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# Is a Delayed Result a Just Result? The Use of Laches as an Equitable Defense to Remedial Back Pay Under the EEOC's Sovereignty

## **Erratum**

corrected header

# IS A DELAYED RESULT A JUST RESULT? THE USE OF LACHES AS AN EQUITABLE DEFENSE TO REMEDIAL BACK PAY UNDER THE EEOC'S SOVEREIGNTY

Ruth Ann Mueller<sup>+</sup>

Unlike private litigants, the Equal Employment Opportunity Commission (EEOC) does not face a statute of limitations when litigating claims for alleged Title VII violations.<sup>1</sup> Instead, the EEOC can file suit against an employer, and recover for both an individual's private claim and the broader public interest affected by the individual's claim, many years after the alleged discrimination occurred.<sup>2</sup> This freedom causes practical implications for employers, such as record retention issues, impaired memory of employees, and witness unavailability.<sup>3</sup> These factors greatly lengthen the amount of time between filing the claim and case dismissal, which can increase the amount of back pay to be pursued against an employer.<sup>4</sup> Without a firm time bar, employers tend to resort to the time-honored equitable defense of laches.<sup>5</sup> This Note explores whether an employer may raise this defense as a matter of law and overcome the presumption that laches cannot be used against the arm of the sovereign, specifically when the EEOC pursues back pay as a remedy.<sup>6</sup>

Title VII of the Civil Rights Act of 1964, as amended by the Employment Opportunity Act of 1972 ("Title VII" or "Act"), prohibits an employer from discriminating based on race, sex, national origin, or religion.<sup>7</sup> In 1972,

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1. See generally 42 U.S.C. § 2000e-2 (2012) (exhibiting that the plain language of the statute does not contain a statute of limitations); *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 360 (1977).

2. See Mary Lynn Kelly, *Preventing Trial by Ambush: The Laches Defense in Title VII Suits*, 8 REV. LITIG. 227, 228 (1989).

3. E.g., *EEOC v. SWMW Mgmt., Inc.*, No. CV-08-0946-PHX-GMS, 2009 WL 1097543, at \*10 (D. Ariz. April 22, 2009).

4. See Kelly, *supra* note 2, at 230–31.

5. E.g., *SWMW Mgmt.*, 2009 WL 1097543, at \*15–16 n.2.

6. See Kelly, *supra* note 2, at 233–34.

7. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (2012).

It shall be an unlawful employment practice for an employer to [1] fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or [2] to limit, segregate,

Congress delegated enforcement authority to the EEOC.<sup>8</sup> This delegation did not include a definitive statute of limitations for the EEOC to initiate claims against a private employer.<sup>9</sup> Congress remedied the recovery issue by amending the statute in 1991 to include recovery by a complaining party, which includes both private employees and the EEOC, for compensatory and punitive damages.<sup>10</sup>

Because federal agencies face large caseloads with limited resources and the types of cases presented under the Act require meticulous review of an employer's practices, as well as an investigation of employee and witness-employee testimony, alleged unreasonable delay often occurs between a discrimination cause of action and the EEOC filing suit.<sup>11</sup> The EEOC protects the overall societal right to freedom from discrimination, and may be exempt from facing the laches defense under sovereign immunity.<sup>12</sup> Despite this, some courts have allowed the use of laches against the EEOC by reviewing the facts

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or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

§ 2000e-2(a).

8. Wesley Kobylak, *Laches or Other Assertion of Untimeliness As Defense To Action Under Title VII of Civil Rights Act of 1964* (42 U.S.C.A. §§ 2000e et seq.) brought by the Equal Employment Opportunity Commission, 67 A.L.R. Fed. 381, § 2[a] (1984).

9. *Id.* § 3[a]. Having a statute of limitations creates a stable and clear understanding of the deadline for when a suit must be filed. See *Tandy Corp. v. Malone & Hyde, Inc.*, 769 F.2d 362, 365 (6th Cir. 1985).

10. 42 U.S.C. §§ 1981a(a)(1), (d)(1)(A). "[T]hese statutes unambiguously authorize the EEOC to obtain the relief that it seeks in its complaint if it can prove its case against [the] respondent." *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 287 (2002). There are limits on compensatory and punitive damages depending on the size of the employer:

Compensatory damages pay victims for out-of-pocket expenses caused by the discrimination (such as costs associated with a job search or medical expenses) and compensate them for any emotional harm suffered (such as mental anguish, inconvenience, or loss of enjoyment of life). Punitive damages may be awarded to punish an employer who has committed an especially malicious or reckless act of discrimination. . . . For employers with 15-100 employees, the limit is \$50,000. For employers with 101-200 employees, the limit is \$100,000. For employers with 201-500 employees, the limit is \$200,000. For employers with more than 500 employees, the limit is \$300,000.

*Remedies for Employment Discrimination*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <https://www.eeoc.gov/employees/remedies.cfm> (last visited Mar. 15, 2018).

11. *E.g.*, *Costello v. United States*, 365 U.S. 265, 281 (1961); *EEOC v. Marquez Bros. Int'l, Inc.*, No. 1:17-CV-44 AWI-EPG, 2018 WL 3197796, at \*6-7 (E.D. Cal. June 26, 2018). The website for the U.S. Equal Employment Opportunity Commission lists the general time requirements for filing discrimination actions. See generally *Time Limits For Filing A Charge*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <https://www.eeoc.gov/employees/timeliness.cfm> (last visited Mar. 15, 2018).

12. See Kobylak, *supra* note 8, § 2[a], § 3[d].

through the lens of a private individual's cause of action against a defendant employer.<sup>13</sup>

The use of laches in the United States has roots in the courts of equity in England, where a defendant could assert an affirmative defense against a dated claim.<sup>14</sup> It is traditionally established by a two-prong test: unreasonable delay and material prejudice to the defendant.<sup>15</sup> Although the defense of laches is predominately utilized in private, equitable suits, there is less certainty in its use against the federal agencies in the United States.<sup>16</sup> Case law generally follows the English proposition that laches cannot be used against the king (or sovereign).<sup>17</sup> Alternatively, some courts have interpreted the availability of the use of laches against the United States government and administrative agencies

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13. *Id.* § 3[c].

14. 30A C.J.S. *Equity* § 6 (2018); *see generally* 30A C.J.S. *Equity* § 4 (2018) (“[W]hen a court exercises its equity powers . . . a court’s duty is to do complete justice between the parties to the action.”). The equitable courts within the United States are “remedial,” not “inquisitorial.” *Id.* Therefore, their purpose is not to create a cause of action. *Id.* “A court of equity moves upon [the] considerations of conscience, good faith, and reasonable diligence.” *Whittington v. Dragon Grp., LLC*, 991 A.2d 1, 8 (Del. 2009) (quoting *Reid v. Spazio*, 970 A.2d 176, 183 (Del. 2009)).

15. *See Kobylak, supra* note 8, § 3[a].

16. *See* 30A C.J.S. *Equity* § 147 (2018).

Thus, in the context of a defense based on laches, delay is not a bar unless it works to the disadvantage or prejudice of other parties. Where no one has been harmed in any legal sense and the situation has not materially changed, the delay is not fatal. Thus, even where impermissible delay is present under the circumstances presented, if the delay has not prejudiced the party asserting the laches defense, it will not bar the equitable action. Furthermore, a party cannot assert the defense of laches if he or she actually benefited from the delay.

*Id.* (citations omitted).

17. Charles Alan Wright et al., *Litigation Advantages of the United States*, 14 FED. PRAC. & PROC. JURIS. § 3652 (4th ed. 2017).

The rule *quod nullum tempus occurrit regi*—that the sovereign is exempt from the consequences of its laches, and from the operation of statutes of limitations—appears to be a vestigial survival of the prerogative of the Crown . . . . But whether or not that alone accounts for its origin, the source of its continuing vitality where the royal privilege no longer exists is to be found in the public policy now underlying the rule even though it may in the beginning have had a different policy basis . . . . “The true reason . . . is to be found in the great public policy of preserving the public rights, revenues, and property from injury and loss, by the negligence of public officers. And though this is sometimes called a prerogative right, it is in fact nothing more than a reservation, or exception, introduced for the public benefit, and equally applicable to all governments.” Story, J., in *United States v. Hoar*, C.C.D.Mass.1821, 26 Fed.Cas. p. 329, 330, No. 15373. Regardless of the form of government and independently of the royal prerogative once thought sufficient to justify it, the rule is supportable now because its benefit and advantage extend to every citizen, including the defendant, whose plea of laches or limitation it precludes; and its uniform survival in the United States has been generally accounted for and justified on grounds of policy rather than upon any inherited notions of the personal privilege of the king.

*Id.*

based on the EEOC's protection of private rights.<sup>18</sup> The question is whether the EEOC acts in the place of the private individual when litigating on his or her behalf, or in the position of the U.S. government as the sovereign who carries enforcement authority. The issue of back pay for an employee continues to fall between the line of a private individual's right and the collective rights of workers protected by the EEOC.

This Note will first discuss the process an individual follows when filing a complaint with the EEOC and how many procedural deadlines do not affect the EEOC's right to sue an employer. Part II discusses the general use of laches against the United States government and how its adoption from English common law occurred. Part III discusses the significance and timeliness that the availability of laches has upon the relationship between the EEOC, private employees, and private employers. Part IV analyzes how courts determine the availability of laches, which scenarios give cause to assert laches against the EEOC, and how an inadequate employer defense could increase back pay liability.

#### I. HOW AN EMPLOYEE'S PRIVATE TITLE VII CHARGE BECOMES A PUBLIC ISSUE

Although the statute does not provide for a specific limitation period for the EEOC to file suit against an employer, *private litigants* must comply with specific deadlines as a condition to bringing suit under the Act.<sup>19</sup> An aggrieved employee must file a charge with the EEOC within 180 days from the day that discrimination took place.<sup>20</sup> The EEOC then serves notice upon the employer within ten days of the employee's charge.<sup>21</sup> This is merely a deadline to provide notice of the charge and is not a bar against the EEOC from filing a subsequent lawsuit.<sup>22</sup>

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18. See generally *Martin v. Consultants & Adm'rs, Inc.*, 966 F.2d 1078, 1100–01 (7th Cir. 1992) (Posner, J., concurring); *Wright et al.*, *supra* note 17 (“Some lower courts have questioned whether the Government's immunity from the defense of laches should be confined to core sovereign functions, and not extended to suits involving the enforcement of federal programs that involve commercial matters, such as loans and mortgages.”). *But see Guar. Trust Co. v. United States*, 304 U.S. 126, 132–33 (1938).

[T]he rule . . . that the sovereign is exempt from the consequences of its laches, and from the operation of [federal] statutes of limitations [survives on the ground of public policy rather than of royal prerogative and is] deemed an exception to local statutes of limitations where the government . . . is not expressly included . . . .

*Id.*

19. See *Time Limits for Filing a Charge*, *supra* note 11.

20. *Id.*

21. *What You Can Expect After a Charge is Filed*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <https://www.eeoc.gov/employers/process.cfm> (last visited Mar. 15, 2018).

22. *Id.*

The EEOC may conduct an investigation to determine if “reasonable cause [exists] to believe that the [employee’s] charge is true . . . .”<sup>23</sup> This decision occurs no later than 120 days from filing the charge.<sup>24</sup> If, after this initial investigation, the EEOC determines that reasonable cause does not exist, the EEOC will issue an administrative dismissal.<sup>25</sup> A notice of administrative dismissal is sent to both the employer and employee; a right-to-sue letter for administrative dismissals accompanies an employee’s dismissal notice.<sup>26</sup> If reasonable cause exists, the EEOC will pursue “informal methods of conference, conciliation, and persuasion” before filing a lawsuit.<sup>27</sup> Essentially, the EEOC must give the employer the opportunity to reach a resolution with the agency before resorting to the courts.<sup>28</sup> If conciliation does not occur, the EEOC can bring forth a lawsuit anytime “thirty days after the filing of the charge.”<sup>29</sup> If a party’s charge is not dismissed, settled, or litigated by the EEOC within 180 days after the initial charge filing, the employee may pursue a private action.<sup>30</sup> Therefore, a private litigant does not lose the ability to file a lawsuit despite a failed conciliation or time period expiration.<sup>31</sup>

The EEOC’s ability to sue an employer for Title VII claims rests within its sovereign power as a federal agency, and is not based upon whether a private litigant initiates a complaint.<sup>32</sup> Although an employer can use the aforementioned deadlines and procedures as a guideline to potential scenarios when defending Title VII lawsuits, the EEOC, in the position of the sovereign, retains the right to sue an employer at any time.<sup>33</sup>

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23. 42 U.S.C. § 2000e-5(b) (2012); see Kelly, *supra* note 2, at 229 (quoting § 2000e-5(b)).

24. See Elinor A. Swanson, *A Textualist Approach to Title VII: Aggrieved Individuals May Bypass The EEOC*, 32 HOFSTRA LAB. & EMP. L.J. 345, 352 (2015); Kelly, *supra* note 2, at 229.

25. See 29 C.F.R. § 1614.017(a)(1)(2016). An agency must dismiss a claim that: fails to state a claim under 29 CFR § 1614.03 or 29 CFR § 1614.106(a), or “states the same claim that is pending before or has been decided by the agency or the Commission.” *Id. Preserving Access to the Legal System: Common Errors By Federal Agencies In Dismissing Complaints of Discrimination on Procedural Grounds*, EEOC 4–5 (Sept. 15, 2014), <https://www.eeoc.gov/federal/reports/dismisssals.cfm#II>.

26. *What You Can Expect After a Charge is Filed*, *supra* note 21.

27. See Kelly, *supra* note 2, at 229–30; see *What You Can Expect After a Charge is Filed*, *supra* note 21.

28. *What You Can Expect After a Charge is Filed*, *supra* note 21.

29. Kelly, *supra* note 2, at 229.

30. *Id.* at 229–30.

31. *Id.*

32. See *What You Can Expect After a Charge is Filed*, *supra* note 21.

33. See *Filing a Lawsuit*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, <https://www.eeoc.gov/employees/lawsuit.cfm> (last visited Mar. 15, 2018) (explaining that the EEOC enjoys the discretion as to if and when to bring a lawsuit).

## II. DISAGREEMENT OVER SOVEREIGN CAPACITY LEADS TO UNCERTAINTY OVER LACHES USE

### *A. Adoption of Laches and Its Two Prongs Within United States Courts*

The rule that the king is not bound by a statute of limitations extends from the English common law relationship between the sovereign and the public.<sup>34</sup> In adopting this ideal, the United States Supreme Court found that “[i]t was deemed important that, while the sovereign was engrossed by the cares and duties of his office, the public should not suffer by the negligence of his servants.”<sup>35</sup> Courts have steadfastly adopted this rule in the United States, adhering to the idea that the sovereign “cannot be expected to look over each individual citizen because his duty is to the population as a whole,” and “the [sovereign] should not be penalized for the negligence of his officers.”<sup>36</sup> Courts have found it to be good policy in restricting use of laches against the government because the sovereign protects the public good.<sup>37</sup> In the past thirty years, courts have loosened this rule in varying situations.<sup>38</sup> Judicial leaders, such as Judge Richard Posner, have stated, “[G]overnment suits in equity are subject to the principles of equity, laches is generally and we think correctly assumed to be applicable to suits by government agencies as well as by private parties.”<sup>39</sup>

Under United States law, the party who asserts the affirmative defense of laches carries the burden of proof with respect to unreasonable delay and material prejudice to the employer.<sup>40</sup> Unreasonable delay begins when a party knows (or should have known) about the defendant’s actions and continues until the plaintiff actually files suit against the defendant.<sup>41</sup> Prejudice is never

34. *Guar. Tr. Co. v. United States*, 304 U.S. 126, 132 (1938) (“But whether or not that alone accounts for its origin, the source of its continuing vitality where the royal privilege no longer exists is to be found in the public policy now underlying the rule even though it may in the beginning have had a different policy basis.”).

35. *United States v. Thompson*, 98 U.S. 486, 489 (1879).

36. An Nguyen, Note, *It’s About Time: Reconsidering Whether Laches Should Lie Against the Government*, 2015 U. ILL. L. REV. 2111, 2128 (2015).

37. *Id.* at 2129.

38. *United States v. Admin. Enters., Inc.*, 46 F.3d 670, 673 (7th Cir. 1995). In this case, the Seventh Circuit advised that laches may be used against the government in “suits against the government in which . . . there is no statute of limitations” or the government’s enforcement of “what are the nature of private rights . . .” *Id.*

39. *NLRB v. P\*IE Nationwide*, 894 F.2d 887, 894 (1990).

40. See Kobylak, *supra* note 8, § 3[a].

41. *Id.*; see HENRY THOMAS BANNING, *THE LAW OF THE LIMITATIONS OF ACTIONS: TOGETHER WITH SOME OBSERVATIONS ON THE EQUITABLE DOCTRINE OF LACHES (OR DELAY) AND ACQUIESCENCE* 229 (3d ed. 1906) (“It is an accepted maxim of equity, that delay defeats equitable rights (5); and even a comparatively short delay, which is not satisfactory accounted for, tells heavily against a plaintiff . . .”).

There is no absolute rule as to what constitutes laches, and each case must be determined according to its own particular circumstances. In other words, the question of laches is addressed to the sound discretion of the court. Since laches is an equitable doctrine, its

assumed, and the party who asserts the defense carries the burden of proof with respect to these two prongs.<sup>42</sup> Ultimately, “[t]he mere passage of time will not give rise to an inference of prejudice . . .” because there must be a “resultant injury or prejudice by reason of the delay, or a change in the condition of the property or relations of the parties rendering it . . . .”<sup>43</sup>

### *B. The Beginning of Judicial Sidestepping Around Laches Use*

The United States affirmatively considered the use of laches against the sovereign in *Costello v. United States*.<sup>44</sup> Frank Costello, an illegal bootlegger, applied for citizenship in 1925.<sup>45</sup> Costello fraudulently indicated that he worked in real estate both on his naturalization application and to his naturalization examiner.<sup>46</sup> Costello admitted to a government agent in 1938 that he engaged in illegal bootlegging between 1923 and 1931.<sup>47</sup> Costello admitted his involvement in the conspiracy on two separate occasions before a grand jury in 1939 and again in 1943.<sup>48</sup> The United States filed suit against Costello in 1952, and subsequently revoked his citizenship in 1959.<sup>49</sup>

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application is controlled by equitable considerations. Laches cannot be invoked to defeat justice, and it will be applied where, and only where, the enforcement of the right asserted would work injustice.

30A C.J.S. *Equity* § 142 (2018).

42. 30A C.J.S. *Equity* § 147 (2018).

43. *Id.*; *Guar. Tr. Co. v. United States*, 304 U.S. 126, 132 (1938); *see Irwin v. Dep’t of Veteran Affairs*, 489 U.S. 89, 98 (1990) (“Not only is the Court’s holding inconsistent with our traditional approach to cases involving sovereign immunity, it directly overrules a prior decision by this court.”). *See also* RESTATEMENT (SECOND) OF JUDGMENTS § 74 (1982).

The relevant factors in denying relief to which an applicant is prima facie entitled include undue delay, possible prejudice to the winner of the judgment, and protection of interests of innocent third persons. Undue delay and prejudice to the judgment winner merge into each other. While delay in assertion of a claim does not as such produce adverse consequences, it can induce a sense of repose that itself may become a protectable interest. Correlatively, the likelihood and extent of reliance on a judgment, or of change in conditions, increases as time passes after the judgment’s rendition.

*Id.* *See generally* BANNING, *supra* note 41, at 231–232.

“Standing by” is a specific laches,—although it is, more usually, a species of acquiescence: And the effect of it, where the position of the defendant has been materially altered as a consequence of it, will be to prevent the plaintiff’s equitable right from being enforceable . . . . In every case, it must be remembered, that the fraudulent conduct continues valid until the plaintiff has elected to avoid it . . . .

*Id.*

44. 365 U.S. 265, 281 (1961); *see also Kelly*, *supra* note 2, at 235.

45. *Costello*, 365 U.S. at 267.

46. *Id.*

47. *Id.* at 273.

48. *Id.*

49. *Id.* at 266.

Costello argued that the twenty-seven year delay between his filing for citizenship and the government's suit against him prejudiced his defense.<sup>50</sup> Whether or not undue delay occurred in the proceeding, the Court held that Costello did not experience prejudice due to the delay.<sup>51</sup> Rather, the Court decided that any probable prejudice would burden the government rather than Costello by bringing the suit twenty-seven years later and thus, diminishing the memories of the United States' witnesses.<sup>52</sup>

Ultimately, the Court rejected Costello's use of laches.<sup>53</sup> Despite a willingness to open the door to Costello's laches defense, the Court did not affirmatively decide whether laches could be used against the government since Costello could not satisfy laches' two-prong requirements.<sup>54</sup>

*C. The Use of Laches Against the EEOC's Right to Litigate on Behalf of the Public Interest in EEOC-Initiated Cases*

The guiding case with respect to laches and EEOC-initiated cases is *Occidental Life Insurance Co. v. EEOC*.<sup>55</sup> The EEOC sued an insurance company that discriminated against an employee under Title VII.<sup>56</sup> It filed suit more than three years after the employee filed a complaint with the EEOC and more than five months after conciliation efforts between the parties ended.<sup>57</sup> The issue before the court was whether a state statute of limitation could be invoked to limit the amount of time the EEOC had to bring forth a claim.<sup>58</sup>

The Court held that there is not a mandatory 180-day limit upon the EEOC to bring forth a Title VII suit.<sup>59</sup> Rather, the Court determined the statute allows an initiating party whose claim has not been dismissed, settled, or litigated by the EEOC to bring forth a lawsuit after the 180 days.<sup>60</sup> Within this holding, the Court determined that state statute of limitations cannot be used to limit the time

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50. *Id.* at 268.

51. *Id.* at 282–83.

52. *Id.* at 283.

53. *Id.* at 281, 284.

54. *Id.* at 281–84.

55. 432 U.S. 355, 355–57 (1977). *See* *Lyons P'ship, L.P. v. Morris Costumes, Inc.*, 243 F.3d 789, 798 (4th Cir. 2001) (“Consequently, when considering the timeliness of a cause of action brought pursuant to a statute for which Congress has provided a limitations period, a court should not apply laches to overrule the legislature’s judgment as to the appropriate time limit to apply for actions brought under the statute.”). *But see* *Guar. Tr. Co. v. United States*, 304 U.S. 126, 132–33 (1938) (stating “[t]he rule that the sovereign is exempt from the consequences of its laches, and from the operation of [federal] statutes of limitations . . .” survives on the ground of public policy rather than of royal prerogative and is “deemed . . . an exception to local statutes of limitations where the government . . . is not expressly included . . .”).

56. *Occidental Life Ins. Co.*, 432 U.S. at 358.

57. *Id.* at 357–58.

58. *Id.*

59. *Id.* at 361.

60. *Id.*

that the EEOC may take to bring an enforcement action, nor is there any time limit the EEOC must follow.<sup>61</sup> Such a limitation would hinder the policy that requires Title VII claims to be both investigated and potentially resolved by the EEOC before litigation, and also would contradict congressional intent.<sup>62</sup>

The Court determined that defendants would not be subjected to unfairness or prejudice by an “artificial” limitation period,<sup>63</sup> reasoning that:

The absence of inflexible time limitations on bringing of lawsuits will not, as the [defendant] asserts, deprive defendants in Title VII civil actions of fundamental fairness or subject them to surprise and prejudice that can result from the prosecution of stale claims . . . [However,] when a Title VII defendant is in fact prejudiced by a private plaintiff’s unexcused conduct of a particular case, the trial court may restrict or even deny back pay relief. The same discretionary power “to locate [ ]a just result’s in light of the circumstances peculiar to the case,” can also be exercised when the EEOC is the plaintiff.<sup>64</sup>

In *United States v. Administrative Enterprises, Inc.*,<sup>65</sup> Judge Posner laid out several possible solutions to the use of laches against the government.<sup>66</sup> One solution was to limit its use to suits that protected a private, rather than a public right.<sup>67</sup> Posner previously toyed with this idea in *Martin v. Consultants & Administrators, Inc.*<sup>68</sup> *Martin* represents a scenario where a federal agency (Department of Labor) may protect both private and public rights, but the dispute at issue does not affect the agency’s sovereignty (individual fund claims), and must be analyzed as if the claim involved private litigants.<sup>69</sup> Specifically, the trustees of a health and welfare fund argued that the DOL’s suit against them regarding the “viability of certain claims” for specific individuals’ retirement accounts were barred by laches.<sup>70</sup> The trustees cited *Occidental Life Insurance Co.* to show that courts have loosened the laches rule in regard to the EEOC when litigating on behalf of an individual’s rights.<sup>71</sup> The trustees analogized this argument to individual funded claims, rather than government funded claims within its own fund.<sup>72</sup>

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61. *Id.* at 368–69.

62. *Id.*

63. *Id.* at 364.

64. *Id.* at 372–73.

65. 46 F.3d 670 (7th Cir. 1995).

66. *Id.* at 672–73; *see* *United States v. Mack*, 295 U.S. 480, 489 (1935) (“Laches within the term of the statute of limitations is no defense at law.”).

67. *Admin. Enters., Inc.*, 46 F.3d at 673.

68. 966 F.2d 1078, 1100–01 (7th Cir. 1992).

69. *Id.* at 1100.

70. *Id.* at 1082–83.

71. *Id.* at 1090.

72. *Id.*

The trustees argued, and the court agreed, that the lawsuit affected the employees' private rights because the dispute rested within individual employee funds.<sup>73</sup> As Judge Posner stated:

In an ERISA suit . . . the invoking of laches to bar the government's suit would not take money out of the U.S. Treasury or interfere with the government's operations. It would not even deprive the government of a financial expectancy. Any money it won in this case would be paid into the pension plans against which the defendants committed a breach of trust.<sup>74</sup>

Although courts and judicial leaders continue to wrestle with the EEOC's balance between public and private rights, the Supreme Court last tackled the issue in-depth in the 2002 ruling of *EEOC v. Waffle House*.<sup>75</sup> Here, the EEOC filed suit for victim-specific relief under the Americans with Disabilities Act, which receives its enforcement procedures from Title VII when enforcing employment discrimination.<sup>76</sup> The Court reviewed whether the EEOC could pursue victim-specific relief from an employer after the charging employee signed an arbitration agreement with the employer.<sup>77</sup>

The Court recognized the changes of enforcement power from the aforementioned 1991 amendments to the statute.<sup>78</sup> The Court disagreed with the lower court's view that only when the EEOC seeks "broad" relief does the "public interest" overcome private interest goals.<sup>79</sup> Rather, the Court held that

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73. *Id.*

74. *Id.* at 1101.

75. 534 U.S. 279, 284–85 (2002).

76. *Id.* at 282; 42 U.S.C. § 12117(a) (2012).

The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.

*Id.*; see BANNING, *supra* note 41, at 229 ("It is an accepted maxim of equity, that delay defeats equitable rights (5); and even a comparatively short delay, which is not satisfactory accounted for, tells heavily against a plaintiff . . .").

77. *Waffle House*, 534 U.S. at 282.

78. *Id.* at 287. See 42 U.S.C. § 1981a(a)(1).

In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 [42 U.S.C. 2000e-5, 2000e-16] against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act [42 U.S.C. 2000e-2, 2000e-3, 2000e-16], and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

*Id.*

79. *Waffle House*, 534 U.S. at 290.

the EEOC's strong policy enforcement considerations do not limit the remedies available to the EEOC.<sup>80</sup> The validity of the EEOC's claims for such remedies, or the type of relief sought when such private agreements are signed, remains an open issue.<sup>81</sup>

### III. THE REVIEW OF LACHES AND ITS EFFECT ON THE RELATIONSHIP BETWEEN THE EEOC, PRIVATE EMPLOYEES, AND PRIVATE EMPLOYERS FOLLOWS CURRENT JUDICIAL CONCERNS

#### *A. Higher Court Action Demonstrates Laches' Timeliness in Federal Cases*

Minimal guidance can be found in other areas of law with respect to EEOC-initiated Title VII cases.<sup>82</sup> In *SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC*, the Supreme Court reviewed the extent to which laches can be used in patent infringement cases and how that may affect ongoing relief, such as damages.<sup>83</sup> The Court held that laches cannot be an affirmative defense under the Patent Act's six-year limitations period.<sup>84</sup> Unlike Title VII claims, Congress codified limitations periods within the patent statutes, and therefore parties to these cases do not face the same uncertainty as the EEOC and private employers with respect to laches.<sup>85</sup>

A more appropriate analogy may be found in the United States' denaturalization caseload. Similar to Title VII claims, there is no statute of limitations when litigating denaturalization cases. The Ninth Circuit recently addressed the issue in this context in *United States v. Arango*.<sup>86</sup> Fernando Arango, a fraudulent green card holder, argued that the United States knew about his involvement in a green card marriage fraud conspiracy, yet waited twenty years until filing suit against him.<sup>87</sup> The Ninth Circuit did not affirmatively address the issue of laches because Arango failed to prove "lack of diligence by

80. *Id.* at 292–93. *But see id.* at 298 (Thomas, J., dissenting) ("Absent explicit statutory authorization . . . I cannot agree that the EEOC may do on behalf of an employee that which an employee has agreed not to do for himself.").

81. *Id.* at 297 ("It is an open question whether a settlement or arbitration judgement would affect the validity of the EEOC[ . . . ]").

82. *See generally* *SCA Hygiene Prods. Aktiebolag, v. First Quality Baby Prods., LLC*, 137 S. Ct. 954, 959 (2017); *United States v. Arango*, 686 F. App'x. 489, 491 (9th Cir. 2017).

83. *SCA Hygiene Prods. Aktiebolag*, 137 S. Ct. at 965–66.

84. *Id.* at 967. The Court considered the following question: "Whether and to what extent the defense of laches may bar a claim for patent infringement brought within the Patent Act's six-year statutory limitations period, 35 U.S.C. § 286." Dennis Crouch, *Supreme Court to Review (and likely Reject) Laches as a Defense in Patent Infringement Cases*, PATENTLYO (May 2, 2016), <http://patentlyo.com/patent/2016/05/supreme-defense-infringement.html>.

85. *See* 35 U.S.C. § 286 (2012) ("Except as otherwise provided by law, no recovery shall be had for any infringement committed more than six years prior to the filing of the complaint or counterclaim for infringement in the action.").

86. 686 F. App'x 489, 490 (9th Cir. 2017).

87. Brief for Appellee at 7, *United States v. Arango*, No. 10-15821, 2010 WL 6753360 (9th Cir. Dec. 29, 2010).

the government” at the trial court.<sup>88</sup> Alternatively, the Sixth Circuit held in *United States v. Mandycz* that laches may not be used in denaturalization cases “[b]ecause the United States act[s] in its sovereign capacity when it [seeks] to denaturalize [a plaintiff] . . . .”<sup>89</sup> Unlike Title VII cases, where an administrative agency holds enforcement power, there is little question that the United States is acting as the sovereign when it denaturalizes an individual.

*Occidental Life Insurance Co.* remains the key case for analysis purposes. Unfortunately, for guidance sake, the question presented before the Court in *Occidental Life Insurance Co.* did not address a laches defense, unlike *Costello*.<sup>90</sup> Without a firm ruling on laches in employment discrimination cases, the aforementioned cases only add to the analysis, rather than provide a clear-cut answer, to the availability of laches an employer may possess for Title VII relief in the EEOC context. This lack of guidance leaves plaintiffs and defendants with mid-twentieth century case law pitted against late twentieth and early twenty-first century employment scenarios.

#### *B. Employers Should Use Costello Evidentiary Deficiencies Against Ongoing Relief*

Generally, disagreements over laches use begin when an individual timely files a complaint with the EEOC and chooses to wait for the EEOC to finalize its administrative processes, or decides to delay suit past the minimum 180-day waiting period.<sup>91</sup> More often than not, the reason for delay in these cases is the EEOC’s claim backlog.<sup>92</sup>

Employers who are defending stale claims often wrestle with the same evidentiary deficiencies analyzed in *Costello* that accompany the passage of time, such as documents destroyed in the ordinary course of business or unavailability of witnesses that naturally arises from employee turnover.<sup>93</sup> Private individuals defending delay on EEOC backlog grounds tend to be successful when they are able to prove that the EEOC was active during the administrative waiting game, rather than dormant or rendering “dilatatory tactics.”<sup>94</sup> “Mere passage of time” is not an indicator, but case law shows that under these fact patterns, suits filed even eight years after the initial complaint

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88. *Arango*, 686 F. App’x. at 490; e.g., *United States v. Dang*, 488 F.3d 1135, 1143–44 (9th Cir. 2007) (“It remains an open question in this circuit as to whether laches is a permissible defense to a denaturalization proceeding.”).

89. *United States v. Mandycz*, 447 F.3d 951, 964 (6th Cir. 2006).

90. *Compare Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 357 (1977) with *Costello v. United States*, 365 U.S. 265, 281–82 (1961).

91. *Kobylak*, *supra* note 8, §§ 4–5.

92. *Id.* §§ 4, 6.

93. *Id.* § 3c.

94. Eric Matusewitch, *If You Snooze You May Lose: Courts Are Ruling on Laches Defense*, 12 NO. 16 ANDRES EMP’T LITIG. REP. 3 (1998); *Kobylak*, *supra* note 8, § 3c.

can be considered reasonable.<sup>95</sup> When cases of dormancy or “dilatatory tactics” are proven, however, employers generally have been able to show prejudice due to the delay because of lack of witnesses and destroyed records due to in-place record retention policies.<sup>96</sup> EEOC-initiated cases have found similar arguments, but less determinative outcomes.<sup>97</sup>

*C. The EEOC Must Continue to Rely on Occidental Life Insurance Co. for a Sound Sovereign Defense*

In addition to *Costello*, district and appellate courts continually use the guiding principle from *Occidental Life Insurance Co.* when deciding laches use against the EEOC in EEOC-initiated cases, despite the Court in *Occidental Life Insurance Co.* not definitely handling a laches argument.<sup>98</sup> When analyzed against *Costello*, these rulings provide a narrow window to interject a laches defense without sovereign immunity questions.<sup>99</sup> Courts have permitted the use of laches against the EEOC despite potentially “protecting a public right” under these fact patterns. However, none have set a threshold that must be met in order to properly establish a laches defense against the EEOC.<sup>100</sup>

Ultimately, the EEOC still functions as an arm of the United States government, and carries the presumption of sovereign rule; an employer’s defense must jump over this hurdle. As long as there are few *Costello* deficiencies, the EEOC should be able to protect its ability to reasonably pursue back pay for the public good.

IV. HOW A FAILED LACHES DEFENSE CAN INCREASE AN EMPLOYER’S BACK PAY LIABILITY

One of the more daunting prejudicial factors faced by an employer due to a prolonged delay is increased monetary liability.<sup>101</sup> Back pay is the total lost earnings an employee incurs, including, but not limited to, “compensation or salary, overtime, premium pay and shift differentials, incentive pay, raises bonuses, lost sales commissions, cost-of-living increases, tips, medical and life insurance, fringe benefits, and pensions, stock awards and options.”<sup>102</sup> The EEOC can pursue back pay under the “Make Whole Relief” doctrine, as

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95. Kobylak, *supra* note 8, §§ 3a, 3d, 6.

96. *Id.* § 3c.

97. *Id.* § 3d.

98. *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 360 (1977); *see, e.g.*, *EEOC v. UPS*, No. 15-CV-4141, 2017 WL 2829513, at \*31 (E.D.N.Y. June 29, 2017) (discussing how some courts might have found exceptions to the laches rule under *Occidental* and Title VII).

99. *Compare Costello v. United States*, 365 U.S. 265, 281 (1961) *with Occidental Life Ins. Co.*, 432 U.S. at 374 (Rehnquist, J., dissenting).

100. Kobylak, *supra* note 8, § 5.

101. *Id.* §§ 3b, 3d.

102. *U.S. Department of Labor DIR 2013-04*, DEP’T OF LABOR 2 (July 17, 2013), <https://www.dol.gov/ofccp/regs/compliance/directives/dir310.pdf>.

characterized by the Department of Labor, for both victim-specific relief (Individual Relief) as well as class-wide relief without facing the class action requirements under Rule 23 of the Federal Rules of Civil Procedure.<sup>103</sup> A remedy under the “Make Whole Relief” doctrine restores a victim or victims to the position that they would have occupied if the discrimination did not take place.<sup>104</sup> Generally, the EEOC can pursue back pay with interest under this approach.<sup>105</sup> Back pay is within the equitable discretion of the court, and, while it may not result in a finding of material prejudice, that “does not eliminate the availability of the laches defense” based on the totality of prejudicial circumstances.<sup>106</sup>

The EEOC’s discretion allows it to work for the collective workers’ interests (i.e., the public interest) in regards to a particular discrimination charge.<sup>107</sup> Although this enforcement of a public right could close the door on an employer’s laches defense outright, courts have found more difficulty in a clear response.<sup>108</sup> The narrower focus of laches’ use against prejudicial back pay renders limited, yet beneficial, advice for employers when facing a growing number of individuals that the EEOC could assert a lawsuit on behalf of over an undetermined number of years.<sup>109</sup> Prejudice must be confined to the discriminatory allegation at hand, generalized prejudice may still occur despite documentary hurdles, but that is not enough for the remedy.<sup>110</sup>

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103. EEOC v. SMWM Mgmt., Inc., No. CV-08-0946-PHX-GMS, 2009 WL 1097543, at \*19 (D. Ariz. April 21, 2009); Gen. Tel. Co. of the Nw., Inc. v. EEOC, 446 U.S. 318, 326 (1980) (“When the EEOC acts, albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination.”).

104. *U.S. Department of Labor DIR 2013-04*, *supra* note 102, at 3.

105. *Id.*

106. Kobylak, *supra* note 8, § 2[a]; Smith v. Caterpillar, Inc., 358 F.3d 730, 735 (7th Cir. 2003).

107. See United States v. R.I. Dep’t of Corr., 81 F. Supp. 3d 182, 185 (D.R.I. 2015):  
[W]hen a Title VII defendant is in fact prejudiced by a private plaintiff’s unexcused conduct of a particular case, the trial court may restrict or even deny [back pay] relief . . . The same discretionary power to locate a just result in light of the circumstances peculiar to the case, can also be exercised when the EEOC is the plaintiff.

*Id.* at 192 n.12.; BANNING, *supra* note 41, at 229 (“It is an accepted maxim of equity, that delay defeats equitable rights (5); and even a comparatively short delay, which is not satisfactory accounted for, tells heavily against a plaintiff . . .”).

108. See *e.g.*, EEOC v. Alioto Fish Co., 623 F.2d 86, 88–89 (9th Cir. 1980).

109. *E.g.*, EEOC v. Jacksonville Shipyards, Inc., 696 F. Supp. 1438, 1440–41 (M.D. Fl. 1988) (“Because of [the EEOC’s] representative role, the defense of laches is sometimes available against [it,] although laches is not available against the United States when it is acting in its sovereign capacity to enforce a public right or protect a public interest.”); EEOC v. Autozone, Inc., 258 F. Supp. 2d 822, 824–26 (W.D. Tenn. 2003). The court decided not to limit back pay to 300 days before the filing of the discrimination charge. *Autozone*, 258 F. Supp. 2d at 832.

110. See 30A C.J.S. *Equity* § 4 (2018).

A. *There is No Definitive Threshold for Undue Delay*

The substantive reasons for a particular delay on behalf of the EEOC have found more traction for establishing the unreasonable delay prong than the length of time between action and filing, specifically during the conciliation and investigatory pre-lawsuit phases.<sup>111</sup> Substantive backlog issues and lengthy delay tend to persuade courts to find for this first prong.<sup>112</sup> District Courts continue to split on the issue of whether a delay is substantive enough, with minimal Circuit Court guidance.

A lawsuit initiated five years after alleged discrimination may dangle between a finding for or against unreasonable delay.<sup>113</sup> In *EEOC v. Jacksonville Shipyards, Inc.*,<sup>114</sup> the court found a five-year delay between alleged discrimination and lawsuit initiation excusable because the EEOC deferred the case to a separate agency to conduct an audit.<sup>115</sup> The court refused to find unreasonable delay because the claim remained active, even though audit deferment may not be the type of movement an employer considers reasonable.<sup>116</sup> Alternatively, in *EEOC v. Autozone*,<sup>117</sup> more than a five-year delay between the EEOC initial claim and lawsuit filing occurred. Here, the actual duration between alleged action and lawsuit tipped the court in favor of the defendant.<sup>118</sup> The court reviewed the case as three separate time periods with three separate delay assessments.<sup>119</sup> The first segment, a two-and-half year period, consisted of the EEOC's review of the applicant material and on-site inspections.<sup>120</sup> The second segment, less than one year, consisted of two separate settlement conferences.<sup>121</sup> Neither of these two periods exerted the unreasonable delay needed for laches.<sup>122</sup> The third segment of the five-year period, which lasted less than two years, represented the most viable area where unfair delay may be imposed because conciliation efforts ended between the parties.<sup>123</sup> The court found in favor of unreasonable delay during this period because the EEOC neither presented a substantive backlog argument nor cited separate agency review of the documents.<sup>124</sup>

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111. See generally 30A C.J.S. *Equity* § 145 (2018).

112. E.g., *Autozone*, 258 F. Supp. 2d at 826.

113. Kobylak, *supra* note 8, § 3[c].

114. 696 F. Supp. 1438 (M.D. Fl. 1988).

115. *Id.* at 1440.

116. *Id.*

117. 258 F. Supp. 2d 822 (W.D. Tenn. 2003).

118. *Id.* at 826–27.

119. *Id.* at 827.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

The actual duration between events corresponds to an individual's back pay calculation.<sup>125</sup> Even when narrowly reviewing the right to back pay, courts tend to require more than mere durational accounts of general prejudice.<sup>126</sup> In *EEOC v. Alioto Fish Ltd.*,<sup>127</sup> the Ninth Circuit found that an administrative delay that caused a sixty-two month delay between charge filing and lawsuit filing naturally caused "substantial[] prejudice[] [to Alioto] in its defense of claims for back pay."<sup>128</sup> Similarly, one court granted summary judgment to the employer in *EEOC v. Peterson, Howell, & Heather, Inc.*<sup>129</sup> after a sixty-three month delay during the investigatory and conciliation stages.<sup>130</sup> The court reasoned:

During . . . administrative delays, the back pay meter has been running, thus exposing the defendants to greater pecuniary losses . . . [T]he EEOC has dealt defendants [with] a double-fisted blow. The passage of time has hindered the defendants in their ability to prevail on the merits while at the same time inflating the potential damages defendants face if they do not prevail.<sup>131</sup>

The undue delay required for laches should also stem from the EEOC itself, not any extraneous entities. In one of the few guiding Circuit Court decisions, the Fourth Circuit found that the trial court in *EEOC v. Navy Federal Credit Union* abused its discretion when it found in favor of the employer due to a four-year delay during the EEOC's investigatory phase of a Title VII retaliation claim.<sup>132</sup> The EEOC cited the delay due to a "lack of diligence" by an independent agency charged with specific investigatory tasks.<sup>133</sup> The defendant argued that the EEOC and the separate entity formed an agency relationship, placing liability on the EEOC.<sup>134</sup> Rather, the Fourth Circuit held that the autonomous relationship between the two agencies cannot surmount to the type of undue delay required for laches against the EEOC.<sup>135</sup> In this scenario, the EEOC cannot be responsible for an independent agency's idleness.

*Occidental Life Insurance Co.* permitted judicial discretion between unreasonable and reasonable delay in order to provide a "just result."<sup>136</sup> As the arm of the sovereign, the EEOC rightly has the power to enforce Title VII,

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125. *U.S. Department of Labor DIR 2013-04*, *supra* note 102, at 2.

126. *See generally infra* notes 127–135.

127. 623 F.2d 86 (9th Cir. 1980).

128. *Id.* at 88–89.

129. 702 F. Supp. 1213 (D. Md. 1989).

130. *Id.* at 1221, 1228.

131. *Id.* at 1224.

132. *EEOC v. Navy Fed. Credit Union*, 424 F.3d 397, 411 (4th Cir. 2005).

133. *Id.* at 409.

134. *Id.* at 409–10. In discussing the differences between the two agencies, the Fourth Circuit discussed how "deferral agencies" under Title VII "operate with substantial independence" despite potentially sharing "primary responsibility to enforce the civil rights laws." *Id.*

135. *Id.* at 411.

136. *See Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 373 (1977).

despite a vague balancing act between unreasonable and reasonable delay.<sup>137</sup> The “double fisted blow” back pay relief can cause when assessing laches availability likely falls under *Occidental Life Insurance Co.*’s intent when allowing judicial discretion.<sup>138</sup> So long as the facts satisfy laches’ material prejudice prong, *Occidental Life Insurance Co.* leaves room to allow a “just result” that neither steps on the EEOC’s jurisdiction nor hinders an employer’s ability to fairly defend against an unreasonable back pay calculation.<sup>139</sup>

*B. When Courts Refuse to Address Back Pay “Head On” Without Discovery*

When concrete examples of material prejudice are unavailable, employers may find more difficulty in obtaining what may be seen as a “just result” in limiting back pay through laches.<sup>140</sup> In *EEOC v. SWMW Management*,<sup>141</sup> the defendant argued that undue delay occurred throughout the EEOC’s investigatory and conciliation effort stages, ultimately causing “unfair[] accentuated potential monetary damages.”<sup>142</sup> The employer cited difficulty in locating key witnesses, corporate structure changes, and high turnover of employees, including those employees in charge of record retention policies.<sup>143</sup> However, the employer did not establish a firm link between these factors and any actual prejudice as the court found these conditions existed before the filing of the discrimination charge.<sup>144</sup> The court did not address the back pay issue head on, despite being one of the defendant’s main arguments, because neither side presented substantial evidence for the court to resolve the matter.<sup>145</sup>

Similarly, the court in *EEOC v. PBM Graphics, Inc.*<sup>146</sup> found the employer’s concern about monetary liability “premature” as neither party had yet conducted discovery.<sup>147</sup> The employer had cited specific examples of witness unavailability after a six-year delay.<sup>148</sup> However, because PBM Graphics could not discuss exactly what evidence was needed from the witnesses, or why affidavits from other employees were not sufficient, the court could not balance potential prejudicial factors against the apparent delay due to EEOC backlog.<sup>149</sup> Only two of the twelve employees at issue remained with the company.<sup>150</sup> The

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137. See 42 U.S.C. § 12117(a) (2012); see also *Occidental Life Ins. Co.*, 432 U.S. at 360.

138. See *Occidental Life Ins. Co.*, 432 U.S. 355 at 373.

139. See 42 U.S.C. § 12117(a).

140. *Occidental Life Ins. Co.*, 432 U.S. 355 at 360.

141. No. CV-08-0946-PHX-GMS, 2009 WL 1097543 (D. Ariz. April 22, 2009).

142. *Id.* at \*14 n.2.

143. *Id.* at \*10.

144. *Id.* at \*11.

145. *Id.* at \*21.

146. 877 F. Supp. 2d 334 (M.D.N.C. 2012).

147. *Id.* at 367.

148. *Id.* at 364.

149. *Id.* at 367.

150. *Id.* at 365.

court agreed that the employer was prejudiced, just not exactly *how* it had been prejudiced.<sup>151</sup>

Courts came to similar conclusions in *EEOC v. Lockheed Martin Global Telecommunications, Inc.*<sup>152</sup> and *EEOC v. Jetstream Ground Services, Inc.*<sup>153</sup> Although the court found that back pay could arguably be “the most prejudicial aspect” of the EEOC’s delay in *Lockheed Martin Global Telecommunications*, the court ordered discovery to allow the EEOC to develop its case theory more thoroughly.<sup>154</sup> Back pay may have been prejudicial to *Jetstream Ground Services, Inc.*, but the employer pointed to no other authority “which indicates that this factor alone suffices to show prejudice . . . .”<sup>155</sup> Ultimately, an employer cannot rest on duration alone in order to effectively meet the burden of unreasonable delay against the EEOC.<sup>156</sup> An employer must specifically define the type of prejudice exerted by the delay, otherwise broad prejudice will not suffice.<sup>157</sup>

### *C. Record Retention Policies and Faded Memories are Not Enough to Limit Back Pay*

One of the biggest effects of laches against employees is the effect of delay on an employer’s routine, record retention policies, and unavailability of witnesses.<sup>158</sup> Employers generally do not keep records past a certain time period due to both procedure and storage constraints. The EEOC requires employers to retain personnel and employment records for at least one year, including records for terminated employees.<sup>159</sup>

In industries with excessive turnover, such as transportation, packaging, and shipping services, a delay of even one year may render prejudice.<sup>160</sup> Because “mere passage of time” is not a threshold, courts continue to question how undue

151. *Id.* at 367–68.

152. 514 F. Supp. 2d 797 (D. Md. 2007).

153. 134 F. Supp. 3d 1298 (D. Colo. 2015).

154. *Lockheed Martin Glob. Telecomm.*, 514 F. Supp. 2d at 805; *see* *EEOC v. Am. Nat’l Bank*, 574 F.2d 1173, 1176 (4th Cir. 1978) (Back pay must be “considered after the facts have been fully developed, if the commission ultimately prevails.”).

155. *JetStream*, 134 F. Supp. 3d at 1333 (“[B]ecause backpay is an equitable remedy and subject to mitigation, the Court has the discretion to take the EEOC’s delay into account when fashioning a remedy.”).

156. *See* Kelly, *supra* note 2, at 228, 230–31.

157. *Id.* at 228–30.

158. *See* *EEOC v. Dresser Indus., Inc.*, 668 F.2d 1199, 1203 (11th Cir. 1982) (“Perhaps the greatest disagreement between the parties concerns the loss of records.”).

159. *Recordkeeping Requirements*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, <https://www.eeoc.gov/employers/recordkeeping.cfm> (last visited Mar. 14, 2018) (“Regulations require that employees keep all personnel or employment records for one year. If an employer is involuntarily terminated, his/her personnel records must be retained for one year from date of termination.”).

160. *E.g.*, *Dresser Indus., Inc.*, 668 F.2d at 1204.

delay may factor into employer fairness, ultimately affecting litigation fairness for both employer and employee.<sup>161</sup> The need for witnesses must be narrowly confined to the discriminatory allegation at hand. Prejudice may still occur despite these various hurdles, but general prejudice is not enough for an equitable remedy.<sup>162</sup>

A telling example where an employer provided specific examples of witness availability as a prejudicial factor occurred in *EEOC v. Dresser Industries, Inc.*<sup>163</sup> In *Dresser*, the employer provided affidavits demonstrating the unavailability of witnesses.<sup>164</sup> Both the manager of quality control and inspection supervisor died during the pendency of litigation, and the employer last heard of the plant manager leaving the country and heading to Libya.<sup>165</sup> Because these three individuals possessed pertinent information no other member of Dresser Industries could preserve, the court ruled in favor of the employer.<sup>166</sup>

*Dresser* also argued that, while it preserved documentation in regard to the charging employee's personnel records, it did not keep any additional records past its internal five-year retention policy.<sup>167</sup> The court did not fault the employer, determining that "[o]nce the [employer] satisf[ied] the EEOC's record retention requirement . . . they should not be punished for failing to exceed standards mandated by the very Commission that promulgated them."<sup>168</sup>

Alternatively, the court and an employer may differ on how instrumental a witness may be to a laches defense. The employer in *PBM Graphics, Inc.* cited specific examples of witness unavailability after a six-year delay.<sup>169</sup> Of the twelve employees at issue, only two remained with the company.<sup>170</sup> Of the management officers, two had died.<sup>171</sup> Only one upper-management employee remained with the company during the time period in question.<sup>172</sup> Because the EEOC had not fully developed its case, which could shift the burden of proof

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161. See *EEOC v. Radiator Specialty Co.*, 610 F.2d 178, 183 (4th Cir. 1979) ("[G]eneralized allegation[s] of harm from the passage of time does not amount to a showing of prejudice.").

162. *Id.*

163. 668 F.2d 1199, 1200 (11th Cir. 1982) ("The tortoise-like speed with which the [EEOC] handled the enforcement action of this Title VII case has cost it the race.").

164. *Id.* at 1203.

165. *Id.*

166. *Id.* at 1201.

167. *Id.* at 1204.

168. *Id.*

169. *EEOC v. PBM Graphics, Inc.*, 877 F. Supp. 2d 334, 365–66 (M.D.N.C. 2012); see *Dresser Indus., Inc.*, 668 F. 2d at 1200–04.

170. *PBM Graphics, Inc.*, 877 F. Supp. 2d at 365.

171. *Id.*

172. *Id.* at 366.

from the government to the employee, it was unclear how witness unavailability specifically affected the employer.<sup>173</sup>

PBM Graphics unfortunately relied on the *Dresser* employer's more specific witness need theory.<sup>174</sup> The question of discriminatory hiring and firing in *Dresser* rested on an individual hiring manager's actions and recollections.<sup>175</sup> PBM Graphics did not cite a specific need for any of the eight upper management employees, only relying on the prejudice of time that left one remaining management position employee available.<sup>176</sup> Although the court did not decide on a threshold, it did call prejudice a "threshold issue" in differentiating witness need from *Dresser*.<sup>177</sup>

Evidence that no one at the company was present during the discriminatory acts is also concrete evidence of prejudice, and a deceased employee inherently causes testimony issues.<sup>178</sup> As analyzed by the court in *EEOC v. Martin Processing, Inc.*, two employees may be in charge of a charging party's hiring and alleged discriminatory firing, and if one is deceased, there are clearly testimonial issues that may hinder an employer's defense.<sup>179</sup> However, when none of the current supervisors had any connection with the employment of the charging employees, the employer cannot cite specific evidentiary prejudice.<sup>180</sup> If an employer cites a deceased witness, but the deceased witness's testimony is neither crucial and can be "replaced" by crucial, living witnesses, the court will rule against prejudice.<sup>181</sup>

The Fourth Circuit faced the opportunity to calm confusion regarding witness and record retention policies in *EEOC v. Propak Logistics, Inc.*,<sup>182</sup> but left the availability of the use of laches as an affirmative defense at the trial level.<sup>183</sup> The EEOC initiated the lawsuit against Propak six and a half years after a former employee filed a discrimination claim.<sup>184</sup> Specifically, the claim stated that Propak discriminated against a class of non-Hispanic individuals at one of its North Carolina facilities.<sup>185</sup> The district court ruled in favor of the defendant's motion for summary judgment, stating, "there were significant periods when the EEOC took little or no action toward completing the investigation."<sup>186</sup> The court

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173. *Id.* at 366–67.

174. *Id.* at 367–68.

175. *Id.*

176. *Id.* at 365–66.

177. *Id.* at 366–68.

178. *E.g.*, *EEOC v. Martin Processing, Inc.*, 533 F. Supp. 227, 230–32 (W.D. Va. 1982).

179. *Id.* at 230–32.

180. *Id.* at 230.

181. *Id.* at 232–33.

182. 746 F.3d 145, 147 (4th Cir. 2014).

183. *Id.* at 150.

184. *Id.* at 148.

185. *Id.*

186. *Id.* at 149.

stated that the defendant experienced prejudice because certain key witnesses were no longer available, and, if they were available, would encounter “faded memories” of the events at question.<sup>187</sup>

Additionally, personnel records had been destroyed in accordance with Propak’s routine of destroying personnel files after a certain time.<sup>188</sup> The Fourth Circuit ruled against the EEOC on procedural grounds, and did not discuss the availability of the use of laches because the EEOC abandoned the argument when it abandoned a prior summary judgment order.<sup>189</sup> The Fourth Circuit affirmed the lower court’s ruling in favor of the defendant’s request for attorney fees.<sup>190</sup> Under the clear error standard of review, the Fourth Circuit failed to state the trial court clearly erred with regard to the laches argument.<sup>191</sup>

*D. Employers Cannot Depend on EEOC Backlog to Stop Back Pay Damages from Accruing*

An employer’s reality in minimizing the ticking back pay clock in pursuit of a laches defense rests on the fact that the hybrid public and private rights the EEOC asserts predominately rest in its sovereign foundation.<sup>192</sup> Defendants cannot rely on the EEOC’s administrative delays, whether in the conciliation process or even pre-litigation phase, to automatically halt back pay.<sup>193</sup> Neither does an employer have firm case law to determine if a court will decide laches on either public sovereign grounds or private grounds based on loose thresholds.<sup>194</sup> Although there is minimal case law of laches use in light of *Waffle House*’s holding, the issue *Waffle House* presents within “public” Title VII enforcement leaves open the door to higher monetary damages with an unknown judgment date.<sup>195</sup>

When asserting a laches defense against the EEOC, the employer does not know whether or not they are defending against a public or private entity.<sup>196</sup> An employer can, however, follow two paths. First, an employer should analyze the specific prejudicial factors as described above in determining if laches is the

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187. *Id.*

188. *Id.* at 149–50.

189. *Id.* at 152–53.

190. *Id.* at 153.

191. *Id.*

192. *EEOC v. Martin Processing*, 533 F. Supp. 227, 229–30. (W.D. Va. 1982).

193. *See e.g., Propak Logistics*, 746 F.3d at 148; *EEOC v. PBM Graphics, Inc.*, 877 F. Supp. 2d 334, 365 (M.D.N.C. 2012); *EEOC v. SWMW Mgmt., Inc.*, No. CV-08-0946-PHX-GMS, 2009 WL 1097543, \*6–7 (D. Ariz. April 22, 2009).

194. *See e.g., Propak Logistics*, 746 F.3d at 151–52; *PBM Graphics, Inc.*, 877 F. Supp. 2d at 368–69; *SWMW Mgmt., Inc.*, 2009 WL 109753, at \*14 n.2.

195. *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 295–98 (2002) (finding that the EEOC acts as more than just a “proxy” when litigating on behalf of an employee).

196. *United States v. Admin. Enters., Inc.*, 46 F.3d 670, 673 (7th Cir. 1995).

appropriate remedy.<sup>197</sup> The causal link between faded memories, lost witnesses, and lost documents must strongly correlate to the present prejudice an employer faces; a court will easily cut the cord to this defense if this does not exist.<sup>198</sup>

More importantly, an employer cannot self-inflict prejudice.<sup>199</sup> Record-retention policies must be crafted in a way that both follows the EEOC's requirements, but that also accounts for inevitable litigation that any employer could face, and the inevitable pre-litigation time period backlog may produce.<sup>200</sup> A subpoena could appear almost seven years after the initial EEOC filing, initiating potential prejudice under the second prong of laches.<sup>201</sup>

It is impractical for an employer to keep years upon years of employee records, especially when it is more common for employees to sign arbitration agreements that limit back pay of a private individual.<sup>202</sup> Although arbitration agreements are not the focus of this Note, *Waffle House's* open issue does affect, for better or for worse, a laches defense.<sup>203</sup> Without clear-cut prejudicial evidence, an employer should present its case against the EEOC as it would against the United States litigating in its sovereign capacity.

## VI. CONCLUSION

The judicial discretion of a "just result" a court may prescribe an employer fails to rely on a guiding principle.<sup>204</sup> Whether the EEOC acts as an entity protecting private rights or as the arm of the sovereign government in discrimination cases remains to be decided by the courts.<sup>205</sup> Both employers and employees remain in limbo and both are stuck relying on the judicial opinions of past discrimination cases and constitutional scholars who abstractly debate an entity's sovereignty. The use of laches in this context, or other acts where Congress imposes no statute of limitations, may easily be cemented by either

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197. See e.g., *EEOC v. Autozone, Inc.*, 258 F. Supp. 2d 822, 826 (W.D. Tenn. 2003).

198. E.g., *Propak Logistics*, 746 F.3d at 149.

199. See *PBM Graphics, Inc.*, 877 F. Supp. 2d at 363–64.

200. Cf. *EEOC v. Dresser Indus., Inc.*, 668 F. 2d 1199, 1203 (11th Cir. 1982) ("Perhaps the greatest disagreement between the parties concerns the loss of records."); *Recordkeeping Requirements*, supra note 159 ("Regulations require that employees keep all personnel or employment records for one year. If an employer is involuntarily terminated, his/her personnel records must be retained for one year from the date of termination.").

201. E.g., *Propak Logistics*, 746 F.3d at 148–49; *PBM Graphics, Inc.*, 877 F. Supp. 2d at 363–64.

202. *EEOC v. Waffle House*, 534 U.S. 279, 282–83 (2002).

203. *Id.* at 296 n.10, 11.

204. *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 373 (1977).

205. See e.g., *Propak Logistics*, 746 F. 3d at 151–52; *PBM Graphics, Inc.*, 877 F. Supp. 2d at 350–60; *EEOC v. SWMW Mgmt., Inc.*, No. CV-08-0946-PHX-GMS, 2009 WL 1097543, \*4–5 (D. Ariz. April 22, 2009).

future judicial opinion or policy venture.<sup>206</sup> Until then, the EEOC must continue to be wary of an employer's back pay limiting weapon of laches.<sup>207</sup>

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206. *Lyons P'ship, L.P. v. Morris Costumes, Inc.*, 243 F.3d 789, 798 (2001) ("Consequently, when considering the timeliness of a cause of action brought pursuant to a statute for which Congress has provided a limitations period, a court should not apply laches to overrule the legislature's judgment as to the appropriate time limit to apply for actions brought under the statute."); see *Occidental Life Ins. Co.*, 432 U.S. at 382; *United States v. Admin. Enters., Inc.*, 46 F.3d 670, 672–73 (7th Cir. 1995); Kelly, *supra* note 2, at 231–32; Kobylak, *supra* note 8, at § 3(a).

207. See 42 U.S.C. § 1981a(a)(1), (d)(1)(A) (2012); *Waffle House*, 534 U.S. at 290; *Time Limits for Filing A Charge*, *supra* note 11.

