position of the liberal courts very well. It said:

When rights of this type are involved, the right to equal employment opportunity outweighs the interest of the company—defendant in avoiding the inconvenience and expense of multiple actions.

2. THE CIVIL COMPLAINT MUST BE TIMELY FILED

As has been stated supra, there are two basic prerequisites that must be satisfied before a civil action under Title VII can be brought. (1) The plaintiff must exhaust certain remedies. This has been discussed in

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34. 416 F.2d 711 (7th Cir. 1969).
35. Id. at 715.
36. 291 F. Supp. at 789.
Section 1. (2) The civil action must be timely filed. The latter prerequisite will be discussed in Section 2.

§ 706(e) states:

If within thirty days after a charge is filed with the Commission . . . . . such period may be extended to not more than sixty days upon a determination by the Commission that further efforts to secure voluntary compliance are warranted), the Commission has been unable to obtain voluntary compliance with this Title, the Commission shall so notify the aggrieved and a civil action may, within thirty days thereafter, be brought against the respondent named in the charge . . . .

A great many problems have arisen under § 706(e); it poses a substantial threat to the unwary. It was originally thought that an attempt by the EEOC to conciliate the charge was a jurisdictional prerequisite to bringing a civil action. Read literally, the language of § 706(e) reasonably leads one to this conclusion. But, the courts now agree that the plaintiff need only file a charge with the EEOC, thus giving the EEOC the opportunity to conciliate. If the EEOC makes no effort to conciliate, the plaintiff is in no way prejudiced.37

The plaintiff is required to get official notification from the EEOC that it either has had jurisdiction over the case for sixty days and has been unable to conciliate or that it has terminated its attempt to conciliate. Just as the state notification of termination of jurisdiction must be official,38 so also the EEOC "60 day letter" is the required official form of notification. If the plaintiff files a civil action before receiving official notification from the EEOC that it has not been able to conciliate the problem, the complaint will be dismissed.39

As has been mentioned, the EEOC charge must be filed within 90 days from the date of the alleged act of discrimination unless the state FEPC must first be contacted (in which event the plaintiff has 210 days to file his EEOC charge). The question has arisen in many cases whether the plaintiff is required to file his court action within 90 days from the date that he files his charge with the EEOC—60 days delay for EEOC action and 30 days thereafter to file the complaint.40

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38. See authority cited supra note 8.
40. Section 706(e) allows the EEOC sixty days to conciliate the claim. The argument made to the courts was that sixty days was the maximum amount of time allowed to the EEOC under
clear trend of judicial thought is that the Act imposes no mandatory period upon the EEOC in which it must act. Rather, § 706(e) has been interpreted to mean that the EEOC may take as much time as is necessary to conciliate the claim, but if the charging party desires, he may initiate a civil action after deferring to the EEOC for a minimum of sixty days. Anytime after sixty days has elapsed, the charging party may demand a "60 day letter" from the EEOC as official verification that the EEOC has had an opportunity for sixty days to conciliate the dispute and has been unsuccessful. The plaintiff's thirty days to file a civil suit begins to run, not at the end of sixty days from the filing of the EEOC charge, but rather, from the receipt of the "60 day letter."

If the plaintiff chooses to petition the court for appointment of counsel under § 706(e), he may preserve his right to file a civil suit without filing a complaint during the thirty days after receipt of the EEOC "60 day letter", if he files his petition for appointment of counsel within thirty days. Otherwise the 30 day requirement is satisfied if the civil complaint is filed with the Clerk of the Court within thirty days pursuant to Rule 3 of the Federal Rules of Civil Procedure.

The effect of the EEOC not finding probable cause to believe the respondent named in the charge committed the alleged unlawful

the statute. Therefore, the thirty days allowed the plaintiff to file his civil action begins to run sixty days after he files a valid complaint with the EEOC.


42. It was held in Grimm v. Westinghouse Elec. Corp., 300 F. Supp. 984 (N.D. Cal. 1969) that if after the charging party receives notification that the EEOC has found that there is no probable cause to believe an unfair employment practice has been committed, he petitions the EEOC to reconsider its adverse finding, the thirty day limitation period will not begin to run until the charging party receives final notification of the EEOC's ruling.


employment practice has generated much confusion and many conflicting district court decisions. It is now clear that, if after sixty days the EEOC has made no determination of the existence of probable cause, the charging party's rights are in no way affected. Federal jurisdiction does not depend on an EEOC finding of probable cause.\(^45\) When the EEOC finds there is no probable cause, the district courts have taken conflicting positions, some holding that such a finding precludes the district court from taking jurisdiction\(^46\) and some accepting jurisdiction notwithstanding the adverse finding by the EEOC.\(^47\)

Courts holding that an EEOC finding of no probable cause precludes the court from assuming jurisdiction reason as follows: § 706(e) conditions jurisdiction on an EEOC notification to the charging party of its inability to obtain voluntary compliance with the Act. Clearly when a claim is frivolous, the EEOC cannot seek to have the respondent named in the charge voluntarily comply with the Act and certainly will not be able to notify the charging party that the EEOC has been unable to effect voluntary compliance. Therefore, the jurisdictional prerequisite of § 706(e), these courts conclude, has not been satisfied.

The courts which accept jurisdiction notwithstanding an adverse finding by the EEOC reason that the EEOC's decision should not be binding on the court for three reasons: (1) The Act does not command such a result. § 706(e) conditions court jurisdiction on notification by the EEOC of its inability to conciliate the dispute. This means inability for any reason, including the failure to attempt conciliation.\(^48\) (2) The legislative history of the Act does not command that the court be


\(^48\) The cases cited at note 37 supra are instructive on this point. There the court held that if no conciliation is attempted the charging party's rights are not prejudiced. The act only requires an opportunity for voluntary compliance not a showing of efforts directed toward conciliations.
bound by an adverse EEOC ruling. The legislative history is inconclusive and gives little guidance. (3) Most importantly, the underlying policy of the Act commands that the charging party not be prejudiced by any action or inaction of the EEOC. The underlying premise of the enforcement policy of Title VII is that Title VII rights shall be ultimately enforced by private individuals, and the courts shall be the exclusive source of enforcement power. Therefore, the courts reason that to allow an EEOC finding to affect the substantive rights of the charging party would certainly give efficacy to a theory of administrative enforcement which is contrary to the above-stated policy.

The courts protect charging parties from being prejudiced by EEOC incompetence in many ways. As has been stated several times, the charging party is not penalized if the EEOC makes no attempt to conciliate. The charging party is not bound by an EEOC conciliation agreement unacceptable to him. One court has overturned EEOC guidelines which depart from Title VII policy. It would be inconsistent to preclude these EEOC rulings and findings from being binding on the court but to allow an EEOC finding of no probable cause to have the effect of completely destroying the charging party's substantive right to sue in federal court.

As there have been no Circuit Court decisions on the issue of the effect to be given an EEOC finding of no probable cause, and since the six district court cases that have ruled on the issue have split evenly, it is difficult to predict what rule will be accepted. The plaintiff's lawyer confronted with the problem should realize that the 4th, 5th, 7th and 9th Circuits have all taken the position when dealing in similar problems that EEOC acts or omissions should not be allowed to determine substantive rights of the accused. Courts in these circuits, at least, should be persuaded by the argument that the Title VII policy of private enforcement requires judicial determination of probable cause and an administrative determination is not binding.

49. See Miller v. Int'l Paper Co., 408 F.2d 283 (5th Cir. 1969).
50. See cases cited note 37 supra.
53. There is a recurring theme in the cases that the charging party's substantive rights should not be affected by EEOC action or omission. See, e.g., Cunningham v. Litton Indus., 413 F.2d 887 (9th Cir. 1969); Miller v. Int'l Paper Co., 408 F.2d 283 (5th Cir. 1969); Choate v. Caterpillar Tractor Co., 402 F.2d 357 (7th Cir. 1968); Jenkins v. United Gas Corp., 400 F.2d 28 (5th Cir. 1968); Johnson v. Seaboard Air Line R.R., 405 F.2d 645 (4th Cir. 1968); Carr v. Conoco Plastics, Inc., 295 F. Supp. 1281 (N.D. Miss. 1969), aff'd per curiam, ___ F.2d ___, 2 FEP Cases 388 (5th Cir. 1970); Noon v. Kaiser Steel Corp., ___ F. Supp. ___, 2 FEP Cases 65 (C.D. Cal. 1969); Sokolowski v. Swift & Co., 286 F. Supp. 775 (D. Minn. 1968).
The issue of whether a federal court is precluded from hearing allegations under Title VII because of a prior determination has arisen in two other contexts. In *Norman v. Missouri Pac. R.R.* the court held that a Black porter may utilize Title VII to vindicate alleged acts of employment discrimination, even though the same issue was previously decided adversely in an administrative procedure under the Railroad Labor Act. In *Stebbins v. State Farm Mutual Automobile Ins. Co.* the court held that the doctrine of res judicata precluded plaintiff from litigating a Title VII action because, in a prior action brought under Title VII, the court had dismissed the plaintiff's identical case under Rule 41(b) of the Federal Rules of Civil Procedure (failure to comply with an order of the court). The court held that the dismissal of the plaintiff's prior action under Rule 41(b) was res judicata because the procedural rule is that such a dismissal is to be viewed as an adjudication of the case on the merits.

**B. Other Procedural Hurdles**

1. **STANDING**

   **a. Labor unions as "persons aggrieved"**

   One of the first procedural questions to face the courts was the question of whether a union could be a "person aggrieved" and join individual members of the union in bringing a suit on behalf of all of the union members in a class-type action under Title VII. In an early case, one court held that a union could be a "person aggrieved" and join as a plaintiff on behalf of all union members. Other courts followed this lead and today it is fair to say that there can be little question that the rule is that unions may be "persons aggrieved" and may sue on behalf of all members of the union.

   **b. Class actions**

   The practice of bringing a class action in Title VII cases was not anticipated by the statute, but has been authorized by the courts. In *Oatis v. Crown Zellerbach Corp.*, the question was whether four

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54. 414 F.2d 73 (8th Cir. 1969).
55. 413 F.2d 1100 (D.C. Cir. 1969).
59. 398 F.2d 496 (5th Cir. 1968).
Black plaintiffs could file a suit seeking injunctive relief against a corporation and two local unions on behalf of themselves and all present and prospective Black employees as a class. The defendants argued that according to the Act, only persons who had filed charges with the EEOC were permissible plaintiffs. The court disagreed, however, finding it wasteful to require numerous employees, all with the same grievance, to file identical charges for EEOC investigation and conciliation. The court noted that discrimination is by definition directed against a class. What would be found true of one charge would be true of the others; no reason would exist for different results from conciliation attempts on any of the charges. The court thus held that a class action, complying with the requirements of Rule 23(a)(b)(2), may be brought on charges previously filed, with the EEOC, by one plaintiff. The holding in Oatis, supra, that a class action may be maintained on behalf of an individual who has exhausted remedies and also on behalf of others similarly situated who have not exhausted such remedies, when the remedy sought is solely a prohibitive injunction, has been followed in many other cases. What is less certain today is the extent to which, if it may do so at all, a court may fashion such individual remedies as reinstatement and award for back wages for unnamed members of the class who were not specifically the subjects of the charge filed with the EEOC and have not exhausted their administrative remedies.

Many courts have developed what has become a jurisdictional limitation when non-exhausting class members seek the remedies of reinstatement or back pay. As the court in Hall v. Werthan Bag Corp. stated

In regard to the injunctive relief sought in this case, . . . the purpose of the requirement of resort to the Commission has already been served. In regard to whatever back pay or reinstatement which might be sought as ancillary relief, however, the purpose of the administrative remedies requirement has been satisfied only as to Robert Hall [the employee who had filed with the Commission], for the Commission had not attempted conciliation in regard to


rectifying any alleged injuries which other Negro employees... may claim to have suffered as a result of the defendant's alleged discrimination.62

The rationale that the EEOC should be accorded an opportunity to conciliate each individual class member's charge prior to an action for reinstatement and back wages, even though such conciliation is held unnecessary as a prerequisite to the remedy of an injunction, has been followed by several other courts.63 These cases in effect make a distinction between remedying the existence of a discriminatory policy wherein injunctions will apply without the necessity of total class exhaustion and the effects of such discrimination, wherein the individual remedies of reinstatement and back pay may be granted only to exhausting class members.

Other cases have allowed non-exhausting members of the class to be awarded affirmative relief. Some require the person to be before the court at least, as an intervening plaintiff while others allow non-exhausting members of the class who are not before the court to be awarded back pay, reinstatement or other affirmative relief.65 These courts seem to be influenced by the arguments that (1) the EEOC has had a chance to conciliate since the composition of the class is limited to members similarly situated with the plaintiff who has exhausted his EEOC remedy, (2) the courts in Title VII actions have a responsibility to be flexible and model their decrees to ensure compliance with the Act, and (3) such a result is necessary because the public interest is vindicated through private litigation and this interest is served as much by relief through awards of back wages and

62. Id., at 188.
reinstatement to obscure class members as by issuance of an injunction. 68

The issue of the appropriate remedy for non-exhausting members of the class is still not conclusively decided. A basic conflict exists here, as it does in other areas under Title VII, between whether emphasis on voluntary compliance or emphasis on involuntary court orders is the procedure possessing the most promise in fulfilling the objectives of the Act. The first judicial battle occurred over the requirement of EEOC conciliation. Supporters of court enforcement won as set forth supra. To the extent that that battle indicates a trend, one could fairly predict that non-exhausting class members will be allowed affirmative relief in the future. Furthermore the above-stated three arguments will be among those found persuasive by the courts.

Another problem the class action has unveiled is the proper composition of the class for which the plaintiff is a fair representative. Here again the courts are in disagreement. Some courts hold that the plaintiff may represent only those who have claims identical to his. 69 Other courts permit a broader definition of the class. The courts hold that the plaintiff may represent all persons having claims reasonably related to the issues generated by the plaintiff’s charge. 70 This theory is particularly significant since it has also been held that the issues generated by plaintiff’s charge are not only those acts of discrimination which are directly injurious to him, but also those acts that will


potentially affect him.71 The class is defined as all those who have claims reasonably related to the issues generated by plaintiff's complaint. The issues generated by plaintiff's complaint are seen as all acts of discrimination which will potentially affect the plaintiff, thus broadly defining the scope of the issue generated by plaintiff's complaint. One can readily see that these two holdings, taken together, will have the effect of allowing the class to be broadly defined.

All that can be stated in the way of summary is that the district courts are in conflict. The only circuit which has taken a position is the 5th Circuit. Even the four 5th Circuit cases on point conflict, but it is now becoming clear that the 5th Circuit will broadly define the permissible composition of the class. Further definitive analysis of the judicial trend on this issue must necessarily await subsequent decisions from the other Circuits.

2. JURISDICTION OVER THE PERSON

a. Service of the EEOC charge upon the respondent

§ 706(a) directs the EEOC to serve a copy of the charge on the respondent named in the charge and to attempt thereafter conciliation if probable cause is found. As has been noted supra, the courts had to decide whether conciliation attempts by the EEOC were prerequisites for federal court jurisdiction. Now it is clear that they are not. Similarly, the courts have had to decide whether service of the charge on the respondent is a jurisdictional requirement to bringing an action in federal court. Although some cases have dismissed private action brought pursuant to § 706(d) when the defendant has never been served with a copy of the charge by the EEOC,72 there is authority that the EEOC's failure to serve a copy of the charge in no way affects the plaintiff's right to bring a private action after the plaintiff has waited the required 60 days.73 So few cases have been decided on the subject that no indication of a trend of judicial thought appears. The plaintiff's attorney should remember, however, the argument used in the cases on EEOC failure to attempt conciliation and EEOC finding of no probable cause, viz., that the EEOC inaction should not affect the rights of the charging party.74 The only clear position most of the

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74. Courts have stated in other contexts that there are only two jurisdictional prerequisites to bringing a federal suit. 1) Filing a timely complaint with the EEOC and 2) Receiving official
courts have taken is that if the EEOC is required to serve a copy of the charge on the respondent in order to create an opportunity to conciliate, there is no statutory time limit in which they must act.\textsuperscript{7} Since the charging party clearly has the right to demand a "60 day letter" 60 days after he has filed with the EEOC,\textsuperscript{76} and since the EEOC is nor required to serve a copy of the charge on the respondent within any specified time period or ever attempt conciliation, it would seem to follow that the courts should hold that the EEOC's failure to serve a copy of the charge on respondents does not affect the charging party's substantive rights.

b. \textit{Persons who need to be named in the EEOC charge}

A requirement that \textit{is} well settled and very dangerous for the plaintiff is that the plaintiff may sue only the respondent named in the EEOC charge.\textsuperscript{77} The underlying reason for this requirement is that the policy of Title VII is to give the EEOC an opportunity to conciliate the dispute.\textsuperscript{78} The EEOC can only conciliate with those named in the charge; to allow others to be subsequently sued would be to allow the plaintiff to bypass the EEOC. The thrust of this rule has a dual effect on the plaintiff. First he may be precluded from suing someone he neglected to charge; but if the person he neglected to name in the charge is an indispensable party, his failure to name that person in the charge will preclude him from suing someone he has named. Therefore, an action against a district union has been dismissed because the locals within the district were necessary parties and were not named in the charge.\textsuperscript{79} A suit against an employer has been dismissed because the

notification that they have had the charge for 60 days and have been unable to conciliate the dispute. \textit{See}, e.g., Cunningham \textit{v.} Litton Indus., 413 F.2d 887 (9th Cir. 1969); Dent \textit{v.} St. Louis S.F. Ry., 406 F.2d 399 (5th Cir. 1969); Choate \textit{v.} Caterpillar Tractor Co., 402 F.2d 357 (7th Cir. 1968); Logan \textit{v.} General Fireproofing Co., \textit{F. Supp.} \textit{F. Supp.} 2, FEP \textit{Cases} 107 (W.D. N.C. 1969).


76. \textit{See} cases cited supra note 42.


79. Local 329, ILA \textit{v.} South Atlantic District, ILA 295 F. Supp. 599 (S.D. Tex. 1968). \textit{See also} Spell \textit{v.} Local 77, IATSE, \textit{F. Supp.} \textit{F. Supp.} 71 LRRM 2811 (D. N.J. 1969) where the court held that an International Union was a necessary party in a suit brought against a Local
union was an indispensable party under Rule 19 and could not be joined because it was not named in the EEOC charge.\textsuperscript{80}

One way to avoid a dismissal for improper joinder as described \textit{supra} is to argue that the party not named is either the principal or agent of the party that was named. Naming the agent, for instance, created an opportunity for conciliation that necessarily affects the principal. This solution has been recognized in several cases\textsuperscript{81} but has only been successful in two.\textsuperscript{82}

3. \textbf{SUFFICIENCY OF THE COMPLAINT}

The courts have had to grapple with the problem of the degree of specificity required in Title VII actions to satisfy the requirement of Rule 8(a)(2), Federal Rules of Civil Procedure, that the complaint contain a “short and plain statement of the claim showing that the pleader is entitled to relief.” As has been noted above, the only trend in most of the issues that have arisen under Title VII is that the courts are in conflict. This issue is no exception. It is, therefore, difficult to know what specificity will be required in the plaintiff’s complaint.

In \textit{Edwards v. North American Rockwell Corp.}.\textsuperscript{83} the court dismissed the complaint under Rule 12(b)(6) of the Federal Rules because the plaintiff did not plead sufficient factual allegations of specific unlawful employment practices to satisfy the requirements of Rule 8(a)(2). Plaintiff had pleaded that she had been discriminated against because of her race (1) in being assigned to dangerous work and (2) by harassing supervisory techniques. The court found that these allegations were mere conclusions and Rule 8(a)(2) could be satisfied only by a “factual summary” of the alleged unlawful employment practices sufficient to give “fair notice to the opposite party of the precise nature of the claim.”\textsuperscript{84} Other courts have followed the reasoning of the \textit{Edwards} court in narrowly construing the requirement of Rule

\footnotesize{Union to have the membership requirements changed. The court held that since the membership requirement in question was in the International Union’s bylaws, the International was a necessary party. Fortunately for plaintiff, he had named the International Union in his charge to the EEOC.


84. \textit{Id.} at 213.
8(a)(2), at least when the plaintiff alleges that a pattern or practice of discrimination exists.\textsuperscript{85}

Some courts have refused to follow \textit{Edwards}. In \textit{Grimm v. Westinghouse Electric Corp.},\textsuperscript{86} the court held that the requirements of Rule 8(a)(2) were satisfied by a complaint that alleged that "on or about January 22, 1968, (sic) defendant willfully and intentionally violated 42 USCA Section 2000e-2 (a)(1) . . . in that said defendant did discharge plaintiff because of her sex, . . . ."\textsuperscript{87} The court in \textit{Grimm} specifically stated that the "requirement of \textit{Edwards} that the complaint contain a factual statement is therefore dictum at best and if not dictum then error."\textsuperscript{88} Several other courts have followed this more liberal construction of Rule 8(a)(2) in Title VII actions.\textsuperscript{89} Similarly, courts have followed a very liberal rule of sufficiency in motions for Summary Judgment for failure to state a claim upon which relief can be granted.\textsuperscript{90}

Although the trend in the federal courts has been toward liberalizing pleading requirements,\textsuperscript{91} it is apparent from some of the cases discussed \textit{supra} that the Title VII plaintiff may not rely on liberal pleading rules and, at least, must be aware of the risk he may run in some jurisdictions by not pleading substantial facts which precisely define the alleged unlawful employment practice.

4. SCOPE OF THE COMPLAINT

A very troublesome problem has been to decide what issues and allegations the plaintiff \textit{may} assert in his civil complaint. The general rule is that the plaintiff may assert only those issues in his civil action that were included in his EEOC charge. As is true with so many of the problems that have arisen under Title VII, this rule is easier to state than to apply. Courts that have ordered allegations struck from the complaint because they were not raised in the EEOC charge justified

\textsuperscript{86} 300 F. Supp. 984 (N.D. Cal. 1969).
\textsuperscript{87} Id. at 986.
\textsuperscript{88} \textit{Id. See 2A Moore's Federal Practice} 1692 (1968).
\textsuperscript{89} Jenkins v. United Gas Corp., 400 F.2d 28 (5th Cir. 1968); Aiken v. New York Times, \textit{F. Supp.}, 2 FEP Cases 64 (S.D. N.Y. 1969) (sufficient to claim that plaintiff has been denied a promotion because of his race); Everett v. Trans-World Airlines, \textit{F. Supp.}, 2 FEP Cases 74 (W.D. Mo. 1969); Banks v. Lockheed-Georgia Co., 46 FRD 442 (N.D. Ga. 1968) (must show that there is no set of facts that plaintiff could prove to entitle him to relief).
\textsuperscript{91} \textit{See} Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959).
the action because there can be no opportunity to conciliate claims that were never made to the EEOC. They state that the allegations of the suit must be the same as the allegations of the charge.\textsuperscript{92}

In \textit{King v. Georgia Power Co.} the court recognized that:

\begin{quote}
It appears that a large number of the charges with EEOC are filed by ordinary people unschooled in the technicalities of the Law. As stated in the brief filed by EEOC: "to compel the charging party to specifically articulate in the charge filed with the Commission, the full panoply of discrimination which he may have suffered may cause the very persons Title VII was designed to protect to lose that protection because they are ignorant of or unable to thoroughly describe the discriminatory practices to which they are subjected."\textsuperscript{93}
\end{quote}

The \textit{King} court adopted the rule that the scope of permissible issues that may be tried in federal courts is "\ldots discrimination like or reasonably related to the allegations of the charge and growing out of such allegations during the pendency of the case before the Commission."\textsuperscript{94} In \textit{Burney v. North American Rockwell Corp.}\textsuperscript{95} the court adopted a similar test. That court held that all alleged acts of discrimination of the same type and character as the discrimination charged in the EEOC charge are permissible allegations in a subsequent civil action.

Essentially the two factors that need to be balanced are (1) the desire not to defeat plaintiff's substantive rights by undue technicalities and (2) the policy of the Act that the EEOC should be given a chance to conciliate the dispute. The courts that allow all issues reasonably related to issues in the charge to be sued upon seem to fulfill both requirements. This broad test will not prey on the unwary layman who files a charge with the EEOC. It also guarantees that the EEOC will not be bypassed, for the EEOC attempts to conciliate not only the charges alleged but also other practices reasonably related to the alleged charge.\textsuperscript{96}

\textbf{C. Summary}

Before the plaintiff ever has a chance to argue the merits of his complaint, he is besieged by a myriad of procedural hurdles and

\begin{footnotes}
\item[94] \textit{Id.}
\item[96] \textit{Supra} note 93 at 946, n.2.
\end{footnotes}
pitfalls. At the minimum, where the law is clear, he must ensure that he avoids the obvious traps. More important, he must know where the law is unsettled and be doubly careful to comply not only with the literal meaning of the statute, but also with the sometimes harsh interpretations of some courts. It is the thesis of this section that the problems here discussed exist because, after almost five years, no judicial consensus yet exists on the issue of whether the goals of the Act are best solved by voluntary compliance or judicial coercion. The plaintiff's attorney must recognize that this is the underlying issue, because only then can he 1) begin to avoid some of the hazards and 2) make persuasive arguments for a more liberal construction.

This section has attempted to (1) highlight the danger areas, (2) indicate the trend of judicial thought where it has begun to emerge and (3) where there seems to be no trend, suggest policy arguments favorable to the plaintiff that may prove persuasive to uncommitted jurisdictions. Hopefully the plaintiff's counsel, being aware of the procedural hazards, will proceed with caution and, where possible, begin early in the administrative stage of the proceeding to avoid procedural mistakes.

III. Remedies

A. Appointment of Counsel and Attorney Fees

§ 706(e) authorizes the court to appoint an attorney for a plaintiff who cannot afford to hire counsel and authorizes the court to allow the plaintiff to proceed in forma pauperis. § 706(k) authorizes attorney fees as an element of recovery. Although court appointment of counsel and in forma pauperis petitions are clearly not "remedies" under the Act, they are dealt with in this section because they are closely related to recovery of counsel fees.

Very few cases have dealt with the issue of court appointment of counsel in Title VII cases. The few that have, follow fairly consistent criteria. First, the plaintiff's claim must appear meritorious. Therefore, the court will not appoint counsel if the EEOC has found no probable cause to believe an unlawful employment practice has taken place, and where there has been no such adverse finding, one court has refused to appoint counsel until the issues are joined in a civil action. This procedure allows the court to determine the probable merit of the


claim. Query whether a destitute plaintiff could ever obtain court-appointed counsel, if he must first show, in a civil action, after the issues are joined, that his claim is meritorious?

The second precondition to court appointment of counsel is that the plaintiff must establish that he has been unable to obtain counsel by any other method, including, a contingency fee arrangement. Since the plaintiff has only thirty days to file a civil action from the time he receives the EEOC "60 day letter", these requirements become burdensome unless the court holds that the 30 day limitation period is satisfied by the filing of the petition for court appointment of counsel. Nevertheless the two above stated requirements seem to represent the trend of judicial thought on the subject.

There is a split of authority over the issue of when attorney fees should be awarded as part of a plaintiff's recovery when the plaintiff fails to prove his own allegation of discrimination, but is successful on behalf of a class in enjoining a pattern or practice of discrimination. One view is that the plaintiff is entitled to no attorney fees in such a case. The other view is that the plaintiff is entitled to that portion of the attorney fees attributable to litigating the injunction of the pattern or practice. Where the plaintiff is successful in his own behalf, he may be awarded, as part of costs, reasonable attorney fees according to the guidelines established under 28 U.S.C. § 1920.

B. Injunctions

1. Preliminary Injunctions

§ 707(a) specifically authorizes the United States Attorney General to seek a preliminary injunction if he finds a pattern or practice of discrimination. Nowhere in the Act, however, are private parties specifically authorized to seek preliminary injunctions to enjoin alleged acts of discrimination. Nevertheless, some courts have issued a preliminary injunction as temporary individual relief. Where a


100. See cases cited supra note 43.


preliminary injunction is sought as individual relief, the plaintiff must act quickly to secure this injunction because it has been held that laches on the part of a Title VII plaintiff is an adequate ground for denying the injunction.\textsuperscript{105}

A critically important issue when considering preliminary injunctions is what needs to be shown to have a court issue a preliminary injunction in class actions. The plaintiff must first make a \textit{prima facie} showing of a pattern or practice of discrimination. Secondly, he must establish that irreparable damage will be done if the motion is not granted, but there is authority that irreparable damage will be presumed given a showing of a pattern or practice of discrimination.\textsuperscript{106} The plaintiff's counsel should therefore be aware of the possibility of obtaining a preliminary injunction merely upon the \textit{prima facie} showing that a pattern or practice of discrimination exists.\textsuperscript{107}

2. PERMANENT INJECTIONS

§ 706(g) specifically authorizes the court to enjoin the respondent from engaging in unlawful employment practice and authorizes the court to order such other affirmative action as may be appropriate. The courts have interpreted this authorization to justify sweeping permanent injunctions against respondents, especially labor unions, engaged in a pattern or practice of discrimination.\textsuperscript{108} The courts that have issued sweeping, broad-based injunctions have based the authority to do so on the premise that courts in Title VII actions have a duty to construe broadly the grant of authority of § 706(g) and must use their discretion and imagination to frame remedies that will ensure compliance with the provisions of Title VII.\textsuperscript{109}


C. Jury Trials

Parties in Title VII actions have often requested a jury trial on the issues of back pay under § 706(g). In the five decisions that have been addressed to this question, back pay has been held an equitable remedy, for which a jury trial is not required by the Act or by the Seventh Amendment.110

D. EEOC Enforcement Power

The courts have ruled on several occasions that the EEOC does not have the power to initiate actions under Title VII. It does have the authority under § 706(i), however, to insure compliance with an order made by a district court in a private Title VII action by initiating compliance suits in federal district courts.111

E. Title VII As The Exclusive Remedy

1. Post civil war civil rights statutes—42 U.S.C. § 1981112

16 Stat. 144, 42 U.S.C. § 1981 [hereinafter cited as § 1981] guarantees, among other things, the right of all persons to make and enforce contracts to the same extent as white citizens. § 1981 has been used to bring damage actions arising out of employment discrimination. When the defendant has been an officer or agent of the state or has acted under color of state law, the courts have had little trouble applying § 1981 to authorize an action for damages and injunctive relief.113

The great question that remains unanswered is whether § 1981 can be used to redress private employment discrimination. Several courts have answered this question in the negative either because they have concluded that Title VII was intended to be the exclusive remedy

for employment discrimination\footnote{114} or because § 1981 is based on the 14th Amendment and therefore only applies to “state action”.\footnote{115} Some courts have denied recovery under § 1981 for both of the above-stated reasons.\footnote{116} Two courts have permitted recovery under § 1981 to redress private employment discrimination.\footnote{117} These decisions follow the reasoning of Jones v. Alfred H. Mayer Co.\footnote{118} that the post-civil-war civil rights statutes (of which 42 U.S.C. § 1981 is one) are based on rights protected by the 13th Amendment. Therefore, certain private discrimination is prohibited by the Acts. The Mayer case is a 1968 case. The question raised but not answered in Clark v. American Marine Corp.\footnote{119} is whether employment discrimination that occurred prior to 1968 can be remedied by application of § 1981. In other words, if the Mayer case is extended to apply to § 1981, will it be applied retroactively to employment discrimination that occurred prior to 1968?

Application of the post-civil-war civil rights statutes to redress private discrimination is still in the developing stages. The plaintiff’s counsel should be aware of the potential usefulness of § 1981, but also must be aware of the lack of acceptance it has received in some private employment discrimination cases.

2. EXECUTIVE ORDERS

One of the few rules in the area of employment discrimination that is well settled is the effect of Presidential Executive Orders prohibiting racial discrimination in employment by government contractors. The rule is clear that these executive orders do not create a private remedy to redress employment discrimination. Enforcement is delegated to administrative agencies under procedures outline in the Order.\footnote{120}


3. FEDERAL LABOR RELATIONS ACT

In sharp contrast to the settled state of the law on the question of the effect of Presidential Executive Orders is the state of the law on the question of the effect of Title VII on court enforcement of nondiscrimination rights guaranteed under Federal Labor Relations Acts. It has been held that one must exhaust his Title VII remedy before suing the employer and union under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1964), for breach of the collective bargaining agreement.¹²¹ It has also been held that Title VII and the Railroad Labor Act are independent of one another and the redress of rights guaranteed by one does not depend on exhaustion of rights under the other.¹²² It has been held that allegations of failure of a union's duty of fair representation is within the exclusive jurisdiction of the National Labor Relations Board, and therefore a member may not seek to remedy the union's discrimination against him through Title VII.¹²³ Exactly the opposite has also been held.¹²⁴

It would be futile indeed to attempt to discover the prevailing view regarding the effect of Title VII on other Federal Labor Laws. It is suggested that the better view is to allow each to exist independent of the other. This gives the employee the maximum opportunity to redress an alleged act of discrimination. With so many procedural traps under Title VII, the chance of having one's claim dismissed is substantial. It is in the public interest, therefore, to allow several possible avenues of redress to (1) mitigate the harshness of a procedural dismissal under Title VII and (2) ensure that no equal employment right created by one statute becomes illusory because of another statute, designed to extend equal employment opportunity. To give a narrow effect to an equal employment statute would be to injure the very people the statutes are designed to help.

Roger C. Hartley

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